COMMENTS

CORROBORATING CONFESSIONS: AN EMPIRICAL ANALYSIS OF LEGAL SAFEGUARDS AGAINST FALSE CONFESSIONS

Almost every American jurisdiction currently follows the ancient common law rule that to be admissible, a confession must be corroborated by some independent evidence. After examining the rule's policies and its variations among jurisdictions and suggesting doctrinal reforms that would make the rule internally consistent with its underlying policy assumptions, this Comment surveys the social science and criminological literature to determine whether the need for the rule is empirically justified. The Comment concludes that the false confession phenomenon includes a broad range of self-incriminating behavior that occurs frequently enough to merit legal safeguards. The corroboration rule, however, is not a sufficient safeguard and should be supplemented by procedures that better alert the judge and jury to the problem of false self-incrimination. Specifically, police should make a complete audio or video recording of the entire interrogation, defense counsel should be encouraged to secure expert witnesses to analyze the interrogation, and the order of proof should be changed to facilitate a more objective appraisal of the extent of corroboration. While not the focus of this Comment, it is further suggested that broader fifth amendment concerns about preserving the privilege against self-incrimination may justify more radical remedies, such as outlawing the use of confessions at trial, in light of empirical evidence showing the inherent coerciveness of interrogation.

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> "Our society long has had effective political and governmental mechanisms for controlling the use of force, but we are just beginning to realize the extent to which man is controlled in non-coercive ways."
>
> —Daryl Bem[1]

I. INTRODUCTION

A distinctive characteristic of American criminal law is its distrust of the confession.[2] Justice Goldberg captured this sentiment when he wrote that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[3]

Two separate policy concerns are implicit in Justice Goldberg's comment: 1) abuse of authority and 2) unreliable confessions. The

1. Bem, *When Saying is Believing*, 1 PSYCHOLOGY TODAY, June 1967 at 21, 25.

2. This distrust has motivated American courts to adopt a variety of exclusionary rules to limit the use of confessions at trial. *See infra* notes 4-11 and accompanying text. While variations of these rules exist abroad, they are generally less strict than American versions. *See generally*, Davey, U.S. v. Britain: *A Contrast in Police Authority*, 17 TRIAL, Oct. 1981, at 48, 52; Hrones, *Interrogation Abuses by the Police in France—A Comparative Solution*, 12 CRIM. L.Q. 68 (1969); Schager, *Recent Developments in the Law Relating to Confessions: England, Canada and Australia*, 26 MCGILL L.J. 435 (1981); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1091-1119 (1966).

3. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).

assumption behind the first concern is that some interrogation tactics are oppressive and violate individual rights even if they elicit a reliable confession. Sometimes the rights in question are constitutionally protected. Thus, the Supreme Court has held that the use of involuntary confessions at trial violates the fourteenth amendment's guarantee of due process of law;[4] an individual's fifth amendment privilege against self-incrimination and sixth amendment right to counsel cannot be preserved unless she is advised of both before interrogation and unless she can invoke them to terminate the interrogation at any time;[5] and confessions that are the fruits of police misconduct that violates other constitutional rights, such as the fourth amendment's prohibition of unreasonable search and seizure, must be suppressed.[6] Other times, the rights in question are

4. Payne v. Arkansas, 356 U.S. 560 (1958) (admission of a coerced confession violates due process and merits reversal even though there may have been sufficient independent evidence to support a conviction); Brown v. Mississippi, 297 U.S. 278 (1936) (state conviction resting solely upon a confession extorted by force violates due process). The Supreme Court has also indicated that the admission of involuntary confessions can never be harmless error. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979); Mincey v. Arizona, 437 U.S. 385, 398 (1978); Chapman v. California, 386 U.S. 18, 23, 23 n.8 (1967). Another procedural protection afforded the defendant is the requirement of a separate, preliminary finding of voluntariness by at least a preponderance of the evidence before submitting the case-in-chief to the jury. Lego v. Twomey, 404 U.S. 477 (1972); Jackson v. Denno, 378 U.S. 368 (1964).

In substance, the voluntariness doctrine tests whether the confession was "the product of an essentially free and unconstrained choice by its maker." Culombe v. Connecticut, 367 U.S. 568, 602 (1961). Although in theory this requirement could be stretched to exclude all confessions as the product of the strains of arrest and interrogation, the doctrine has been used to exclude only two specific kinds of confessions. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 147 (E. Cleary 3rd ed. 1984). The first type of confession is that produced under inherently coercive circumstances—specifically, prolonged and continuous interrogation, *see* Brooks v. Florida, 389 U.S. 413 (1963); Haynes v. Washington, 373 U.S. 503 (1963) (incarceration in a "punishment" cell, in which the suspect is stripped naked and fed a "restricted diet,"); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (deprivation of sleep or food, threats of continued incommunicado detention). *See generally* C. MCCORMICK, *supra* at § 147. The second type of confession is that produced by the suspect's own infirmities. Thus, physical disability, age, sex, race, psychological abnormality, intoxication, lack of education, and inexperience with police procedure have been held relevant factors in determining, under the "totality of the circumstances," a confession's "voluntariness." *Id.* The rule has been criticized as overly vague, difficult to apply, and more limited in scope than the term "voluntariness" would otherwise imply. *Id. See also, e.g.*, Dix, *Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275; Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Note, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167 (1979).

5. Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* protections govern only custodial interrogation. Thus, a suspect who voluntarily appears at the police station to discuss the findings of a police investigation need not be advised of her *Miranda* rights. *See* Oregon v. Mathiason, 429 U.S. 492 (1977).

6. *See, e.g.*, Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S.

statutory or judge-made. Thus, federal statutes as well as the statutes or common law of some states have been interpreted to suppress confessions where the interrogation unnecessarily delays arraignment.[7] Although these rules purport to regulate interrogation in a way that reduces the incidence of false confessions, reliability concerns are collateral to the main purpose of each: to suppress all confessions, whether reliable or not, that result from the abuse of power.[8]

The primary doctrinal remedy for the problem of physically uncoerced false confessions, on the other hand, has been the corroboration rule.[9] Since the nineteenth century, American courts have al-

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471 (1963). Where the causal connection between the alleged constitutional violation and the confession is sufficiently attenuated—such as where *Miranda* warnings are read, where the temporal proximity between alleged detention and the confession is mitigated by the ability of all concerned to maintain a "congenial atmosphere," where the suspect's admissions are apparently spontaneous, and where the police misconduct is not flagrant—the confession will not be suppressed. Rawlings v. Kentucky, 448 U.S. 98 (1980). *Miranda* warnings by themselves do not suffice to cure the taint of a fourth amendment violation, however. *See id.* at 107 (quoting Brown v. Illinois, 422 U.S. at 603-04). *See generally* C. MCCORMICK, *supra* note 4, at § 157; Comment, *Rawlings v. Kentucky: More on Unpoisoning the Fruit or Shall We Just Plant Another Tree?*, 38 WASH. & LEE L. REV. 257 (1981).

7. The "*McNabb-Mallory*" exclusionary rule originated with two Supreme Court cases that suppressed confessions obtained from extensive pre-arraignment interrogation. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). The Court did not derive this rule from the Constitution, but rather from its inherent supervisory power over federal courts and from a federal statute directing that an arrested person be taken without unnecessary delay before a magistrate. *Mallory*, 354 U.S. at 452; *McNabb*, 318 U.S. at 340-42. Once the Supreme Court decided that the interrogator would have to assume an important function of the magistrate—warning the suspect of her rights—and once Congress adopted a provision in the *Omnibus Crime Control and Safe Streets Act of 1968* purporting to overrule the *McNabb-Mallory* rule, the federal courts became very reluctant to use that rule to reverse convictions. *See* C. MCCORMICK, *supra* note 4, at § 156; Comment, *The Ill-Advised State Court Revival of the* McNabb-Mallory *Rule*, 72 J. CRIM. L. & CRIMINOLOGY 204, 206-09 (1981). Several state courts have adopted the *McNabb-Mallory* rule. However, even these states do not enforce the rule strictly and the overwhelming majority of states reject it altogether. *See generally, id.* at 209-24.

8. *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 599 (1975) ("The exclusionary rule thus was applied in *Wong Sun* [to suppress a confession obtained after an illegal arrest] *primarily* to protect Fourth Amendment rights"); Miranda v. Arizona, 384 U.S. 436, 481-82 n.52 (1966) ("Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence [establishing the confession's reliability] . . . is, of course, irrelevant"); Rogers v. Richmond, 365 U.S. 534, 544 (1961) ("whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . [is] a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth"); McNabb v. United States, 318 U.S. 332, 344 (1943) ("the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society").

9. The corroboration rule is often termed the "*corpus delicti*" rule because the orthodox version of the rule requires corroboration of the *corpus delicti*, or body of the crime. *See*

most universally held that a conviction based on a extrajudicial confession[10] cannot be sustained unless the prosecution introduces some corroborating evidence.[11] This Comment will examine the rationale and effectiveness of this approach to the reliability problem. After tracing the development of the doctrine in various jurisdictions, the policy assumptions behind the doctrine will be examined empirically. Because there is already sufficient psychological, sociological, and criminological research to evaluate the dynamics of interrogation and confession, this Comment will rely exclusively on existing empirical data to assess the effectiveness of the corroboration rule and alternative approaches to the reliability problem. The thesis of this Comment is that while some forms of the corroboration rule are preferable to others and while the rule should not be abandoned, the rule by itself is not a sufficient remedy for the problem of physically uncoerced false confessions. Ultimately, the solution to the reliability problem lies not in doctrinal evolution, but in interrogation and trial procedures that better alert the judge and jury to the causes and frequency of false confessions.

I. DOCTRINE

Part II discusses the policy, scope, procedural aspects, and substantive variations of the corroboration rule. The assumptions behind the rule will be empirically examined in Part III.

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infra notes 105-121 and accompanying text. The best discussion of the corroboration rule is in Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638 (1955) [hereinafter cited as Note, *Proof of Corpus Delicti*]. *See also* C. MCCORMICK, *supra* note 4, at § 145; 7 J. WIGMORE, EVIDENCE §§ 2070-72 (Chadbourn rev. 1978); Margolis, *Corpus Delicti: State of the Disunion*, 2 SUFFOLK U. L. REV. 44 (1968); Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173 (1962); Veldorale, *The Principle of Corpus Delicti and the Evidence Pertaining Thereto*, 39 TEMP. L.Q. 1 (1965); Comment, *Pennsylvania's Corpus Delicti Rule in Criminal Confession Cases*, 77 DICK. L. REV. 297 (1973) [hereinafter cited as Comment, *Pennsylvania's Corpus Delicti Rule*]; Note, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 FORDHAM L. REV. 1205 (1978) [hereinafter cited as Note, *Confession Corroboration in New York*]; *Developments in the Law—Confessions*, *supra* note 2, at 1072-84; Note, *Criminal Law-Confessions—Admissibility of Corroborative Evidence*, 42 N.C.L. REV. 219 (1963); Comment, *California's Corpus Delicti Rule: The Case for Review and Clarification*, 20 UCLA L. REV. 1055 (1973) [hereinafter cited as Comment, *California's Corpus Delicti Rule*]; Annot., 45 A.L.R. 2d 1316 (1956).

10. An extrajudicial confession is made out of court; an infrajudicial confession is made in court, such as on the witness stand or in a guilty plea. This Comment discusses only extrajudicial custodial confessions. *See infra* note 34 and accompanying text; *see also infra* note 197.

11. At present, the only jurisdiction that does not follow some version of the rule is Massachusetts. *See infra* notes 17-18 and accompanying text.

A. Policy

The origins of the corroboration requirement can be traced back to seventeenth century England. In *Perrys' Case*,[12] the court, following well-established precedents, sustained a murder conviction based solely upon an uncorroborated confession. The untimely return of the supposed victim after the defendant's execution prompted a reevaluation of these precedents.[13] Some English courts began to require corroboration of murder confessions, specifically, some proof of death.[14] However, the corroboration requirement was never universally accepted and was not applied to prosecutions other than murder.[15]

Meanwhile, the corroboration rule was adopted and readily applied to all criminal prosecutions in a number of nineteenth century American jurisdictions.[16] With the exception of Massachusetts,[17] every jurisdiction in the United States presently requires that extrajudicial confessions be corroborated by some independent evidence.[18] Considerable difference of opinion persists, however, as to

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12. Perrys' Case, 14 How. St. Tr. 1312 (1660).

13. The "victim" was waylaid, kidnapped, and held as a slave in Turkey. The defendant, his servant, was implicated by his failure to return home after being sent to find his master on the night of the disappearance. His subsequent confession also implicated his brother and mother. The three were convicted and executed on the basis of the "victims" disappearance, a bloodied hat, and the confession. *See* Note, *Proof of Corpus Delicti*, *supra* note 9, at 638-39.

14. *Id.* at 638-40.

15. 7 J. WIGMORE, *supra* note 9 at § 2070. As a result of the "best evidence" principle, however, a defendant's confession of a former marriage was generally deemed insufficient to support a bigamy conviction. Note, *Proof of Corpus Delicti*, *supra* note 9, at 640. *See also* 7 J. WIGMORE, *supra*, at § 2086.

16. The earliest case appears to be State v. Long, 2 N.C. (1 Hayw.) 455 (Super. Ct. 1797) (per curiam) ("naked confession unattended with circumstances" held insufficient to convict). *See generally* Note, *Proof of Corpus Delicti*, *supra* note 9, at 640-41 (collecting early cases). Only one nineteenth century case expressly rejected any corroboration requirement. State v. Cowan, 29 N.C. (7 Ired.) 239 (1847).

17. The Massachusetts Supreme Court reasoned that the jury was competent to evaluate the probative value of an uncorroborated confession and that the "trend of modern decisions is in the direction of eliminating quantitative tests of the sufficiency of evidence." Commonwealth v. Kimball, 321 Mass. 290, 293, 73 N.E.2d 468, 470 (1947) (quoting Commonwealth v. Gale, 317 Mass. 274, 277-78, 57 N.E.2d 918, 920 (1944)).

18. Federal: Wong Sun v. United States, 371 U.S. 471 (1963); Smith v. United States, 348 U.S. 147 (1954); Opper v. United States, 348 U.S. 84 (1954); D.C. Circuit: United States v. Johnson, 589 F.2d 716 (D.C. Cir. 1978); First Circuit: Smith v. United States, 210 F.2d 496 (1st Cir.), *aff'd*, 348 U.S. 147 (1954); Second Circuit: United States v. Braverman, 376 F.2d 249 (2d Cir. 1967); Third Circuit: United States *ex. rel.* Hayward v. Johnson, 508 F.2d 322 (3d Cir.), *cert. denied*, 422 U.S. 1011 (1975); Fourth Circuit: United States v. Waller, 326 F.2d 314 (4th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); Fifth Circuit: United States v. White, 493 F.2d 3 (5th Cir.), *cert. denied*, 419 U.S. 901 (1974); Sixth Circuit: United States v. Davis, 459 F.2d 167 (6th Cir. 1972); Seventh Circuit: United States v. Kampiles, 609 F.2d

the nature and extent of the independent evidence required.[19]

In contrast to the other exclusionary rules governing confessions, which are primarily concerned with preventing the abuse of authority, the corroboration rule explicitly tests the *reliability* of a confession. Its primary purpose is to prevent "errors in conviction

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1233 (7th Cir. 1979); Eighth Circuit: United States v. Stabler, 490 F.2d 345 (8th Cir. 1974); Ninth Circuit: United States v. Mathews, 429 F.2d 497 (9th Cir. 1970); Tenth Circuit: United States v. Charpentier, 438 F.2d 721 (10th Cir. 1971).

State: Alabama: Johnson v. State, 378 So. 2d 1164 (Ala. Crim. App. 1979); Alaska: Armstrong v. State, 502 P.2d 440 (Alaska 1972); Arizona: State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983); Arkansas: ARK. STAT. ANN. § 43-2115 (1977); Boden v. State, 270 Ark. 614, 605 S.W.2d 429 (1980); California: People v. Towler, 31 Cal.3d 105, 641 P.2d 1253, 181 Cal. Rptr. 391 (1982); Colorado: Martin v. People, 179 Colo. 237, 499 P.2d 606 (1972); Connecticut: State v. Tillman, 152 Conn. 15, 202 A.2d 494 (1964); Delaware: Jenkins v. State, 401 A.2d 83 (Del. 1979); District of Columbia: *In re* R.A.B., 399 A.2d 81 (D.C. 1979); Florida: Frazier v. State, 107 So. 2d 16 (Fla. 1958); Georgia: GA. CODE ANN. §§ 38-420 (1981); Cunningham v. State, 248 Ga. 835, 286 S.E.2d 427 (1982); Hawaii: State v. Yoshida, 44 Hawaii 352, 354 P.2d 986 (1960); Idaho: State v. Urie, 92 Idaho 71, 437 P.2d 24 (1968); Illinois: People v. Willingham, 89 Ill. 2d 352, 432 N.E.2d 861 (1982); Indiana: Evans v. State, 460 N.E.2d 500 (Ind. 1984); Iowa: IOWA CODE ANN. § 813.2 (Rule 20(4)) (West 1978); State v. White, 319 N.W.2d 213 (Iowa 1982); Kansas: State v. Pyle, 216 Kan. 423, 532 P.2d 1309 (1975); Kentucky: KY. R. CRIM. P. 9.60 (1970); Dolan v. Commonwealth, 468 S.W.2d 277 (Ky. 1971); Louisiana: State v. Willie, 410 So. 2d 1019 (La. 1982); Maine: State v. Curlew, 459 A.2d 160 (Me. 1983); Maryland: Lemons v. State, 49 Md. App. 467, 433 A.2d 1179 (1981); Michigan: People v. Allen, 39 Mich. App. 483, 494-506, 197 N.W.2d 874, 880-86 (1972) (Levin, J., dissenting), *rev'd*, 390 Mich. 383, 212 N.W.2d 21 (1973) (dissent adopted per curiam); Minnesota: MINN. STAT. ANN. § 634.03 (West 1983); State v. Hansen, 286 Minn. 4, 174 N.W.2d 697 (1970); Mississippi: Rhone v. State, 254 So. 2d 750 (Miss. 1971); Missouri: State v. Wood, 596 S.W.2d 394 (Mo.), *cert. denied*, 449 U.S. 876 (1980); Montana: State v. Dixson, 80 Mont. 181, 260 P. 138 (1927); Nebraska: State v. True, 210 Neb. 701, 316 N.W.2d 623 (1982); Nevada: Sheriff v. Larsgaard, 96 Nev. 486, 611 P.2d 625 (1980); New Hampshire: State v. George, 109 N.H. 531, 257 A.2d 19 (1969); New Jersey: State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959); New Mexico: State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966); New York: N.Y. CRIM. PROC. LAW § 60.50 (McKinney 1971); People v. Murray, 40 N.Y.2d 327, 353 N.E.2d 605, 386 N.Y.S.2d 691 (1976), *cert. denied*, 430 U.S. 948 (1977); North Carolina: State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983); North Dakota: State v. Champagne, 198 N.W.2d 218 (N.D. 1972); Ohio: State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976), *sentence vacated*, 438 U.S. 911 (1978); Oklahoma: Goforth v. State, 644 P.2d 114 (Okla. Crim. App. 1982); Oregon: OR. REV. STAT. § 136.425(1) (1983); State v. Lerch, 296 Or. 377, 677 P.2d 678 (1984); Pennsylvania: Commonwealth v. Ware, 459 Pa. 334, 329 A.2d 258 (1974); Rhode Island: State v. Halstead, 414 A.2d 1138 (1980); South Carolina: *In re* Perkins, 276 S.C. 378, 278 S.E.2d 781 (1981); South Dakota: State v. Best, 89 S.D. 227, 232 N.W.2d 447 (1975); Tennessee: State v. Teague, 645 S.W.2d 392 (Tenn. 1983); Texas: Self v. State, 513 S.W.2d 832 (Tex. Crim. App. 1974); Utah: State v. Knoefler, 563 P.2d 175 (Utah 1977); Vermont: State v. Goyet, 120 Vt. 12, 132 A.2d 623 (1957); Virginia: Wilson v. Commonwealth, 220 Va. 26, 255 S.E.2d 464 (1979); Washington: State v. Goranson, 67 Wash. 2d 456, 408 P.2d 7 (1965); West Virginia: State v. Mason, 249 S.E.2d 793 (W. Va. 1978); Wisconsin: Holt v. State, 17 Wis. 2d 468, 117 N.W.2d 626 (1962); Wyoming: Konopsios v. State, 26 Wyo. 350, 185 P. 355 (1919).

The status of the North Dakota rule is in doubt, since the statute upon which it was based was repealed in 1973. *See* 1973 N.D. Sess. Laws 116, § 41.

19. *See infra* notes 105-150 and accompanying text.

based upon untrue confessions alone."[20] The fundamental assumption behind the rule is that corroboration is an effective test of a confession's reliability[21] and therefore, confessions lacking a threshold level of corroboration should be deemed untrustworthy as a matter of law and excluded from evidence.[22]

In addition to addressing reliability concerns, the corroboration rule also is used as an indirect means of curbing the abuse of authority. First, the rule is perceived as a means of motivating the police to undertake a thorough investigation of the crime;[23] if the police rely solely on the confession and do not obtain corroborating evidence, the confession will be excluded. Apart from providing independent evidence, or lack thereof, with which to assess the confession's reli-

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20. Warszower v. United States, 312 U.S. 342, 347 (1941).

21. *See, e.g.*, Smith v. United States, 348 U.S. 147, 152-53 (1954) (even though voluntary, a confession's reliability still may be suspect; therefore corroboration necessary); Smoot v. United States, 312 F.2d 881 (D.C. Cir. 1962) (independent evidence needed to test trustworthiness of confession); Nelson v. State, 50 Del. 96, 123 A.2d 859 (1956) (danger of false or untrustworthy confession cured by requiring independent proof of *corpus delicti*); Borza v. State, 25 Md. App. 391, 403, 335 A.2d 142, 150 (1975) ("The thrust of the [corroboration] principle is to prevent mentally unstable persons from confessing to, and being convicted of, crimes that never occurred.").

22. The corroboration rule operates as a rule of evidence; uncorroborated confessions are excluded as incompetent evidence. *See infra* notes 77-80 and accompanying text.

23. Note, *Proof of Corpus Delicti*, *supra* note 9, at 647. In reversing convictions based on poorly corroborated confessions, courts often express extreme irritation with the failure of the police to gather easily available independent evidence. *See, e.g.*, People v. Hennessey, 15 Wend. 147, 155 (N.Y. 1836):

> The truth is, no court will ever rely upon the confession alone, when it is apparent that there is evidence aliunde to prove that an offense has been committed. In the case now before us, it was manifest that there were witnesses not before the court who could have given material testimony to prove the facts essential to the body of the offence.

See also People v. Applegate, 181 Colo. 339, 509 P.2d 1238 (1973) (police could have corroborated confession to forgery by showing that signature on check endorsed by defendant was false or by introducing evidence of why check was returned by bank); State v. Vuilleumier, 3 Conn. Cir. Ct. 223, 210 A.2d 673 (App. Div. 1965) (in prosecution for procuring liquor under false pretenses, state should have presented at least some independent evidence of false pretenses); Lemons v. State, 49 Md. App. 467, 433 A.2d 1179 (1981) ("the record is devoid of any efforts by the state to locate her [a missing woman alleged to have been murdered]—even at the address mentioned by [her former employer] . . . or the appellant himself [defendant]."); State v. Smith, 65 Mont. 458, 211 P. 208 (1922) (per curiam) (not a "scintilla" of independent evidence was introduced to show that alleged improper sale took place); State v. Washington, 1 Or. App. 96, 458 P.2d 694 (1969) (State could have easily established age of alleged victim of statutory rape by introducing school records); East v. State, 146 Tex. Cr. App. 396, 175 S.W.2d 603 (1943) (although one could infer from confession and circumstances that defendant improperly received funds, State could have easily shown receipt of funds by calling a number of available witnesses). *But see* People v. Holmes, 67 Ill. 2d 236, 367 N.E.2d 663 (1977) (criticizing failure of police to gather easily available independent evidence, but concluding that such failure was "not fatal to the People's case").

ability, investigative work helps prevent the criminal justice system from becoming inquisitorial. In back of the disgust courts often express for the failure of police to gather independent evidence[24] is the sentiment that in an adversarial system of justice, the state should be forced to introduce evidence rebutting the defendant's repudiation of a confession, rather than be permitted first to extract a confession and then to force the defendant to explain her innocence.[25]

Second, the rule also curbs the abuse of authority by providing a remedy for the defendant who is prevented by problems of proof from showing that the confession was involuntary.[26] In the pre-*Miranda* era, courts recognized the difficulty defendants might experience in showing that, under the totality of the circumstances, their confessions were involuntary and viewed the corroboration rule as an added protection against coerced, unsubstantiated confessions.[27] *Miranda*, however, alleviated these problems of proof by abandoning the traditional emphasis on the circumstances surrounding an arrest and confession in favor of applying objective rules governing interrogation. If the state cannot show that the defendant was informed of her constitutional rights or that those rights were not respected when invoked, the confession is conclusively presumed to be involuntary.[28] Given the protections against police abuses created by the *Miranda* decision, some courts have questioned the continued need for the corroboration rule.[29] Other courts have reasoned

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24. *See supra* note 23.

25. Often quoted in this regard is East v. State, 146 Tex. Cr. App. 396, 400-01, 175 S.W.2d 603, 605 (1943):

> The wisdom of this [corroboration] rule lies in the fact that no man should be convicted of a crime, the commission of which he confesses, unless the State shows, by other testimony, that the confessed crime was in fact committed by someone. The contrary would authorize a return of conditions that existed in the days of the inquisition.

26. Of course, this protection against abuse of authority is limited only to those abuses that result in unreliable—i.e., uncorroborated confessions.

27. *See e.g.*, Smith v. United States, 348 U.S. 147, 153 (1954); *see also* Note, *Proof of Corpus Delicti*, *supra* note 9, at 642-43. Except for a few jurisdictions, the prosecution had the burden of proving the voluntariness of the confession. 3 J. WIGMORE, *supra* note 9, at § 860. Yet, problems of proof arose if the police testified as to the propriety of their methods. The only witnesses to methods of third degree were usually the police and the defendant. Even if the defendant could show exactly what occurred in the interrogation room, police tactics may be subtle enough to allow the prosecution to carry its burden of proof on the voluntariness issue. Note, *Proof of Corpus Delicti*, *supra* note 9, at 643.

28. The *Miranda* decision did not abandon the need to prove that a confession was voluntary. *See, e.g.*, Lego v. Twomey, 404 U.S. 477 (1972); *see also supra* note 4. Rather, the Court abandoned its previous reluctance to supplement a subjective finding of voluntariness with objective rules. *See generally* C. MCCORMICK, *supra* note 4, at § 150.

29. *See* State v. Urie, 92 Idaho 71, 76, 437 P.2d 24, 29 (1968) (McFadden, J. concurring) ("The rule is no longer needed as a safeguard against coerced confessions as recent devel-

that the rule is still necessary because the police might take advantage of a confused and agitated defendant without violating *Miranda*.[30] Furthermore, it is sometimes argued that regardless of the safeguards against the abuses of custodial interrogation, the rule affords a necessary protection against the malicious or self-interested testimony of third parties purporting to detail the private "confessions" of the defendant.[31]

B. Scope

As typically formulated, the corroboration rule holds that "[a]n extrajudicial confession, in itself, is insufficient to support a conviction unless corroborated by other evidence."[32] The scope of the rule thus depends on 1) the definition of "extrajudicial," 2) the definition of "confession," and 3) who must make the "confession" to whom.[33]

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opments in our criminal law amply protect an accused."); State v. Edwards, 49 Ohio St. 2d 31, 35-36, 358 N.E.2d 1051, 1056 (1976), *sentence vacated*, 438 U.S. 911 (1978) ("Considering the revolution in criminal law of the 1960's and the vast number of procedural safeguards protecting the due-process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations."); Self v. State, 513 S.W.2d 832 (Tex. Crim. App. 1974) (earlier distrust of confessions that gave rise to *corpus delicti* rule may now be dissipating because of *Miranda* protections). *See also Developments in the Law—Confessions*, *supra* note 2, at 1084 ("serious consideration should be given to elimination of the corpus delicti requirement" in light of recent court decisions "severely" restricting police practices likely to produce untrustworthy confessions); Comment, *California's Corpus Delicti Rule*, *supra* note 9, at 1089-90 (arguing that *Miranda* adequately addresses some of the policy concerns that originally motivated the adoption of the *corpus delicti* rule); Comment, *Pennsylvania's Corpus Delicti Rule*, *supra* note 9, at 314-15 (arguing that present protections against involuntary confessions and "increased sophistication on the part of both investigators and jurors as to the psychological motivations possibly underlying a confession" obviate *corpus delicti* rule).

30. See Jones v. Superior Court of Santa Clara County, 96 Cal. App. 3d 390, 157 Cal. Rptr. 809 (1979) (rule necessary as a curb against improper police practices); State v. Sinclair, 43 N.C. App. 709, 712, 259 S.E.2d 808, 809 (1979) (quoting State v. Long, 2 N.C. 455, 456 (1797)) ("in such situations [police interrogation] the mind is agitated—the man may easily be tempted to go further than the truth"; Commonwealth v. Moyer, 277 Pa. Super. 172, 419 A.2d 717 (1980) (stressing danger of conviction on basis of confessions that are "hasty" and "unguarded"); State v. Hamrick, 19 Wash. App. 417, 576 P.2d 912 (1978) (regardless of *Miranda* protections, rule "does not seem unwise"; since the police and the defendant are the only witnesses to confessions, such added protection as *corpus delicti* rule affords is desirable); *see also Margolis*, *supra* note 9 (arguing that the *corpus delicti* rule is the "first cousin" of the voluntariness doctrine and should therefore be constitutionalized by the Supreme Court).

31. *Cf.*, People v. Allen, 39 Mich. App. 483, 504, 197 N.W.2d 874, 885 (1972) (Levin, J., dissenting), *rev'd*, 390 Mich. 383, 212 N.W.2d 21 (1973) (dissent adopted per curiam) ("The corpus delicti rule reflects an uneasy feeling based on experience that persons who attribute statements to accused are often not trustworthy witnesses.").

32. People v. Avery, 88 Ill. App. 3d 771, 776, 410 N.E.2d 1093, 1098 (1980).

33. English courts and a number of older American courts also limited the scope of the corroboration rule by applying it only to more serious crimes. *See* Note, *Proof of Corpus Delicti*, *supra* note 9, at 673-74; *see also supra* notes 12-15 and accompanying text. The distinction has been criticized as arbitrary, see Note, *Proof of Corpus Delicti*, *supra*. The only juris-

As for the first factor, an "extrajudicial" confession is made out of court. The rule therefore does not govern "infrajudicial" confessions, which are made in court, whether in the form of testimony or a guilty plea.[34]

The second factor has played a larger role in determining the scope of the corroboration rule. Before the Supreme Court decided *Opper v. United States*[35] in 1954, many courts limited the rule by distinguishing between "confessions" and "admissions."[36] Unlike confessions, admissions incriminate the defendant, but do not manifest a conscious, open acknowledgement of guilt.[37] Those courts drawing the distinction required that only "confessions" be corroborated.[38] The *Opper* Court, however, ignored the distinction, applying the corroboration rule to both. The Court also required corroboration of "exculpatory statements," i.e., statements that are accompanied by an express denial of guilt but that are in fact incul-

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diction that apparently recognizes this distinction (at least rhetorically) is North Carolina. *See* State v. Sinclair, 43 N.C. App. 709, 711, 259 S.E.2d 808, 809 (1978) (quoting State v. Jenerett, 281 N.C. 81, 85-86, 187 S.E.2d 735, 738 (1972)) ("a *felony* conviction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence") (emphasis added).

34. *See, e.g.*, Manning v. United States, 215 F.2d 945 (10th Cir. 1954) (defendant's in-court testimony can corroborate confession); State v. Tharp, 49 Ohio App. 2d 291, 296, 361 N.E.2d 469, 472 (1976) (testimonial confession is the "equivalent of a conviction"); Alvarez v. State, 374 S.W.2d 890, 891 (Tex. Crim. App. 1964) ("The testimony of appellant from the witness stand is a judicial confession and as such needs no corroboration."); *but see* State v. Camley, 140 Vt. 483, 438 A.2d 1131 (1981) (jury not obliged to believe a judicial confession).

The rationale behind the distinction is that in court, a host of procedural protections, the presence of counsel and the judge, and the solemnity of the proceedings, protect against ill-considered, coerced, or unreliable confessions. *See Developments in the Law—Confessions*, *supra* note 2, at 1079-80; Note, *Proof of Corpus Delicti*, *supra* note 9, at 667-69.

35. 348 U.S. 84 (1954). The case involved a federal crime and was not decided on constitutional grounds. *Cf.* Aschmeller v. South Dakota, 534 F.2d 830 (8th Cir. 1976) (corroboration rule held not to be a constitutional requirement).

36. *See* Comment, *Corroboration of Extrajudicial Statements*, 7 STAN. L. REV. 378, 379-80 (1955).

37. Opper v. United States, 348 U.S. 84, 91 n.7 (1954) (quoting 3 J. WIGMORE, EVIDENCE § 821 (3d ed. 1940)):

> A confession is *an acknowledgement in express words*, by the accused in a criminal case, *of the truth of the guilty fact charged* or *of some essential part of it.*
>
> . . . .
>
> . . . Confessions are thus only one species of admissions; and all other admissions than those which directly touch the fact of guilt are without the scope of the peculiar rules affecting the use of confessions.

Thus, a defendant's statement that he had hit the deceased twice has been held to be an "admission." As he had not acknowledged his guilt, the statement was not a "confession" and did not require corroboration. People v. Manske, 399 Ill. 176, 184-86, 77 N.E.2d 164, 168-69 (1948). See also, Note, *Proof of Corpus Delicti*, *supra* note 9, at 670, 670 n.163.

38. *See* Note, *Proof of Corpus Delicti*, *supra* note 9, at 669-71; Comment, *supra* note 36, at 379-80.

patory.[39] Most courts have adopted *Opper*'s broad definition of "confessions."[40]

Nevertheless, some courts continue to constrict the definition of "confession," and the applicability of the corroboration requirement, by introducing the element of time. It generally has been held, by the few courts that have reached the issue, that statements preceding the crime are not "confessions."[41] These courts reason that such statements are more trustworthy than those made after the crime, apparently on the theory that they are not colored by the pressures of interrogation or by an exaggerated or manufactured consciousness of guilt.[42] California, however, expressly requires corroboration of statements preceding the crime.[43]

Some courts have expanded the foregoing rational to exempt from corroboration statements contemporaneous with the crime.[44] This approach has been stretched even further to exempt "roughly" contemporaneous statements made substantially after the crime.[45]

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39. *Opper*, 348 U.S. at 90-92. The defendant was convicted of inducing a federal employee to accept outside compensation for services in a matter before a federal agency. In the course of denying his guilt, the defendant stated that he had met with the federal official several times and had "loaned" the official money. *Id.* at 88. According to one commentator, only one court before *Opper* had required corroboration of exculpatory statements. Comment, *supra* note 36, at 380, 380 n.11 (citing State v. Abrams, 131 Iowa 479, 108 N.W. 1041 (1906)).

40. *See, e.g.*, People v. Towler, 31 Cal. 3d 105, 641 P.2d 1253, 181 Cal. Rptr. 391 (1982); State v. Curlew, 459 A.2d 160 (Me. 1983); State v. Summers, 362 S.W.2d 537 (Mo. 1962). *See generally* Perkins, *supra* note 9, at 179-80; Annot., 45 A.L.R. 2d 1316, 1323-25 (1956); *but see* Dolan v. Commonwealth, 468 S.W.2d 277 (Ky. 1971) (murder defendant's statement that "I didn't mean to do it. I only meant to scare her," held to be an admission and not to need corroboration); People v. Oliver, 111 Mich. App. 734, 314 N.W.2d 740 (1981) (murder defendant's statement that he had blacked out after taking a butcher knife held not to be a confession; no corroboration required).

41. Warszower v. United States, 312 U.S. 342, 347 (1941); Castillo v. State, 614 P.2d 756, 759 (Alaska 1980); State v. Saltzman, 241 Iowa 1373, 1382, 44 N.W.2d 24, 28-29 (1950) (citing *Warszower* rule with approval); People v. Hamp, 110 Mich. App. 92, 97, 312 N.W.2d 175, 178 (1981) (citing *Warszower* rule with approval); Commonwealth v. Jones, 97 Pa. Super. 417 (1929); *see* Perkins, *supra* note 9, at 178; Note, *Proof of Corpus Delicti*, *supra* note 9, at 673.

42. The courts do not explain why statements preceding the crime are trustworthy. Rather, they cite the conclusory language of *Warszower*: "[w]here the inconsistent statement was made prior to the crime this danger [of erroreons convictions caused by untrue confessions] does not exist. *Warszower*, 342 U.S. at 347.

43. People v. Beagle, 6 Cal. 3d 441, 455 n.5, 492 P.2d 1, 10 n.5, 99 Cal. Rptr. 313, 322 n.5 (1972) ("Although we agree that the risk of conviction on a false pre-offense statement alone is less than the risk of such a conviction upon a false confession or admission, we find the risk of an unjust result sufficient to justify our broader rule.").

44. State v. Saltzman, 241 Iowa 1373, 1380-82, 44 N.W.2d 24, 27-29 (1950); People v. Hamp, 110 Mich. App. 92, 97-98, 312 N.W.2d 175, 178 (1981) (quoting People v. Randall, 42 Mich. App. 187, 190-92, 201 N.W.2d 292, 294-95 (1972)).

45. State v. Snowden, 345 So. 2d 856, 860 (Fla. Dist. Ct. App. 1977) ("[t]he word 'contemporaneous' as used in reference to res gestae is not to be taken in its strict meaning

Alternatively, these courts define such statements as hearsay declarations admissible under the "*res gestae*" exception; because these statements are admissible, and because they impliedly possess the indicia of trustworthiness that sanctions an exception to the hearsay rule, they need not be corroborated.[46]

Given the breadth of the *res gestae* doctrine, these decisions define an exception to the corroboration requirement that may well overwhelm the rule. The concept of *res gestae*, which means literally "things done,"[47] has been dismissed as an embarrassing non sequitur by many courts and commentators.[48] But the concept has evolved into a password for the well-established "spontaneous declarations" exception to the hearsay rule.[49] The spontaneous declarations rule, in turn, includes a number of hearsay exceptions that would admit many confessions into evidence: 1) declarations of present bodily condition, 2) declarations of present mental states and emotions, 3) excited utterances, and 4) declarations of present sense impressions.[50] Thus, a full scale confession of guilt "roughly contemporaneous" with the crime could be considered a declaration of present emotions and mental state; an admission of guilt made substantially after the crime could be considered an "excited utterance."[51]

. . ."); *Saltzman*, 241 Iowa at 1380-82, 44 N.W.2d at 27-29 (exempting from corroboration "substantially" contemporaneous statements occurring after police arrived on scene); *Hamp*, 110 Mich. App. at 97, 312 N.W.2d at 178 (quoting People v. Quimby, 134 Mich. 625, 96 N.W. 1061 (1903)) ("statements roughly contemporaneous with the crime even if shortly after" are exempt from corroboration rule); State v. LaRue, 67 N.M. 149, 353 P.2d 367 (1960).

46. *See* cases cited *supra* note 45.

47. BLACK'S LAW DICTIONARY 1173 (rev. 5th ed. 1979). Initially the concept was used to admit into evidence words that accompanied the principle litigated fact. Since the "thing done" can be defined to include almost any relevant act, the concept was used expansively. *See* C. MCCORMICK, *supra* note 4, at § 288.

48. *E.g.*, Manning v. United States, 215 F.2d 945, 946 (10th Cir. 1954); C. MCCORMICK, *supra* note 4, at § 288; 6 J. WIGMORE, *supra* note 9, at § 1767.

49. C. MCCORMICK, *supra* note 4, at § 288. An underlying policy justification for the *res gestae* exception to the hearsay rule was that statements made spontaneously during the course of the "thing done" were especially trustworthy. Therefore, the underlying policy rationale increasingly came to define the rule. *Id.*

50. *Id.*

51. The extraordinary breadth of the *res gestae* exception is demonstrated by State v. Snowden, 345 So.2d 856 (Fla. Dist. Ct. App. 1977). Shortly after allegedly killing her baby, the defendant confessed to her neighbor. Three days later she further confessed that she had dismembered the baby in order to dispose of it. The court noted that these statements were insufficiently corroborated to be admissible under the traditional corroboration rule. Notwithstanding that these confessions took place after the crime, were in no way connected with the crime itself, and could hardly be considered "spontaneous" given the three-day lapse between confessions, the court invoked the *res gestae* rule to admit them into evidence. *Id.* at 859-60.

This use of the *res gestae* rule to circumvent the corroboration requirement is doctrinally incorrect. In addition to creating an exception that swallows the rule, the *res gestae* rule is not relevant in determining the admissibility of a confession unless the confession can be defined as a form of hearsay in search of a hearsay exception, be it "corroboration" or "*res gestae*."[52] Yet, courts almost never consider competing hearsay exceptions when determining whether a confession should be included in evidence,[53] which indicates that confessions, admissions, and exculpatory statements are *sui generis* and not hearsay declarations to begin with.[54]

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52. That is, a statement need only fit one hearsay exception to be admissible; that it fails to meet every other exception is irrelevant. Therefore, if confessions can be considered hearsay and corroboration can be considered a hearsay exception, the ability to satisfy another hearsay exception, such as the *res gestae* doctrine, would render the statements admissible regardless of a lack of corroboration.

53. When finding a confession involuntary, courts do not consider whether to admit the confession as an "excited utterance" or a statement against penal interest. Nor do courts attempt to admit confessions under the *res gestae* rule after they find that the police failed to read the *Miranda* warnings. Accordingly, a majority of courts ignore the *res gestae* doctrine when applying the corroboration rule. Indeed, research has revealed only three jurisdictions that have used the *res gestae* rule to escape the corroboration requirement. *See* cases cited *supra* note 45.

54. *Cf.* C. MCCORMICK, *supra* note 4, at § 144 (demonstrating difficulty of reconciling rules regulating the admissibility of confessions with rules governing the admission of hearsay).

Because statements governed by the corroboration rule are not hearsay to begin with, the *res gestae* concept is only relevant if it can be used to sanction the admissibility of evidence that is not hearsay. An extrajudicial utterance is not hearsay when it is offered to prove something other than the truth of the matter asserted. *See* 6 J. WIGMORE, *supra* note 9, at § 1766. The *res gestae* doctrine has been used to admit into evidence the following kinds of statements that can properly be described as nonhearsay: 1) utterances material to the case as a part of the issue, 2) verbal parts of an act, and 3) utterances used circumstantially, as giving rise to indirect inferences, but not, however, as assertions to prove the matter asserted. *Id.* It can therefore be argued that the *res gestae* doctrine allows the admission of these classes of utterances without corroboration.

This argument is persuasive only with respect to the second class of utterance. Where the utterance is in fact an element of the crime, it should not be considered a "confession" that requires corroboration. Thus, courts have properly refused to require the corroboration of the conspiratorial statements of persons charged with criminal conspiracy. *See, e.g.*, United States v. Russell, 703 F.2d 1243, 1251 (11th Cir. 1983).

The first class of utterances would not implicate the corroboration rule because it is a doctrine applied to contract law. *See* 6 J. WIGMORE, *supra* note 9, at § 1770. The third type of nonhearsay utterances—utterances used circumstantially—would include confessions that are not offered to prove the truth of the matters asserted but as circumstantial proof of some other facts. Thus, the prosecutor could argue that a murder confession is admissible not to show that the defendant murdered the victim, but to show that the defendant knew the victim. *Cf. id.* at § 1789 (utterances offered to prove knowledge are not hearsay). If the confession was uncorroborated, it would be inadmissible under the corroboration rule. Under such circumstances, the court would have to reconcile opposite results mandated by two different rules governing the competence of evidence. The usual compromise—limited admissibility—would be impossible, because the jury could not be expected to ignore the confession of guilt.

The final factor to consider in defining the scope of the corroboration rule is the parties to the transaction: who must confess to whom in order to implicate the corroboration requirement? The corroboration rule governs only the defendant's confession.[55] Other evidentiary rules, however, sometimes require corroboration of the extrajudicial confessions of third parties[56] or accomplices.[57] Generally, the party to whom the confession is made does not affect the applicability of the corroboration rule. Thus, courts require corroboration whether the defendant confesses to an investigative officer or to a private citizen.[58] The latter type of confession is arguably more reliable because it is not the product of interrogation pressures. While no case exempts private confessions from corrobo-

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The better rule would be to exclude the confession altogether. *Cf.* C. MCCORMICK, *supra* note 4, at § 59 at 152:

> It seems, however, that in situations, where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight or the point for which it is competent can readily be proved by other evidence, the judge's power to exclude the evidence altogether is clear in case law and under the Federal and Revised Uniform Rules of Evidence.

In sum, the *res gestae* doctrine should be used to circumvent the corroboration rule only when the inculpatory statements are themselves an element of the crime, such as a conspiratorial statement. For an alternative argument against the *res gestae* exception to the corroboration rule, *see* Note, *Proof of Corpus Delicti*, *supra* note 9, at 671-72. That argument, however, is premised on the questionable assumption that the corroboration rule is a rule of evidentiary sufficiency, not a rule of evidentiary competence. *See infra* notes 63-80 and 92-104 and accompanying text.

55. *But see infra* notes 56-57.

56. Extrajudicial confessions of third parties are hearsay, but, in many jurisdictions, are admissible under the exception governing admissions against penal interest. However, because of concerns that the third party may lie either to exculpate or inculpate those they love or hate, as the case may be, despite the consequences to themselves, courts require some corroboration as a further indicium of trustworthiness. *See generally* Comment, *The Corroboration Requirement of Federal Rule of Evidence 804(b)(3) and United States v. McDonald: How Things Should Not Work*, 131 U. PA. L. REV. 999 (1983); Comment, *The Status of the Third Party Confession in Virginia: In Search of a Trustworthiness Standard*, 15 U. RICH. L. REV. 173 (1980).

57. Because all accomplices are third parties, all accomplice confessions are also third party confessions. But not all third party confessions are accomplice confessions, since some third parties can confess that they alone committed the crime. Some jurisdictions have placed greater restrictions on the use of this subset of third party confessions by statutorily requiring corroboration of the infrajudicial confessions (i.e., testimony) of accomplices. Typically, these statutes state that a conviction cannot rest solely on the testimony of an accomplice. *See, e.g.*, CAL. PENAL CODE § 1111 (West 1970); IOWA CODE ANN. § 813.2, Rule 20(3) (West 1979); Minn. Stat. Ann. § 634.04 (West 1983). The common law rule, on the other hand, does not require corroboration of the testimony (infrajudicial confessions) of accomplices. *See, e.g.*, State v. Brooks, 38 N.C. App. 48, 247 S.E.2d 38 (1978); Rohl v. State, 65 Wis. 2d 683, 692-93, 223 N.W.2d 567, 571-72 (1974); *see generally* 30 AM. JUR. 2d *Evidence* § 1151 (1964).

58. *E.g.*, State v. Azzone, 271 Minn. 166, 170-72, 135 N.W.2d 488, 493-94 (1965) (corroboration rule applies even when defendant voluntarily confesses to private persons); Commonwealth v. Burns, 409 Pa. 619, 187 A.2d 552 (1963); *Developments in the Law—Confessions*, *supra* note 2, at 1079.

ration, the distinction is sometimes used to justify a resort to the more dubious exceptions to the corroboration rule. Thus, in *Smith v. United States*,[59] the Supreme Court indicated that it might not favor mandatory corroboration of "admissions" made to private citizens.[60] In *Knight v. State*,[61] the Florida appellate court justified its *res gestae* exception to the corroboration requirement on similar grounds stating that *res gestae* statements "are not induced by possible police pressure and thus are not of suspect reliability."[62]

C. Procedure

The primary purpose of the corroboration rule is to prevent "errors in conviction based upon untrue confessions alone."[63] The rule attempts to accomplish this by excluding poorly corroborated confessions from evidence. Although the rule often specifies that a conviction cannot be "sustained" unless the confession on which it is based is properly corroborated,[64] the rule does not operate as a rule of evidentiary sufficiency. Rather, a conviction will not be sustained because the uncorroborated confession, which, given the lack of independent corroborating evidence, comprises almost the entire case against the accused, will be excluded from evidence.[65] The rule governs the admissibility of evidence, not the ultimate sufficiency of all

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59. 348 U.S. 147 (1954).

60. *See id.* at 155. In the companion case, Opper v. United States, 348 U.S. 84 (1954), the Supreme Court decided that admissions and exculpatory statements fall within the corroboration rule. *See supra* notes 35-40 and accompanying text. But in both *Opper* and *Smith*, the "admissions" were made to investigating officers, and in the latter case, the Court noted that in other circumstances the admissions might be reliable enough to render corroboration unnecessary. *Smith*, 348 U.S. at 155, 155 n.3.

Very few courts have attempted to explain or apply the *Smith* footnote. The courts that do, are split as to whether it can be used to disinter the confessions/admissions distinction. *See generally* United States v. O'Connell, 703 F.2d 645, 647 (1st Cir. 1983) (briefly discussing cases but not reaching the issue); *see also supra* notes 35-40 and accompanying text. One federal district court has suggested that the cases can be reconciled by exempting from corroboration "admissions" to someone other than an investigating officer, and then only if the surrounding circumstances justify an inference of reliability. United States v. Northrup, 482 F. Supp. 1032, 1038 (D. Nev. 1980).

61. 402 So. 2d 435 (Fla. App. 1981).

62. *Id.* at 436 n.1 (citing State v. Snowden, 345 So. 2d 856 (Fla. App. 1977)).

63. Warszower v. United States, 312 U.S. 342, 347 (1941). *See supra* notes 20-31 and accompanying text.

64. *E.g.*, People v. Willingham, 89 Ill.2d 352, 358-59, 432 N.E.2d 861, 864 (1982); State v. Sinclair, 43 N.C. App. 709, 711, 259 S.E.2d 808, 809 (1979).

65. Of course, the prosecution can proceed on a different theory of the case that is not dependent on the confession. But the prosecution cannot obtain a conviction based upon a theory of the case that is based upon an uncorroborated confession.

evidence to convict.[66] This distinction is critical for resolving three important procedural issues: 1) the allocation of responsibilities between judge and jury, 2) the order of proof, and 3) appellate review.

1. RESPONSIBILITIES OF JUDGE AND JURY

Rules of evidence sometimes blur the traditional functions of judge as finder of law and jury as finder of fact. Such is the case with the corroboration rule. A finding of corroboration is a finding of law because it governs the admissibility of evidence—the confession. Yet in two respects the finding is also a finding of fact. First, in order to decide whether a confession is corroborated one must make a judgment about facts. Second, this preliminary finding corresponds with the ultimate issue in the case: whether the confession is believable. If the confession is excluded, the prosecution's case probably collapses; if the confession is admitted, the ultimate finder of fact will make the same inquiry into the reliability of the confession, though in the context of determining guilt beyond a reasonable doubt. Findings of fact that determine the admissibility of evidence are termed "preliminary findings of fact" and are generally decided with finality by the judge. Where, however, the preliminary finding of fact corresponds with ultimate issues of fact that the jury normally decides, as is the case with the finding of corroboration, the allocation of responsibility is less clear. The concern is that if the judge alone makes the finding, she may be misappropriating the role of the jury.[67]

Whether such a preliminary finding of fact governs the relevance or competence of evidence has traditionally been dispositive

66. It is held that an extrajudicial confession *cannot be admitted into evidence* unless some corroborating evidence is produced. *See, e.g.*, Armstrong v. State, 502 P.2d 440 (Alaska 1972); People v. Wong, 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973); Martinez v. People, 129 Col. 94, 267 P.2d 654 (1954); Schneble v. State, 201 So. 2d 881 (Fla. 1967), *vacated on other grounds*, 392 U.S. 298 (1968); Sluss v. State, 436 N.E.2d 907 (Ind. App. 1982); Azbill v. State, 84 Nev. 345, 440 P.2d 1014 (1968); State v. Austin, 52 Ohio App. 2d 59, 368 N.E.2d 59 (1976); State v. Washington, 1 Or. App. 96, 458 P.2d 694 (1969); State v. Halstead, 414 A.2d 1138 (R.I. 1980); *see also* C. MCCORMICK, *supra* note 4, at § 145.

There is some authority to the contrary. Judge Cummings of the United States Seventh Circuit Court of Appeals has argued that "the [corroboration] rule's nature, rationale, and history suggest that the requirement states a test of the sufficiency of proof rather than merely an evidentiary rule governing 'competence' of a confession or admission." United States v. Bukowski, 435 F.2d 1094, 1105-06, 1106 n.7 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). Judge Cummings suggests that the corroboration rule requires some independent proof in addition to what is necessary to establish guilt beyond a reasonable doubt and that such additional evidence should tend to establish the *corpus delicti*. *Id.*

67. This discussion of preliminary findings of fact closely follows the discussion in C. MCCORMICK, *supra* note 4, at § 53.

in allocating responsibilities between judge and jury. Evidence is irrelevant if it does not logically tend to establish a material proposition; evidence is incompetent if it is relevant but if, for a variety of policy reasons, it is excluded from evidence.[68] If the preliminary finding of fact determines the relevance, or logical probative value, of the evidence, the role of the judge generally has been limited to insuring that the jury could reasonably find the evidence relevant.[69] To say that the relevance of evidence depends upon a preliminary finding of another factor is only to say that it requires a combination of both to produce a relevant factor in the case.[70] The jury, as primary finder of fact, is best qualified to make this judgment of probative value; the judge's role is simply to limit the jury's discretion to reasonable, rational judgments. If, for example, a confession is challenged as irrelevant because it was allegedly made long before the crime in question, the judge should admit the confession into evidence if she is satisfied that the jury could reasonably find a preliminary fact necessary to make the confession relevant, e.g., that the confession was made shortly *after* the crime occurred.[71]

If the preliminary finding of fact determines the competence of evidence, the judge assumes a larger responsibility. A determination of competence requires a balancing of policy concerns that go beyond the mere probative value of evidence. Traditionally, the judge has been deemed better equipped, by virtue of her experience with applying legal rules and her sense of professionalism, to enforce "technical" rules of competence that often operate to exclude probative evidence.[72] In addition, it is often argued that the jury would not be able to ignore the probative worth of evidence it found to be incompetent[73] or that disclosure of incompetent evidence can itself

68. *Id.* at § 185 (defining relevant); Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 165-66, 165 n.2 (1929) (defining competence).

69. C. MCCORMICK, *supra* note 4, at § 53.

70. Morgan, *supra* note 68, at 167, "[t]o say that the relevancy of A depends upon the existence of B is only to say that it requires a combination of A and B to produce a relevant factor in the case."

71. The example is a bit strained, since the confession would in any event be relevant to show intent to commit a crime. For other examples illustrating the principle outside the criminal context, *see* C. MCCORMICK, *supra* note 4, at § 53; Morgan, *supra* note 68, at 166-67.

72. *See* C. MCCORMICK, *supra* note 4, at § 53. For example, a confession that is made after an illegal arrest is excluded on grounds that have nothing to do with the probative value of the confession. *See supra* note 6. The jury, which is intent on reaching a verdict in accordance with what it believes is true, will probably undervalue the importance of the fourth amendment interests served by a rule of competence that excludes probative evidence.

73. *E.g.*, C. MCCORMICK, *supra* note 4, at § 53.

violate the purposes behind a rule of competence.[74] Thus, the judge does not simply determine whether the jury could reasonably find evidence competent; rather, the judge determines, usually by a preponderance of the evidence,[75] that the evidence is competent.[76]

The corroboration rule governs the competence of evidence.[77] If a confession is uncorroborated it is excluded not because it is logically irrelevant in determining guilt, but for policy reasons.[78] These policies are: first, preventing conviction of the innocent; second, motivating police to undertake a thorough investigation of the crime; and third, preventing both overreliance on the confession and an inquisitional system of criminal justice.[79] An important corollary to these policies is that a rule of evidence administered by the judge is a necessary safeguard against the tendency of jurors to view confessions uncritically.[80] In order properly to enforce these policies, par-

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74. *E.g.*, Morgan, *supra* note 68, at 169:

> In many instances, moreover, the chief objective of the exclusionary rule [governing the competence of evidence] would be destroyed [by submitting the question to the jury]. Where the exclusion is based on a policy of protection of an interest, nothing could be more absurd than to violate the interest and then instruct the jury to repair the damage by disregarding the wrongfully extracted evidence. If a lawyer is compelled to repeat in open court the confidential communications of his alleged client, and the jury is told to disregard them in case they find the relationship exists, the harm of disclosure is beyond remedy.

75. *See generally* Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

76. *See* C. MCCORMICK, *supra* note 4, at § 53; Morgan, *supra* note 68.

77. Poorly corroborated confessions are excluded as "incompetent" or lacking in "foundation," and the judge's review of the independent evidence is termed a "preliminary finding of fact." *See, e.g.*, State v. Loyd, 118 Ariz. 106, 574 P.2d 1325 (Ct. App. 1978); People v. Manson, 71 Cal. App. 3d 1, 139 Cal. Rptr. 275 (1977), *cert. denied*, 435 U.S. 953 (1978); State v. Mullins, 353 So. 2d 243 (La. 1977); State v. Kelley, 308 A.2d 877 (Me. 1973); State v. True, 210 Neb. 701, 316 N.W.2d 323 (1982); Wilson v. Commonwealth, 220 Va. 26, 255 S.E.2d 464 (1979).

78. Of course, one of the policies behind the rule does concern the probative value of the confession: it is assumed that uncorroborated confessions are unreliable. *See supra* notes 20-22 and accompanying text. But a policy judgment on the probative worth of evidence should not be confused with a question of relevance. Even an involuntary and uncorroborated confession is relevant because despite being very weak evidence, it does *logically* tend to establish guilt. The policy concern behind the corroboration rule is that the usual means for weighing the probative value of admittedly relevant evidence are unavailing in the case of uncorroborated confessions. This is so because without corroboration there are no means of evaluating the precise probative value of the confession. *Id.* Furthermore, it is assumed that jurors are less critical of confessions than judges are. *See infra* note 80 and accompanying text.

79. *See supra* notes 20-31 and accompanying text.

80. *See, e.g.*, Smith v. United States, 348 U.S. 147, 153 (1954) (because jurors do not share the judiciary's long experience with evaluating confessions and with the ability of persons to confess falsely in the absence of coercion, it is necessary to restrict the power of the jury to convict by invoking the corroboration rule); Jones v. Superior Court of Santa Clara County, 96 Cal. App. 3d 390, 157 Cal. Rptr. 809 (1979); State v. Watts, 208 Or. 407, 301 P.2d 1035 (1956).

ticularly this last concern, the corroboration requirement must be administered by the judge as a rule of evidentiary competence.

The doctrinally correct procedure, then, is for the judge to determine whether the confession is corroborated.[81] If the confession is corroborated, it will be admitted into evidence, and the jury will be able to consider the confession in rendering its verdict. Apparently, all jurisdictions except Georgia charge the judge with the responsibility of making a preliminary finding of corroboration.[82] Many jurisdictions, however, resubmit the evidentiary question to the jury; that is, if the judge decides to admit the confession as corroborated, the jury is instructed to decide the issue of corroboration before reaching the ultimate issue of guilt. If the jury finds no corroboration, it cannot consider the confession in determining guilt.[83] Other jurisdictions reject this procedure as confusing or unnecessary.[84]

Resubmission of the corroboration question to the jury seems doctrinally incorrect. The purpose of the rule is to enforce policies that go beyond the probative value of a particular confession; because the judge is more competent to assess and weigh the policies at stake, there is no reason to force the jury to duplicate an unsuitable task. Moreover, resubmission is inappropriate because one of the policies served by the corroboration rule is to protect the defendant from the tendency of jurors to view confessions uncritically.[85] Fur-

81. In addition, evidence doctrine probably requires the judge to apply a stricter standard than that used in assessing the relevance of evidence, i.e., whether the evidence would raise a reasonable inference of corroboration, the preliminary fact in question. Many jurisdictions, however, fail to apply such a standard of proof. *See infra* notes 158-166 and accompanying text.

82. In Georgia, the jury determines whether the confession is corroborated, though the judge may review this judgment. *See* Whisman v. State, 221 Ga. 460, 145 S.E.2d 499 (1965), *appeal dismissed*, 384 U.S. 895, *reh'g denied*, 385 U.S. 893 (1966).

83. *See, e.g.*, People v. Brucher, 148 Cal. App. 3d 230, 237, 195 Cal. Rptr. 808, 811 (1983) (sua sponte duty to charge the jury to find corroboration; error not necessarily reversible, however); Jefferson v. State, 128 So. 2d 132, 135 (Fla. 1961) (citing with approval instructions requiring jury to find corroboration); People v. De Simone, 27 Ill. 2d 406, 411, 189 N.E.2d 329, 332, *cert. denied*, 375 U.S. 846 (1963) (same); State v. Hanson, 286 Minn. 4, 8-9, 174 N.W.2d 697, 699-700 (1970) (same); People v. Cender, 13 N.Y.2d 16, 191 N.E.2d 464 (1963) (reversible error not to instruct jury to find corroboration); Gwinn v. State, 595 S.W.2d 832, 835 (Tenn. 1979) (citing with approval instruction requiring jury to find corroboration). *See also* Comment, *Pennsylvania's Corpus Delicti Rule*, *supra* note 9, at 309-12; *Developments in the Law—Confessions*, *supra* note 2, at 1081-82.

84. *See, e.g.*, D'Aguino v. United States, 192 F.2d 338, 357 (9th Cir. 1951), *cert. denied*, 343 U.S. 935, *reh'g denied*, 343 U.S. 958 (1952), *reh'g denied*, 345 U.S. 931 (1953); State v. Webb, 239 Iowa 693, 703, 31 N.W.2d 337, 342 (1948); Caldwell v. Commonwealth, 351 S.W.2d 867, 868-69 (Ky. 1961); State v. Herman, 280 S.W.2d 44, 46 (Mo. 1955); Aubuchon v. State, 645 S.W.2d 869, 873 (Tex. Crim. App. 1983); *see also Developments in the Law-Confessions*, *supra* note 2, at 1081-82.

85. The argument in favor of the procedure is that the defendant has nothing to lose by having two decisionmakers (judge and jury) instead of one decide the corroboration issue.

thermore, the corroboration rule involves some unusually confusing doctrine. It is doubtful whether the jury can understand concepts such as the *corpus delicti* that have been consistently misunderstood by judges for hundreds of years.[86]

Thus, courts that resubmit the corroboration question to the jury do not understand that the corroboration rule governs the admissibility and competence of evidence. Nevertheless, if it is assumed that corroboration is the best means to assess the reliability of a confession, then the jury should be apprised of this. The better rule, therefore, would be to instruct the jury to consider corroborating evidence when assessing the credibility of a confession.[87] Such guidance on the means of determining the ultimate credibility of the evidence accords with the jury's role as finder of evidentiary sufficiency; the technical specifics of the corroboration rule, such as the precise nature and extent of corroboration required for admissibility are best applied exclusively by the judge.

It is possible that a jury would correct a judge's mistake. Professor Morgan contends that this argument is flawed because it assumes that the judge will make the initial determination of the preliminary fact with the same care regardless of whether she must resubmit the issue to the jury. Morgan, *supra* note 68, at 176. In this context, Morgan would argue that in close cases the judge will be reluctant to suppress the confession instead of admitting the confession in order to get a "second opinion" from the jury; the judge would probably be quite reluctant to overrule a jury finding of corroboration, as such a finding would represent an unanimous decision by the primary finder of fact.

86. On arguments against the resubmission of preliminary questions of fact to the jury, see generally C. MCCORMICK, *supra* note 4, at § 53; Morgan, *supra* note 68.

87. The instruction might read as follows:

> The prosecution has introduced the defendant's confession as evidence against him. Because the defendant has repudiated this confession, you must not accept it at face value. Rather, the prosecution must convince you that it is credible. You may choose to believe the confession in whole or in part, or you may reject it altogether. In making this judgment, you must consider whether the confession has been adequately corroborated by other evidence.

Stripped of the arcane baggage of evidence doctrine, the instruction should be grasped more easily by the jury. Compare the above instruction with the Minnesota version given in an arson prosecution:

> Now, one of the facets of this case, an important element of evidence that I should discuss with you, is this matter of the confession. And I would like first to caution you on this, because it's the law in Minnesota that only after the corpus delicti, the body of the crime, is established can the confession be considered by you. You must first consider or find that the evidence establishes the existence of the fire, there is no controversy about that; the death or deaths, there is no controversy about that, that they resulted from the fire; and also that the fire was set by a criminal agency.

State v. Hansen, 286 Minn. 4, 8-9, 174 N.W.2d 697, 699-700 (1970) (quoting trial court's instruction).

2. ORDER OF PROOF

If the corroboration rule governed the sufficiency rather than the admissibility of evidence, courts would not be concerned with the order of proof. Rather, courts would simply decide the sufficiency of corroboration after all evidence had been introduced. But because the rule governs the admissibility of evidence, courts have struggled to determine whether the confession is admissible before it has been shown competent by the introduction of independent evidence. In general, courts permit the introduction of incompetent evidence on the condition that the facts necessary to establish its competence are subsequently introduced.[88] Some courts have refused to apply this general rule to the case of corroborating confessions,[89] presumably on the theory that the weight of independent evidence is more objectively assessed if it is heard before the confession.[90] Although most courts find this to be the "better practice," the order of proof generally is held to be within the sound discretion of the trial judge and therefore not grounds for reversal.[91]

3. APPELLATE REVIEW

Whether a confession has been corroborated sufficiently to be admissible in evidence is a preliminary question of fact.[92] Appellate courts generally defer to the trial court's resolution of preliminary questions of fact, because of efficiency concerns[93] and because of the trial court's superior factfinding ability.[94] Typically, appellate

88. C. McCORMICK, *supra* note 4, at § 58.

89. *See e.g.*, State v. Ralston, 67 Ohio App. 2d 81, 425 N.E.2d 916 (1979) (holding that independent proof of *corpus delicti*, the type of corroboration required by Ohio, must be introduced before admitting the confession, despite the courts reservations about the rule); State v. Halstead, 414 A.2d 1138 (R.I. 1980) (only after state has introduced independent evidence of *corpus delicti* may it introduce confession).

90. *See* Note, *Proof of Corpus Delicti*, *supra* note 9, at 657-58 (knowledge of confession "produces powerful suggestive influences" that lead to overvaluation of independent evidence).

91. *Id.*; Annot., 45 A.L.R. 2d 1316, 1340 (1956); *see, e.g.*, Armstrong v. State, 502 P.2d 440 (Alaska 1972); *In re* Flodstrom, 134 Cal. App. 2d 871, 277 P.2d 101 (1954); Garr v. State, 262 Ind. 134, 312 N.E.2d 70 (1974); State v. Mullins, 353 So. 2d 243 (La. 1977); State v. Snow, 483 A.2d 485, 486 n.2 (Me. 1981) (suggesting that Maine Evidence Code may have overruled prior decisions defining mandatory order of proof); State v. Wandix, 634 S.W.2d 203 (Mo. App. 1982); State v. Best, 232 N.W.2d 447 (S.D. 1975).

92. *See supra* notes 67-80 and accompanying text.

93. *See, e.g.*, Nardone v. United States, 308 U.S. 338, 342 (1939).

94. *See, e.g.*, United States v. Gypsum Co., 333 U.S. 364, 394-95 (1948).

courts do not reverse such preliminary findings unless they are "clearly erroneous."[95]

In reviewing the trial court's finding of corroboration, many appellate courts have misperceived both the standard of review and the substance that must be reviewed. As for the former, a number of courts have applied an overly deferential standard of review. Rather than employ the clearly erroneous standard, these courts have used the more deferential standard accorded to a judgment of the sufficiency of evidence to convict. Such a judgment will be reversed if the court finds that based on the evidence no rational trier of fact could have reached the judgment.[96] This standard is inappropriate because the finding of corroboration determines the admissibility of evidence, not the sufficiency of evidence to convict.[97] Like other preliminary questions of fact, the finding of corroboration is in one sense a finding of law because it represents a judgment about the competence of evidence.[98] The intermediate "clearly erroneous" standard is therefore appropriate, as it represents a compromise between the *de novo* review accorded questions of law[99] and the deferential review accorded the more purely factual question of whether the evidence in total is sufficient to convict.[100]

As for the substance of review, proper resolution of the corroboration issue requires a two-tiered inquiry. The appellate court must first determine whether the judge's decision to admit the confession was "clearly erroneous." While the corroboration rule itself does not govern the sufficiency of evidence to convict, corroboration is a relevant consideration in determining sufficiency.[101] Therefore, after

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95. *E.g.*, Sligh v. Doe, 596 F.2d 1169, 1171 (4th Cir. 1979).

96. This standard of review for the sufficiency of evidence in criminal cases, now a constitutional requirement, was articulated in Jackson v. Virginia, 443 U.S. 307 (1979). Specifically, the *Jackson* court held that, in reviewing criminal convictions, a conviction cannot stand unless there is sufficient evidence to permit a rational juror to find the defendant guilty of the crime charged beyond a reasonable doubt. *Id.* For an example of a court improperly applying this very deferential sufficiency of evidence standard to review a finding of corroboration, see People v. Lipsky, 57 N.Y.2d 560, 443 N.E.2d 925, 457 N.Y.S.2d 451 (1982) (affirming conviction not because finding of corroboration passed "clearly erroneous" standard but because sufficient corroboration existed to present a "jury question.").

97. *See supra* notes 63-66 and accompanying text.

98. *See supra* notes 67-87 and accompanying text.

99. *See, e.g.*, Murphy v. Turner, 426 F.2d 422, 423 (10th Cir. 1970) (where there is no dispute in the evidence, appellate court exercises its own independent judgment with respect to lower court's conclusions of law).

100. *See supra* note 96 and accompanying text.

101. For the same reason, appellate courts finding that the admission of the confession was erroneous do not reach the issue of harmless error. It is difficult to imagine a fact situation in which courts could find too little independent evidence to justify the admission of the confession but enough independent evidence to justify the conviction and render the error

determining that the admission of the confession was not clearly erroneous, appellate courts should decide whether a rational trier of fact could have found the defendant guilty on the basis of the confession and the corroborating evidence.[102] To be sure, the standard of review employed in the latter context is more deferential than that employed in the former. Yet, because the traditional version of the corroboration rule does not require independent evidence to establish the defendant's guilt, but only evidence that someone committed the crime,[103] it is possible for an appellate court both to affirm the admission of the confession and reverse the ultimate verdict. That is, it would not be "clearly erroneous" to admit a confession where independent evidence clearly established that *someone* committed the crime; but if the same independent evidence clearly showed that no rational trier of fact could have found beyond a reasonable doubt that the defendant committed the crime charged, the conviction would have to be reversed.[104]

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harmless beyond a reasonable doubt. On the other hand, if the prosecution presented an alternative theory of the case that did not depend on the confession, the harmless error doctrine would seem applicable. In any event, research has revealed no case which discusses the relationship between the corroboration rule and the harmless error doctrine.

102. Many courts carefully distinguish between the evidentiary finding of a threshold level of corroboration and review of the ultimate question of whether all the evidence raised a reasonable doubt of the defendant's guilt. *See, e.g.*, United States *ex. rel.* Hayward v. Johnson, 508 F.2d 322 (3d Cir.), *cert. denied*, 422 U.S. 1011 (1975) (pointing out that it must decide two separate questions: the admissibility of the confession and the overall sufficiency of the evidence); State v. Tillman, 152 Conn. 15, 202 A.2d 494 (1964) (after adopting a limited version of the *corpus delicti* rule, the court stressed that regardless of the rule, all evidence must establish defendant's guilt beyond a reasonable doubt); People v. Hubbard, 38 Ill. 2d 104, 230 N.E.2d 220 (1967) (while the confession was adequately corroborated for the purposes of admissibility, the conviction should be reversed because the totality of the evidence failed to paint a credible rape scenario).

103. *See infra* notes 105-121 and accompanying text.

104. For an example of a fact situation that would fit this description, see Kellam, *A Convincing False Confession*, 130 NEW L.J., January 10, 1981 at 29. In that case, the statement of the victim and forensic evidence clearly showed that the victim had been raped. Thus, the confession was properly admissible. However, no rational trier of fact could have found the defendant guilty because subsequent forensic investigation revealed that the blood contained in the seminal stains could not have originated from the defendant.

Many courts, however, fail to appreciate the need for a two-tiered inquiry. *See, e.g.*, State v. Wandix, 634 S.W.2d 203 (Mo. Ct. App. 1982) (reasoning that since confession was admissible under *corpus delicti* rule, contention that evidence was insufficient to convict was "moot"). Another perplexing case is Bailey v. Commonwealth, 502 S.W.2d 48 (Ky. 1973), where the court sustained a sentence of 99 years simply because the defendant's confession to robbing and killing a cabdriver was corroborated by proof that a dead, wallet-less cabdriver had been discovered by the police. The court should have reviewed all the evidence to determine whether the confession was reliable enough to connect the defendant to the crime, especially because of the severity of the sentence. Even a court which requires that only the existence of a crime be corroborated before the confession is admitted into evidence should be satisfied that the details of the confession are sufficient to permit a rational juror to convict

D. Substance: The Nature and Extent of Corroboration Required

1. THE ORTHODOX RULE

Most jurisdictions require that the confession be corroborated with independent proof of the *corpus delicti* of the confessed crime.[105] The *corpus delicti*, or "body of the crime,"[106] is established when it is shown that someone committed the alleged crime.[107] To reach this conclusion, it must be established that: 1) someone has suffered the loss or harm associated with the crime, and 2) the loss was caused by a criminal agency rather than by an innocent or accidental one.[108] Corroboration of a third element necessary to convict—that the accused was the criminal agent—is not required by these *corpus delicti* jurisdictions.[109] Some courts, perhaps dissatisfied with the prospect of convicting in the absence of any independent evidence linking the defendant to the crime, have increased the corroboration burden by defining the *corpus delicti* to include all the elements of the offense charged.[110] Such a hard and fast rule is inevitably eroded, however, when courts are faced with the prospect of reversing a conviction because one trivial element remains uncor-

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beyond a reasonable doubt. *See, e.g.*, People v. Hubbard, 38 Ill. 2d 104, 230 N.E.2d 220 (1967) (reversing a rape conviction because the confession, while admissible, failed to paint a credible rape scenario).

105. The *corpus delicti* jurisdictions are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *See* statutes and cases cited *supra* note 18.

106. BLACK'S LAW DICTIONARY 310 (rev. 5th ed. 1979).

107. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 4 (1972).

108. *Id.*

109. *See, e.g.*, People v. Manson, 71 Cal. App. 3d 1, 42, 139 Cal. Rptr. 275, 298 (1977), *cert. denied*, 435 U.S. 953 (1978) ("The defendant's admissions or confessions are competent evidence after prima facie proof of the corpus delicti is made and may of themselves be sufficient to establish his connection with the crime."); Frazier v. State, 107 So. 2d 16 (Fla. 1958) (finding adequate corroboration of murder confession even though only evidence linking the defendant to the crime was a scratch over his eye and his unexplained whereabouts during the commission of the crime; since the victim's body evidenced foul play, the *corpus delicti* was not in doubt).

110. *E.g.*, State v. Washington, 1 Or. App. 96, 98, 458 P.2d 694, 695-96 (1969) (*corpus delicti* rule requires independent proof of "each element of the crime before the confession can be used as evidence."); People v. Allen, 39 Mich. App. 483, 496, 197 N.W.2d 874, 881 (1972) (Levin, J., dissenting), *rev'd*, 390 Mich. 383, 212 N.W.2d 21 (1973) (dissent adopted per curiam).

roborated.[111] Furthermore, too strict a rule defeats the purpose of obtaining confessions. The mental element of crime is not easily proven by evidence independent of the defendant's thoughts; the confession provides a convenient means of directly assessing the workings of the defendant's mind so that the prosecution can show the often subtle degrees of intent specified in criminal statutes.[112]

Consequently, courts generally have resisted expansive definitions of the *corpus delicti* that require corroboration of each element of the specific offense charged rather than some showing of basic criminality.[113] Thus, proof of death by foul play has been held to corroborate sufficiently the *corpus delicti* of homicide, regardless of whether the specific degree of homicide charged requires a showing of malice aforethought,[114] coincident intent to commit a felony,[115] or conspiracy.[116] Once corroborated, the confession may be used to

111. *See, e.g.*, State v. McGuire, 327 Mo. 1176, 39 S.W.2d 523 (1931) (conviction of "larceny at night" upheld even though an essential element of the crime—that it was committed at night—was not proven by independent evidence); *but see* People v. Zwierkowski, 368 Mich. 56, 117 N.W.2d 179 (1962) (conviction of breaking and entering at night reversed where nighttime element not established by any independent evidence).

112. *See* Note, *Proof of Corpus Delicti*, *supra* note 9, at 654.

113. *See* Veldorale, *supra* note 9, at 22 (1965) (concluding that intent is unique to the defendant and thus not part of the *corpus delicti*); Note, *Proof of Corpus Delicti*, *supra* note 9, at 654-55; Note, *Confession Corroboration in New York*, *supra* note 9, at 1213-16; *see, e.g.*, Manning v. United States, 215 F.2d 945, 946 (10th Cir. 1954) ("The term 'corpus delicti' is not synonymous with the whole of the charge. If the government must prove the whole of the charge, in order to corroborate the confession, of what use is the confession?"); Ezell v. State, 217 Ark. 94, 229 S.W.2d 32 (1950); State v. Pyle, 216 Kan. 423, 532 P.2d 1309 (1975); State v. Austin, 52 Ohio App. 2d 59, 368 N.E.2d 59 (1976); State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976), *sentence vacated*, 438 U.S. 911 (1976); Goforth v. State, 644 P.2d 114, 118 (Okla. Crim. App. 1982); *but see* Sluss v. State, 436 N.E.2d 907 (Ind. Ct. App. 1982) (independent evidence of breaking but not entering does not sufficiently corroborate the *corpus delicti* of burglary); State v. Washington, 1 Or. App. 96, 458 P.2d 694 (1969) (clear and convincing independent proof of victim's age required to corroborate *corpus delicti* of statutory rape).

Connecticut and North Dakota limit the corroboration requirement by eliminating the "criminality" element of the *corpus delicti*. Thus, only the loss associated with the crime, such as the fact of death in homicide, need be corroborated; proof of criminal agency producing the loss is not required. *See* State v. Tillman, 152 Conn. 15, 202 A.2d 494 (1964); State v. Gibson, 69 N.D. 70, 284 N.W. 209 (1938). Wigmore supported this more limited definition of the *corpus delicti*. 7 J. WIGMORE, *supra* note 9, at § 2072.

114. State v. Galvano, 34 Del. 409, 154 A. 461 (1930).

115. People v. Lytton, 257 N.Y. 310, 178 N.E. 290 (1931) (a body killed by gunshot wounds held sufficient corroboration of any degree of homicide, including felony murder); *accord*, Rhone v. State, 254 So. 2d 750 (Miss. 1971); People v. Murray, 40 N.Y.2d 327, 353 N.E.2d 605, 386 N.Y.S.2d 691 (1976), *cert. denied*, 430 U.S. 948 (1977), *contra*, People v. Allen, 39 Mich. App. 483, 494-502, 197 N.W.2d 874, 880-86 (1972) (Levin, J., dissenting), *rev'd*, 390 Mich. 383, 212 N.W.2d 21 (1973) (dissent adopted per curiam).

116. People v. Holmes, 67 Ill. 2d 236, 367 N.E.2d 663 (1977); *cf.* United States v. Vega-Limon, 548 F.2d 1390 (9th Cir. 1977) (per curiam) (while existence of a conspiracy needed to be corroborated by independent evidence, defendant's connection with conspiracy could be shown by confession alone).

prove the specific *mens rea* or any other elements required by statute.[117]

As for the quantum of corroborating evidence, *corpus delicti* jurisdictions require anything from "slight" independent evidence of the *corpus delicti*[118] to independent proof beyond a reasonable doubt.[119] The most common approach is either to specify no quantum[120] or to require "prima facie" proof.[121]

2. ALTERNATIVE RULES

Reasoning that proof of the *corpus delicti* is neither a necessary nor a sufficient indicium of reliability,[122] a minority of jurisdictions require the confession to be corroborated by any independent evidence that proves its trustworthiness. On the whole, the minority rules are as strict or stricter than the *corpus delicti* rule in excluding confessions.[123]

a. The Federal Rule

In *Opper v. United States*,[124] the United States Supreme Court held that confessions, admissions, and exculpatory statements must be corroborated by "substantial independent evidence which would tend to establish the trustworthiness of the statement."[125] Theoretically, the *Opper* rule would sustain a conviction even in the absence

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117. *See, e.g.*, State v. Halstead, 414 A.2d 1138 (R.I. 1980).

118. State v. True, 210 Neb. 701, 704, 316 N.W.2d 623, 625 (1982).

119. Commonwealth v. Brusky, 219 Pa. Super. 54, 57, 280 A.2d 826, 828 (1971).

120. Since the rule can be stated in the negative—that no one may be convicted solely on the basis of an extrajudicial confession—courts can avoid specifying the quantum of independent evidence required. *See, e.g.*, Azbill v. State, 84 Nev. 345, 352, 440 P.2d 1014 (1968); State v. Sinclair, 43 N.C. App. 709, 711, 259 S.E.2d 808, 809 (1979).

121. *See* Marvin v. State, 407 So. 2d 576 (Ala. Crim. App. 1981); People v. Wong, 35 Cal. App. 3d 812, 111 Cal. Rptr. 314 (1973); Schneble v. State, 201 So. 2d 881 (Fla.), *vacated on other grounds*, 392 U.S. 298 (1967); State v. Pyle, 216 Kan. 423, 532 P.2d 1309 (1975); State v. Dixson, 80 Mont. 181, 260 P. 138 (1927); State v. Hamrick, 19 Wash. App. 417, 576 P.2d 912 (1978).

122. *E.g.*, State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959) (arguing that the *corpus delicti* rule is inadequate insofar as it does not protect against a false confession to a real crime, which is a greater likelihood than a false confession to a crime that never occurred).

123. *See infra* notes 124-50 and accompanying text; *see also Confession Corroboration in New York*, *supra* note 9, at 1211. Relying on older cases, a number of commentators have wrongly considered the *corpus delicti* rule to be the stricter version. *See* 7 J. WIGMORE, *supra* note 9, at § 2071 (*corpus delicti* rule is the "stricter version"); Note, *Proof of Corpus Delicti*, *supra* note 9, at 666. There are some peculiar fact situations where this is still so. *E.g.*, Lemons v. State, 49 Md. App. 467, 433 A.2d 1179 (Md. Ct. Spec. App. 1981).

124. 348 U.S. 84 (1954).

125. *Id.* at 93.

of any independent evidence of the *corpus delicti*, since corroboration could take the form of evidence that confirmed some of the details of the confession without establishing the *corpus delicti*.[126] Nevertheless, in every federal case researched, the corroborating evidence has established both the *corpus delicti* and the confession's trustworthiness.[127]

The *Opper* Court did not decide whether evidence of the *corpus delicti* would always be presumed sufficient to corroborate a confession. Although some courts and commentators have contended that, as a matter of common sense, proof that the defendant confessed to a crime that actually occurred does not necessarily make the confession reliable,[128] the federal courts have disagreed. In *Wong Sun v. United States*,[129] the Supreme Court indicated that proof of the *corpus delicti* always establishes the reliability of a confession.[130] Al-

126. The *Opper* Court expressly recognized and sanctioned this possibility. *Id.* Nevertheless, it is difficult to imagine how any amount of corroboration can establish the trustworthiness of a confession where the only proof that a crime even occurred is the confession itself. *But see infra* note 127.

127. Even in *Opper* the Court concluded that the independent evidence tended to establish both the trustworthiness of the confession and the *corpus delicti*. 348 U.S. 84 at 93-94.

On the other hand, Texas adopted the federal rule and has used it to admit a confession that would not have been admitted under the *corpus delicti* rule. Self v. State, 513 S.W.2d 832 (Tex. Crim. App. 1974) (although cause of death by foul play was not established by independent evidence, corroboration of the location of the victim described in confession sufficed to establish confession's reliability); *see also* Evans v. State, 632 S.W.2d 912, 914 (Tex. Crim. App. 1982) ("If there is some evidence corroborating the confession, the state has met its burden to prove the *corpus delicti*."). The Maryland courts, which had initially adopted the federal rule, decided to reaffirm the *corpus delicti* version when faced with a case in which some details of the confession were corroborated but proof of death and proof of criminal agency were lacking. *See* Lemons v. State, 49 Md. App. 467, 433 A.2d 1179 (Md. Ct. Spec. App. 1981).

128. *E.g.*, People v. Gavurnik, 2 Ill. 2d 190, 194, 117 N.E.2d 782, 785 (1954); State v. Morro, 313 Mo. 98, 103, 281 S.W. 720, 722 (1926); State v. Lucas, 30 N.J. 37, 54, 152 A.2d 50, 60 (1959); People v. Rooks, 40 Misc. 2d 359, 368, 243 N.Y.S.2d 301, 311 (Sup. Ct. 1963); State v. Knapp, 70 Ohio St. 380, 393, 71 N.E. 705, 707 (1904); Note, *Proof of Corpus Delicti*, *supra* note 9, at 666-67.

129. 371 U.S. 471 (1963).

130. *See id.* at 489 n.15. The Court noted, however, that for some crimes, the concept of *corpus delicti* is useless. When a crime involves physical damage to persons or property it is possible to distinguish between the body of the crime and the identity of the criminal. But for crimes like tax evasion, there is no "tangible" injury that can be isolated as a *corpus delicti*. In the case of these crimes, which have an "intangible" *corpus delicti*, the prosecution can not benefit from the *Wong Sun* rule because it is impossible to establish the *corpus delicti* without also establishing the identity of the criminal. *See id.* (citing Smith v. United States, 348 U.S. 147, 154 (1954)).

though the statement was dictum, the lower federal courts have accepted it as binding.[131]

In sum, the federal courts have essentially changed the formulation of the *corpus delicti* rule without changing its ultimate effect.[132] Three states and the District of Columbia have adopted the federal rule.[133]

b. The Wisconsin Rule

After a series of rather confused cases,[134] the Wisconsin Supreme Court, in 1962, rejected the *corpus delicti* rule in favor of a simple requirement that "any significant fact" of the confession be corroborated.[135] "Such corroboration is required," the court reasoned, "in order to produce a confidence in the truth of the confession."[136] Like the United States Supreme Court in *Opper*, the Wisconsin court indicated that, theoretically, the corroborating evidence could be sufficient to establish the trustworthiness of a confession even if the confession were the only proof that a crime had ever occurred.[137] Unlike the federal courts, however, the Wisconsin Supreme Court has not had an opportunity to determine precisely

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131. *See, e.g.*, United States v. Braverman, 376 F.2d 249 (2d Cir.), *cert. denied*, 389 U.S. 889 (1967) (independent evidence that established that crime of counterfeiting occurred was sufficient to support a conviction; confession sufficient to link defendant with crime); United States v. Hall, 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918 (1968); United States v. Daniels, 528 F.2d 705 (6th Cir. 1976); United States v. Vega-Limon, 548 F.2d 1390 (9th Cir. 1977) (per curiam); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979) (per curiam).

Some courts have criticized the *Wong Sun* rule as not insuring the reliability of confessions. *See, e.g.*, United States v. Johnson, 589 F.2d 716, 719 n.32 (D.C. Cir. 1978) ("Whatever attraction these arguments [against the *corpus delicti* test] might have, we are bound by the Supreme Court's pronouncements and by the long established holdings of this and other courts."); United States v. Opdahl, 610 F.2d 490, 494 (8th Cir. 1979) (Henley, J., concurring), *cert. denied*, 444 U.S. 1091 (1980) ("I am far from persuaded that it [the *Wong Sun* dictum] is sound.").

132. *See* C. McCORMICK, *supra* note 4, at § 145.

133. The states are Hawaii, New Mexico, and Texas. *See* State v. Hale, 45 Haw. 269, 367 P.2d 81 (1961); Doe v. State, 94 N.M. 548, 613 P.2d 418 (1980); Evans v. State, 632 S.W.2d 912 (Tex. Crim. App. 1982). For the District of Columbia rule, see Harrison v. United States, 281 A.2d 222 (D.C. 1971).

134. In two delphic cases, the Wisconsin court seemed to hold that no corroboration of any kind was required. *See* Potman v. State, 259 Wis. 234, 47 N.W.2d 884 (1951); State v. DeHart, 242 Wis. 562, 8 N.W.2d 360 (1943). When the court later announced its corroboration rule, it apparently interpreted these cases as rejecting only the *corpus delicti* version of the corroboration rule. *See* Holt v. State, 17 Wis. 2d 468, 480, 117 N.W.2d 626, 632-33 (1962).

135. Holt v. State, 17 Wis. 2d 468, 480, 117 N.W.2d 626, 632-33 (1962).

136. *Id.*

137. "The corroboration, however, can be far less than is necessary to establish the crime independently of the confession." *Id.*

what is required to corroborate a confession.[138] Whether the Wisconsin rule presumes that independent evidence of the *corpus delicti* necessarily "produce[s] a confidence in the truth of the confession,"[139] as the federal courts do[140] or whether the trustworthiness principle requires the substantial amount of corroboration that some other minority jurisdictions require[141] is unsettled.

c. The New Jersey Rule

In 1959, the New Jersey Supreme Court rejected the *corpus delicti* rule in favor of a rule requiring 1) proof of loss or harm associated with the crime and 2) other proof "tending to establish that when the defendant confessed he was telling the truth."[142] The court reasoned that it was unnecessary to prove the criminal agency component of the *corpus delicti* to serve the historic policy behind the corroboration requirement: to prevent the use of the criminal sanction where no harm or loss occurs.[143] However, the court reasoned that because defendants sometimes falsely confess to crimes that actually occur, independent evidence should prove more than the occurrence of a crime.[144]

In practice, the New Jersey courts have strictly applied this rule, and have reversed convictions even where the *corpus delicti* and some details of the confession had been established by independent evidence. In testing the reliability of the confession, the New Jersey courts have viewed the totality of the independent evidence to determine whether discrepancies between the confession and other evi-

138. In all but one of the cases it has heard since announcing the rule, the prosecution has introduced abundant corroborating evidence, both of the *corpus delicti* and the defendants guilt. *See e.g.* Larson v. State, 86 Wis. 2d 187, 271 N.W.2d 647 (1978); State v. Verhasselt, 83 Wis. 2d 647, 266 N.W.2d 342 (1978); Schultz v. State, 82 Wis. 2d 737, 264 N.W.2d 245 (1978); LaTender v. State, 77 Wis. 2d 383, 253 N.W.2d 221 (1977); Triplett v. State, 65 Wis. 2d 465, 222 N.W.2d 689 (1974); Freeman v. State, 51 Wis. 2d 537, 187 N.W.2d 191 (1971); Jacobs v. State, 50 Wis. 2d 361, 184 N.W.2d 113 (1971); Jackson v. State, 29 Wis. 2d 225, 138 N.W.2d 260 (1965). In the one case where the Wisconsin court applied the *corpus delicti* rule to reverse a conviction, the complete absence of corroborating evidence made it unnecessary to elaborate precisely on how much corroboration the rule requires. Barth v. State, 26 Wis. 2d 466, 132 N.W.2d 578 (1965) (the Wisconsin test is not satisfied when the only evidence corroborating a confession to a homosexual act is the existence of the alleged homosexual partner).

139. Holt v. State, 17 Wis. 2d 468, 480, 117 N.W.2d 626, 633 (1962).

140. *See supra* notes 128-131 and accompanying text.

141. *See infra* notes 142-150 and accompanying text.

142. State v. Lucas, 30 N.J. 37, 58, 152 A.2d 50, 61 (1959).

143. *Id.* at 57, 152 A.2d at 60.

144. *Id.*

dence merited reversal.[145] New Hampshire has followed the New Jersey approach.[146]

d. The Iowa Rule

In January of 1978, the Iowa legislature adopted the nation's strictest corroboration rule.[147] The State supreme court, has interpreted the statute to require independent proof of both the *corpus delicti* and the defendant's link to the crime.[148] However, the rule does not require strong or substantial evidence of the defendant's connection with the crime; "some material fact" suffices.[149] Like the *corpus delicti* rule, the Iowa rule is a rule of evidence. The judge makes a preliminary finding that corroborating evidence exists; the jury makes the determination of whether the corroboration and the confession are sufficient to find the defendant guilty beyond a reasonable doubt.[150]

3. EVALUATION

The *corpus delicti* rule does not logically serve the policies behind the corroboration requirement. To establish that the defendant confessed to a real crime says very little about the reliability of the confession. False confessions to real crimes seem just as likely as false confessions to unreal crimes.[151] And the danger of the latter

145. *See e.g., In re* J.P.B., 143 N.J. Super. 96, 362 A.2d 1183 (1976) (significant discrepancies between confession and independent evidence merited reversal); *In re* B.D., 110 N.J. Super. 585, 266 A.2d 326 (1969) (despite ample evidence that two victims had indeed been stabbed to death as described in confession, discrepancies between details of confession and independent evidence merited reversal).

146. New Hampshire, however, has completely discarded the concept of *corpus delicti* and therefore does not require even proof of loss. Rather, New Hampshire simply requires "substantial independent evidence indicating that the admission of the defendant is true." State v. George, 109 N.H. 531, 257 A.2d 19 (1969); *see also* State v. Hanley, 116 N.H. 235, 356 A.2d 687 (1976).

147. "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense." IOWA CODE ANN. § 813.2, Rule 20(4) (West 1978).

148. State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

149. *Id.* Perhaps this explains why the Iowa court has yet to use the rule to reverse a conviction.

150. *See* State v. White, 319 N.W.2d 213, 214 (Iowa 1982).

151. The argument against the *corpus delicti* rule was best summed up in State v. Lucas, 30 N.J. 37, 57, 152 A.2d 50, 60 (1959):

> There seems to be little difference in kind between convicting the innocent where no crime has been committed and convicting the innocent where a crime has been committed, but not by the accused. . . . Indeed, it is ofttimes more likely that persons giving false confessions because of mental disease or defect will confess to crimes where there is abundant proof of . . . the *corpus delicti* but where there is no proof as

kind of confession is perhaps already cured by the realities of law enforcement: what triggers investigation and interrogation in the first place is knowledge and evidence that a real crime has in fact been committed.[152]

Furthermore, the *corpus delicti* is an impossibly vague concept. It is difficult to assess which elements of the crime should be established in order to prove the "basic criminality" of an act.[153] And the concept is completely irrelevant where, because of the nature of the crime charged, it is impossible to show that a crime occurred without also implicating a specific defendant.[154] This ambiguity results in arbitrary applications of the rule.[155] Some of the confusion could be avoided if courts defined the *corpus delicti* in the negative; that is, it is easier to define what the *corpus delicti* is not than to define what it is. We know that the "body of the crime" has not been established where the independent evidence shows that the events in question resulted from accident or innocent conduct. For example, the *corpus delicti* of arson has not been established where the independent evidence shows that the fire was accidental. Therefore, if the *corpus delicti* rule is retained, the better rule would be simply to require judges to admit confessions where the independent evidence is more consistent with the existence of criminal conduct than with accident or innocent conduct. The Pennsylvania courts have adopted this approach.[156]

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to the perpetrator. The danger is not so much that such persons will confess to noncriminal occurrences but rather to crimes committed by some one other than themselves. Under such circumstances the confessor is probably afforded greater protection by the requirement that the State must introduce such independent corroborative proof of facts and circumstances tending to generate a belief in the trustworthiness of the confession than he is by the rule requiring independent proof of the *corpus delicti*.

152. *Accord, Developments in the Law—Confessions, supra* note 2, at 1083; Note, *Proof of Corpus Delicti, supra* note 9, at 648.

153. *See supra* notes 110-117 and accompanying text.

154. *See supra* note 130.

155. The ambiguity of the rule has caused some dubious convictions and reversals of convictions. For the former, see *supra* notes 102-104 and accompanying text. For the latter, see, *e.g.*, People v. Rogers, 415 Ill. 343, 114 N.E.2d 398 (1953) (reversing statutory rape conviction on grounds that an element of crime (the defendant must be over 16 years of age) was not established by independent evidence: that jury could view the defendant—who was alleged to be 35 years old—held insufficient to establish age); State v. Ralston, 67 Ohio App. 2d 81, 425 N.E.2d 916 (1979) (per curiam) (corpus delicti of murder not established even though defendant confessed and then led detectives to precise location of remains).

156. *E.g.*, Commonwealth v. Moyer, 277 Pa. Super. 172, 176, 419 A.2d 717, 719 (1980):

> It was enough if the Commonwealth "established that the fire resulted from human intervention even though the evidence was consistent with both accidental and criminal conduct." [Commonwealth v. May, 451 Pa. 31, 33, 301 A.2d 368, 370

By directly assessing the reliability of the confession in light of all the corroborating evidence, minority jurisdictions better serve the policies behind the corroboration rule.[157] Yet, as is also the case with the *corpus delicti* jurisdictions,[158] minority jurisdictions generally adopt a standard of proof that is inconsistent with the interests served by a rule governing the competence of evidence.[159] If unjust convictions are to be avoided, if the police are to be motivated to search for independent evidence, and if the defendant is to be protected against the tendency of the jury to view confessions uncritically, then the judge must make her own independent determination that the confession is sufficiently corroborated to be reliable. A standard of proof that simply requires the judge to find corroboration of "any significant fact"[160] or enough to raise a "reasonable inference" of reliability[161] can hardly do justice to the policies behind the corroboration requirement and the judge's responsibility to enforce them. The judge must make an independent determination of corroboration; she must not simply decide that it would be rational to find the confession reliable.[162]

(1973).] . . . A corpus delicti, however, was not established "if the independent evidence was equally consistent with accident or criminality." [Commonwealth v. Ware, 459 Pa. 334, 366, 329 A.2d 258, 274 (1974).]

157. Not all of the minority jurisdictions have completely liberated themselves from the conceptual morass of the *corpus delicti*, however. *See supra* notes 128-133, 142-144 and accompanying text.

158. For standards governing the quantum of corroborating evidence required by *corpus delicti* jurisdictions, see *supra* notes 118-121 and accompanying text.

159. That the corroboration rule governs the admissibility and competence of evidence is discussed *supra* notes 63-87 and accompanying text.

160. This is the Wisconsin rule. *See supra* notes 134-136 and accompanying text.

161. The "reasonable inference" standard is quite common among *corpus delicti* jurisdictions. *See, e.g.*, State v. Gillies, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983); People v. Towler, 31 Cal. 3d 105, 114-17, 641 P.2d 1253, 1258, 181 Cal. Rptr. 391, 395-96 (1982); State v. Lerch, 296 Ore. 377, 677 P.2d 678, 691 (1984).

One minority jurisdiction applies the "reasonable inference" standard in substance if not in name. The Iowa court requires only "some" corroborating evidence, on the theory that the sufficiency of corroborating evidence is an issue of fact for the jury. State v. White, 319 N.W.2d 213, 214 (Iowa 1982); State v. Hobson, 284 N.W.2d 239, 243 (Iowa 1979). Essentially, the court simply determines that there is "some" corroborating evidence from which the jury could reasonably infer the reliability of the confession and, in turn, the defendant's guilt.

162. By simply determining that there is "some" corroborating evidence, that a "significant fact" is corroborated, or that there is enough corroborating evidence to raise a "reasonable inference" of reliability, the court essentially passes to the jury the ultimate responsibility of assessing the confession's reliability. That is, the court determines that the jury could reasonably find reliability. Such a weak standard is appropriate only where the judge determines the relevance but not the competence of evidence. *See supra* notes 67-76 and accompanying text.

Indeed, the almost universal standard that governs a finding of a preliminary fact like corroboration is that of a "preponderance of the evidence."[163] Courts implicitly assume, however, that confessions are generally reliable and that something less that a preponderance standard is a sufficient insurance against conviction of the innocent.[164] In any event, if the judge, and not the jury, must determine the sufficiency of corroboration, the standard must be stronger than a "reasonable inference of reliability."[165] Perhaps the best compromise is that reached by New Hampshire, which requires "*substantial* independent evidence indicating that the admission of the defendant is true."[166]

E. Summary

Part II has analyzed the corroboration rule and criticized various facets in order to fashion a rule internally consistent with its underlying policies. Specifically, Part II has suggested that narrowing the scope of the rule through such devices as distinguishing between "admissions" and "confessions" is ill-advised, that the minority rules are preferable to the *corpus delicti* version of the corroboration rule, and that the judge should find at least "substantial" corroborating evidence before admitting a confession into evidence.

But the prevailing paradigm of American legal theory in the twentieth century has been to go beyond the law in the books and to study the law in action.[167] "It is the work of lawyers," wrote Roscoe Pound in 1910, "to make the law in action conform to the law in the books, not by . . . eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action

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163. *See* Saltzburg, *supra* note 75, at 273.

164. Courts do not squarely address the inconsistency between the general rule that the judge apply the preponderance standard when making preliminary findings of fact that govern the competence of evidence and the almost universal use of weaker standards in assessing the extent of corroboration. The only way to resolve this inconsistency is to recognize the implicit assumption noted in the text. Some courts do apply a standard stronger than the preponderance standard—*see* Commonwealth v. Brusky, 219 Pa. Super. 54, 280 A.2d 826 (1971) (reasonable doubt standard); State v. Cooley, 603 P.2d 800, 801-02 (Utah 1979) (requiring "clear and convincing evidence")—but only one court applies the preponderance standard. *See* Roberts v. State, 210 Miss. 777, 50 So. 2d 356 (1951) *cited* and *discussed* in Note, *Proof of Corpus Delicti*, *supra* note 9, at 659 n.112.

165. *See supra* note 162.

166. State v. George, 109 N.H. 531, 533, 257 A.2d 19, 21 (1969) (emphasis added).

167. *See generally* R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). For a brilliant critique of this traditional paradigm, see Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

can conform to it."[168] With this empirical spirit in mind, this Comment will next discuss whether the policies and doctrine of the corroboration rule are consistent with the "law in action."

III. Empirical Analysis

Part III examines whether the policy assumptions behind the corroboration rule withstand empirical scrutiny. The first and most fundamental issue is whether false confessions are a sufficiently serious problem to merit legal safeguards. Section A surveys the psychological and sociological literature and concludes that physically uncoerced false confessions occur with sufficient regularity to justify prophylactic measures. The second issue is whether the corroboration rule provides an effective test of a confession's reliability. Section B concludes that it does not. While some form of the corroboration rule should be retained, it should be supplemented by trial procedures that alert the judge and jury to the problem of false confessions. The third issue is what affirmative measures courts can take to regulate interrogation in order to aid in the prevention or detection of false confessions. Section C examines several alternatives and concludes that courts should require the police to make a complete record of all extrajudicial, post-arrest interrogations.

A. Incidence of False Confessions

It is perhaps the common-sense view that physically uncoerced false confessions are made by freaks and occur freakishly. If the incidence of such confessions is indeed so low, an exclusionary rule against uncorroborated confessions would seem unjustified. The ultimate issue is an empirical one: are physically uncoerced false confessions rare, bizarre occurrences or do they occur with enough regularity to justify prophylactic measures? Yet, a certain resolution of this empirical issue is doomed by linguistic ambiguity and by imperfect data. It is difficult to define what distinguishes a "rare" occurrence from a "common" occurrence, or how much regularity in occurrence is necessary to justify prophylactic measures. And even if the issue can be framed in well-defined terms, how does one determine the rate of false confessions? Records are not kept, and if they were, the convincing false confession, by definition, would be heavily underreported.

168. Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 36 (1910).

In any event, proponents and opponents of legal safeguards against false confessions both must make assumptions about the incidence of false confessions. Uncertain as it is, empirical analysis is the only way to test whether those assumptions are sound. The problem is best approached by first addressing three subsidiary issues. First, what is a "false confession?" Opponents of the corroboration rule trivialize the reliability problem by arguing that full-blown, fantastic, written confessions by persons who lack any connection with the crime are too rare to justify legal safeguards. But when false confessions are defined to include subtle distortions of memory that serve to link a suspect to the crime or to incriminate her of a more serious offense than she committed, overstatements of a suspect's guilt, and even false exculpatory statements made in a moment of panic that later haunt the suspect at trial, the problem is more difficult to dismiss.

Second, the coerciveness of interrogation must be evaluated; the more coercive interrogation is found to be, the more likely it will prompt false as well as true confessions. The social science literature indicates that interrogation is inherently coercive. Thus, even if the interrogator acts in good faith and does not physically or psychologically abuse the suspect, the suspect is still under enormous pressure to confess falsely, as broadly defined above. Indeed, subtle coercion is the most effective coercion, and less abusive interrogators will elicit the most true and false confessions.

Third, does the root cause of false confessions lie in the personal idiosyncracies or in deterministic forces that shape the individual? The social science literature indicates that physically uncoerced false confessions are not idiosyncratic. Larger psychodynamic, social psychological, and sociological forces, not the quirks of a few individuals, motivate the false confession. Even in the absence of physical coercion, a broad range of "normal" personalities are capable of false confessions. Since the source of the false confession is the general malleability of man rather than the bizarre quirks of a few individuals, the false confession phenomenon would seem common enough to justify prophylactic measures.

This section will discuss these three issues by analyzing in turn the internal psychological, social psychological, and sociological causes of false confessions. This section will draw two general conclusions from this empirical analysis. First, the breadth of the "false confession" phenomenon, the inherent coerciveness of interrogation, and the universality of the causes of false confessions cumulatively indicate that false confessions are a serious enough problem to merit legal safeguards. Second, in light of the complexity and sub-

tlety of the false confession phenomenon, the corroboration rule by itself is not a sufficient safeguard. This latter conclusion will be discussed more thoroughly in the two succeeding sections of Part III.

1. INTERNAL PSYCHOLOGY

Human behavior can be explained, in part, by individual psychology. This approach de-emphasizes the importance of personal interaction within a given social environment and, instead, assumes that the internal psychodynamics of an individual causes that individual's behavior. This concentration on the internal workings of the mind, as something that can be abstracted from the social setting and studied in isolation, marked the early attempts of psychologists, most notably Munsterberg[169] and Reik,[170] to explain false confessions. The common theme of Munsterberg, Reik, and their successors, is that the false confession is not the product of a diseased mind, different in kind from a normal mind, but is simply an extreme manifestation of quite "normal" and understandable behavior.

As early as 1909,[171] Munsterberg criticized courts for assessing the mental state of criminal defendants "by the crudest standards of easy-going psychology which considers a mental life as typical and unaltered as long as the man is neither insane nor intoxicated."[172] For Munsterberg, all human minds share the same set of mental traits. What distinguishes the diseased mind is a lack of proportionality; one trait becomes grotesquely enlarged.[173] On the continuum of mental normality, Munsterberg defined a broad "borderland," where only a precarious balance between mental traits could be maintained. By rigidly distinguishing between "normal" and "diseased" minds, lawyers and jurors ignored the extent to which the "normal" but borderland mind could become temporarily unbal-

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169. *See* H. MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 137-71 (1927).

170. *See* T. REIK, *The Compulson to Confess*, in THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT 179 (1959).

171. Munsterberg, a Harvard psychology professor, first published *On the Witness Stand* in 1909.

172. H. MUNSTERBERG, *supra* note 169, at 150-51.

173. According to Munsterberg:

> There is no mental trait which belongs to mental diseases only; whatever we find in the asylums is made up of the same material that enters into the normal interplay of human minds. . . . Mental diseases are like caricatures of a person; in the caricature too every part of the face is the same as in the ordinary physiognomy, but the proportion is lost, as one special part, perhaps the nose or teeth are grotesquely enlarged.

Id. at 151-52.

anced.[174] Thus, the diseased melancholic's[175] predilection for false self-accusation differs only in degree from the pessimist's tendency toward self-doubt and ability to feel guilty without real guilt; the conventional wisdom ignored the pessimist's non-static mental life, and that at some point the predilection for guilt may become dangerously strong, causing a temporary loss of mental balance and the same kind of compulsive self-accusation characteristic of the melancholic.[176]

Munsterberg, however, offered little insight as to the specific underlying psychic causes of the move from mental normality to a willingness to confess falsely.[177] Theodor Reik, who shared Munsterberg's conviction that the false confessor was not necessarily pathological, provided the missing theoretical framework. Reik, a Freudian psychiatrist of the 1920's, started from the premise that confessions are a part of everyday behavior. For instance, slips of the tongue are confessions about repressed urges or conflicting desires.[178]

Criminal confessions are simply a more dramatic manifestation of this universal form of behavior. The primitive urges, or "id," that caused the criminal act are repressed by the "ego," the conscious self that attempts to control the id so that the individual can survive in society.[179] Two psychodynamic factors result in a compulsion to confess the crime. First, the impulses of the id are strong and not easily repressed; the confession expresses these urges and relieves psychic stress. Second, the superego, or conscience, demands the confession to punish an act perceived as morally wrong. Where the need for punishment is too great, however, the individual will be driven to repeat the crime.[180]

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174. *See id.* at 150-55.

175. Melancholia describes a pathological need for self-accusation. For Freud's brief explanation of the phenomenon, see S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 369 (G. Hall trans. 1920). A number of anecdotes about confessions by melancholics to police are collected in Note, *Voluntary False Confessions*, 28 IND. L.J. 374 (1953).

176. *See* H. MUNSTERBERG, *supra* note 169, at 152-55. The immediate cause of the move from borderland normality to the pathological act of self-incrimination, Munsterberg postulated, was an unexpected stimulus that stirred up either long forgotten memories that had been unconsciously distorted or imaginative thoughts that had percolated in the unconscious. A new, distorted personality temporarily takes command. *Id.* at 157-63.

177. The immediate cause, he believed, was an unexpected stimulus. *See supra* note 176. He did not explain precisely what caused the distorted personality that responded to such a stimulus.

178. T. REIK, *supra* note 170, at 179-211.

179. *Id.* at 212-13; on the Freudian concepts of id, ego, and superego, see generally L. WRIGHTSMAN, SOCIAL PSYCHOLOGY 243-76 (2d ed. 1977).

180. Reik suggests:

Reik believed that the same psychodynamic factors explained false confessions, since knowledge of another's crime could stimulate repressed guilt feelings about one's own bad acts. Thus, Reik removed the false confession from the realm of the bizarre and explained it as an extreme manifestation of a universal compulsion to confess.[181]

It is difficult to design an empirical test of Reik's rather general theory. While some attempts have been made to test such basic Freudian concepts as the ego and stages of character development, the results have not been favorable to the Freudians.[182] Nevertheless, the carefully documented false confessions of political prisoners in China[183] do apparently confirm one general theme common to both Munsterberg and Reik: nonpathological guilt feelings can motivate false confessions to unrelated acts.

In a study of American civilians who were imprisoned by the Chinese between 1950 and 1956, Professor Schein concluded that one of the primary causes of compliance, false confession, and attitude change was a sense of guilt.[184] The interrogators induced a variety of forms of guilt in their prisoners. The prisoners felt "social" guilt because they were made to recognize that much of what they had in life was not earned, but had been given to them by the accident of birth;[185] they felt "ego or identity" guilt because, in complying with the Chinese in some respects, the prisoners failed to live up to their own self-image;[186] they felt "persona" guilt from deliberately or involuntarily lying about themselves in manufactured con-

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> The compulsion to confess is the unconscious tendency toward expression of repressed instinctual impulses that is modified by the influence of the need for punishment. Its result, the confession, unconsciously represents a punishment and satisfies a part of the need for punishment. If the need for punishment is too great, a confession cannot be arrived at, only a substitute of the original action in which the need for punishment had its beginning.

T. REIK, *supra* note 170, at 251; *see also id.* at 265 (confession is "psychic overcoming of that traumatic event [the crime].").

181. *Id.* at 261-62. For a modern restatement of Reik's view of false confessions, see J.A.C. BROWN, TECHNIQUES OF PERSUASION 249-52 (1963).

182. *See* L. WRIGHTSMAN, *supra* note 179, at 252-54.

183. *See* R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1961); E. SCHEIN, COERCIVE PERSUASION (1961). American civilian prisons and interrogation rooms are somewhat more hospitable than those run by the Chinese military. Yet, brutality has been shown to be a rather ineffective interrogation device. *See, e.g., infra* notes 234-238 and accompanying text. Insofar as the Chinese data show the remarkable effectiveness of subtle psychological techniques in eliciting false confessions, the data is quite relevant to show what can be accomplished under the more "civilized" conditions prevailing in the United States.

184. E. SCHEIN, *supra* note 183, at 140-56.

185. *Id.* at 146-48.

186. *Id.* at 148-52.

fessions that were made to appease their interrogators;[187] they felt "loyalty" guilt because they complied in a way that violated the norms of their reference groups;[188] and they felt "situational" guilt when their interrogators skillfully magnified the importance of their minor infractions or petty acts of selfishness that were inevitably a part of their everyday life in prison.[189]

After guilt was reinforced in the prisoners during interrogation, the prisoners were more prone to accept and believe the strong objective indications of their guilt: arrest, imprisonment, and accusation of various crimes by authority figures.[190] As a result, the prisoners confessed to major crimes and were successfully indoctrinated by the Chinese.

Drawing upon much of the same evidence as Schein, Robert Lifton reasoned that interrogators are able to tap the "individual guilt potential" of prisoners by attacking the identity of the prisoners—by demonstrating their helplessness and evidence of their "guilt" and by unanimously and ceaselessly condemning them as guilty of great crimes.[191] The subjects magnified normal dissatisfaction with human failings into a free-floating sense of their own evil and then channeled these emotions into a sincerely felt confession of specific crimes against society.[192]

The remarkable ease with which human conduct can be manipulated by inducing guilt has also been demonstrated experimentally. Researchers consistently have found that inducing guilt in subjects by making them commit minor malicious acts prompts further compliance.[193]

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187. *Id.* at 152-54.

188. *Id.* at 154-55.

189. *Id.* at 155.

190. *Id.* at 143-44, 156.

191. R. LIFTON, *supra* note 183, at 67-68.

192. *Id.* at 74-75.

193. *See generally* Konoske, Staple & Graf, *Compliant Reactions to Guilt: Self-Esteem or Self-Punishment*, 108 J. SOC. PSYCHOLOGY 207, 207-08 (1979) (collecting results of previous experiments). The malicious acts included lying, inducing cheating, and deliberately upsetting the crucial order of a graduate student's index cards. The subsequent compliance did not necessarily take the form of direct compensation to the harmed individual, because, "the motive for compliance seems to be more complex than simple restitution." *Id.* at 208.

There is some disagreement as to whether such subsequent compliance is explained by a need to alleviate guilt by subjecting oneself to the punishment of further compliance or to reaffirm a more positive self-image. The "self-punishment" view assumes that individuals need to believe in a just world where people get what they deserve. Once an individual harms another, she expects punishment. Therefore, the individual complies further with the experimenter in order to fulfill this need for punishment. *Id.* The other view is that compliance is aimed at raising self-esteem; that is, compliance reaffirms a more positive self-image. *Id.* The experimental results may favor this latter view. In one experiment, subjects complied more

Psychologists have tended to view the false confession not as the product of a diseased mind, but in universal terms. The general theme that unites the writings of psychologists as diverse as Munsterberg, Reik, Schein, and Lifton is that however produced or manipulated, the human capacity for guilt is the fundamental cause of false confessions. The false confession relieves guilt arising from acts or events unrelated to the substance of the confession. Since all humans have capacity for guilt, the false confession can be a product of a "normal" mind.

This view of the false confession has been corroborated empirically. Guilt, once induced in subjects, can be channeled by experimenters into greater compliance with requests unrelated to the original source of guilt. The Chinese apparently were able to use this property of guilt to extract sincerely-felt false confessions from entirely "normal" American prisoners. The empirical corroboration of theories which predict that false confessions can be the product of "normal" minds indicates that the incidence of false confessions may be sufficiently high to merit legal safeguards.

This section has attempted to trace the empirical research defining the internal psychological causes of false confessions. Yet, from Munsterberg to Lifton, there is an increasing inability to explain human behavior as purely a product of internal psychodynamics. To be sure, Schein and Lifton saw false confessions as more likely where the individual prisoner had a high guilt potential. Nevertheless, it was the *interaction* of interrogator and environment with internal psychological forces that fully explained the false confessions of American prisoners. This indicates that false confessions are a greater danger than even Munsterberg and Reik had recognized: for, if *external* forces are an important cause of false confessions, then even the strongest mind might, under the right circumstances, produce a false confession. This will be explored in the next two sections.

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where the subsequent expiating act was a benevolent one (consistent with self-esteem hypothesis) rather than a malevolent one (consistent with the self-punishment hypothesis). *Id.*

In any event, both views help explain the false confession. Given some level of initial guilt, a person could falsely confess to an unrelated act as a means of self-punishment or as a means of raising self-esteem, by enjoying the positive reaction of the police and society to individuals who admit to their "guilt."

2. SOCIAL PSYCHOLOGY

Social psychology is the systematic study of social behavior.[194] Unlike the Freudian psychologist, the social psychologist does not study internal psychodynamics in isolation, but rather, studies individual behavior as it is influenced by the operation of social stimuli.[195] Social psychologists have amassed an impressive array of evidence that shows police interrogation to be inherently coercive.[196] The social coercion endemic to the confession drama can be traced to the nature of the interrogation environment, the interpersonal dynamics in such a setting, and the nature of human cognition.

a. The Interrogation Environment

The interrogator and the defendant interact in a certain social environment. That social environment consists of a physical place—an interrogation room—and an institutional setting—imprisonment.[197] Both coerce.

Interrogation manuals indicate that police carefully structure the physical conditions of the interrogation environment to maximize the defendant's anxiety and compliance. Thus, the interrogator purposefully dresses in a way that emphasizes the disparity in social status, reduces stimuli available to the defendant, violates social norms by maintaining a close physical proximity to the defendant, and removes the usual props that provide psychological support or relief from tension, such as paper and pencil, paper clips, and cigarettes.[198] The social science literature generally confirms that

194. J. FREEDMAN, D. SEARS & J. CARLSMITH, SOCIAL PSYCHOLOGY 4 (3d ed. 1978).

195. *See* P. ZIMBARDO & E. EBBESEN, INFLUENCING ATTITUDES AND CHANGING BEHAVIOR 15 (1970).

196. *See generally* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968) (collecting social psychological literature and concluding that *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation); Inman, *Police Interrogation and Confessions*, in PSYCHOLOGY IN LEGAL CONTEXTS: APPLICATIONS AND LIMITATIONS 45, 48-58 (S. Lloyd Bostock ed. 1981) (surveying literature and concluding that even legally unobjectionable interrogation may be coercive).

197. A considerable amount of interrogation takes place in the field by investigating officers. Because such interrogation is not as productive of confessions as the custodial interrogation that follows arrest and incarceration, this Comment will discuss the social psychology of only the latter. See Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47, 54-57 (1967).

198. *See, e.g.*, F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 11-23 (2d ed. 1967); *see also* Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 38-43, 49-52 (1965) (collecting advice of interrogation manuals and reporting data from survey of interrogation practices of various police departments); *see generally* Driver, *supra* note 196, at 44-56 (collecting police science suggestions and analyzing social science implications); *but see* Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J.

such an environment heightens anxiety and promotes compliance.[199]

But the more compelling and obvious source of coercion in the interrogation environment is the institutional setting. The shock and self-mortification of arrest and imprisonment cause the defendant to enter the interrogation room in a badly debilitated state.

Erving Goffman argues that the transition from everyday life to life in a "total" institution, such as prison, mental asylums, the military, or concentration camps, is accomplished by a sudden mortification of the self.[200] Former behavior patterns must be restructured to fit into a highly regimented institutional setting. In the total institution, the individual must live a less eclectic life; she will now sleep, play, and work in the same place. The inmate has one role: that of an institutionalized human.[201]

In the prison system, this transition is accomplished swiftly through rituals of admission and humiliation. The inmate is photographed, weighed, fingerprinted, assigned a number, searched, undressed, disinfected, issued institutional clothing, and assigned to quarters; this is the initial step in creating a "milieu of personal failure in which one's fall from grace is continually pressed home."[202] Other inmates also perpetuate the milieu of personal failure. They define the new inmate with a derogatory label, such as "fish" or

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1519, 1539-40, 1542 (1967) (New Haven interrogation room not as stark as portrayed in interrogation manuals; one-third of suspects observed were offered cigarettes, food, or drink during questioning).

199. Surveying the social science literature, Driver concluded that the violation of social norms governing spatial distance prompts an automatic response to retreat, which in turn increases the suspect's anxiety because he or she is unable to escape. Driver, *supra* note 196. Driver also found that the social prestige and status conveyed by the interrogator's dress and manner can "overcome the suspect's initial reluctance to interact socially with the interrogator, for it is expected in our society that the person of higher social rank will initiate conversation" and can increase compliance on the part of lower status suspects, who are likely to be more vulnerable to indoctrination. *Id.* at 47-48.

As for the lack of stimuli and props that relieve tension, laboratory studies indicate that subjects who are deprived of sensation, whether by confinement in silence and darkness (sensory deprivation) or in blank environments with "white" noise and diffuse light (perceptual deprivation), tend to experience difficulty in thinking coherently and in concentrating. Suedfeld, *Changes in Intellectual Performance and in Susceptibility to Influence*, in SENSORY DEPRIVATION: FIFTEEN YEARS OF RESEARCH 126, 127-30 (P. Zubek ed. 1969). The subjects also tended to be more susceptible to influence from the stimuli that was provided, *e.g.*, propaganda tapes. Perhaps the explanation for this result is that the subjects were at loose ends and hungered for stimuli and guidelines for behavior. *Id.* at 160-66. *See also* Jones, *Stimulus Seeking Behavior*, in *id.* at 167.

200. Goffman, *On the Characteristics of Total Institutions: The Inmate World*, in THE PRISON: STUDIES IN INSTITUTIONAL ORGANIZATION AND CHANGE 23-48 (D. Cressey ed. 1961).

201. *Id.* at 17, 23-25.

202. *Id.* at 23-25, 62.

"swab," which reinforces her new identity as a mere inmate with a special low status even in this low group.[203] While some inmates will adapt to the institutional environment by resisting authority, most assume a more compliant, humiliated personality. Some inmates will experience complete personality disintegration,[204] some will become quite content, some will be converted to the official staff view of themselves and will act out the role of the perfect inmate, and most will "play it cool" by adopting some combination of the above.[205]

Of course, in order to have an effect on the interrogation this self-mortification process must be swift, since the police do not have discretion to incarcerate the defendant indefinitely without filing charges,[206] bringing the defendant before a magistrate (who must be persuaded that there is sufficient evidence to support the charges)[207] and honoring the defendant's rights to bail[208] and a speedy trial.[209] The social science literature indicates, however, that the shock of initial arrest and imprisonment is the most stressful period in the prison experience.[210]

The rapidity with which incarceration can cause healthy individuals to behave pathologically has been demonstrated experimentally by a group of Stanford researchers who created and observed a prison environment on campus.[211] The subjects of the experiment were twenty-four healthy, normal college students largely of middle-class background and, with one exception, Caucasian.[212] They were chosen from a pool of seventy-five volunteers on the basis of their mental and physical maturity.[213] Half of the subjects were randomly chosen to play the role of "guard" and the other half "prisoner." The prisoners were arrested by the local police, brought to the police station for fingerprinting and processing, and incarcer-

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203. *Id.* at 26.
204. *Id.* at 58.
205. *Id.* at 58-62.
206. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2; WIS. STAT. § 970.01 (1981-82).
207. *See, e.g.*, WIS. STAT. §§ 970.01, 971.01, 971.02, 971.05 (1981-82).
208. *See* U.S. CONST. amend. VIII.
209. Criminal defendants enjoy a sixth amendment right to a speedy trial. Barker v. Wingo, 407 U.S. 514 (1972). Many states require that charges be dismissed if a trial is demanded and does not commence within a specified number of days. *See, e.g.*, WIS. STAT. § 971.10 (1981-82) (60 days for a misdemeanor; 90 days for a felony).
210. *See generally* Bukstel & Kilmann, *Psychological Effects of Imprisonment on Confined Individuals*, 88 PSYCHOLOGICAL BULL. 469, 477-82 (1980).
211. Haney, Banks & Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. OF CRIMINOLOGY & PENOLOGY 69 (1973).
212. *Id.* at 73.
213. *Id.*

ated in three cells erected in the Stanford psychology building. Other than the issuance of prisoner and guard uniforms and a categorical prohibition against the use of physical force, the prisoners and guards were given little guidance as to what specific behavior was expected of them.[214]

The researchers found that the guards quickly began to relish their power and increasingly subjected the prisoners to verbal abuse and harassing rules and rituals.[215] Five of the ten prisoners had to be released early because of extreme depression, crying, rage, and acute anxiety; the pattern of symptoms began as early as the second day of imprisonment.[216] On the whole, the prisoners behaved with increasing passivity and complied, after a brief rebellion, with the guards' orders.[217] The prisoners also began to internalize the guard's negative attitudes towards themselves.[218] The researchers decided to terminate the experiment prematurely after only six days.[219] They concluded that the prison environment was inherently pathological, capable of causing, within a matter of days, a sample of normal, healthy American college students to become ei-

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214. *Id.* at 72-76. In fairness to real-life prison guards and police, it can be argued that they are given quite specific guidance as to what is and is not proper behavior. The Stanford study does permit the inference, however, that notwithstanding the rule book, informal institutional codes of behavior that are pathological in nature may evolve.

215. For instance, in order to account for the whereabouts of each prisoner, the prisoners were lined up for a "count" three times a day. On each successive day, however, the counts increased in duration until some lasted several hours and became occasions for the verbal abuse of prisoners. *Id.* at 76-77, 85-86.

216. *Id.* at 81. One of those five had to be treated for a psychosomatic rash. *Id.*

217. The researchers observed:

> At first they [the prisoners] exhibited disbelief at the total invasion of their privacy, constant surveillance and atmosphere of oppression in which they were living. Their next response was rebellion, first by the use of direct force, and later with subtle divisive tactics designed to foster distrust among the prisoners. They then tried to work within the system by setting up an elected grievance committee. When that collective action failed to produce meaningful changes in their existence, individual self-interests emerged. The breakdown in prisoner cohesion was the start of social disintegration which gave rise not only to feelings of isolation but deprecation of other prisoners as well. As noted before, half the prisoners coped with the prison situation by becoming extremely disturbed emotionally—as a passive way of demanding attention and help. Others became excessively obedient in trying to be "good" prisoners. They sided with the guards against a solitary fellow prisoner who coped with his situation by refusing to eat.

Id. at 95.

218. Analysis of audio recordings showed that half of all reported private interaction between prisoners could be characterized as nonsupportive and noncooperative. Eighty-five percent of evaluative statements regarding fellow prisoners were uncomplimentary and deprecating. *Id.* at 86-87.

219. *Id.* at 81.

ther sadistic guards or passive, dependent, depressed, helpless, and self-deprecating prisoners.[220]

Custodial interrogation, then, occurs in an inherently coercive institutional environment: incarceration. The shock of arrest and imprisonment can cause a perfectly "normal" individual to enter the interrogation room in a depressed and pathological state of mind. The physical environment of the interrogation room intensifies the anxiety of the defendant and maximizes compliance. In sum, the interrogation environment enables the interrogator to confront a defeated, depressed, and compliant individual. The interpersonal dynamics that in turn enable the interrogator to elicit a false confession from that individual are discussed in the next section.

b. Interpersonal Dynamics

The relationship between the defendant and the interrogator can be manipulated in a way that facilitates false confessions. In particular, two tenets of social psychology explain the ability of the interrogator to engage defendants in a discourse that reconstructs and distorts their past. First, maintenance of attitudes, beliefs, and opinions requires support from reference groups; that is, "an opinion, a belief, an attitude is 'correct,' 'valid,' and 'proper' to the extent that it is anchored in a group of people with similar beliefs, opinions, and attitudes."[221] Second, individuals need to behave in accordance with a coherent role.[222] When the trauma of arrest and incarceration removes the defendant from her accustomed roles and reference groups, the interrogator is given the opportunity to create new roles and reference groups that encourage inculpatory statements.

Professor Schein has confirmed the importance of reference groups in determining human behavior; his study of the false confessions of American prisoners of war in Korea concluded that "[u]ltimately, that which sustains humans is their personality inte-

220. *Id.* at 89. Perhaps the "normality" of the subjects—their white, middle-class background—explains their degeneration under stress. Bruno Bettelheim, who was able to observe the behavior of a broad cross-section of European society in the Nazi concentration camps, found that the mere arrest of middle-class prisoners, whose esteem and self-respect were grounded on the material trappings of middle-class life and loyalty to the authorities, so disoriented them that they often "disintegrated." B. BETTELHEIM, THE INFORMED HEART 119-22 (1960). Many became cheats and Nazi spies. *Id.*

221. Driver, *supra* note 196, at 46 (*quoting* Cartwright, *Influence, Leadership, and Control*, in HANDBOOK OF ORGANIZATIONS 27 (J. March ed. 1965)).

222. *See, e.g.*, K. GERGEN & M. GERGEN, SOCIAL PSYCHOLOGY 25 (1981) ("[o]rderly social behavior results when people follow the proper rules or roles in various social situations").

gration born out of secure and stable group identification."[223] The Chinese elicited false confessions by systematically isolating the prisoners from reference groups that could validate the moral code against collaboration. The Chinese destroyed the prisoners' formal and informal group structure by segregating the men by race, nationality, and rank; selection of prisoner squad leaders was arbitrary. The Chinese set prisoners against each other by disclosing to each the confession of the others and by placing spies and informants in the prison camps. Moreover, the Chinese undercut support from home by withholding mail; usually, only mail that carried bad news was delivered.[224]

Cut off from external support and unanimously condemned by their environment as guilty, the prisoners began to feel guilty.[225] The only source of support was the interrogators themselves, with whom the prisoners began to feel a curious need to identify.[226] Almost all the prisoners collaborated in some way, whether by tendering false confessions, writing propaganda, delivering lectures, or in-

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223. Schein, *Reaction Patterns to Severe Chronic Stress in American Prisoners of War of the Chinese*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY 638, 644 (H. Proshansky & B.Seidenberg eds. 1965). *Cf.* W. MISCHEL, PERSONALITY AND ASSESSMENT 283 (1968) (citing Curle, *Transitional Communities and Social Reconnection Part I*, 1 HUM. REL. 45 (1947)):

> The dependence of personality consistencies upon stable environmental supports is well illustrated by the effects of massive alterations in routine living conditions. Disruption in habitual role behaviors and environmental relations can alter even long-standing personality patterns. For example, British soldiers who were war prisoners during the Second World War found after a few years in prison that their new existence in the prisoner-of-war camps had more reality than their previous patterns of life. . . .

224. Schein, *supra* note 223, at 640-41.

225. This point is made more explicitly by Schein in his discussion of the false confessions of American civilians in China. *See supra* notes 184-190 and accompanying text.

226. Schein, *supra* note 223, at 644. This need for identity was present even under circumstances as brutal as the concentration camp. Bettelheim found that prisoners needed to project positive emotions on a few Gestapo officers, who, the prisoners believed, were working secretly for the prisoners' own best interests. Bettelheim, *Individual and Mass Behavior in Extreme Situations*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY, *supra* note 223, at 628, 637. Indeed, the need to identify with the powerful led some prisoners to wear old pieces of Gestapo uniforms, copy the games played by the guards, and even emulate the most brutal Gestapo techniques in slowly killing informants. *Id.* at 636.

Driver points out that the notorious "Mutt and Jeff" tactic employed by police interrogators capitalizes on this need for identity: one interrogator plays the role of "bad cop," who exacerbates the defendant's anxiety, while the other plays the role of "good cop," offering ego satisfaction and a strong personal attachment in return for a confession. Driver, *supra* note 196, at 50-51, 54. The technique is effective. *See, e.g.*, Zimbardo, *Coercion and Compliance: The Psychology of Police Confessions*, in THE TRIPLE REVOLUTION: SOCIAL PROBLEMS IN DEPTH 550, 554 (R. Perucci & M. Pilisuk ed. 1968) (defendant who falsely confessed to murder after "Mutt and Jeff" interrogation believed "good cop" to have been nicer to him than his own father).

forming on fellow prisoners.[227] Those who collaborated most often generally either had weak egos or lacked strong, stable group identifications that could survive the Chinese tactics—e.g., those who had suffered low social status in America.[228]

Laboratory experiments confirm this ability to manipulate the presence and response of reference groups to induce compliance. The pressure to yield to group judgments can cause people to deny the evidence of their own senses. In one experiment, a subject was placed in a room with seven others and instructed to tell the group his or her judgment as to the relative length of four lines. Unbeknownst to the subject, the seven others had been instructed to offer clearly wrong judgments. Only 13 of the 50 subjects publicly defied the group's erroneous judgment on each of the 12 sets of lines observed.[229] Other social psychology experiments similarly have shown that individuals in new environments tend to adopt the attitudes of the new groups in which the individual is motivated to gain or maintain acceptance.[230]

The arrest and imprisonment of the defendant removes her from the familiar reference groups—such as family, friends, or fellow employees—that validate the defendant's belief in her own innocence and self-worth. Particularly where the integration with those reference groups is originally tenuous, such as where the defendant has very low social status, the defendant is apt to look upon the police as the new reference group by which to judge her conduct and

227. Schein, *supra* note 223, at 642. Those few who did chronically resist the Chinese were generally well integrated with secure, stable reference groups or else were either chronic obstructionists before imprisonment, martyrs, or "guilt-ridden individuals who could only cope with their own strong impulses to collaborate by denying them and over-reacting in the other direction." *Id.* at 643.

228. *Id.* at 642-43.

229. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY, *supra* note 223, at 393, 394-97. On the other hand, the other 37 subjects did not completely capitulate to the group's judgment. While most subjects did make at least one error in response to group pressure, not one subject adopted the group's views for each of 12 series of lines shown. Indeed, 68% of the total judgments made by all 50 subjects were correct despite the pressure of the majority. *Id.* at 396. Thus, the capitulation rate could perhaps best be defined as 32 percent.

230. *E.g.*, Kelley, *Two Functions of Reference Groups*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY, *supra* note 223, at 210, 211 (new replacements in combat units tend to adopt strong group code against glamorizing combat; expressions of readiness by replacements to get into actual battle zone declined from 45% to 28% once replacements joined combat units); Newcomb, *Attitude Development as a Function of Reference Groups: The Bennington Study*, in BASIC STUDIES IN SOCIAL PSYCHOLOGY, *supra* note 223, at 215 (college community characterized by the approval of liberal political attitudes tends to cause students from generally conservative political backgrounds to adopt more liberal viewpoints); *see generally* J. Freedman, D. Sears & J. Carlsmith, *supra* note 194, at 318-20, 386-423.

self-worth.[231] The police can exploit this vulnerability by validating inculpatory statements. This can, in turn, be accomplished by expressing certainty as to the defendant's guilt but defining that guilt as palatable, by minimizing the seriousness of the offense or by encouraging personal redemption through confession.[232]

In addition, the interrogator can use role-playing psychology to elicit false confessions. If individuals had constantly to improvise responses to each of life's successive demands, the psychic strain might prove unbearable.[233] Consequently, individuals tend to interact in accordance with coherent roles, especially in times of stress.[234] Drawing upon his research of the behavior of over 200 American prisoners repatriated from captivity in North Korea and China, Albert Biderman concluded that interrogation succeeds when the prisoner can be subtly manipulated into playing a cooperative role.[235]

Biderman found that every one of the American prisoners had divulged more information to the enemy than was allowed by the rigid injunction against disclosing anything besides "name, rank, and serial number."[236] Torture and death threats were not the cause of this universal breach of the moral and military code against aiding the enemy in time of war. Indeed, physical coercion was a relatively ineffective interrogation device.[237] On the contrary, the interrogators' ability to recognize and capitalize on the tensions associated with the role of silence explained the prisoners' inability to keep silent.[238]

Silence is itself a form of interaction that has automatic and specific meanings to participants in an encounter. The emotional connotations of silence—hostility, coyness, arrogance, and guilt—

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231. *See supra* notes 223, 228 and accompanying text.

232. Such tactics are recommended by the interrogation manuals and their effectiveness is supported by the social science literature. *See* Driver, *supra* note 196, at 50-55.

233. *See* Biderman, *Social-Psychological Needs and "Involuntary" Behavior as Illustrated by Compliance in Interrogation*, 23 SOCIOMETRY 120, 130-31 (1960).

234. *See id.* (citing experimental findings that improvisation is particularly difficult in situations that arouse anxiety and that anxiety is associated with stereotypical and "overlearned" responses).

235. *Id.*

236. *Id.* at 125.

237. Over one-half of the prisoners were threatened with death in order to gain information; only five percent of these threats caused the prisoners to yield the information demanded. *Id.* at 140. Biderman reasoned that the indefinite threats of the more sophisticated interrogators provoked more anxiety and hence more compliance. "Many prisoners who report that they almost eagerly sought to 'get it all over with' by saying: 'Go ahead and shoot!' eventually tried to 'get it all over with' by real or feigned compliance." *Id.* at 141.

238. *Id.* at 126-30.

are not those that the prisoner usually wants to convey. Biderman discovered that many prisoners found it psychically easier simply to adopt the rule-roles of civility: as in everyday life, one felt a duty to speak when spoken to. Those who resisted speaking were quickly reminded of the emotional connotations of that role. When the prisoner did not answer a question, the interrogator indicated to the prisoner that he interpreted the silence as an affirmative, silent confirmation of guilt. Rather than confirm the interrogator's accusations regarding his guilt or his knowledge of sensitive information, the prisoner felt compelled to enter denials, or at least to respond with an equivocal, but more socially acceptable, "I don't know."[239]

Having agreed to cooperate by interacting verbally with the interrogator, the prisoner committed himself to an essentially cooperative role. The prisoner strove to maintain a consistent, coherent role of cooperativeness and civility, rather than to improvise an oscillation between cooperation and resistance.[240] The prisoner and the interrogator essentially began to bargain over the extent to which the prisoner would cooperate. A major bargaining tool of the interrogator was the prisoner's desire to "shield the self." The prisoner feared losing control and being "broken" by the interrogator; he was willing to divulge true information or falsely confess in return for a reaffirmation of his "control" of himself, which in turn enabled him to "shield" both his self-respect and more sensitive military information from the enemy.[241] One prisoner summed up this curiously self-defeating strategy as follows: "I decided to give in while I still had my wits about me and could control what they got out of me, rather than waiting until they broke me completely."[242]

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239. *Id.*

240. *See id.* at 130-31. Biderman found that while the prisoners usually reported oscillating between cooperativeness and resistance in successive interrogation, they almost always reported that they persisted in the same attitude throughout any given interrogation. *Id.* at 131.

241. *Id.* at 131-34. Driver explained Biderman's concept of "shielding the self" as follows:

> Often in an effort to avoid this state of humiliation, the arrested person will try to "shield" himself by attempting to maintain some aspects of his self-image and his usual role. This stance suggests two needs that might lead to an arrested person's speaking to an interrogating officer. First, in talking "freely" as an equal, he asserts that he is not in a position inferior to that of the interrogator. Second, by answering questions before any pressure is exerted, he knows he forecloses a later confrontation with the interrogating officer at which he might humiliate himself by bowing to the pressure and talking.

Driver, *supra* note 196, at 58-59 (citations omitted).

242. Biderman, *supra* note 233, at 131.

However paradoxical, the prisoners' compliance cannot be dismissed as anomalous. Every one of the prisoners felt compelled to talk, even in the absence of physical coercion.[243] A third of the prisoners acknowledged divulging some information that had an effect on military operations.[244] Drawing upon much of the same data, Schein estimated that ten to fifteen percent of the prisoners became chronic collaborators, who falsely confessed or otherwise became agents of the enemy.[245]

Given Biderman's thesis that compliance in interrogation is achieved by subtle psychological manipulation, these data indicate that confessions, even when obtained without the "third degree" and in accordance with *Miranda* protections, may often be unreliable. Empirical studies verify that criminal defendants feel compelled to speak with their interrogators despite fifth amendment protections.[246] That most confessions are made in the face of overwhelming evidence[247] is also consistent with Biderman's thesis: rather than undergo the humiliation of interrogation, and of denying guilt despite overwhelming evidence, the suspects confess to protect their dignity.[248] Even if the evidence against the suspect is false,[249] the

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243. *See supra* notes 236-237 and accompanying text.

244. *See* Biderman, *supra* note 233, at 126.

245. *See* Schein, *supra* note 223 at 642; *see also supra* notes 223-28 and accompanying text.

246. A Yale University study of the interrogation of Vietman draft resisters concluded:

> The most striking lesson we learned from interviewing the suspects after their [draft] interrogation is the point, obvious once noticed, that interrogation is a social situation, and suspects respond according to the normal rules of social interaction in such a situation. For middle-class suspects like ours, it seems that one of the fundamental rules is that one not be unnecessarily rude. . . .
>
> The agents were careful not to disrupt the social situation in which the rule of politeness obtained. They were themselves very polite; they assumed an engaging, middle-class manner.

Griffiths & Ayres, *A Postcript to the Miranda Project: Interrogation of Draft Resisters*, 77 YALE L.J. 300, 315 (1967). *See also infra* notes 361-376 and accompanying text.

247. *See infra* note 380 and accompanying text.

248. A common interrogation technique is to confront the suspect with the evidence against her, state that there is already enough evidence to convict her, and demand a confession to fill in the details of the crime. Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1543-44 (1967). When interrogators disbelieve a suspect's story, they commonly force the suspect to repeat her story over and over, while they look for discrepancies. Often, disbelief in the suspect's story is coupled with a show of sympathy and a suggestion that things will go better for the suspect if he tells the truth. *Id.* at 1544.

249. For example, eyewitness identification of the suspect is often considered dispositive of guilt, but has been shown by psychological research to be quite unreliable. *See, e.g.*, E. LOFTUS, EYEWITNESS TESTIMONY (1979). Perhaps, then, erroneous identification of an innocent suspect provokes many false confessions. *Cf.* E. BORCHARD, CONVICTING THE INNOCENT (1932) (detailing a number of cases in which misidentification led to unjust convictions).

interrogator's belief in the evidence and the humiliation of interrogation may be no less real, and may compel false inculpatory statements in order to shield the self.

Another manifestation of the "shielding of the self" effect may be the frequent incidence of false exculpatory statements observed by Yale researchers who witnessed interrogations by New Haven police.[250] The researchers found that suspects often seemed compelled to try to talk their way out of a difficult situation. Many invented false alibis that were easily exposed by the interrogators.[251] Prosecutors report that such false exculpatory statements can be more valuable at trial than inculpatory statements.[252] Yet, false exculpatory statements may be less indicative of guilt than of the pressures of circumstances and a desire to shield the self and preserve one's dignity by constructing a story for the benefit of interrogators who refuse to believe a simple blanket denial of guilt.[253] The ability of innocent persons to make incriminating false exculpatory statements[254] demonstrates both the subtlety of the coercion that is inherent in the interrogation encounter and the clumsy ineffectiveness of traditional remedies like the corroboration rule that fail to take this subtlety into account. How does one corroborate a false exculpatory statement? The coerciveness of interrogation and the danger of false self-incrimination is an exceedingly complex problem that requires remedies more flexible and more sophisticated than the corroboration rule.

c. Human Cognition

Modern social psychologists have used the experimental method to construct theories of epistemology[255] and human memory.[256] These theories demonstrate the way human cognitions can

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250. The Yale researchers observed 127 interrogations that occurred in New Haven police station house during the summer of 1966. *See* Note, *supra* note 248, at 1521-22, 1532.

251. *Id.* at 1572.

252. *See* W. McDonald, H. Rossman & J. Cramer, Police-Prosecutor Relations in the United States: Executive Summary 21 (1981) (unpublished manuscript) (available at the National Criminal Justice Reference Service, Rockville, Maryland).

253. *See supra* note 248.

254. *See, e.g.*, E. BORCHARD, *supra* note 249, at 158-64, 281-86, 317-20, 332-37 (reporting a number of cases in which false alibis or other false exculpatory statements helped convict innocent defendants).

255. For an excellent review of the major experiments and theories, see R. NISBETT & L. ROSS, HUMAN INFERENCE 195-227 (1980).

256. *See generally* Penrod, Loftus & Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, in THE PSYCHOLOGY OF THE COURTROOM 119 (N. Kerr & R. Bray ed. 1982).

be externally manipulated. Given the inherent malleability of the human mind, confession evidence should be considered presumptively unreliable.

The common-sense view of epistemology is that each individual has special, direct access to her emotions and beliefs and, consequently, can define and explain them through introspection. Yet, if mental events are ultimately reducible to physiological occurrences in the central nervous system, perhaps access to beliefs and emotions is no more direct or infallible than is "direct" access to the workings of the eyeball or the adrenal gland.[257] Building on this line of argument and on the work of B. F. Skinner[258] and Stanley Schachter,[259] Daryl Bem fashioned a radical, deterministic theory of epistemology: beliefs and emotions do not necessarily pre-exist and determine behavior; rather, behavior and external circumstances can determine beliefs and emotions.

Bem's "self-perception" theory postulates that beliefs and emotions are not easily discernible by introspection ("internal cues") and that, therefore, to the extent that internal cues are weak, individuals will observe their actions and external circumstances ("external cues") to determine what their beliefs and emotions must be.[260] This reliance on external cues can be used to manipulate beliefs and emotions.[261] Bem recognized the implications of such malleability for the reliability of criminal confessions. He designed an experiment to assess whether the manipulation of external cues could distort memory and induce belief in false confessions.[262]

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257. *See* R. NISBETT & L. ROSS, *supra* note 255, at 203.

258. *E.g.*, B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953).

259. *E.g.*, Schachter, *The Interaction of Cognitive and Physiological Determinants of Emotional State*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 49 (L. Berkowitz ed. 1964) (discussing external manipulation of emotional states).

260. Bem, *Self-Perception Theory*, in 6 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (L. Berkowitz ed. 1972). For a philosophical treatment of the problem of self-reference behavior, see L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

261. For experimental confirmation see Bandler, Madaras & Bem, *Self-Observation as a Source of Pain Perception*, 9 J. PERSONALITY & SOC. PSYCHOLOGY 205 (1968) *cited* and *discussed* in Bem, *supra* note 260, at 12-15 (subjects manipulated to misperceive strength of electric shocks); Cantor, Zillman & Bryant, *Enhancement of Experienced Arousal in Response to Erotic Stimuli Through Misattribution of Unrelated Residual Arousal*, 32 J. PERSONALITY & SOC. PSYCHOLOGY 69 (1975) *cited* and *discussed* in R. NISBETT & L. ROSS, *supra* note 255, at 199-200 (subjects made to perceive some pictures of nudes as more erotic); J. Weiss & P. Brown, Self-Insight in the Explanation of Mood (Harvard University, 1977) (unpublished manuscript) *cited* and *discussed* in R. NISBETT & L. ROSS, *supra* note 255, at 221-23 (demonstrating ambiguity of introspective cues of one's own happiness).

262. Bem's experiment and the implications for the legal safeguards against false confessions are discussed in Bem, *When Saying is Believing*, 1 PSYCHOLOGY TODAY, 21 (June 1967); *see also* D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 61-66 (1970). For a more scholarly discussion of the experimental method and data, see Bem, *Inducing Belief in False*

The act, or "crime," the subjects would be questioned about was the mechanical task of comparing two lists of common nouns and crossing out words that appeared on both. Before "interrogation," the subjects were conditioned to tell the truth in the presence of amber light. They were told to answer some questions truthfully and others falsely. Whenever they deliberately told the truth, the room was bathed in amber light; when they were told to lie, the room was bathed in green light.[263]

"Interrogation" consisted of repeating statements about the list of nouns. The subjects were required to repeat statements like: "I did cross out the word 'dog.'" Half of the statements were true; the other half were false. The subjects were asked to write down what they felt to be the true answer. When asked to repeat a false statement in the presence of the amber "truth" light, they tended to believe the lie. Thus, when they were not subjected to the lights, they remembered correctly which words they had crossed out 75.5 percent of the time; when asked to lie in the presence of the truth light, they remembered correctly only 62 percent of the time. As predicted by self-perception theory, the subjects unconsciously looked outside themselves for external cues of the truth; less attention was paid to the internal memory cue, and as a result, the experimenters manipulated memory.[264]

Bem reasoned that the suspect in the interrogation room responds to the same external credibility cues that an outside observer would. As a result, the less the police use overt coercion, the more susceptible the suspect is to thought control through self-persuasion. The suspect feels the presence of the truth because of the civic duty to tell the truth to investigating officers acting within the bounds of the law, because she is given a choice to remain silent by virtue of the *Miranda* warnings,[265] and because the interrogator behaves in a civil fashion. As a result of these "truth" signals, the suspect is likely to accept any inadvertent errors she makes in otherwise truthful testimony as being true. Furthermore, the suspect is

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Confessions, 3 J. PERSONALITY & SOC. PSYCHOLOGY 707 (1966). *See also* Bem, *supra* note 260, at 10-12 (relating experimental data to self-perception theory).

263. Bem, *When Saying is Believing*, *supra* note 262, at 23. Researchers told subjects that they were testing the effectiveness of lie detection equipment that analyzed voice patterns. Actually, the only function of the machine was alternatively to bathe the interrogation room in amber and green light. The subjects believed the light was only a byproduct of the machine and consciously ignored it. *Id.* at 22-23.

264. *Id.* at 23.

265. It is remarkably easy for police to induce suspects to talk. *See supra* notes 233-39 and accompanying text. But since the suspects will perceive nevertheless that they have the choice to remain silent, they will persuade themselves that they are speaking freely.

likely to view an interrogator's leading questions and "helpful hints" as sources of truth. Consequently, the interrogator may be able to elicit inaccurate and distorted inculpatory statements.[266]

To be sure, where internal cues are unambiguous, the individual does not look to external cues.[267] Suspects may well resist self-persuasion because they have direct access to some very strong, unambiguous internal cues; e.g., knowledge of their own innocence or fear of self-incrimination. Yet it is also conceivable that the suspect's internal cues will be more ambiguous notwithstanding her innocence: she may suffer from guilt feelings arising from unrelated acts,[268] the police may induce guilt feelings,[269] she may be traumatized by the shock of arrest and imprisonment,[270] she may feel a need for approval,[271] or she may feel a need to shield the self.[272]

Given the unreliability of human memory, it is doubtful whether internal cues are ever wholly unambiguous. Memory is a complex, multistage process that can be manipulated.[273] Thus, information that is learned by the individual after events have been encoded and stored in the mind can alter her memory of the original event.[274] For example, when subjects who viewed a film of an automobile accident were asked about the speed of a car as it passed a nonexistent barn, seventeen percent later reported having seen a barn.[275] Similarly, when information is retrieved from memory, the type of questioning that prompts the retrieval further alters the re-

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266. D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS, 63-66 (1970). The inculpatory effect of leading questions and "helpful hints" can be damning, for it is through these devices that the police (often unwittingly) convey information that only they and the real perpetrators could know. *See, e.g.*, Kellam, *A Convincing False Confession*, 130 NEW L.J. 29, 30 (1980) (phrasing and inflection of police questioning allowed suspect unconsciously to determine what information the police wanted to hear; as a result, suspect falsely confessed to details of the crime that only the police and the true perpetrator could know).

267. Self-perception effects are observed only "to the extent that internal cues are weak, ambiguous, or uninterpretable." Bem, *supra* note 260, at 15. Thus, experimenters could manipulate subjects to misattribute sources of fear only in a "low-fear" condition; where the internal stimuli of fear was too great, it overrode any information potentially available to the individual from external sources, including overt behavior. *Id.*

268. *See supra* notes 171-81 & 193 and accompanying text.

269. *See supra* notes 184-93 and accompanying text.

270. *See supra* notes 200-20 and accompanying text.

271. *See supra* notes 223-32 and accompanying text.

272. *See supra* notes 233-54 and accompanying text.

273. *See* Penrod, Loftus & Winkler, *supra* note 256.

274. Interrogators also can manipulate a subject's memory during the initial encoding stage. In that stage, the mind sifts the perceptions of the senses, recording some and rejecting others. Research indicates that the greater the frequency, duration, complexity, organization, stressfulness, and seriousness of events, the more likely they will be better recorded. *Id.* at 123-38.

275. *Id.* at 136-37.

port of the original event. Thus, subjects who were asked to give a free narrative of the events gave more accurate but less complete versions than subjects who were asked direct questions.[276] The suggestiveness of direct questioning is exemplified by an experiment in which subjects were asked to estimate the speed of colliding cars previously viewed in a film. The estimate was significantly higher when the interrogator employed the verb "smash" rather than "contact."[277]

Memory, then, is not an objective and static source of the truth; it is malleable, and a skillful interrogator can elicit a desired version of the facts by carefully tailoring the form of questions. Moreover, recent research indicates that memory can be a very ambiguous internal cue, and the suspect may well turn to external sources, e.g., the police, for the truth.

In sum, Bem's theory of epistemology and recent research on memory indicate that human cognition is susceptible to extensive external manipulation. The mind is neither a videotape machine that records events accurately for future retrieval nor is it necessarily a rational calculator of attitudes, beliefs, or behavior. To a large degree, human beliefs, attitudes, and memory are ultimately contingent on external factors. Belief in one's innocence and memory of past events do not necessarily form an internal bedrock upon which an individual can rely to resist interrogation; they are internal cues that are themselves ambiguous and malleable.

3. SOCIOLOGY OF THE CONFESSION

The psychologist's unit of analysis is the individual; the sociologist's unit of analysis is society.[278] The sociologist believes that human behavior and character are socially determined and that individual traits can best be understood by analyzing the social setting.[279] From a sociological perspective, the confession is interesting not because of the psychological forces that ostensibly cause it, but because of the larger social forces that compel it and the larger social purposes it serves. The confession provides an important link be-

276. *Id.* at 138-39.

277. *Id.* at 139. It has also been found that questions containing definite articles elicit more false answers than those containing indefinite articles. For example, the best way to elicit a report of a nonexistent dog is to ask "Did you see the dog?", rather than "Did you see a dog?" *Id.* at 138.

278. P. ZIMBARDO & E. EBBESEN, *supra* note 195, at 15.

279. S. ASCH, SOCIAL PSYCHOLOGY 15-16 (1952).

tween the internal conscience and the external social order.[280] An individual's compulsion to confess may be explained not by the individual's high propensity for guilt feelings, but in a larger sense by the external order that creates the conscience, and which is legitimated and reinforced by a confession. This social pressure to confess may be great enough to cause even the innocent to "confess."

British sociologists Hepworth and Turner have defined the confession as a "ubiquitous remedial institution" in Western society that mediates between the "interior freedom of individual conscience and the exterior requirements of public order."[281] The confession is ubiquitous in the sense that it is not confined to the police interrogation room, but is a routine feature of all social relationships. One confesses confidences to one's intimate friends and sins to clergymen or psychiatrists. A criminal confession is simply an extreme manifestation of normal behavior.[282]

The confession mediates between interior freedom of conscience and exterior social order in favor of the latter: the confession is an important means of social control. In non-Western societies, the confession is a public ritual that serves to validate and reinforce dominant beliefs. Social conflicts are ventilated and resolved; the public expression of belief in core values serves to dramatize, clarify, and simplify those core values.[283]

In Western societies, the confession serves a similar purpose. It is a ritual of social inclusion through which society reinforces its norms by first defining deviants and then restoring them to the graces of society.[284] But Western notions of individual responsibility and ethics cause the Western confession to be a more private ritual, in which the individual comes to realize her deviance from

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280. M. HEPWORTH & B. TURNER, CONFESSION: STUDIES IN DEVIANCE AND RELIGION 175 (1982).

281. *Id.* at 14-15.

282. *See id.* at 5. For a discussion of the sociology of the religious confessional, see *id.* at 40-58. For an analysis of how Freudian psychoanalysts and the endless self-disclosures of the present sexually "permissive" society are forms of confession, see *id.* at 58-64, 170.

283. *Id.* at 39, 83.

284. The act confessed to is defined by society as a transgression. Because transgressions do not pre-exist society but are defined and constructed by society, the confession is in some sense a ritual of exclusion. The transgressor is defined as a deviant and by defining what deviance is, and by excluding and degrading deviants, society comes to understand what its norms are—i.e., what the deviants deviate from. But the confession is also a ritual of social inclusion, since the individual is restored to former social status by the catharsis of the confession. By functioning as both a ritual of exclusion and inclusion, the confession allows society first to define its norms by defining deviants and then to legitimate those norms by persuading the confessor of their ethical force and restoring her to society once she has been so persuaded. *See id.* at 16-65.

societal norms and confesses it to other individuals. The confession dramatizes and reinforces the importance of the individual's conscience, which in turn mirrors societal norms. Western culture affirms the importance of the individual, yet manages to achieve social control over the individual by causing her to internalize societal norms in the form of an interior conscience.

The social purpose of the confession, then, is to restore deviants to their former social status. By doing this, the confession legitimates the correctness of the social order, shows deviance and evil to be caused by individuals, not society, and reaffirms the value of individual conscience, which in turn mirrors societal norms. The suspect in an interrogation room has been defined as a deviant and excluded from society by the degradation rituals of arrest and incarceration.[285] The social compulsion to talk is overwhelming: the individual must reaffirm her former social and individual status by either denying guilt or accepting it through confession.[286] In extreme cases, the desire for immediate redemption through confession can outweigh the longer term consequences of a false confession and can induce the suspect to make false inculpatory statements.[287]

Empirical verification of a sociocultural theory as broad as Hepworth and Turner's is perhaps an impossible task. Yet, the theory is consistent with empirical evidence of the remarkable inability of prisoners to remain silent during interrogation.[288] Furthermore, if the need for social inclusion is compelling enough to motivate both extraordinarily evil[289] and self-destructive[290] acts, it may also be

285. *Id.* at 17-18.

286. *See id.* at 37-38, 171-74.

287. *Id.* at 14-15, 171.

288. *See supra* notes 233-54 and accompanying text.

289. In a classic experiment, Stanley Milgram induced subjects to administer electric shocks that they believed were of dangerously high voltage. The subjects were told that the experimenters were testing the effectiveness of negative feedback on learning capacity. The subjects read questions to the learner-subject; when the learner-subject answered incorrectly, the subjects were instructed to administer electric shocks as punishment. In reality, the learner-subject was a confederate of the experimenters and the shocks were fake. Despite the screams and then silence of the learner-subject, 62.5% of the subjects administered the highest level shock—labelled 450 volts and "Danger: severe shock." Even when the learner-subject was placed in closer visual proximity to the subjects, 40% still administered the highest level shock; when the learner-subject was within touch proximity, 30% of the subjects administered the highest level shock. The subjects felt it was their duty to obey and please the experimenters, who stood by them and ordered them to continue with the shocks. S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 13-43 (1974). Milgram reasoned that humans were able to survive in nature by forming deeply hierarchical societies. Obedience to authority is the sine qua non of such societies, and individuals learned and internalized this duty. *Id.* at 123-34. The need for social inclusion, then, is nothing less than a manifestation of the survival instinct, and often the price willingly paid for inclusion is the obedient commission of evil acts.

be sufficiently compelling to motivate an act as personally abhorrent and self-defeating as the false confession.

Even more than the social psychologist, the sociologist abstracts the explanation of false confessions from the variables of individual idiosyncracies. Individuals confess not because of strange psychological quirks but because society pressures individuals to confess. The confession is a ubiquitous social ritual that both expresses the power of society and legitimates and reinforces that power. The false confession can be viewed as a necessary byproduct of society's investment in this ritual. The pressure to confess is so great and so important to both society and the individual that the confession becomes an end in itself; one feels compelled to confess regardless of guilt. Because of the inevitability of false confessions, a prophylactic exclusionary rule may be justified.

B. Discovery of False Confessions

If false confessions and admissions occur with sufficient regularity to merit adoption of prophylactic measures, what measures should be adopted? Some method of discovering false confessions must be developed. Because the criminal defendant must be proven guilty beyond a reasonable doubt, however, the discovery tool need not prove the falseness of the confession, but need only show a sufficient probability of falseness to merit a prudent disbelief in the confession. Furthermore, because of the availability of various institutional decisionmakers, it is necessary to determine who should be responsible for ferreting out false confessions as well as how.[291] Historically, American jurisdictions overwhelmingly have chosen the judge to be the institutional decisionmaker and the corroboration rule to be the discovery tool. The empirical evidence shows the former choice to rest on some questionable assumptions and the latter to be of questionable effectiveness.

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290. Lemert's sociological study of check forgers demonstrates the psychic cost of social exclusion and the willingness of people to incriminate themselves in order to attain social inclusion. Lemert noted that because the forger had to assume new identities, move regularly, and limit interpersonal relationships, the self-image of the forger could not be validated by close, supportive interaction with others. The forger inevitably reached a psychic crisis and an impressive number coped by engineering their own downfall, whether by calling the police or by remaining in one city, knowing full well that the police would soon catch them. *See* E. LEMERT, *Role Enactment, Self, andIdentity in the Systematic Forger*, in HUMAN DEVIANCE, SOCIAL PROBLEMS, AND SOCIAL CONTROL 119 (1967); *see also* M. HEPWORTH & B. TURNER, *supra* note 280, at 36-37 *discussing* LEMERT, *supra*.

291. *Cf.* Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981) (defining and applying "comparative institutional analysis").

1. DISCOVERY BY WHOM—JUDGE OR JURY?

A major assumption behind the corroboration rule is that the defendant must be protected from the jury's tendency to view confessions uncritically. Therefore, responsibility for testing the reliability of a confession has been placed with the judge: the judge decides whether or not the confession has been sufficiently corroborated to be admissible into evidence. There is little empirical evidence to support the assumption that the jury is less critical than the judge, however. An argument can be constructed to favor the judge as decisionmaker, but it cannot rest on this traditional assumption.

The assumption that juries tend to view confessions uncritically is contradicted by empirical evidence of a surprising jury hostility to confessions.[292] A national study of prosecutors in selected jurisdictions with populations over 100,000, revealed a consensus that the value of a confession to the state's case could be "completely diminished at any time with any publicized incident bringing police credibility into question—something that is a standing problem in some jurisdictions."[293] Thus, the presence of a confession was not found to be significantly associated with a conviction in ten of twelve cases analyzed. Interviews with fifteen defendants further revealed that while six had confessed, only two said the confession was a major factor in their decision to plead guilty.[294]

Kalven and Zeisel's famous study of the American jury also indicates that the jury may be more critical of confessions than the judge. To be sure, they found that the presence of a repudiated confession in close cases apparently had no effect on the level of judge-jury disagreement over verdicts.[295] But they did find that the statistically normal level of judge-jury disagreement prevailed despite the

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292. *See* W. McDonald, H. Rossman & J. Cramer, Police-Prosecutor Relations in the United States: Executive Summary 21-22 (1981) (unpublished manuscript) (available at the National Criminal Justice Reference Service, Rockville, Maryland).

293. *Id.* at 21.

294. *Id.* It should be apparent from these statistics, however, that the study may be methodologically flawed. Twelve cases and fifteen defendants are not impressive statistical samplings. Nevertheless, given the large number of prosecutors interviewed and the combination of structured interviews and unstructured ones, the study probably accurately reflects the perceptions of prosecutors. And prosecutors are in a very good position to know the value of confessions at trial and in plea negotiations.

295. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 172-74 (1966). Kalven and Zeisel found that the evidence was "inconclusive as to whether confessions have any impact on judge-jury disagreement." *Id.* at 174. Although they later speculated that "the jury may not so much consider the credibility of the confession as the impropriety of the method by which it was obtained," they offered no statistical evidence to prove this or to show that judges were less swayed by such impropriety. *See id.* at 320.

presence of a repudiated confession.[296] Analysis of the normal level of disagreement reveals that the jury is strikingly more likely than the judge to be lenient with the defendant.[297] Therefore, on balance, the Kalven and Zeisel data reveal that the jury is *more* critical of the confession, just as it is, in general, more critical of any evidence introduced against a criminal defendant.

The empirical literature, then, does not support the traditional assumption that compared with the judge, the jury is so predisposed to believe a confession that it cannot competently assess the confession's reliability. Indeed, the literature supports the opposite conclusion: on average, the jury is more likely than the judge to disbelieve the confession. On the other hand, an empirically-based argument that would support a preference for the judge as decisionmaker is the judge's greater competence at applying legal tests. That is, if the tool for assessing the reliability of a confession is a formal legal test—such as the corroboration rule—the judge should be the institutional decisionmaker who applies the test. If the jury applies the test, it must be instructed on how to do so by the judge; a number of researchers have demonstrated that jurors find the judge's instructions technical and confusing and misapply them with alarming frequency.

The most egregious example of juror misunderstanding was the ability of only fifty percent of mock jurors who viewed a videotape of the Florida Standard Jury Instructions to demonstrate by written test that they understood that the defendant did not have to present any evidence of his innocence and that the state had to establish guilt with evidence beyond a reasonable doubt.[298] Yet, this study may have been methodologically flawed,[299] and mock jurors

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296. *See id.* at 172-74.

297. In 22% of the criminal cases surveyed by Kalven and Zeisel, the judge and jury disagreed on the ultimate verdict; in 86% of these cases of disagreement, the jury was more lenient than the judge. *See id.* at 55-65. The 86% figure is derived as follows. In 19% of the cases surveyed, the judge would have convicted but the jury acquitted. In 3% of the cases, the judge would have acquitted but the jury convicted. In the other 78% of the cases, the judge and jury reached the same verdict. *Id.* at 58. Nineteen percent is approximately 86% of 22%. Thus, in 86% of the cases of judge-jury disagreement, then, the jury was more lenient than the judge. Kalven and Zeisel conclude that the traditional view of the jury as a bulwark of protection for the criminal defendant is correct.

298. Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976). The mock jurors were Florida veniremen who had not been impaneled. The study was conducted by researchers from Florida Technological University.

299. Since juries perform in groups, the memory of individual jurors is less relevant than the group's memory—i.e., how the group would define the meaning of the judge's instructions once all jurors had had a chance to pool their memory and correct each other's mistakes. *Cf.* R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 81 (1983) (discussing relevance of group memory data). Furthermore, the individual jurors may have been more

have performed relatively better in other studies. For example, a Drake University study showed that when mock jurors were allowed to deliberate with each other in answering a written test of their understanding of judge's instructions, they achieved a combined mean score of 81.5 percent.[300] But this study found that juries performed substantially less well in comprehending the more technical legal rules, such as the requirement of proximate cause.[301] A Nebraska study that employed a Michigan pattern negligence instruction in the context of a mock trial found a similar rate of juror comprehension.[302] No significant difference in comprehension was found between these jurors and a control group of jurors who were read no instructions at all.[303] Apparently, this lack of comprehension translated into a high degree of clearly erroneous verdicts: fifteen of thirty-nine jurors who were read the Michigan instructions and who found both the defendant and the plaintiff negligent misapplied the Michigan contributory negligence rule.[304] The Nebraska researchers concluded that "the presentation of presently used

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attentive to the instructions had they heard them in the context of a trial and had they been able to relate the abstract language of instructions to the concrete events and issues presented in trials. *Cf. id.* at 40-43 (discussing importance of format and location in jury simulation studies).

The importance of these two factors is perhaps demonstrated by Kalven and Zeisel's finding that the American jury is remarkably competent. If 50% of jurors think that it is up to the defendant to prove her innocence, why, then, would real judges and juries agree on 78% of all verdicts and why would juries be more willing than judges to extend the defendant the benefit of the doubt? *See supra* notes 295-97 and accompanying text.

300. Forston, *Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, 18 TODAY'S SPEECH 34, 36 (Fall 1970). This study may have been methodologically imperfect. The researchers did not read the instructions to the jurors within the context of a mock trial. In addition, because the subjects were college students, they differed from the average juror in terms of age, education, income, and ideology. *Cf.* R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 299, at 40 (criticizing use of college students in mock juries).

301. Forston found that 71.6% of individual jurors and over 50% of deliberating juries failed to answer correctly a question on proximate cause. Forston, *supra* note 300, at 35, 37. In addition, "almost four-fifths of the deliberating juries could not correctly answer one or more questions regarding the nature of evidence. . . ." *Id.* at 37.

302. *See* Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 L. & HUM. BEHAVIOR 163 (1977). The Nebraska study was well-designed. The mock jurors were recruited from the general public and were brought to the local courthouse to observe a videotaped trial. After the jurors deliberated and reached verdicts, they completed a variety of questionnaires. *Id.* at 173-75. The "Comprehension Questionnaire" tested the jurors' comprehension and memory of the issues of law and procedures discussed in the judge's instructions. Those jurors who observed the mock trial that included the Michigan pattern instructions managed a mean correct score of about 62%. *Id.* at 175.

303. *Id.* at 175.

304. Because Michigan followed a contributory negligence rule, if jurors believed that both the defendant and plaintiff were negligent, they were required to reach a verdict in favor of the defendant. The Nebraska researchers determined that 39 jurors believed that both parties were negligent, but 15 of them failed to reach the only verdict consistent with this

Michigan negligence instructions is about as effective in helping jurors understand the law as the presentation of no instructions at all."[305]

Perhaps the definitive study of jury comprehension and application of instructions is that undertaken by Hastie, Penrod, and Pennington in Massachusetts.[306] Their data show that jurors take the judge's instructions seriously and that verdicts can hinge on the jurors' memory and interpretation of the instructions.

The Massachusetts study calculated that twenty-five percent of all remarks in deliberations referred to the instructions.[307] Nevertheless, the jurors displayed a remarkable inability to remember correctly the contents of the instructions. Postdeliberation tests revealed that while jurors could recall items stated directly in testimony with a sixty percent accuracy, they could recall items stated directly in the instructions with only a thirty percent accuracy.[308] The researchers reasoned that this memory failure was partially cured by the ability of juries to think as a group: if only one juror could remember the items in the instructions or could correct the erroneous statements of another, the jury as a whole would be able to recall the instructions accurately.[309] Crediting each jury with recall if any member had recalled the item, the researchers determined that juries "remembered" the instructions with an eighty percent accuracy.[310]

This rate of recall is comparable to that found by the Drake and Nebraska researchers. And while the recall rate indicates that jurors probably understand instructions better than the Florida study's (probably erroneous) finding suggests, the Massachusetts researchers demonstrated that poor juror recall can be a "major obstacle to

finding: a verdict for the defendant. *Id.* at 176. This performance was not substantially better than the control group, which was read no instructions at all. *Id.*

305. *Id.* at 163.

306. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 299. While the focus of the Massachusetts study was to assess the effect of varying the rule of unanimity, the researchers compiled extensive data on all aspects of jury deliberation. Over one thousand citizens called for jury duty by the State trial courts in three Massachusetts counties were asked to view a three-hour filmed reenactment of a murder trial. The researchers informed the jurors that they would observe their deliberations through a discretely placed camera. Each statement by each juror was classified and recorded by two observers pursuant to an elaborate coding scheme. The researchers also gathered data by distributing questionnaires before and after deliberations. The major independent variable was the verdict decision rule. The researchers observed three different experimental conditions: unanimous verdict, verdict by a vote of 10-out-of-12 jurors, and verdict by a vote of 8-out-of-12 jurors. *Id.* at 37-58.

307. *Id.* at 85.

308. *Id.* at 80.

309. *See id.* at 81 (on group memory data).

310. *Id.* Jury memory averaged over 90% for evidentiary material.

proper jury decision making."[311] Many of the recall errors concerned the definitions of and rather complex distinctions between the various verdict categories, particularly manslaughter and not guilty by reason of self-defense. Seventy-five percent of the juries could not perfectly recall the elements of each of the verdicts.[312] Two findings indicate that this confusion resulted in improper verdicts. First, the researchers concluded that a first degree murder verdict was unjustified.[313] Errors in defining the requirements of first degree murder and the lesser offenses charged were associated with the erroneous first degree verdicts. Second, the jurors were much more open to persuasion on the law than on the facts. Once jurors constructed a "story" to explain events, their view of the facts solidified, and they became resistant to persuasion. Yet, many jurors were persuaded to change their verdict preference and, sometimes, a minority faction effected a dramatic reversal in the majority's opinion. The researchers found that the minority changed the majority's verdict by contesting the legal implications of uncontested facts, and this often involved interpreting the judge's instructions.[314] Thus, a persuasive interpretation of the judge's instructions can be dispositive, and where such interpretations are clouded by failures in memory or in comprehending the more arcane legal distinctions, improper verdicts can result.

On the whole, the empirical evidence justifies confidence in the jury's competence. The judge and jury usually agree on the ultimate verdict. When they do not, the jury is almost always more lenient,

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311. *Id.* at 238.

312. *Id.* at 81.

313. The researchers found that:

> Deviations from the second-degree murder verdict for the stimulus case are a cause for concern, because this verdict is the "correct" one on a number of grounds. First, the jury in the actual trial on which the case was based returned a verdict of second-degree murder. Second, the legal experts who viewed the case consistently selected the second-degree murder verdict. Third, second degree murder is the modal verdict for the experimental juries. However, the issue of the correctness of the final verdict cannot be resolved in absolute terms, for there are no ideal rational or empirical criteria for accuracy in jury decisions. At a minimum, each jury's evaluations of witness credibility, reasonable inferences from the testimony, and reconstruction and interpretations of the judge's summary of the law must be considered in order thoroughly to assess verdict correctness. For example, in the stimulus case, if a jury decided that all testimony from defense witnesses was false, a verdict of first degree murder could be acceptable. Yet, such an interpretation of the evidence would be very unconventional. For the most part, the exceptional, nonsecond-degree murder verdicts were associated with jurors' errors of comprehension and memory for testimony or the judge's instructions.

Id. at 62.

314. *Id.* at 169.

which is in keeping with the jury's traditional role as a bulwark of protection for the criminal defendant's rights and for the integrity of the reasonable doubt standard.[315] The jury has also proven itself to be a very competent factfinder and to be quite capable of informed, sensitive decisionmaking.[316] Yet, the empirical evidence also demonstrates that the jury has difficulty understanding and applying the judge's instructions, particularly those involving complex legal distinctions.[317]

Juror comprehension of instructions can be improved greatly by adopting more enlightened procedures for instructing juries, such as reading the instructions to the jury at the beginning of the trial as well as the end,[318] rewriting instructions in accordance with empirical knowledge of the factors affecting the comprehension of language,[319] and allowing jurors to bring written transcripts or audiotapes of the instructions with them to the jury room.[320] Despite these means of improving juror comprehension of instructions, however, the judge is inherently more qualified to apply a technical legal rule, such as the corroboration rule. Even with improved instructions and procedures, jurors still make many errors.[321] Moreover, only the legal training and experience of the judge can insure an un-

315. *See supra* notes 295-97 and accompanying text.

316. In juries following the rule of unanimity, fact errors occurred about one-half as frequently as errors of law. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 299, at 88. The jury's group memory of evidentiary material exceeded 90%. *Id.* at 81. Deliberations allow jurors to compare various scenarios explaining the facts and to sharpen each other's memory of the evidence. *Id.* at 230. The juries also showed a commitment to comply with their perceived duties: frequent references were made to the judge's instructions and jurors invariably concluded that it was inappropriate to discuss evidence ruled inadmissible by the judge. *Id.* at 85, 87. The researchers therefore concluded: "[b]ecause jury performance of the factfinding task is so remarkably competent, few innovations are needed to improve performance." *Id.* at 230.

317. Forston found that 50% of deliberating juries failed to answer correctly a question concerning proximate cause. *See supra* note 301. Nebraska researchers found that juries consistently failed to apply the Michigan contributory negligence rule properly. *See supra* note 304 and accompanying text. The Massachusetts study found considerable juror confusion over the often arcane distinctions between various degrees of homicide, and this confusion apparently resulted in some improper verdicts. *See supra* notes 311-14 and accompanying text.

318. Kassin & Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instructions and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOLOGY 1877 (1979).

319. Elwork, Sales & Alfini, *supra* note 302, at 163-69, 175-78.

320. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 299, at 231. Although, the researchers do not cite any specific empirical evidence of the effectiveness of such a procedure, the procedure's effectiveness comports with common sense.

321. Although the Nebraska researchers documented a dramatic improvement in the jury's ability to apply correctly the Michigan contributory negligence rule when read rewritten instructions, 4 out of 32 jurors (about 12%) still reached clearly erroneous verdicts. *See* Elwork, Sales & Alfini, *supra* note 302, at 176.

derstanding of the more arcane concepts in the law—such as the relationship between a subsidiary finding of corroboration and the ultimate verdict and the distinction between an admissible but incredible confession.[322]

In sum, empirical literature disproves the traditional assumption that the jury is more likely than the judge to view confessions uncritically. There is, then, no inherent reason to prefer the judge as the institutional decisionmaker to assess a confession's reliability. However, if the tool for assessing the reliability of a confession is a traditional, technical legal test, empirical data showing the difficulty of properly communicating the law to jurors indicates that the judge applies this tool more competently.

2. DISCOVERY BY WHAT METHOD—IS CORROBORATION A VIABLE TEST?

The corroboration rule is premised on the assumption that false confessions are best detected by examining evidence independent of the confession. The rule requires the judge to examine the independent evidence to decide whether the confession is sufficiently corroborated to be reliable.[323] While the absence of any corroboration may be powerful evidence that the confession is unreliable, empirical literature indicates that the corroboration requirement is unsatisfactory. Three factors tend to subvert its effectiveness: 1) the ability of the police to suggest corroborating evidence and incorporate it into the suspect's confession; 2) the inability of the corroboration rule to offer protection against false confessions that overstate the

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Kassin and Wrightsman found that reading instructions before the presentation of evidence caused a dramatic reduction in guilty verdicts—from 59% to 37%. Kassin & Wrightsman, *supra* note 318, at 1880. Apparently, the authors assumed that the not guilty verdict was the correct one because the case was "close." Without more information about the mock trial, it is impossible to determine whether the reversal in verdicts was a reflection of "correct" judgments or whether either verdict was equally justifiable and within the range of the jury's discretion.

322. Even judges have had difficulty appreciating these more subtle aspects of the corroboration rule. *See supra* notes 63-66 & 92-104 and accompanying text. The Massachusetts researchers documented an interesting example of jurors' failure to grasp rules of law that are obvious to lawyers. The researchers found that jurors rarely discussed the reasonable doubt standard. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 299, at 86. The researchers reasoned that because the defendant was unquestionably guilty of causing the decedent's death, the jurors did not appreciate the continuing relevance of the reasonable doubt standard to determining the degree of homicide (or the viability of a not guilty by reason of self-defense verdict). When an issue of less certain resolution, such as the need to identify the defendant as the perpetrator of the crime, was made the focus of the trial, discussion of the standard of proof became more prominent. *Id.* at 87-88.

323. *See supra* notes 67-87 and accompanying text.

gravity of the suspect's offense; and 3) the failings of human inference that prevent an objective evaluation of the independent evidence once the confession has been heard.

As for the first factor, "[c]onfessions must be viewed not as preexisting collections of facts but as accounts of criminal responsibility produced by all of the participants in the interrogation process. Confessions are constructed not discovered."[324] In many ways, the police are coauthors of the confession: they suggest—consciously or unconsciously—facts and story lines to the suspect, they approve or disapprove of the suspect's statements, and they control the social setting in which the confession is made. During interrogation, the police can incorporate into the confession information known only to themselves and to the real perpetrator. By suggesting facts that can be easily and independently verified, the police, in effect, corroborate the confession. For example, New York City police apparently suggested to an innocent suspect enough details known about a double murder to fill a sixty-one page confession; because these details were independently verified, the confession was substantially "corroborated."[325] In a recent British case, police suggested a number of crucial, independently verifiable details to an innocent rape suspect through such subtle means as leading questions, discouraging the suspect when he departed from their version of events, and hinting at the "correct" answer by changes in voice inflection.[326]

The police do not have to act in bad faith to accomplish this. Indeed, the factors that motivate the false confession also explain why the suspect incorporates the police version of events into her confession. The suspect is motivated to confess in part by her need for approval from the police, whether to regain her self-esteem[327] or to participate in a ritual of social inclusion.[328] Given this need, the suspect is quite willing to please the police by telling them what she believes they want to hear. Another factor that explains both the false confession and the tendency to incorporate evidence known by

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324. M. HEPWORTH & B. TURNER, *supra* note 280, at 148.

325. *See* Zimbardo, *supra* note 226, at 553-56. The case also indicates that mistaken identity may well be an important indirect cause of false confessions. For, as was the case here, a positive identification by the victim or other witness is strong evidence of guilt and can lead to such intensive interrogation that even the suspect may begin to doubt her innocence. On the immediate causes of false confessions, see *supra* notes 169-290 and accompanying text. On the surprising unreliability of eyewitness accounts, see E. LOFTUS, *supra* note 249.

326. The case is reported and analyzed by a British psychologist in Kellam, *supra* note 266, at 29-33.

327. *See supra* notes 223-32 and accompanying text.

328. *See supra* notes 281-87 and accompanying text.

the police is the dynamics of role play. Interrogators can manipulate suspects into playing a cooperative role.[329] The confession itself is a form of role play in which the suspect acts out the perpetrator role. She is forced to repeat her story over and over and becomes absorbed in the reality of this role. Oververbalization and imaginary re-creation of the crime allows the suspect to incorporate all the facts known to the police (and suggested to her by their questioning) into an airtight confession. Experiments indicate that expansive and creative role playing results because the individual, impressed by her arguments, achieves satisfaction from her performance.[330] Furthermore, the limitations of human cognition can cause the suspect to confess to the police version of events.[331] Because memory is incomplete and malleable, police questioning can suggest factual details that the subject incorporates into her confession which further incriminate her and corroborate her confession.[332] And if individuals infer their attitudes, beliefs, and emotions from external cues, the police can provide the social setting and the information from which to infer the police version of the "truth."[333]

A second reason why corroboration is an unsatisfactory test is that a clearly guilty defendant might falsely confess to an offense that is more serious than the one he actually committed. That is, independent evidence could establish that a suspect caused another's death, yet the suspect still might falsely confess to first degree murder rather than negligent homicide. Indeed, given the guilt feelings arising from the incident,[334] the small changes in narrative that could successfully establish the suspect's guilt of a more serious offense,[335] and the vagaries of human cognition, this kind of false

329. *See supra* notes 233-46 and accompanying text.

330. Driver, *supra* note 196, at 53 (citing Janis & King, *The Influence of Role Playing on Opinion Change*, in READINGS IN SOCIAL PSYCHOLOGY 482 (1958)).

331. On the malleability of human cognition and the ability to induce false confessions, *see supra* notes 255-77 and accompanying text.

332. *See supra* notes 273-77 and accompanying text.

333. *See supra* notes 255-72 and accompanying text.

334. On the ability of guilt feelings to motivate confessions to unrelated acts, see *supra* notes 183-93 and accompanying text.

335. For example, in Larson v. State, 86 Wis. 2d 187, 271 N.W.2d 647 (1978), the defendant Larson confessed to shooting the decedent Heintz after Heintz assaulted Larson with a metal pipe in the course of Heintz's apparent attempt to carry out his threat to kill his own wife. According to the confession, Larson shot Heintz as the latter turned away and then shot him once more in the back of the head. At trial, Larson repudiated his confession and testified that he intended to shoot over Heintz's head and that Heintz then appeared to slip and was still approaching him when he fired the second shot. *Id.*, at 192-93, 271 N.W.2d at 648-49. The pathologist testified that the shots entered behind the left ear and in the left side of the neck respectively. *Id.*, at 198, 271 N.W.2d at 651.

confession would seem to be the most common.[336] Yet, because such a confession is corroborated by independent evidence establishing guilt of a lesser offense, the corroboration rule offers no protection from this kind of confession.[337]

Third, even if corroboration were a better test of the confession's reliability, it is difficult to apply objectively because the confession itself raises a strong hypothesis of guilt. That is, once the judge hears the confession, her judgment as to the sufficiency of corroboration will be colored by her reluctance to disconfirm the hypothesis of guilt that the confession creates. Laboratory research shows that individuals are overly reluctant to abandon such an initial hypothesis.[338]

The confession raises a strong presumption of guilt and provides a theory of the case that resists subsequent repudiation by in-

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In Wisconsin, first degree murder is defined as "caus[ing] the death of another human being with intent to kill." WIS. STAT. § 940.01(1) (1975). Manslaughter is defined as causing the death of another "[u]nnecessarily, in the exercise of . . . [t]he privilege to prevent or terminate the commission of a felony." Wis. Stat. § 940.05(2) (1975). Larson's confession supported a first degree murder verdict because he acted deliberately and, especially with respect to the second shot, without regard for whether Heintz could continue in his attempt to kill his wife. Larson's testimony at trial was more consistent with manslaughter because he acted as if to deter Heintz from killing his wife. The pathologist's testimony was consistent with both versions, if the "back of the head" could be defined to include the left side of the neck or the left ear. *See id.*, 86 Wis. 2d at 198, 271 N.W.2d at 651. In the end, whether or not Larson was guilty of first degree murder or manslaughter turned on the juxtaposition of Larson and Heintz's head. Was Heintz turning away when he was shot or was he approaching Larson with his head slightly averted? Was Heintz shot a second time in the back of the head after he was felled or was Heintz still approaching Larson when the second shot was fired? And, in any event, did Larson really know what precisely happened given his drinking, the stress of the circumstances, and the time that had elapsed since the incident?

Obviously, these details are crucial to a determination of the degree of guilt, yet they form a very small facet of an elaborate and apparently well-corroborated confession. Such corroboration has little relevance to the question of what offense Larson was guilty. Of more relevance was whether Larson, while under considerable stress and perhaps feeling guilty about shooting his friend, slanted a small facet of his confession—i.e., the juxtaposition of Larson and Heintz—in a way that overstated his guilt.

336. For example, in the *Larson* case, discussed *supra* note 335, the police could have increased their chances of obtaining a first degree murder verdict rather than a manslaughter verdict by suggesting that Heintz had turned away before Larson fired the first shot (as opposed to having approached Larson with the left side of his head facing Larson). On theories of memory and perception that explain how police can suggest such details to the suspect, see *supra* notes 255-77 and accompanying text.

337. The corroboration rule would only be effective in this context if it required corroboration of every element of the crime charged. The courts have thus far rejected such an approach and with good reason: if every element of the offense charged required corroboration, so much independent evidence would be needed that the confession would become redundant. *See supra* notes 110-21 and accompanying text.

338. *See generally* R. NISBETT & L. ROSS, *supra* note 255, at 167-92. Indeed, once subjects infer a theory from preliminary evidence, even a complete discrediting of that evidence may not affect the subject's belief in the theory. *Id.*

dependent evidence. This is particularly true because confessions are "vivid" data; that is, the confession is an emotional experience that the finder of fact can visualize.[339] Research indicates that vivid evidence is given far greater weight than it is worth, often at the expense of drier but more probative evidence, such as forensic analysis.[340]

To conclude from this empirical evidence, however, that the corroboration rule should be discarded confuses the sufficient with the necessary. That is, while the corroboration rule is an ineffective tool for testing the reliability of a confession, it may be a necessary and desirable tool. Because "corroborating" evidence can be easily incorporated into a false confession, the absence of any corroborating evidence justifies a per se finding that the confession is unreliable and inadmissible. Given the natural tendency to overestimate the weight of corroborating evidence once one has heard a confession, corroboration of trivial details may also justify a similar per se finding.

If the corroboration rule is retained, two reforms should be adopted. First, the tendency to overestimate the weight of corroborating evidence can be countered by changing the order of proof. The prosecution should be required to introduce independent evidence of the defendant's guilt before the confession is admitted into evidence. After hearing the independent evidence, the judge should decide whether there is sufficient foundation for the confession to be admitted into evidence. Of course, unless the corroboration rule is so stringent as to require the independent evidence to establish a prima facie case of the defendant's guilt, the judge will have to read the confession to decide whether independent evidence corroborates it. However, since the judge will hear the independent evidence first, she will not have to disconfirm a strong initial hypothesis of guilt and will be more sensitive to the possible weaknesses of the independent evidence. If the confession is admitted into evidence, the jury also will be sensitized to the possible weakness of corroboration by hearing the independent evidence first.

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339. Nisbett and Ross found that the weight individuals assign evidence often defies logic. One example is "vivid" data. "Vividness is defined as the emotional interest of information, the concreteness and imaginability of information, and the sensory, spatial, and temporal proximity of information." *Id.* at 62. Nisbett and Ross reasoned that vivid data often are given disproportionate weight because such evidence receives more attention and "time in thought," is more likely to trigger additional information of similar import from memory, and is more likely to be pondered and rehearsed. *Id.*

340. While Nisbett and Ross do not discuss forensic evidence, they note that individuals (even scientifically trained individuals) tend to underestimate the weight of scientific and statistical data. *Id.* at 55-56.

Second, greater weight should be given to inconsistencies between the confession and facts unknown to the police at the time of the interrogation. If the suspect's confession is consistent with facts known to the police at the time of interrogation, but inconsistent with subsequently discovered facts, it is likely that the confession is the fictional product of police suggestions and the suspect's creativity. The New Jersey courts have adopted this approach.[341]

If the corroboration rule is a necessary but not a sufficient test of reliability, it should be supplemented by new tests. Given the jury's proven competence as a fact-finder[342] and the jury's willingness, relative to the judge, to give the defendant the benefit of the doubt,[343] the most desirable course is to rely on the jury's informed judgment, rather than on new legal tests to be administered by the judge. The most direct and effective means of testing the confession's reliability is for the jury to examine a videotape of the interrogation in light of the psychological theories that explain false confessions. Expert testimony could educate the jury about the ability of people to confess falsely or to make false admissions of fact. Research indicates that expert testimony can be an effective educational tool. For example, illusions about the reliability of eyewitness testimony can be dispelled by general testimony about the problem.[344] Videotaping confessions, moreover, does not appear to be overly expensive or time consuming. For example, the Bronx District Attorney voluntarily videotaped approximately 3,000 confessions between 1975 and 1983.[345] The District Attorney believed that the videotapes allowed the judge to assess more quickly the voluntariness of the confession and provided a convincing rebuttal of any *Miranda* claims or other claims of police misconduct.[346] Law enforcement authorities in St. Louis, Miami, and New Orleans also have voluntarily videotaped confessions, though less extensively than in the Bronx.[347] While this practice is laudable, a video record of only the confession is not nearly as useful as a record of the inter-

341. *In re* B.D., 110 N.J. Super. 585, 266 A.2d 326 (App. Div. 1969); *see also* State v. Ordog, 45 N.J. 347, 212 A.2d 370 (1965), *cert. denied*, 384 U.S. 1022 (1966).

342. *See supra* notes 315-17 and accompanying text.

343. *See supra* notes 295-97 and accompanying text.

344. *See* Penrod, Loftus & Winkler, *supra* note 256, at 157.

345. *Smile, You're on the D.A.'s Camera*, TIME, 61 (June 27, 1983).

346. *Id.* Because of some empirical evidence that jurors tend to overreact to reports of police indiscretions by presuming all confessions to be unreliable, videotaping may be a necessity in some jurisdictions. *See supra* notes 292-94 and accompanying text.

347. *See Smile, You're on the D.A.'s Camera, supra* note 345.

rogation that produces the confession.[348] Because videotaping extended interrogations may be too costly, audiotaping might prove to be an acceptable, inexpensive substitute.

C. Judicial Supervision of Interrogation

Thus far, this Comment has suggested that false confessions are a serious enough problem to merit legal safeguards and has discussed ways to evaluate the reliability of confessions. The final issue this Comment will consider is what affirmative measures the courts can take to reform the administration of criminal justice. The judiciary has increasingly used its power to supervise the police in an attempt to insure the fair, effective, and efficient operation of the criminal justice system.[349] In particular, appellate courts assume they can modify police behavior that results in disutilities, such as false confessions, by using rules of law to restructure police incentives.

Appellate courts have adopted two distinct kinds of rules to reform interrogation and the production of false confessions. The first rule seeks to modify police behavior, not to prevent false confessions from occurring but to better alert police and courts to the confession's unreliability. This is the approach taken by the corroboration rule, which attempts to force the police to do enough investigative work to corroborate the confessions; if the police cannot corroborate the confession, the court will hold the confession inadmissible. This incentive to gather independent evidence ostensibly causes the police to rely less on confessions and allows them (and, later, the courts) to assess the truthfulness of the suspect's confession.[350] The second rule attempts to prevent false confessions from occurring in the first place by suppressing confessions when the interrogator

348. For example, in 1981 the Bronx District Attorney videotaped Clifton Lawson's 20-minute confession to murder and rape. Lawson supplied many details about the crime that only the perpetrator or the police could have known. Defense counsel argued that Lawson, who had an I.Q. of 70 and the emotional maturity of a five-year-old, had told the police what he thought they wanted to hear so that he could be released to attend choir practice that night. The District Attorney failed to videotape a lengthy interrogation session in which police apparently exploited Lawson's religious convictious to extract a preliminary confession. Defense Counsel argued that events prior to the videotape placed Lawson under so much stress that he lost touch with reality. As for Lawson's knowledge of details about the crime, an expert witness testified that Lawson's auditory skills were relatively advanced and that he had been able to learn about the crime by sitting in a squad room for nine hours listening to police discuss the crime. Although defense counsel did ultimately persuade the jury of his client's innocence, the trial would have been fairer if police recorded the events that led to the ultimate videotaped confession. *See* Capeci, *Beating the Videotape*, 5 NAT'L L.J. 6 (1983).

349. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

350. *See supra* notes 20-25 and accompanying text.

behaves improperly. In a sense, *Miranda* takes this approach. Although the *Miranda* Court sought to remedy only the infringement of fifth and sixth amendment rights by interrogators,[351] some courts view *Miranda* as a means of redressing the imbalance of power during interrogation, thereby reducing the incidence of false confessions.[352] These two rules, however, often fail to accomplish their regulatory purpose. Consequently, the best way to police the police is to require them to make a complete record of all interrogations.

1. THE CORROBORATION RULE

Empirical evidence indicates that, contrary to the assumptions behind the corroboration rule, the rule does not motivate police to gather independent evidence.[353] This failure can be attributed, in part, to the inability of courts and prosecutors adequately to communicate the law to police.[354] In addition, because police suffer from severe budget and time constraints, police tend to view any investigative efforts beyond that of establishing probable cause as doing the prosecutor's work.[355] Prosecutors, however, often do not have the investigative resources to supplement the evidence gathered by police.[356] Indeed, rather than attempting costly investigation to corroborate confessions, police seek confessions.[357] Interrogation is

351. *See* Miranda v. Arizona, 384 U.S. 436 at 442 (1966).

352. See supra note 29.

353. A national survey of the police-prosecutor relations by Georgetown researchers found that "once . . . [confessions] are obtained, there is a tendency for the police not to seek additional evidence to further strengthen the case and protect it against suppression motions and credibility problems." W. McDonald, H. Rossman & J. Cramer, *supra* note 292, at 21. *But cf.* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 38-39, 41 & 42-43 (1969) (this failure is ameliorated by willingness of prosecutors to prosecute notwithstanding absence of independent evidence of *corpus delicti* because of expectation of guilty plea).

354. *See* W. McDonald, H. Rossman & J. Cramer, *supra* note 292, at 18.

355. *Id.* at 18-19.

356. Although prosecutors do have an investigative responsibility under law, this function remains almost entirely with the police. While prosecutors have investigative staffs, between 80 and 90% of their time is used to locate witnesses. *Id.* at 30-31.

357. For example, Yale researchers found that the police detectives' ability to generate independent evidence was limited by poor training, lack of manpower to analyze forensic evidence, and the need to devote an inordinate amount of time to recordkeeping and filing reports. Note, *supra* note 198, at 1597-99. Furthermore, lack of time and the nature of the crime can cause investigation to be especially perfunctory. Burglars, for instance, are seldom seen by their victims and almost never identified by them. *See id.* at 1598-99. Given the limitations of the capacity of the public to generate forensic evidence, a confession would therefore be especially useful in a burglary case. Burglary and larceny were also the most common crimes in New Haven; the volume of cases when combined with the difficulty of investigation caused the police to do little more than file a report. *See id.*

cost efficient,[358] and yields a remarkably high rate of confessions.[359] Even if more independent evidence were generated, however, corroboration is an unsatisfactory test of a confession's reliability.[360]

2. THE *MIRANDA* RULE

An important threshold issue for any discussion of the means to regulate interrogation is the effect of the *Miranda* decision on the incidence of confessions; if the decision substantially reduced the incidence of confessions there is no need to police against false confessions.[361] Numerous empirical studies, however, reveal that an extraordinary percentage of arrested criminal suspects still confess, despite being advised of their rights.[362] It is difficult to compare the confession "rates" found by the various studies because different re-

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The need for interrogation as the only feasible and affordable investigative device available in some cases should not be exaggerated. The typical confession is elicited precisely because the police already possess substantial independent evidence as a result of independent field work and the circumstances surrounding the arrest. *See infra* notes 380-84 and accompanying text. In short, the typical confession is of little use because it is given in the face of overwhelming evidence that led to the arrest; the typical *useful* confession is sought by police as a substitute for independent investigation.

358. *See* Note, *supra* note 198, at 1541.

359. *See infra* notes 362-65 and accompanying text. Again, the usefulness of confessions should not be overestimated, since many confessions are redundant in light of the overwhelming independent evidence that often prompts the confession in the first place. *See infra* notes 380-84 and accompanying text.

360. *See supra* notes 323-40 and accompanying text.

361. *Cf.* Miranda v. Arizona, 384 U.S. 436, 541-45 (1966) (White, J., dissenting) (forecasting drastic decline in frequency of confessions as a result of the decision).

362. The empirical studies are: N. SOBEL, THE NEW CONFESSION STANDARDS 136-50 (1966); N. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971); Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1 (1970); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, in THE IMPACT OF SUPREME COURT DECISIONS 139 (T. Becker & M. Feeley ed. 1973); Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974); Reiss & Black, *Interrogation and the Criminal Process*, 374 ANNALS 47 (1967); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L.J. 425; Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Survey*, in THE IMPACT OF SUPREME COURT DECISIONS I50 (T. Becker & M. Feeley ed. 1973); Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L.J. 255 (1966); Note, *supra* note 198. For valuable pre-*Miranda* data, see Piersante, Confessions in Felony Prosecutions for the Year 1961 as Compared to January 20, 1965 through December 31, 1965 (July 27, 1966) (unpublished report) *cited* and *discussed* in Note, *supra* note 198, at 1640-41.

searchers defined the base number of suspects differently.[363] Nevertheless, only one study concluded that *Miranda* significantly decreased the incidence of confessions.[364] However, that study indicates that although confessions declined after *Miranda*, they still occur frequently enough to justify prophylactic measures.[365] Other studies uniformly have concluded that *Miranda* has had little effect on the incidence of confessions.[366] Furthermore, all show confessions to be a remarkably common occurrence: typically, the studies find that confessions were elicited in forty to fifty percent of the criminal cases surveyed.[367]

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363. For instance, some researchers surveyed suspects randomly, while others surveyed only those suspected of certain crimes. *Compare, e.g.*, Medalie, Zeitz & Alexander, *supra* note 362, at 141 *with* Neubauer, *supra* note 362, at 103-04. Some researchers surveyed only data on suspects that were recorded in police files, while others relied on direct observation of interrogation or interviews with defendants. *Compare, e.g.*, Seeburger & Wettick, *supra* note 362, at 150-51 *with* Note, *supra* note 198, at 1527-28 and Leiken, *supra* note 362, at 11-14. All of the studies defined "confessions" broadly to include anything from oral incalpatory statements to full-scale written confessions. *See, e.g.*, Note, *supra* note 198, at 1564.

364. *See* Seeburger & Wettick, *supra* note 362, at 153-54.

365. The study examined all files of "cleared" cases in Pittsburgh from 1964 to 1966 and concluded that the percentage of homicide, robbery, forceful sex, burglary, and auto larceny cases in which confessions were elicited declined from 54.4% before *Miranda* to 37.5% afterwards. *Id.*

366. *See* N. SOBEL, *supra* note 362, at 143; N. MILNER, *supra* note 362, at 46-51; Medalie, Zeitz & Alexander, *supra* note 362, at 149; Neubauer, *supra* note 362, at 111; Reiss & Black, *supra* note 362, at 47; Robinson, *supra* note 362, at 493-506; Witt, *supra* note 362, at 332; Younger, *supra* note 362, at 262; Note, *supra* note 198, at 1613.

367. *See* Leiken, *supra* note 362, at 17 (Table I) (42%); Medalie, Zeitz & Alexander, *supra* note 362, at 142 (40%); Neubauer, *supra* note 362, at 105 (Table 2) (46%); Witt, *supra* note 362, at 325 (67%); Younger, *supra* note 362 (47%, as calculated from Younger's data in Note, *supra* note 198, at 1641 n.10); Note, *supra* note 198, at 1566 (Table 12) (roughly 50%); *but see* N. SOBEL, *supra* note 362, at 141-42 (14%). All of the studies defined "confessions" broadly. *See supra* note 363.

There is some evidence of a long-term trend toward fewer confessions. Based upon their study of New Haven police files, Yale researchers estimated that there had been a decline of roughly 10 to 15% from 1960 to 1966 in the number of suspects who incriminated themselves. Note, *supra* note 198, at 1573. Given the amount of decline attributable to the pre-*Miranda* warnings and given their inability to find a statistical correlation between *Miranda* warnings and unsuccessful interrogation, the researchers concluded that something larger than the *Miranda* decision had caused this decline. The researchers speculated that changing attitudes on the part of suspects, who perhaps became more uncooperative as the mass media publicized the Warren Court's increasing protection of criminal suspects, and on the part of the police, who began to abandon third-degree tactics as unseemly, may have been responsible for the decline in confessions. *Id.* These factors, rather than *Miranda*, may explain the decline in confessions noted by Pittsburgh researchers. Seeburger & Wettick, *supra* note 362, at 154. Furthermore, because the most recent survey of confessions was conducted in the summer of 1969, the surveys do not indicate whether in the 18 years following *Miranda*, attitudes of police and suspects have evolved sufficiently to cause a drastic decline in confessions. In any event, the data that *are* available indicate that confessions are still very routine in most jurisdictions throughout the country.

Having established that the frequency of confessions is substantial even after *Miranda*, it is necessary to determine whether *Miranda* warnings—or any rule similarly aimed at forcing the interrogator behave "properly"—are at least effective in preventing *false* confessions. The consensus among commentators who have studied the impact of *Miranda* is that the warnings do not substantially redress the power imbalance of the interrogation room. In general, suspects do not understand or appreciate the meaning of the warnings and are under considerable pressure not to invoke their rights.

Knowledge of one's rights can be analyzed into two components: 1) cognitive knowledge of the general rules, and 2) appreciation of the application and effect of those legal rules in specific circumstances. As for cognitive knowledge, two studies have shown that a substantial minority of interrogated suspects do not understand that they have a right to remain silent and a right to a lawyer.[368] The data also indicate that cognitive knowledge does not in itself prevent the suspect from incriminating herself or waiving her right to a lawyer.[369]

This indicates that the second component of knowledge is more important than the first. The empirical studies reveal that whatever the suspects' understanding of their general legal rights in the abstract, suspects generally fail to grasp the practical effect and application of those rights in specific circumstances. For example, while one's freedom to refuse to confess may be clear enough in the abstract, it is less clear what precisely "counts" as a "confession." Two studies revealed that many suspects mistakenly believed that the fifth amendment right is broad enough to prevent the police from

368. *See* Leiken, *supra* note 362, at 14-15 (31% of suspects interviewed in Denver County Jail could recall neither their fifth nor sixth amendment rights; suspects were asked to recall the contents of the *Miranda* warnings and were deemed to have remembered their rights if they referred directly or indirectly to the right to counsel or the right against self-incrimination—even if in a vague or incorrect manner); Medalie, Zeitz & Alexander, *supra* note 362, at 145-46 (after reading each *Miranda* warning to District of Columbia defendants, researchers asked the suspects what the warnings meant to them; 15% failed to understand the right-to-silence warning, 18% failed to understand the right-to-counsel warning, and 24% failed to understand the right-to-appointed-counsel warning).

369. The Denver study found that 41.2% of those who could recall both their fifth and sixth amendment rights confessed anyway, as opposed to a 36.4% confession rate for those who could recall neither rights. Leiken, *supra* note 362, at 17 (Table I). Another study found that 34% of the suspects who understood their sixth amendment rights waived counsel during interrogation and 41% who understood their fifth amendment right to remain silent incriminated themselves. Medalie, Zeitz & Alexander, *supra* note 362, at 147-48; *see also* Note, *supra* note 198, at 1563-64 (finding no correlation between *Miranda* warnings and suspects' behavior).

using oral admissions as evidence against them.[370] This misunderstanding of one's rights is not confined to the intellectually unsophisticated. The FBI's success in interrogating Yale University faculty, staff, and student draft resisters shows that even when the most educated, sophisticated suspects are read their *Miranda* warnings, they can fail to appreciate the precise legal implications of interrogation.[371] Furthermore, the police can undermine appreciation of one's rights during interrogation by tactics that signal to the suspect that rights are mere "technicalities." For instance, by reading the rights in a monotone and then immediately requesting a written waiver, the police indicate that the rights are an irritating formality and not meant to be invoked by honorable, clear-thinking persons.[372]

But even if suspects know and appreciate their rights, they are under considerable pressure to waive them. There are strong social sanctions against silence in the face of incriminating evidence.[373] The suspect is also in a crisis situation: she faces the possibility of years in prison and must decide in a few seconds whether or not to waive her rights.[374] As a result, there is a strong temptation to talk one's way out of the situation or play for leniency by confessing.[375] Once the suspect begins to talk, the psychological and sociological dynamics of the encounter can lead to false inculpatory statements.[376]

A natural response to the failure of *Miranda* is to seek new ways to make police behavior less coercive. Perhaps the *Miranda* warnings should be rewritten or explained at length; perhaps a waiver

370. Forty-five percent of a sample of Denver suspects believed that oral statements could not be used against them in court. Leiken, *supra* note 362, at 15. New Haven researchers noted the same common misconception, though they did not quantify its incidence. *See* Note, *supra* note 198, at 1572.

371. The resisters had delivered their draft cards to the Department of Justice as a symbolic act of protest against the Vietnam War. The FBI sought admissions as to the whereabouts of each resister's draft card and his or her intent in parting with it. The suspects failed to appreciate that the encounter was a legal rather than a moral one, that their admissions would be valuable at trial, and that the admissions had extrajudicial uses. Griffiths & Ayres, *supra* note 362, at 300-01, 306, 310-11, 313-14.

372. *See* Note, *supra* note 198, at 1552. *See also* N. MILNER, *supra* note 362, at 211-12 (Wisconsin police read warnings with expectation that they will be waived immediately thereafter through execution of a waiver form; interrogators denigrate rights as mere formalities); Griffiths & Ayres, *supra* note 362, at 308 (FBI agents present waiver form simultaneously with warnings, usually with a terse observation that the form states the suspect's constitutional rights).

373. *See supra* notes 233-39 and accompanying text.

374. Note, *supra* note 198, at 1613-14.

375. *Id.*

376. *See supra* notes 169-290 and accompanying text.

form should not be thrust on the suspect immediately; or perhaps the *Miranda* framework should be abandoned altogether for an elaborate code of rules for conducting interrogation. Yet because the empirical evidence indicates that interrogation is inherently coercive, most reforms would be ineffectual. Indeed, it is in the interrogator's best interests to behave as benevolently as possible. Benevolent behavior makes the suspect more susceptible to the subtle manipulations of memory and attitudes that can cause false inculpatory statements.[377] In short, the rules of the interrogation encounter cannot be reformed to eliminate its inherent coerciveness. The only choice for courts and legislators is to decide whether to make extrajudicial confessions inadmissible altogether or to regulate interrogation in a way that facilitates an effective assessment of a confession's reliability.

3. NEW APPROACHES FOR REGULATING INTERROGATION

No jurisdiction has outlawed the use of extrajudicial confessions at trial, although some commentators have advocated one reform that would effectively eliminate the incidence of confessions: a nonwaivable right to counsel during interrogation.[378] Such radical reform, however, is staunchly opposed by critics who point to the parade of horrors that ostensibly will result from outlawing confessions.[379] The empirical evidence indicates that the costs of outlawing confessions are not nearly as high as the critics posit. First, the significance of high confession rates must be discounted by the presence of other evidence sufficient to convict. That is, suspects often confess simply because the evidence against them is overwhelming.[380] Outlawing such evidentially redundant confessions would

377. *See supra* notes 255-77 and accompanying text.

378. *See* Leiken, *supra* note 362, at 46-51; Note, *supra* note 198, at 1615-16.

379. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 541-45 (1966) (White, J., dissenting).

380. One study found that while 45% of all felony defendants in an Illinois jurisdiction confessed, defendants accused of property crimes were much more likely to confess than those accused of crimes against the person. The study concluded that this differential in confession rates probably indicated that many confessions are motivated by resignation in the face of overwhelming evidence, since in property crimes the police are more likely to possess dispositive physical evidence (e.g., fingerprints, forged signatures, stolen goods) than in personal crimes. *See* Neubauer, *supra* note 362, at 106, 111. *See also* Reiss & Black, *supra* note 362, at 55; Note, *supra* note 198, at 1572; *cf.* McConville & Baldwin, *The Role of Interrogation in Crime Discovery and Conviction*, 22 BRIT. J. CRIMINOLOGY 165, 166 (1982) (concluding that eliminating confessions would have fatally weakened the prosecution's case in only one-fifth of the Crown Court cases studied).

have little or no effect on the ability of police to obtain convictions or guilty pleas.

Second, the significance of the confession rate must be further discounted by the ability of the police to gather evidence against the suspect by using alternative investigative means available.[381] Based upon their assessment of the availability of alternative investigative means and the amount of independent evidence already gathered against the suspect, Yale researchers calculated that interrogation was necessary in only twelve of the ninety interrogations observed in New Haven during the summer of 1966.[382] Interrogation of these twelve suspects was successful only four times. Thus, if confessions were outlawed, only four of the ninety cases observed in this jurisdiction would have been affected.[383] Moreover, since the police did not interrogate in hundreds of other cases, the significance of these four cases as a percentage of all cases declines further.[384]

The benefit of outlawing confessions would be to eliminate unjust convictions of those who falsely confess or who overstate their guilt. Since the prevailing ethos of American criminal law is that it is better to free a guilty person than to convict an innocent person,[385] outlawing confessions would be justified even if the net result were to free more guilty persons than innocent ones. Moreover, the bene-

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381. *See* Note, *supra* note 198, at 1581.

382. *Id.* at 1584. From information gained observing the interrogations and studying police files, researchers characterized the amount of evidence available in each case as 1) none, 2) some, 3) enough to go to trial, or 4) probably enough to convict. *Id.* at 1582. The investigative resources currently available to the New Haven police were also coded in four categories: 1) none, 2) available but probably inadequate for conviction, 3) available and probably adequate for conviction, or 4) further investigation unnecessary. *Id.* at 1583. Interrogation was considered "essential" where there were no investigative alternatives and either none or some existing evidence. *Id.* at 1583 (Table 19). Interrogation was considered "important" where investigative alternatives were available but probably inadequate and there was either none or some evidence. *Id.* Interrogation was either essential or important in 12 of 90 cases observed. *Id.* at 1584.

A survey of the detectives' evaluation of the necessity of interrogation in 70 of the cases corroborated these findings. The detectives rated interrogation important in 13 cases and unnecessary in 57. *Id.* at 1591. *See also* Witt, *supra* note 362, at 323-24 (applying methodology of Yale researchers to data obtained from a Los Angeles County jurisdiction and concluding that interrogation was necessary in only 13% of the cases studied).

383. *See* Note, *supra* note 198, at 1589.

384. The empirical studies probably overstate the incidence and importance of confessions by sampling suspects of felonies or a few more serious crimes. Thus, the Yale researchers noted that the Special Services Division, a "vice squad" that arrested a large number of gambling and sex offenders and other misdemeanants, questioned only 8 of the almost 200 suspects they arrested. *Id.* at 1536.

385. *See, e.g., In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring): "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

fit of preserving the fifth amendment privilege against self-incrimination is distinct from the benefits accrued from ridding the criminal justice system of unreliable confessions. If interrogation is inherently coercive, perhaps all interrogation per se violates the privilege against self-incrimination. When combined with concerns about reliability, perhaps these fifth amendment concerns justify per se inadmissibility of extrajudicial confessions.[386]

On balance, however, outlawing confessions on *reliability grounds alone* is too extreme a remedy. The empirical evidence does indicate that interrogation is inherently coercive and that confessions are unreliable enough to merit legal safeguards. But, these data do not merit an irrebutable presumption against the reliability of every confession. Furthermore, if the cost of outlawing confessions is substantially less than has been portrayed by critics of the Warren Court, it is nevertheless a real and significant cost. Many suspects confess truthfully and if each jurisdiction the size of New Haven lost four convictions every eleven weeks,[387] thousands of guilty persons would be freed annually as a result of outlawing confessions.

In short, outlawing confessions on *reliability grounds alone* is not justified. Given the inadequacy of the corroboration rule, the alternative is to regulate interrogation in a way that facilitates an effective assessment of a confession's reliability. This can be done by requiring the police to make a video or audio record of the entire interrogation as a condition for admitting the confession.[388] If expert witnesses analyzed the tapes and educated the jury as to the psychology of the interrogation encounter, the jury would be sufficiently informed to make a judgment about the confession's reliabil-

386. Cost-benefit analysis is distorted by the greater ease in measuring costs as opposed to usually less tangible benefits. *See generally* Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate*, 1984 WIS. L. REV. 385, 417. Such may be the case here, since defenders of confessions can point to tangible, quantifiable harm—i.e., thousands of guilty persons set free—while critics must rely on the intangible benefits that accrue from defining and enforcing the policies behind the fifth amendment. Those who undertake cost-benefit balancing should be aware of this subtle skewing effect and should compensate for it, especially since, however intangible and ambiguous, the rhetoric of the bill of rights makes the state's enforcement of criminal law politically legitimate.

387. The Yale researchers observed all interrogations undertaken in the New Haven station house for an 11 week period during the summer of 1966. Note, *supra* note 198, at 1522. Interrogation was necessary and successful in four cases. *See supra* notes 381-83 and accompanying text. The "loss" of these convictions should, of course, be discounted by the possibility that some of these confessing suspects were not guilty, or overstated their guilt.

388. Apparently, the police do not consider such a requirement to be an intolerable burden, as many jurisdictions have voluntarily taken steps in this direction already. *See supra* notes 345-48 and accompanying text.

ity. The jury could discount the confession in whole or in part, and, as a result, unjust convictions could be prevented.

IV. CONCLUSION

The corroboration rule is primarily a legal safeguard against false confessions; it is the attempted solution to the "reliability problem."[389] A survey of the psychological, social psychological, and sociological causes of false confessions[390] reveals that the reliability problem is broader and more subtle than is commonly realized. First, the danger is not simply that pathological persons confess falsely. Rather than trivialize the reliability problem in this way, courts and commentators should recognize that false self-incrimination is a universal form of behavior; even the most "normal" persons falsely confess. Second, the reliability problem includes more subtle behavior than full-blown, fantastic false confessions. Subtle distortions of memory and self-perception effects can cause an innocent suspect to make incriminating statements unwittingly, without consciously acknowledging guilt. Similarly, a guilty person can be led to overstate her degree of guilt. Finally, perhaps the most subtle manifestation is the ability of an entirely innocent suspect to utter false exculpatory statements in moments of panic or confusion. Such statements can be damning evidence of consciousness of guilt.

In short, the false confession phenomenon includes subtle forms of self-incrimination that occur more frequently than is commonly believed. Thus, the problem certainly merits legal safeguards. However, the safeguards must respond to the subtleties and complexities of the problem at hand.

Courts and legislatures have employed two kinds of rules to address the reliability problem. The first kind of rule attempts to civilize the interrogation encounter. Thus, confessions must be found voluntary, the police must read and respect the suspect's rights, and interrogation must not unnecessarily delay arraignment. While the primary purpose of these rules is to check the abuse of authority, it is commonly assumed that they also decrease the incidence of false confessions by reducing the coerciveness of interrogation.[391] This assumption is not supported by empirical evidence which shows in-

389. The corroboration rule also addresses a second major policy concern raised by interrogations and confessions: the abuse of authority. *See supra* notes 2-11 & 23-31 and accompanying text; *see also infra* notes 401-02 and accompanying text.

390. *See supra* notes 169-290 and accompanying text.

391. *See supra* notes 2-11 and accompanying text.

terrogation to be inherently coercive. Indeed, heavy-handed interrogation methods are the least effective, and the more civilized behavior encouraged by the confession rules will, paradoxically, produce a greater number of false confessions.[392]

The second kind of rule, which has traditionally been the primary remedy for the reliability problem, is the corroboration requirement. However, the corroboration rule is insufficient to insure the reliability of confessions for three reasons: first, the police can suggest corroborating evidence and incorporate it into the suspect's confession; second, the rule does not offer any protection against false confessions that overstate the degree of guilt (nor can it protect against false exculpatory statements by an entirely innocent person); third, juries and judges cannot effectively evaluate independent evidence once they have heard the confession.[393] On the other hand, the corroboration rule should be retained in some form. Given the ease with which "corroborating" evidence can be incorporated into a false confession, the absence of any corroborating evidence justifies a per se finding that the confession is unreliable and inadmissible. Moreover, to sustain a conviction solely on the basis of a confession is unwise because empirical evidence indicates that confessions are often unreliable.

If the corroboration rule is retained, it should be consistent with its underlying assumptions and with the empirical data. First, the rule should apply to all extrajudicial statements. To exempt from corroboration "*res gestae*" statements, statements made before the crime, or statements that do not amount to full confessions of guilt is not justified by any of the policies behind the rule.[394]

Second, the illogical *corpus delicti* version of the rule should be abandoned. To be internally consistent, the rule should require the judge to find substantial independent evidence showing the truth of the confession.[395] While the empirical evidence disproves the rule's assumption that jurors tend to view confessions uncritically,[396] the rule should nevertheless be administered by the judge. Studies of the ability of jurors to comprehend and apply "technical" rules of law

392. *See supra* notes 169-290 & 361-77 and accompanying text.

393. *See supra* notes 323-48 and accompanying text.

394. *See supra* notes 32-62 and accompanying text. It can be argued that an exception for statements made before or during the crime is justified on empirical grounds: such statements are not a product of inherently coercive interrogation. Yet, such statements will be reported by witnesses who are questioned by the police. While not the focus of suspicion, these witnesses will be subject to the same self-perception effects and will possess the same malleable memory as interrogated suspects. *See supra* notes 255-77 and accompanying text.

395. *See supra* notes 67-87 & 157-66 and accompanying text.

396. *See supra* notes 292-97 and accompanying text.

embodied in the judge's instructions shows that the judge is more competent to administer the corroboration rule.[397]

Ultimately, however, the solution to the reliability problem depends on the informed judgment of the judge and jury. The credibility of a confession is too complex an issue to be reduced to a simple tabulation of the quantum of corroborating evidence. And while it is reassuring that empirical studies show that jurors are quite capable of viewing confessions critically, jurors cannot adequately evaluate a confession's reliability without some inkling as to the circumstances surrounding the interrogation and the general causes and manifestations of false self-incrimination. Therefore, a confession should not be admissible unless the police make a complete audio or video recording of the entire interrogation.[398] Second, defense counsel should be encouraged to secure expert witnesses to analyze the recordings and educate the judge and jury on the general causes and manifestations of false self-incrimination.[399] As for the corroboration issue, the judge can better determine admissibility and the jury can be sensitized to the possible weaknesses of the corroborating evidence if the prosecution were required to introduce all the independent evidence before it could introduce the confession.[400]

In addition to reliability concerns, the corroboration rule, and the law of confessions in general, attempt to prevent the abuse of authority by police.[401] That interrogation is inherently coercive has graver implications for this latter kind of policy concern than for the former. The reliability problem can be remedied by relying on the informed judgment of the judge and jury. But such a post hoc solution does not remedy the inherent coerciveness of interrogation;[402] interrogation may be per se an abuse of authority. Therefore, while

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397. *See supra* notes 298-322 and accompanying text.

398. If the extrajudicial statements are not made to police or are made in the field, such as before or during arrest, recording is not feasible and, therefore, should not be a prerequisite for admissibility.

399. Expert testimony is expensive, and it might be contended that a rigorous cost/benefit analysis would not support the cost in many cases. Assuming that "efficiency" concerns are dispositive, the better solution would be to lower costs by using a standard educational videotape rather than dispense with expert testimony altogether. Such general and generic testimony can be quite effective in educating the jury. *See supra* note 344 and accompanying text.

400. *See supra* notes 338-40 and accompanying text.

401. *See supra* notes 2-11 & 23-31 and accompanying text.

402. In theory, the various rules governing confessions should cause the prosecution to rely less on interrogation and more on independent investigation, thereby alleviating concerns about the abuse of authority. *See supra* notes 23-31 and accompanying text. That exclusionary rules appreciably alter police behavior is empirically questionable. *See supra* notes 349-67 and accompanying text.

outlawing the use of confessions at trial would not be justified on reliability grounds alone, such a radical alternative might be justified on broader fifth amendment grounds: specifically, the need to remedy the abuse of authority and to preserve the privilege against self-incrimination.[403]

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403. *See supra* note 386 and accompanying text.