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PROHIBITION, STARE DECISIS, AND THE LAGGING ABILITY OF SCIENCE TO INFLUENCE CRIMINAL PROCEDURE

WESLEY M. OLIVER*

Science has revealed that, contrary to longstanding intuitions, eyewitnesses are sometimes mistaken and false confessions do occur. The methods police use to obtain identifications and confessions can affect their reliability. Yet criminal procedure does not deter investigatory methods that produce unreliable evidence as thoroughly as it does those methods that produce reliable evidence. If an officer conducts an illegal search of a car trunk, the evidence is excluded and subsequently officers know that they must follow the rules if they hope to admit the fruits of such searches. If, however, an officer creates a suggestive lineup—which risks a false conviction—the identification from this lineup is not necessarily excluded. Interrogation methods that risk unreliable confessions are not even a concern for the rules of criminal procedure unless the suspect's will is overborn, or the suspect has not agreed to be interrogated. The explanation for this state of affairs appears to be historical. Our rules of criminal procedure largely derive from the era of Prohibition, when searches for reliable evidence were society's primary concern. Now that wrongful conviction is at least as great a concern as unreasonable searches, the law should acknowledge the need to deter police practices that risk the collection of unreliable evidence.

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TABLE OF CONTENTS

INTRODUCTION 994
I. PROHIBITION LED TO ACCEPTANCE OF EXCLUSION OF RELIABLE PHYSICAL EVIDENCE 998
II. THIRD DEGREE FEARS OF THE ROARING '20S TAKE FOCUS OFF RELIABILITY 1007
III. EFFORTS TO CABIN THE EXCLUSIONARY RULE LEAVE EYEWITNESS IDENTIFICATIONS UNDER-REGULATED 1022
CONCLUSION 1030

INTRODUCTION

Investigatory constitutional criminal procedure is, in many ways, backwards. Police are more effectively deterred from minimally intrusive misconduct that produces reliable evidence than they are from engaging in misconduct that threatens wrongful convictions. Physical evidence obtained in an unlawful seizure is excluded merely because of the means of the seizure,[1] while efforts by police to contaminate confessions or eyewitness identifications yield the exclusionary sanction only if courts find that police misconduct produced unreliable evidence.[2] Police are thus given greater latitude under our constitutional scheme to manufacture false evidence than to discover legitimate evidence.

This anomaly can only be explained by the historical context of modern constitutional criminal procedure. While the current scheme of police regulation has roots in jurisprudence prior to the Prohibition Era, from 1920 to 1933, it was the rampant excesses during Prohibition that led states to adopt draconian rules excluding reliable physical evidence[3] and prompted

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[1] *See* Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH. L. REV. 391 (2010) (describing the justification of the rule throughout its history).

[2] Unreliable confessions are excluded, if at all, only under evidentiary rules that very liberally admit evidence. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (stating the admissibility of a potentially unreliable statement "is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment"); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486 (2006) (describing the exclusion of unreliable confessions as a "largely forgotten purpose of the rules" regulating interrogations). Intentional efforts by police officers to produce suggestive lineups do not necessarily invalidate the resulting identifications. *See* Manson v. Brathwaite, 432 U.S. 93, 111–13 (1977) (rejecting per se exclusion of suggestive lineups).

[3] *See* Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*,

widespread concerns about police practices, notably interrogation practices.[4] Third-degree tactics came into disrepute in the 1920s even when they produced reliable confessions.[5] Inaccurate eyewitness identifications were hardly contemplated, but reckless and destructive alcohol searches and third-degree tactics made front-page news. Police abuses in this era were feared for their own sake, irrespective of their potential to produce wrongful convictions.[6]

The criminal procedure revolution of the 1960s largely constitutionalized the scheme of police regulation developed as state courts responded to police excesses created, exacerbated, and highlighted by Prohibition. *Mapp v. Ohio*, which required states to exclude unlawfully obtained evidence, was justified in light of *state* adoptions of the exclusionary rule, most of which occurred during Prohibition.[7] *Miranda v. Arizona* traced its origins to the findings of the Wickersham Commission Report, a Prohibition Era re-telling of decades-old interrogation abuses.[8] Whatever merits *Miranda* may have as the primary mechanism of screening confessions, ensuring reliability is not one of them.[9]

Neither the recent spate of DNA exonerations,[10] nor scientific

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52 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 246, 250 (1961) (observing that "most of the states that accepted the 'Weeks Rule' did so during the period of national prohibition").

[4] *See* Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 100 (1986) (describing Wickersham Commission as first successful effort to reform police interrogators); Franklin E. Zimring, *The Accidental Crime Commission: Its Legacy and Lessons*, 96 MARQ. L. REV. 995, 997 (2013) (observing that the focus of the Wickersham Commission was Prohibition).

[5] MARILYNN JOHNSON, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 125 (2003) ("Public alarm over [third-degree tactics] in the Progressive Era . . . proved fleeting and ineffective. In the 1920s, however, public debate over the third degree reemerged with a vengeance.").

[6] *See* Zechariah Chafee, Jr. et al., *The Third Degree: Report to the National Commission on Law Observance and Enforcement*, *in* NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, NO. 11, REP. ON LAWLESSNESS IN LAW ENFORCEMENT 154–55 (1931).

[7] Mapp v. Ohio, 367 U.S. 643, 651 (1961); *see also* Allen, *supra* note 3.

[8] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[9] *See* Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 910 n.97 (1997) ("That the *Miranda* Court's reference to the reliability value was confined largely to a footnote referring to the possibility of false confessions . . . reveals that the Court was concerned with some Fifth Amendment values beyond the reliability of confessions.").

[10] *See* Sabra Thomas, Comment, *Addressing Wrongful Convictions: An Examination of Texas's New Junk Science Writ and Other Measures for Protecting the Innocent*, 52 HOUS. L. REV. 1037, 1038 & n.3 (2015) (observing that DNA has led to the exoneration of 325 people

discoveries about the problem of false confessions,[11] nor incorrect witness identifications,[12] have galvanized society to revamp the regulation of police in the way that Prohibition did.[13] As a result, the regime designed to guard against over-zealous police continues to define the contours of constitutional criminal procedure. Police brutality *in the search for evidence* is not a major concern in modern society, while police contamination of confessions and identifications has been shown to lead to wrongful convictions.[14] Our patchwork rules of constitutional criminal procedure thus remain backwards.[15] They over-deter the collection of reliable evidence and under-deter the fabrication of false evidence.

Criminal procedure doctrines are being questioned as reliability is becoming an increasingly important basis for admitting or excluding challenged evidence. State courts and legislatures have gradually shown

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in the United States as of January 2015 and suggesting that the rate of exonerations shows no sign of decreasing).

[11] *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010) (observing that false confessions were "present in 15–20% of all DNA exonerations").

[12] *See* Gary L. Wells et al., *Double-Blind Photo Lineups Using Actual Eyewitnesses: An Experimental Test of a Sequential Versus Simultaneous Lineup Procedure,* 39 LAW & HUM. BEHAV. 1, 1 (2015) (observing that 75% of the first 250 DNA exonerations involved mistaken eyewitness identifications).

[13] Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process,* 41 TEX. TECH. L. REV. 133 (2008) (calling for new vision of criminal procedure in light of recent exonerations); *cf.* DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 57–77 (2012) (arguing that police departments have played a role in the resistance to scientific developments).

[14] Society's relative concerns about even the search for evidence does not map onto the way in which the Supreme Court chooses to regulate—and not regulate—search and seizures. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*,*"* 42 DUKE L.J. 727 (1993) (describing results of an empirical study on how relatively invasive society regards government intrusion). Obviously, police brutality claims presently occupy a very high profile, but those cases do not involve searches for evidence. As the Supreme Court recognized in *Terry v. Ohio*, constitutional criminal procedure does little to prevent police misconduct that is not designed to obtain evidence, as the exclusionary rule is the primary remedy for police misconduct. 392 U.S. 1, 15–16 (1968); *see also* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 446 (1995) ("The vast majority of the many rules that govern how police deal with suspects do not concern the level of force the police apply. Rather, these rules govern what police can see or hear.").

[15] *See, e.g.*, Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011) ("[J]udicial decisions interpreting the Fourth Amendment are infamous for their byzantine patchwork of protections.").

greater concern about reliability in eyewitness identification,[16] while federal courts are increasingly unwilling to exclude reliable but illegally obtained evidence.[17] Yet, there has been no substantial effort to overhaul or overrule the basic framework of constitutional criminal procedure.[18] Instead, courts have identified circumstances, which have not been previously considered and are unrelated to the reliability of the evidence, in which evidence otherwise inadmissible under Warren Court doctrines may be admitted.[19] Understanding that our scheme of criminal procedure has its origins in Prohibition—a quirky period in America's past—should make courts more willing to overhaul criminal procedure in ways that are at least no less sensitive to the risks of wrongful conviction than they are to risk of improper searches.

Part I of this article lays the foundation for the historical claim, illustrating the role Prohibition played in creating and prompting widespread acceptance of a rule excluding reliable but illegally obtained physical evidence to deter improper searches. Part II then demonstrates how the Prohibition-created fear of investigatory police practices reoriented rules on confessions to exclude statements because of police misconduct rather than concerns about the reliability of improperly obtained confessions. Finally, Part III describes the efforts of the Supreme Court to cabin, but not

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[16] *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 801–02 & n.300 (2013) (describing statutes in Illinois, Montana, and North Carolina identifying lack of reliability as a basis for excluding evidence and calling on courts in those states and elsewhere to screen confessions for lack of reliability); Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 VILL. L. REV. 69, 78–81 (2013) (discussing state court decisions making it more difficult for prosecution to admit identifications from suggestive lineups).

[17] *See* Joëlle Anne Moreno, *Rights, Remedies, and the Quantum and Burden of Proof*, 3 VA. J. CRIM. L. 89, 98–103 (2015) (describing the Roberts Court expansion of the Fourth Amendment good faith exception).

[18] *See* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1060 (2002) ("[T]he Burger and Rehnquist Courts fundamentally reworked constitutional criminal procedure through a gradual yet highly effective process of limiting and chipping away at, and occasionally overruling, Warren-era precedents.").

[19] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2504 (1996). Steiker explains:

> While the Court has left relatively intact its instruction to police officers about proper police practices (conduct rules), it has changed radically the consequences of violating those instructions (decision rules). While the Court did not purport to overrule the Fourth Amendment exclusionary rule, just as it declined to overturn *Miranda* or *Massiah*, the Court nevertheless promulgated a series of what I call "inclusionary rules."

Id.

fundamentally overhaul, this politically unpopular scheme of police regulation, leaving largely unregulated the process of eyewitness identifications.

I. PROHIBITION LED TO ACCEPTANCE OF EXCLUSION OF RELIABLE PHYSICAL EVIDENCE

The bulk of any course on investigatory criminal procedure involves limits on searches for, and to a lesser extent seizures of, tangible and intangible evidence.[20] Courts have created more doctrines regulating police tactics designed to uncover and obtain physical evidence and recordings than they have for any other techniques of law enforcement.[21] And, of course, this evidence is almost always quite reliable.[22] Unless planted, the marijuana found in a defendant's pocket in all likelihood belongs to him; the conversation intercepted on a wiretap is unlikely to falsely incriminate the parties. The extensive limitations on the ability of police to obtain reliable evidence are a relic of Prohibition.

The existence of a vast body of law governing searches and seizures is not surprising. The exclusionary rule, which forbids the use of illegally obtained evidence in criminal prosecutions, has given a host of litigants, for almost a century, an incentive to require judges to define the parameters of legitimate searches and seizures.[23] The existence of the *exclusionary rule* is

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[20] A look at any of the leading casebooks on criminal procedure illustrates this point. *See, e.g.*, RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE (4th ed. 2016) (discussing the Fourth Amendment doctrine for 436 of 624 pages); JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (5th ed. 2013) (investigatory doctrines relate to Fourth Amendment issues for 403 of 683 pages).

[21] *See* Russell D. Covey, *Interrogation Warrants*, 26 CARDOZO L. REV. 1867, 1867–68 (2005) (arguing that the privacy protections of the Fourth Amendment should be extended to interrogations as the Fourth Amendment provides greater protections).

[22] *See* Office of Legal Policy, U.S. Department of Justice, Report to the Attorney General on the Search and Seizure Exclusionary Rule (1986), *reprinted in* 22 U. MICH. J. L. REFORM 573, 610 (1989) ("The exclusionary rule excludes the most reliable evidence . . . .").

[23] Those criticizing the Supreme Court's decision in *Davis v. United States*, holding that evidence seized consistent with existing precedent is admissible, argue that without an incentive to litigate Fourth Amendment issues, litigants will not bring new issues, and when they do, courts will not be able to rule for defendants; thus Fourth Amendment doctrines will not further develop. 131 S. Ct. 2419, 2438 (2011) (Breyer, J., dissenting); Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2010–2011 CATO SUP. CT. REV. 237, 253 (2011) ("*Davis v. United States* wrestle[s] with the tension between the development of Fourth Amendment law and the availability of Fourth Amendment remedies.").

the surprising part. The tradeoff the rule makes between reliability in criminal trials and deterring police misconduct is so radical—and such a breach from history—that one would expect that a substantial change in circumstances would have been required to create it. Yet the connection between the exclusionary rule and Prohibition has been largely overlooked.

The rule was roundly rejected prior to Prohibition as undermining the reliability of trials.[24] The country's split personality on Prohibition meant that many would have liked to see the bootlegger—and certainly the bootlegger's customer—go free.[25] Even more were willing to let the bootlegger go free to deter police from engaging in the aggressive searches for alcohol that have come to be iconic images from the Roaring '20s.[26]

The full history of the exclusionary rule—and therefore the depth of the connection between Prohibition and the rule—is not well known, as most scholars assume the United States Supreme Court created the rule in *Boyd v. United States* in 1886.[27] A willingness to sacrifice reliability to deter

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[24] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786–87 (1994) (citing examples of nineteenth century judges rejecting that the admissibility of evidence turns on the method of its seizure).

[25] *See* J. ANNE FUNDERBURG, BOOTLEGGERS AND BEER BARONS OF THE PROHIBITION ERA 163 (2014) (observing that many Philadelphia-area magistrates objected to Prohibition and the search and seizure efforts required to enforce it).

[26] *Id.* (observing that some Philadelphia area magistrates objected to the efforts to enforce Prohibition but not necessarily to Prohibition itself); *cf.* Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 CENT. L.J. 113, 122 (1924) (observing, and lamenting, that enforcement of Prohibition could not occur without effectively repealing the Fourth Amendment).

[27] Boyd v. United States, 116 U.S. 616 (1886). United States Supreme Court Justice Potter Stewart, writing in one of the country's leading scholarly publications, is among those to ignore the development of the exclusionary rule in state cases prior to *Boyd*. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983) ("[T]he first case associated with the development of the exclusionary rule is *Boyd v. United States*."); *see also* United States v. Peltier, 422 U.S. 531, 551 n.9 (1975) (Brennan, J., dissenting) (describing *Boyd* as origin of exclusionary rule); TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 3 (2012) ("*Boyd v. United States* and *Weeks v. United States* [] established the foundation for what would become the rule that individuals were entitled to keep illegally acquired evidence out of criminal proceedings."); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 107 (1937) ("The first [Fourth Amendment] case of real importance was decided in 1886. This was *Boyd v. United States*, one of the leading cases on the subject of search and seizure, a case which did much to chart the subsequent course of federal law."); Amar, *supra* note 24, at 787 (describing *Boyd* as the case that allowed the exclusionary rule to "creep" into American law); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure,* 93 MICH. L. REV. 1016, 1017–18

unlawful liquor searches, however, pre-dated the period of National Prohibition by many decades and was prompted by state-level alcohol laws.[28] In the mid-nineteenth century, states throughout the Northeast and Midwest adopted versions of Prohibition.[29] Fears of unlawful liquor searches under these laws led a number of these states to adopt a version of the exclusionary rule limited to unlawful alcohol searches.[30]

Liquor prosecutions under these laws were initiated when complainants alleged that alcohol could be found in a particular place and at least one complainant described the reason for believing the alcohol could be discovered in this location.[31] In a world of only a few nascent metropolitan

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(1995) ("*Boyd* . . . laid the foundation for modern search and seizure and self-incrimination doctrine."). *But see* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 45 (1969) ("The exclusionary rule for unlawfully obtained evidence made its appearance in Iowa in 1903, and was adopted for the federal judiciary by the Supreme Court decision in the *Weeks* case in 1914.").

[28] *See* Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 399–419 (2011) [hereinafter Oliver, *Modern History*]; Wesley M. Oliver, *Portland, Prohibition, and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure*, 23 ME. B.J. 210, 214–17 (2008).

[29] WILLIAM BLACKWOOD & SONS, BLACKWOOD'S EDINBURGH MAGAZINE 211 (1867) (identifying the 13 states to adopt Prohibition in the mid-nineteenth century); *see also* Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 141 (Mark H. Moore & Dean R. Gerstein eds., 1981). Prohibition did not extend to the southeast in the nineteenth century because of the linkage between the Temperance Movement and the Abolition Movement, though Prohibition nearly succeeded in parts of the antebellum South, such as Kentucky. *See* Thomas H. Appleton, Jr., *"Moral Suasion Has Its Day": From Temperance to Prohibition in Antebellum Kentucky*, *in* A MYTHIC LAND APART: REASSESSING SOUTHERNERS AND THEIR HISTORY 19–42 (John David Smith & Thomas H. Appleton, Jr. eds., 1997). Ironically, Prohibition then found some of its strongest support in the south in the early twentieth century as the Ku Klux Klan, with its strongest (though not exclusive) support in the southeast, strongly supported Prohibition. KATHLEEN DROWNE, SPIRITS OF DEFIANCE: NATIONAL PROHIBITION AND JAZZ AGE LITERATURE, 1920–1933, at 20 (2005); Kris Durocher & Amy Louise Wood, *Ku Klux Klan, Second (1915–1944)*, *in* 24 NEW ENCYCLOPEDIA OF SOUTHERN CULTURE 228–29 (Thomas C. Holt & Laurie B. Green eds., 2013).

[30] *See* State v. Staples, 37 Me. 228, 230 (1854) (arresting conviction as complaint authorizing search for alcohol was found to be inadequate since it failed to describe basis of complainant's belief of location of liquor); Fisher v. McGirr, 67 Mass. 1, 6 (1 Gray 1) (1854) (discussing action to recover value of liquor seized on the basis of improper complaint, which was analogous to modern search warrant); People v. Toynbee, 11 How. Pr. 289, 330 (N.Y. Gen. Term 1855) (Strong, J.) ("The complaint [analogous to the modern affidavit in support of a search warrant] is a substitute for an indictment . . . and requires at least as much particularity."); State v. Twenty-Five Packages of Liquor, 38 Vt. 387, 390–92 (1866) (recognizing that action to forfeit liquor could be quashed when search warrant in insufficiently particular).

[31] There was some variation in the requirements for warrants in various states during the

police forces, the enforcement of these laws fell on private citizens, the most zealous possible enforcers of state prohibitory laws.[32] Beyond concerns about the new laws—and the searches that would be necessary to make them effective—the objectivity of these witnesses raised serious concerns.[33]

Appellate courts responded by developing a mechanism to limit over-reaching by these aggressive volunteer agents.[34] Judgments of conviction were set aside when complainants failed to adequately describe a basis for believing alcohol could be located in the place searched. These courts regarded the entire prosecution to be a nullity, because the complaint, the charging instrument, was invalid.[35] Though this mechanism was limited to liquor cases, and limited to cases involving bad complaints (what modern lawyers would describe as invalid warrant applications), [36] this mid-nineteenth century innovation was undeniably an early version of the

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mid-nineteenth century version of Prohibition. Some states required more than one complainant, but many obviously did not. Not all states required the complainant to describe the reasons for his belief that alcohol could be found in a particular location. The practice of permitting a complainant to assert his belief that alcohol could be found in a particular location continued in some places through National Prohibition in the 1920s, when such a basis for a search warrant for liquor was struck down in *Nathanson v. United States*, 290 U.S. 41 (1933). Many states, however, began to require, for the first time in ordinary criminal cases, complainants to provide magistrates a basis for their suspicions. *See* Oliver, *Modern History*, *supra* note 28, at 403–08 (describing development of requirement that a complainant provide a basis for his suspicions in nation's first prohibitory law in Maine). This was actually quite an innovation in search and seizure law, which had previously merely required a complainant to allege that he believed evidence of a crime could be discovered in a particular place. Fabio Arcila and I examined form books and actual warrant applications from the late eighteenth and early nineteenth century to arrive at this conclusion. *See id.*; Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 40 (2007) (observing that "justices of the peace presented with search warrant applications easily could have concluded that they did not have an absolute duty to engage in probable cause sentryship."); Oliver, *Modern History*, *supra* note 28, at 378 ("Probable cause was essentially a pleading requirement. . . ."). *But see* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal and Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 78 n.122 (2010) (relying on magistrate's manuals to conclude that magistrates required affiants to provide the basis of their reasoning).

[32] *See* FRANK L. BYRNE, PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE 39 (1961).

[33] *Id.* at 42.

[34] *See* Oliver, *Modern History*, *supra* note 28, at 410–11.

[35] *Id.*

[36] The Supreme Judicial Court of Maine ruled in 1873 that a judgment of conviction would not be arrested if an officer seized liquor without a complaint. State v. McCann, 61 Me. 116, 118 (1873).

exclusionary rule. Courts were refusing to permit prosecutions for liquor possession to proceed because of the unlawful manner in which the contraband alcohol was seized.

Contemporaneous with the adoption of the Eighteenth Amendment, most states enacted provisions complementing the federal ban on alcohol.[37] As states attempted to enforce these new laws, state courts began anew to embrace a rule that prevented a conviction when the police employed unlawful means to search for alcohol.[38] The early twentieth century versions of the exclusionary rule in the states, consistent with the federal rule and unlike their nineteenth century predecessors, were not specific to liquor enforcement.[39]

Certainly federal courts, first with the opinion in *Boyd v. United States*[40] and then more clearly in *Weeks v. United States*,[41] fashioned a version of the exclusionary rule in federal prosecutions prior to Prohibition that was not limited to liquor cases. *Silverthorne Lumber Co. v. United States* made clear that this version of the federal exclusionary rule was not merely a generic version of the state rules in liquor cases ordering the return of property.[42] *Silverthorne* not only required the improperly seized property to be returned but also barred the use of the information learned from improperly seized documents.[43] This version of the exclusionary rule was not just limited to liquor cases or the remedy of replevin, as almost all of the pre-Prohibition state rules had been. Before Prohibition, then, the federal courts had gone far beyond the state court decisions in liquor cases and created a rule greatly resembling the rule applicable in modern courts. State courts, however, did not embrace this version of the rule until Prohibition.

Even at the turn of the twentieth century, well prior to incorporation of the guarantees in the U.S. Constitution against state encroachment,[44] it would

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[37] *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 24–25 (2006).

[38] *See* Allen, *supra* note 3, at 250.

[39] *Id.*

[40] Boyd v. United States, 116 U.S. 616 (1886).

[41] Weeks v. United States, 232 U.S. 383 (1914) (holding the illegally seized papers must be returned to defendant and may not be used in his trial).

[42] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[43] *Id.* at 391.

[44] *See* Kenneth Katkin, *"Incorporation" of the Criminal Procedure Amendments: The View from the States*, 84 NEB. L. REV. 397, 397–99 (2005) (describing the period of incorporation from 1932 to 1969). The United States Supreme Court's first effort to exert supervision of any sort over state court proceedings appears to have occurred in *United States*

seem hard to argue that precedents of the U.S. Supreme Court had little relevance. The reality was, however, that federal decisions had little impact on the American criminal justice system at that time. The FBI was not created until 1908.[45] Federal proceedings even today constitute only a small percentage of the total number of criminal prosecutions in this country,[46] but in the late nineteenth and early twentieth centuries, the federal criminal docket was negligible.[47] Federal procedures, while providing persuasive insights on how states might administer their criminal justice systems, were applied so infrequently as to barely be detectable. Prior to the *Weeks* decision, it was often claimed that only one state adopted a generic version of the exclusionary rule—Iowa in 1903,[48] almost twenty years after *Boyd* and a decade before *Weeks*.[49] Almost immediately after efforts began to enforce Prohibition, however, states began to adopt the exclusionary rule.

Prohibition awakened Americans to threat of unlawful searches and seizures. Prohibition prompted officers to conduct searches that much of society found offensive.[50] An Assistant United States Attorney handling liquor cases in New York City observed in 1923:

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v. Shipp, in which the Court, under the Due Process Clause of the Fourteenth Amendment, ordered a retrial of a defendant who received a sham of a trial in state court, and ordered the defendant transferred to federal custody for his protection pending trial. 214 U.S. 386 (1909). In *Shipp*, the Court held the sheriff in contempt for failing to protect the defendant from a lynch mob. *Id.* at 386–87. For an incredible description of the extraordinary facts of the case, *see* MARK CURRIDEN & LEROY PHILLIPS, JR., CONTEMPT OF COURT: THE TURN OF THE CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM (1999), which should be required reading for admission to any bar in this country.

[45] UNITED STATES GOVERNMENT, THE FBI: A CENTENNIAL HISTORY, 1908–2008 (2011).

[46] Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 675–79 (1997) (observing that while state prosecutions are far more common than federal prosecutions, the likelihood of conviction, and the penalty, in federal court is considerably higher).

[47] Thomas J. Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?"*, 50 SYRACUSE L. REV. 1317, 1322–30 (2000) (describing history of federal regulation of crime). Learned Hand, then a United States District Judge in Manhattan, opposed Prohibition because it flooded federal courts, turning them into low-level criminal courts. *See* MICHAEL A. LERNER, DRY MANHATTAN: PROHIBITION IN NEW YORK CITY 85–86 (2007).

[48] State v. Sheridan, 96 N.W. 730 (Iowa 1903). Interestingly, though, the *Sheridan* opinion reads much like the nineteenth century liquor cases that arrested a judgment of conviction and returned illegally seized alcohol to the victim of the illegal search. The Iowa Supreme Court reasoned in *Sheridan* that "parties will be restored to the rights and positions they possessed before they were deprived thereof by . . . fraud, violence, or abuse of legal process." *Id.* at 731.

[49] *See* Allen, *supra* note 3, at 249–50. Sarah A. Seo, The Fourth Amendment, Cars, and Freedom in Twentieth Century America 103 (Ph.D. dissertation, Princeton Univ. 2016).

[50] *See, e.g.*, John Barker Waite, *Evidence—Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685–86 (1944) (describing destruction of bars once alcohol was found).

> For a time after the Volstead Act went into effect . . . few persons, even among lawyers, conceived the idea of questioning any Federal Government agent's right to search for and seize contraband liquor as he felt inclined or as his suspicions directed. The agents themselves, and many of their superiors, felt secure in their right to do so as Government officials.[51]

The Wickersham Commission observed in 1931 that Prohibition had gotten off to a "bad start" in part because:

> High-handed methods, shootings and killings, even where justified, alienated thoughtful citizens, believers in law and order. Unfortunate public expressions by advocates of the law, approving killings and promiscuous shootings and lawless raids and seizures and deprecating the constitutional guarantees involved, aggravated this effort. Pressure for lawless enforcement, encouragement of bad methods and agencies of obtaining evidence, and crude methods of investigation and seizures on the part of incompetent or badly chosen agents started a current of adverse opinion in many parts of the land.[52]

The relationship between the new federal and state liquor laws, their enforcement, and the adoption of the exclusionary rule has been grossly understated. Zechariah Chafee in 1922 attributed the adoption of the exclusionary rule in the states to "the effect of the Supreme Court decisions [in *Boyd, Weeks,* and *Silverthorne*] . . . beginning to be felt."[53] John Henry Wigmore, perhaps the most vocal critic of the exclusionary rule, objected in principle to the exclusion of reliable evidence as undermining the truth-seeking function of a court to deter police misconduct.[54] Wigmore's Prohibition-era rants against the exclusionary rule did not observe that the public had become outraged by a rash of police misconduct in the search for alcohol, nor did his post-Prohibition objections to the exclusionary rule contend that the misconduct prompting the rule's widespread-adoption no longer existed.[55] Finally, the Wickersham Commission's broad-reaching consideration of the criminal justice system, a study prompted by the effect Prohibition had on law enforcement, did not weigh in at all on the fact, or

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[51] Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923, at X14.

[52] NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 722, at 45, 46 (1931).

[53] Zechariah Chafee, Jr., *The Progress of the Law, 1919–1922*, 35 HARV. L. REV. 673, 696 (1922).

[54] *See* John Henry Wigmore, *Using Evidence Obtained by Illegal Searches and Seizures*, 8 A.B.A. J. 479 (1922).

[55] *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2184 (2d ed. 1923); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2184 (rev. 1961).

wisdom of the exclusionary rule.[56]

Nevertheless, the primary role Prohibition had in making the exclusionary rule the primary method of police regulation cannot be denied. The majority of states to adopt the exclusionary rule prior to *Mapp v. Ohio* did so during Prohibition,[57] and did so in cases involving violations of their state's prohibitory laws.[58] In fact, only two of the states that adopted and maintained the exclusionary rule during Prohibition did so in cases that did not involve violations of liquor laws.[59]

The role of Prohibition may best be illustrated by the exclusionary rule's history in New York State. In 1903, the New York Court of Appeals stated in *People v. Adams*, as many other state courts had, that the manner in which evidence was obtained did not affect its admissibility.[60] Nevertheless, a flurry

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[56] *See* Records of the Wickersham Commission on Law Observance and Enforcement.

[57] Elkins v. United States, 364 U.S. 206, 224–25 (1960) (listing state court cases adopting exclusionary rule); *see* Allen, *supra* note 3.

[58] *See* Atz v. Andrews, 94 So. 329 (Fla. 1922) (alcohol seized in restaurant); State v. Arregui, 254 P. 788 (Idaho 1927) (bare-bones accusation of liquor sale in a search warrant application is insufficient); People v. Castree, 143 N.E. 112 (Ill. 1924) (officers, in search for liquor, exceeded scope authorized by warrant); Flum v. State, 141 N.E. 353 (Ind. 1923) (still discovered on property broadly described in warrant); Youman v. Commonwealth, 224 S.W. 860 (Ky. 1920) (search of home for liquor without warrant); People v. Marxhausen, 171 N.W. 557 (Mich. 1919) (search of home for liquor without warrant); Tucker v. State, 90 So. 845 (Miss. 1922) (search of home for liquor without warrant); State v. Owens, 259 S.W. 100 (Mo. 1924) (search of person for liquor without suspicion); State *ex rel.* King v. Dist. Ct. of Fourth Judicial Dist. Missoula Cty., 224 P. 862 (Mont. 1924) (search of buildings inadequately described in warrant); Gore v. State, 218 P. 545 (Okla. Crim. App. 1923) (mere belief that alcohol can be found at the location in question found insufficient to justify a warrant); State v. Gooder, 234 N.W. 610 (S.D. 1930) (mere belief that alcohol was at the scene); Hughes v. State, 238 S.W. 588 (Tenn. 1922) (recognizing in case involving seizure of alcohol post-arrest, that illegally obtained evidence should be suppressed); State v. Gibbons, 203 P. 390 (Wash. 1922) (search of automobile for liquor unlawful); State v. Wills, 114 S.E. 261 (W. Va. 1922) (dependent was arrested without cause and had alcohol on him); Hoyer v. State, 193 N.W. 89 (Wis. 1923) (search of a car without probable cause yielded five bottles of liquor). Interestingly, the Texas Legislature enacted a statute creating the exclusionary rule after the Texas Court of Criminal Appeals rejected the exclusionary rule in a liquor case. Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 195–98 (1981).

[59] *See* State v. Laundy, 204 P. 958 (Or. 1922) (sabotage case); State v. George, 231 P. 683 (Wyo. 1924) (larceny case). New York, much like many northern states, had adopted a liquor-specific mechanism functioning much like the modern exclusionary rule in the mid-nineteenth century.

[60] People v. Adams, 68 N.E. 636, 638 (N.Y. 1903) ("[T]he court, when engaged in trying a criminal cause, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence.").

of trial and appellate court opinions during Prohibition began to exclude evidence obtained as a result of unlawful police conduct.[61] Of course, Judge Cardozo in 1926, which would seem to be the height of Prohibition, famously rejected the exclusionary rule. Cardozo, writing for the New York Court of Appeals, quite memorably wrote that the criminal should not go free because the constable blundered.[62]

New York had a reputation for being a fairly progressive jurisdiction and Benjamin Cardozo similarly had a reputation as being a fairly progressive judge. Cardozo's rejection of the exclusionary rule therefore often has served as a compelling argument for opponents of the rule. The history of Prohibition in New York, however, explains why Cardozo would not have had the same concerns as many other judges of his era. After the election of Al Smith as Governor of New York in 1922, New York repealed its prohibitory law, meaning that officers were no longer searching for alcohol.[63] New York courts followed *Adams* until Prohibition when trial and appellate courts began to embrace the exclusionary rule, but by the time the New York Court of Appeals was called upon to re-consider the exclusionary rule in 1926, Prohibition had effectively ended in the Empire State, even though the federal effort at Prohibition would continue until 1933.

With *Mapp* in 1961, the Supreme Court required the strong minority of states that had not yet adopted the exclusionary rule to exclude illegally obtained evidence to deter unlawful searches and seizures and preserve the integrity of the judiciary.[64] Remarkably, one of the Court's arguments for imposing this requirement on the states was the trend of state courts to embrace the rule.[65] Prohibition thus not only prompted a number of states to

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[61] *See, e.g.*, People v. Kinney, 185 N.Y.S. 645 (Crim. Ct. 1920) (ordering return of defendant's revolver discovered in a search of his home for opium on the basis of an invalid warrant); State v. One Hudson Cabriolet Auto., 190 N.Y.S. 481, 481–82 (Saratoga Cty. Ct. 1921) (returning alcohol seized and dismissing action for unlawful alcohol possession); People v. 738 Bottles of Intoxicating Liq., 116 Misc. 252, 257 (Saratoga Cty. Ct. 1921) (holding that dismissal and return of alcohol is the appropriate remedy for unlawfully seized alcohol); People v. Jakira, 193 N.Y.S. 306 (Ct. Gen. Sess. 1922) (seizure of pistol in residence without warrant required suppression); *In re* Search Warrant to Search & Seize Intoxicating Liqs., 190 N.Y.S. 574 (Orange Cty. Ct. 1921) (search of address other than one listed in warrant required suppression of evidence discovered).

[62] People v. Defore, 150 N.E. 585 (N.Y. 1926).

[63] Post, *supra* note 37, at 32–33 (discussing Al Smith's view that the states were not required to assist the federal prohibitory effort); Comment, *Enforcement of the 18th Amendment in the Absence of State Legislation*, 36 YALE L.J. 260, 260 (1926) (observing New York's repeal of the Mullan-Gage Act).

[64] Mapp v. Ohio, 367 U.S. 643, 659–60 (1961).

[65] *Id.* at 651–52, 660.

adopt the rule, but played the largest role in the Supreme Court imposing this rule on states long after the repeal of the Eighteenth Amendment.

Even though he failed to recognize the social circumstances prompting the creation of the exclusionary rule, Dean Wigmore's description of the rule was undeniably correct—reliable evidence is sacrificed to deter misconduct. Courts in the past few decades have been more sensitive to the loss of reliable evidence.[66] The limits of the Fourth Amendment have increasingly shrunk since the early 1970s as categories of exceptions have been carved to the exclusionary rule.[67] More recently, the Supreme Court and lower federal courts have expanded good faith rules to prevent the exclusion of reliable evidence.[68] Nevertheless, the rules governing searches and seizures for reliable evidence remain more complex and restrictive than constitutional rules governing either interrogations or identification procedures, each of which pose significant risks for false conviction.[69]

II. THIRD DEGREE FEARS OF THE ROARING '20S TAKE FOCUS OFF RELIABILITY

The public's keen awareness of police lawlessness during the era of Prohibition reoriented the focus of American law on confessions from reliability to deterrence. Up until the Prohibition Era, confessions obtained by improper methods were excluded because the methods were believed to

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[66] Laurence Naughton, *Taking Back Our Streets: Attempts in the 104th Congress to Reform the Exclusionary Rule*, 38 B.C. L. REV. 205, 220 (1996) ("In recent years . . . the Supreme Court has determined with increasing frequency that the cost of excluding reliable evidence outweighs the deterrent effect that suppression would produce.").

[67] *See* Smith, *supra* note 18, at 1060 (describing the chipping away of Fourth Amendment protections); Steiker, *supra* note 19, at 2500 (describing the Court's presentation of Warren Court doctrines but limiting their reach).

[68] *See, e.g.*, Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (describing and criticizing Supreme Court's decision finding that good faith record-keeping errors by police will not require exclusion); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 484–89 (2009) (same); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 786–87 (2009) (same). The Supreme Court and lower federal courts are very rapidly expanding the good faith exception. *See* Heien v. North Carolina, 135 S. Ct. 530 (2014) (incorrect interpretation of traffic law by officer will not yield suppression); *see also* United States v. Katzin, 769 F.3d 163 (3d Cir. 2014) (finding police officers reasonably relied on precedent allowing warrantless tracking by crude beepers to assume that warrantless GPS tracking was acceptable).

[69] *See* Stuntz, *supra* note 14.

risk false confessions.[70] Third-degree methods became a concern for the first time during Prohibition despite the much older lineage of these abuses.[71] Understandably, courts wanted to deter torture, whether it created a risk of producing or produced false confessions, but Prohibition has left us with a scheme of regulating confessions that under-appreciates reliability concerns.[72] The very real possibility of false confessions, revealed by recent exonerations, shows that the constitutional scheme regulating confessions leaves something to be desired.[73]

The Supreme Court has, from its first interrogation cases, assumed the Due Process Clause requires that a confession satisfy the common law voluntariness test. Voluntariness is, and has always been, a term of art. Because it is impossible to read minds, there is certainly no way to know when a statement has been involuntarily extracted—or, what it would mean to involuntarily extract a confession. The Supreme Court has recognized that, in some sense, all confessions are involuntary in that they are prompted by an official request for a statement from a suspect.[74] Until Prohibition, however, courts considering the voluntariness of a statement looked at factors the court believed to bear on the statement's reliability. In a time when false confessions were not studied as they are today, surely there was often considerable guesswork involved, but confessions were nevertheless excluded because of fears that they would falsely incriminate the accused. As Prohibition created a fear of police excesses, the voluntariness test was re-

[70] *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 323–25, 331 (1998) (observing that pre-1936 cases were based on reliability though claiming *Bram v. United States*, 168 U.S. 532 (1897), was not a departure from reliability in the Supreme Court); *cf.* Leo et al., *supra* note 2, at 492–93 (contending that *Bram* was also motivated by reliability concerns).

[71] Widespread third-degree tactics are widely believed to have begun in the United States in the late-nineteenth century. *See* Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 52 (G. Daniel Lassiter ed., 2004); *see also* TIMOTHY J. GILFOYLE, A PICKPOCKET'S TALE: THE UNDERWORLD OF NINETEENTH CENTURY NEW YORK 249–52 (2006) (describing career of Inspector Thomas J. Byrnes, who is widely credited with bringing routine uses of the third degree to the New York Police Department).

[72] Well before *Miranda*, the voluntariness test did not contemplate the reliability of a confession, nor does it in the post-*Miranda* world. *See* Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2014–20 (1998) (observing that interrogation law is concerned with conduct of the officers, not the reliability of the confession).

[73] *See* Leo et al., *supra* note 2, at 499 (objecting to lack of reliability in the consideration of admissibility of confessions).

[74] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973); *see also* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979).

conceptualized to prevent police conduct in interrogation rooms that overbear the will of the suspect.

Historically, though, voluntary was a synonym for reliable. American cases typically trace the origins of the voluntariness rule to the English case of *Regina v. Warickshall* (1783), a case that actually deals with the admission of evidence gathered as a result of an unlawfully obtained confession, rather than the admissibility of a confession itself. Jane Warickshall confessed to receiving stolen property after receiving "promises of favour," and the details of that confession led to the discovery of the stolen property "between the sackings of her bed."[75] The court rejected the idea that confessions obtained through trickery or threats should be excluded to discourage interrogators from making threats or offering promises.[76] The fruits of the confession were admissible, the court reasoned, because once the property was located, the accuracy of the confession was no longer in doubt. However, statements obtained by threats or promises were not necessarily reliable and thus, the court reasoned, inadmissible:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt. . . . [B]ut a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[77]

The court reasoned that the discovery of the stolen goods hidden in Warickshall's bed was an incriminating fact whose evidentiary value did not depend on whether the confession was true or false.[78] If confessions were excluded to deter the use of threats or promises in interrogations, then there would certainly be some value to excluding the fruits of improperly induced statements.

When the Supreme Court held in *Bram v. United States* in 1897 that due process required a confession to be voluntary, reliability would remain at least one of the reasons.[79] Though the Court also raised a concern that confessions should not be obtained at the cost of sacrificing individual autonomy, the Court continued to view the voluntariness rule as preventing

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[75] The King v. Warickshall (1783) 168 Eng. Rep. 234 (K.B.) 234; 1 Leach 263, 263.

[76] *Id.* (describing as a "mistaken notion" the view that such confessions are "to be rejected from a regard to public faith").

[77] *Id.* at 235.

[78] *Id.*

[79] Bram v. United States, 168 U.S. 532 (1897); *see* Leo et al., *supra* note 2, at 492–93 (observing that the Court grounded the basis for excluding the statement "in both the idea of reliability and the idea of individual freedom").

the consideration of false confessions.[80] To prevent this risk, the Court continued to embrace the very restrictive view on interrogation tactics that had appeared in *Warickshall* and a number of treatises before and after *Warickshall*: "A confession . . . whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, . . . is not admissible evidence."[81]

As the Supreme Court's first meaningful foray into confessions law, *Bram v. United States* can hardly be ignored.[82] But *Bram* is a puzzling case. The officer's promise, if it can be so construed, hardly seemed to threaten the statement's reliability or implicate a concern other than accuracy. The Court, however, ignored a very real threat of physical violence against the suspect, a threat that was increasingly becoming a routine part of police interrogations, and focused on the vaguest of promises for confessing.[83] *Warickshall*'s very strict prohibition on threats and promises thus co-existed with routine torture in interrogation rooms, a dichotomy one can see even in the *Bram* opinion itself.

Bram, the first mate on a ship, was accused of murdering the ship's captain, the captain's wife, and the second mate with an ax.[84] The crew, having reason to suspect Bram and another member of the crew, placed them both in irons until the ship reached Halifax, Nova Scotia, where they were

[80] *See* Leo et al., *supra* note 2, at 492–93.

[81] *Bram*, 168 U.S. at 547.

[82] The Court had previously considered the issue of voluntariness in *Hopt v. Utah*, which observed in a quite cursory fashion that there was no evidence contradicting the lower courts' finding that a statement was voluntary. 110 U.S. 574, 584 (1884). Interestingly, the Court observed in *Hopt* that "the rule against [a confession's] admissibility has been sometimes carried too far; in its application justice and common sense have too frequently been sacrificed at the shrine of mercy." *Id.* Three years later, the Court's opinion in *Bram* would provide perhaps the high-water mark of the type of mercy the Court decried. *See, e.g.*, Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 477 (2005) ("Many slight pressures applied by the police to a suspect that would have been considered unconstitutional under *Bram's* highly protective standard would now be considered permissible as being insufficient to overbear the will of most suspects.").

[83] *See* Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 454–56 (1938) (objecting to statements produced by "unlicensed barbarity of the practice, which is almost a routine in some parts of the country, of torturing prisoners to extort confessions," but arguing that statements produced by promises should be excluded only if untrustworthy).

[84] *Bram*, 168 U.S. at 535–36.

separately interrogated by local authorities.[85] Before any questioning began, the detective interrogating Bram began to strip him naked.[86] As odd as this procedure may seem to modern readers, the meaning of the act was likely not lost on Bram.[87] Lashing was a common punishment, both on the high seas and in American jails during the nineteenth century.[88] Victims were stripped of their clothing to make the punishment more painful and humiliating. Further, third-degree interrogation tactics were widely practiced, and were known to be widely practiced by the late nineteenth century. Bram had to believe that he was about to be whipped when the detective began his questioning.[89]

It was not, however, the implicit threat of torture that the Supreme Court found objectionable in *Bram*, it was the hope of benefit that the detective held out with his questions. During the interrogation, he stated, "If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."[90] This appeal to the defendant's conscience was sufficient to render the confession inadmissible, and was the only part of the events surrounding the interrogation that the Court found worthy of mentioning in its voluntariness analysis.

> Conceding that, closely analyzed, the benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally imported a suggestion of some benefit as to the crime

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[85] *Id.* at 561.

[86] *Id.* at 561–62.

[87] *Id.* at 563–64.

[88] *See, e.g.*, MARK E. KANN, PUNISHMENT, PRISONS, AND PATRIARCHY: LIBERTY AND POWER IN THE EARLY AMERICAN REPUBLIC 158 (2005) ("Penal reformers and officials who approved of the use of the whip to discipline prisoners defended it against charges of cruelty, barbarism, and injustice by portraying it as normal, moral, and effective. Well into the nineteenth century, whipping was a ubiquitous punishment administered by parents to children, teachers to students, and officers to sailors and soldiers."); *Art. V—Report of the Massachusetts State Prison (Documents of the Senate, January, 1846.* No. *3.)*, 2 PA. J. PRISON DISCIPLINE & PHILANTHROPY 183, 185–93 (1846) (describing debate over whether lashings ought to be abandoned in prisons).

[89] *See* Murphy v. United States, 285 F. 801, 812–13 (7th Cir. 1923) (concluding that Bram's confession was involuntary, not because of an implied promise of a benefit, but because stripping Bram was an implicit threat of flogging).

[90] *Bram*, 168 U.S. at 564.

and its punishment as arising from making a statement.[91]

Bram quickly became perhaps the most irrelevant Supreme Court case in the history of American criminal justice—announcing a rule too restrictive of police questioning to be followed and completely out of touch with even the realities of contemporary police practices implicated by its facts.[92] *Bram* would also provide state courts a basis for treating police violence as something other than a threat or promise. Such a decision could not have come at a worse time, as third-degree tactics were just starting to become commonplace in American police stations at the time *Bram* was decided.

While examples of torture-induced confessions are as old as confessions themselves, the systematic use of torture as a regular feature of American police interrogation is widely believed to have commenced in the late 1800s.[93] While there were concerns raised about police brutality, especially in the early years of the New York Police Department, the public ultimately looked the other way as Progressives like New York Police Commissioner Teddy Roosevelt argued that a police force, free of corruption, could be trusted to use physical violence against the right people.[94] Police, Progressives argued, could been trusted to identify guilty suspects and abuse them with locust clubs on the street. Progressive reformers were less explicit about their support for violence in interrogation rooms, though their advocacy of police violence against the criminal element on the street was quite explicit.

In state courts, where most interrogation practices were being considered, judges looked the other way, even when there was substantial evidence that police were torturing suspects. When there was a question about whether a confession was voluntarily given—which often meant whenever officers denied torture—state courts generally let the jury hear the statement, but informed the jury that it was to disregard it if involuntarily obtained.[95]

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[91] *Id.* at 564-65.

[92] OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 25 (1973) ("[T]he elaborate development of standards governing the admissibility of confessions in state courts followed a course altogether different from that suggested by the *Bram* decision.").

[93] *See* Leo, *supra* note 71, at 52.

[94] JOHNSON, *supra* note 5, at 90–91, 124–25 (describing Roosevelt's view of police violence and observing that while incidents of police torture were known in the Progressive Era, efforts at reform during this period "proved fleeting and ineffective"). Judge William J. Gaynor criticized Progressive reformers for their belief that society could "be reformed and made better . . . instead of being debased . . . by the policeman's club and axe." William J. Gaynor, *Lawlessness of the Police in New York*, 176 N. AM. REV. 10, 25 (1903).

[95] *See* Indian Fred v. State, 282 P. 930, 934 (Ariz. 1929) ("In most jurisdictions, if there is

Torture during this period went from being the most forbidden interrogation technique to the most permitted. Some mid- to late-nineteenth century courts had imposed greater sanctions on statements extracted by actual physical violence than statements extracted by the "flattery of hope, or by the torture of fear."[96] Even though *Warickshall* and its extensive progeny permitted the admission of physical evidence obtained as a result of an involuntary confession, at least two courts held that physical fruits of a tortured confession were inadmissible, even though the physical fruits were, unlike a bare statement, unquestionably reliable.[97] By the early twentieth century, physical violence was *less* a reason to exclude a confession than a promise of leniency. As the New York Court of Appeals stated in *People v. Trybus* in 1916:

> The question is not . . . whether the detective struck defendant or held him illegally in custody. Neither of these facts, per se, makes the reception of the statements in evidence illegal as a matter of law, although they are properly to be considered by the jury in determining the voluntariness of the statements.[98]

In *Trybus*, a private detective had been permitted to unlawfully detain a suspect in the Buffalo jail, where he initially visited physical violence on his prisoner and obtained a statement from him that he and Buffalo detectives swore "was obtained without threats or promises."[99] In addition to the assault and illegal detention, Trybus contended that he was promised leniency in exchange for his confession, which the officers denied. The New York Court of Appeals concluded that the question of the statement's voluntariness had appropriately been left to the jury because, "[a]side from the rough handling and the illegal custody, which are not denied, there is no uncontradicted

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a conflict of evidence on the question, and the court is not satisfied that the confession is voluntary, it should submit it to the jury with instructions to disregard it if upon all the evidence they believe it to be involuntary."); *see generally* H. Rockwell, Annotation, *Voluntariness of Confession Admitted by Court as Question for Jury*, 85 A.L.R. 870 (1933) (describing cases in which voluntariness is a question for the jury).

[96] The King v. Warickshall (1783) 168 Eng. Rep. 234 (K.B.) 235; 1 Leach 263, 264.

[97] *See* Rusher v. State, 21 S.E. 593, 594 (Ga. 1894) ("The fruits of physical torture, as distinguished from mere fear, it would seem, ought to be unavailing. The honor and decency of the law would seem to be involved in rejecting them. The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime, and bringing the offender to punishment."); Jordan v. State, 32 Miss. 382, 386 (1856) ("[I]f it appeared that the confession had been extorted by violence, [the law] also protects [the defendant] against testimony which could only be discovered, or made available through the instrumentality of such confession.").

[98] People v. Trybus, 113 N.E. 538, 540 (N.Y. 1916) (citation omitted).

[99] *Id.* at 539.

evidence of threats or promises."[100] Uncontradicted claims of physical violence, combined with illegal custody, were thus not enough to prevent a jury from hearing the confession, though uncontradicted evidence of a threat or a promise apparently would have been sufficient.

Courts thus gave the green light to outrageous police conduct in the late nineteenth and early twentieth centuries. Even those readers generally aware of the existence of third-degree tactics are apt to be disturbed by the extent of official torture in the history of American law enforcement. Those rightly shocked by the in-court admissions of Mississippi deputies who obtained tortured confessions in the seminal case of *Brown v. Mississippi*,[101] may be surprised to learn that this degree of candor was not isolated. Wisconsin officers, for instance, similarly boasted of beating a confession out of a suspect in 1920, leaving marks so telling that a physician testified that the suspect "must have suffered extremely."[102] One of the officers in that case, when asked if he had beaten the suspect, responded "what we ought to have done would be to kill him."[103] Semi-official interrogation devices were not limited to the iconic rubber hoses.[104] At least two police departments built versions of the electric chair to be used in interrogations, delivering painful but less-than-lethal amperage.[105]

The tolerance of such extraordinary force—some of the specifics of which were undeniably kept from the public—depended on enormous trust in police officers to correctly identify guilty suspects.[106] Prohibition eroded the public's confidence in law enforcement. Prohibition demonstrated that corruption was intractable and that even honest enforcement was a thing to be feared. It destroyed the faith Americans had developed in burgeoning police forces and called into question the legitimacy of their tactics.[107]

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[100] *Id.* at 540.

[101] Asked during the trial how severely he had beaten one of the suspects in that case, the deputy sheriff answered, "Not too much for a negro." Brown v. Mississippi, 297 U.S. 278, 284 (1936); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 375 (1993).

[102] Lang v. State, 189 N.W. 558, 560 (Wis. 1922).

[103] *Id.*

[104] There were certainly a number of documented uses of rubber hoses. *See* Note, *The Third Degree*, 43 HARV. L. REV. 617, 618–19 (1930); Rowe v. State, 123 So. 523 (Fla. 1929); People v. Sweeney, 136 N.E. 687 (Ill. 1922).

[105] *The Third Degree*, *supra* note 104, at 619.

[106] I have laid out this argument in much more detail in Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 483–515 (2010).

[107] *Id.*

This loss of faith in police shifted the focus of interrogation law from the possibility of a false confession to a concern about brutality itself, regardless of whether the resulting confession was reliable. Newspapers, books, and even films by the 1930s detailed the horrors of police interrogations.[108] In New York City, juries began to acquit defendants in cases involving police interrogation with sufficient frequency to prompt even trial judges supportive of the Progressive view of police violence to call for investigations of interrogation methods.[109] Jurors did not share the judiciary's faith in the reliability of tortured confessions and, with repeated public accounts of police misconduct inside and outside interrogation rooms, increasingly did not believe officers' claims that they had not assaulted suspects. Acquittals in cases involving confessions became quite common. Legal reformers began to insist that courts more stringently supervise interrogations. Without looking into individual cases, the traditionally conservative New York Bar Association called on courts to more carefully scrutinize confessions and not allow juries to determine the voluntariness of confessions if there was evidence supporting a claim of brutality. Courts in New York and beyond began to adopt this position.[110]

Reliability was no longer the sole focus of regulating interrogations—reliability became a secondary concern. The frequency of torture and, perhaps more importantly, the perception of the frequency of torture in interrogation rooms that led to acquittals, needed to be reduced to restore the public's confidence in confessions and in police practices generally. The practice of routine police torture, once thoroughly exposed, was itself rightly seen as something to be condemned and deterred, even if the evidence obtained through these methods was eminently reliable. The Wickersham Commission's report on interrogations in 1931—itself prompted by President Hoover's call for an evaluation of the enforcement of Prohibition—concluded that third-degree practices risked unreliable confessions but described the violent method of interrogation as "shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated."[111]

Coercive tactics thus came to be seen as problematic for their own sake. Irrespective of the reliability of the confessions they produced, courts began to exclude the fruits of improper interrogations at the same time that the

[108] RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 44 (2008).
[109] JOHNSON, *supra* note 5, at 129–31.
[110] *Id.* at 124–28.
[111] Chafee, Jr. et al., *supra* note 6, at 155.

exclusionary rule was gaining popularity as a method to influence police practices.[112] Judicial regulation of confessions on a basis other than reliability was hardly a stretch at this point in history. Excluding the fruits of improper searches only achieved the goal of fewer improper searches; excluding the fruits of improperly conducted interrogations deterred potentially unreliable confessions.

Perhaps not surprisingly, a doctrine regulating the exclusionary rule provided the vehicle for decoupling reliability from confessions law in the Supreme Court shortly after Prohibition. With the decision in *Nardone v. United States*, the Court recognized the "fruit of the poisonous tree" doctrine, excluding evidence discovered as a result of information unlawfully learned, unless the latter discovery was "so attenuated [from the illegal conduct] as to dissipate the taint."[113] In *Nardone*, the government sought to use evidence discovered as a result of an unlawful wiretap, not the words actually intercepted by the wiretap. The Court concluded that derivative use of unlawfully obtained evidence would undermine the deterrent rationale of the exclusionary rule. "To forbid the direct use of [illegally obtained evidence] but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standard and destructive of personal liberty,'" the Court reasoned.[114] Famed evidence professor Charles McCormick suggested a year before the *Nardone* decision that the same sort of deterrent justified excluding the fruits of tortured confessions.[115]

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[112] Academic commentators, for the first time during Prohibition, began to advocate use of the exclusionary rule to deter unreasonable searches and seizures. *See* Thomas E. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 COLUM. L. REV. 11, 24–25 (1925). To the extent academic commentators commented on pre-Prohibition expressions of the rule, they either merely described the new rule or were quite critical. *See* JAMES PARKER HALL, CASES ON CONSTITUTIONAL LAW 188–89 (1913); WIGMORE, *supra* note 55; Wigmore, *supra* note 54. Of course, the United States Supreme Court had adopted a clear version of the rule in *Weeks v. United States*, 232 U.S. 383 (1914), and had stated a version of the rule that did not depend on the deterrence rationale in *Boyd v. United States,* 116 U.S. 616 (1886). Early versions of the rule, that seemingly had to rest on a deterrence rationale, appeared in state court decisions as early as the mid-1800s. *See* discussion *supra* notes 28–39 and accompanying text.

[113] Nardone v. United States, 308 U.S. 338, 341 (1939).

[114] *Id.* at 340. *Nardone* involved a case of wiretapping contrary to the prohibition of the 1934 Communication Act, which, unlike the present federal wiretapping rule, did not itself contain a provision excluding evidence. For an excellent description of the background of *Nardone*, see Neal Katyal & Richard Caplan, *The Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent*, 60 STAN. L. REV. 1023 (2008).

[115] *See* McCormick, *supra* note 83, at 454–55 ("Certainly the right to be immune in one's person from the secret violence of the police seems to be even more deserving of judicial

The courts and the legislatures increasingly have come to believe that a privilege to have the fruits of such a search or seizure suppressed as evidence is needed to discourage the practice. The reason for extending to the person from whom a confession has been wrung by torture, a similar privilege, whether the confession be true or false, is even stronger.[116]

The Supreme Court would soon apply the deterrent rationale from *Nardone* to unlawfully obtained confessions. Just as the fruit of the poisonous tree doctrine required exclusion of the unlawfully obtained physical evidence as well as evidence obtained as a result of the illegally discovered evidence, subsequent voluntary confessions as well as physical evidence were to be excluded when the product of an involuntary confession.[117] If reliability was the sole basis for determining voluntariness, subsequent confessions, and certainly physical fruits of the confessions, would be admissible unless there were reasons to suspect the reliability of these pieces of evidence.[118] Courts and commentators recognized that reliability was being augmented by a goal of deterring police excesses in interrogation rooms.[119] McCormick, who appears part insightful commentator and part prophet when viewed in the lens

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protection than the immunity from searches and seizures. The courts and legislatures have increasingly come to believe that a privilege to have the fruits of such a search or seizure suppressed as evidence, is needed as a discourager of the practice. The reason for extending to the person from whom a confession has been wrung by torture, a similar privilege, whether the confession be true or false, is even stronger. Such policy as modern writers are able to discover as a basis for the self-incrimination privilege—and it is feeble and inadequate at best—pales to a flicker beside the flaming demands of justice and humanity for protection against extorted confessions.").

[116] McCormick, *supra* note 83, at 454–55.

[117] Lyons v. Oklahoma, 322 U.S. 596 (1944) (subsequent statement); United States v. Bayer, 331 U.S. 532, 540–41 (1947) (dictum) (suggesting that physical fruits of an involuntary confession might be excluded under principle announced in *Nardone*); Leyra v. Denno, 347 U.S. 556 (1954) (subsequent statement); United States v. Blue, 384 U.S. 251, 255 (1966) (recognizing that unlawfully obtained statement and its fruits should be excluded); *see also* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 939 (1995) ("As the voluntariness test continued to evolve in the middle part of the twentieth century, the results reached by the Court seemed to reflect less a concern with the reliability of a particular confession than disapproval of police interrogation tactics considered offensive or subject to serious abuse."). Lower courts into the 1950s continued to admit the physical fruits of involuntarily obtained statements. *Id.* at 937–39. Of course, the Supreme Court currently recognizes as hornbook law the exclusion of "involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." United States v. Patane, 542 U.S. 630, 640 (2004).

[118] *See, e.g.*, Killough v. United States, 315 F.2d 241, 244 (D.C. Cir. 1962) (admitting statement after previous involuntary statement would "defeat the exclusionary rule").

[119] *See* Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 665 (1966).

of history, observed in 1938:

> Can we not best understand the entire course of decisions in this field as an application to confessions both of a privilege against illegally obtained evidence—a privilege more clearly emerging in the decisions as the courts more clearly perceive the hidden iniquities of torture—and of an overlapping rule of incompetency which excludes the confession when untrustworthy?[120]

Concerns about interrogation methods would then prevail as the sole justification for excluding a confession as involuntary. In 1960, the Supreme Court announced in *Rogers v. Richmond* that the reliability of a confession played no role in evaluating its admissibility.[121] Rejecting the trial court's legal standard that "took into account the circumstances of probable truth or falsity," the Court held:

> The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question of whether the behavior of the State's law enforcement officials was such as to overbear [the suspect's] will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not [the suspect] in fact spoke the truth.[122]

If reliability played no part in the voluntariness analysis, then even completely unreliable statements could be admitted if there was no police misconduct. This next logical step was taken in *Colorado v. Connelly*.[123] Connelly, who was mentally ill and reported hearing voices, approached a Denver police officer and told the officer he had committed a murder and wanted to talk about it.[124] The Supreme Court acknowledged that there were reasons to conclude that Connelly's statement was not reliable, but concluded concerns about reliability did not provide a basis for concluding that the statement was involuntary. The Court concluded even if the circumstances under which a confession was given suggested that the statement was "quite unreliable," state or federal rules of evidence, not the Due Process Clause of the Constitution, governed its admissibility.[125]

Most often, however, courts inquiring into the voluntariness of a confession addressed factors that are related to a statement's reliability. The defendant's age, education and intellectual capacity, and experience dealing

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[120] *See* McCormick, *supra* note 83, at 457.

[121] Rogers v. Richmond, 365 U.S. 534 (1961).

[122] *Id.* at 543–44. *See also* Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.").

[123] Colorado v. Connelly, 479 U.S. 157 (1986).

[124] *Id.* at 157.

[125] *Id.* at 166–67.

with the police all bear on whether he is likely to falsely incriminate himself in the face of police questioning.[126] Under the voluntariness test, the less sophisticated the suspect, the more likely his statement is to be deemed involuntary.[127]

The voluntariness test, however, did not survive as the primary means of regulating confessions. Frustrated with its own efforts, and the efforts of lower courts, to identify and apply factors in the voluntariness test, the Court in *Miranda v. Arizona* turned to a waiver approach.[128] *Miranda*, designed to prevent involuntary statements, asks only whether the suspect has been informed of his or her rights and has waived those rights. So long as the suspect has the intellectual capacity to comprehend the warnings and has waived them, the *Miranda* inquiry goes no further.[129]

If the voluntariness test continued to be justified by a concern about reliable confessions, *Miranda* could hardly be regarded as protecting it. Practically, *Miranda* even turns the twentieth century voluntariness considerations on their head. Those who are most willing to assert their rights are not likely to be the poorly educated, low-functioning suspects who lack experience with the criminal justice system—those who assert their rights are likely to be just the opposite. *Miranda* confers yet another of the law's advantages on sophisticated players. Other things being equal, the more educated, more sophisticated, and wealthier members of society are more likely to invoke their right to the assistance of counsel. Those who have the means to imagine engaging an attorney, and certainly those who have attorneys on retainer can more easily envision the process of consulting with counsel.[130]

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[126] *See* Steven Drizin & Richard Leo, *The Problem of False Confessions in a Post-DNA World*, 82 N.C. L. REV. 891 (2004) (observing that the young and mentally ill were overly represented in a sample of false confessors). Earl Washington's confession provides an example of circumstances in which adherence to many of the factors considered in the voluntariness analysis, if seriously considered, would have prevented the admission of a false confession. *See* Paul T. Hourihan, Note, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1495–1501 (1995).

[127] *See* White, *supra* note 72, at 2028 n.171.

[128] *See* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) (observing that the voluntariness test risked overlooking a confession that was voluntary). An interesting recent commentary suggests that because of the substantial limitations the United States Supreme Court has placed on *Miranda*, voluntariness may once again be the primary method of confession regulation. Eva Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 115 MICH. L. REV. 1 (2015).

[129] *But see* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (noting that age can be considered in determining whether *Miranda* waiver was valid).

[130] *Moran v. Burbine*, 475 U.S. 412 (1985), is one of the few interpretations of *Miranda*

Sophistication, however, is not always about class or wealth in the criminal justice system. Sometimes it is about experience. Repeat players—recidivists—have street-smarts. They have experience in dealing with attorneys, have learned the advantages of invoking their rights to silence and counsel, and are not as intimidated by the criminal process as first-time arrestees. These are the suspects who are most likely to invoke their rights to silence and counsel. *Miranda* is not just rewarding past wrongs, it is stacking the deck against reliability. Those with prior records are statistically more likely to be guilty of crime than those with no criminal records.[131] Other things being equal, *Miranda* has the effect of giving a right to silence that is more likely to be exercised by guilty suspects than innocent ones.[132] This seeming irony is possible only because *Miranda* is aimed at guarding against an involuntary confession, not an unreliable one.

This state of affairs would be bad enough if *Miranda* merely supplemented the post-Prohibition version of the voluntariness test, which does not formally recognize reliability as a goal. But *Miranda* went further. As the Supreme Court has often noted, it is very difficult to demonstrate that a statement is involuntary if there is a valid *Miranda* waiver.[133] *Miranda* has

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that does not privilege the more sophisticated. A person who has the means to have a lawyer on retainer may not have that lawyer invoke his warnings for him, placing those with and without lawyers on retainer on an equal footing. But many of the interpretations of *Miranda* further the elitist protection of *Miranda*, such as the requirement that a suspect clearly invoke his rights to silence and counsel. *See* Davis v. United States, 512 U.S. 452 (1994) (right to counsel); Berghuis v. Thompkins, 560 U.S. 370 (2010) (right to silence). Heartier, more sophisticated suspects are more likely to speak with the sort of clarity required to invoke these protections.

[131] *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) (recognizing probative value of prior bad acts, but also recognizing evidentiary rule excluding them because they risk "confusion of the issues, unfair surprise and undue prejudice").

[132] *See* George C. Thomas, III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1294 (2007) (noting that "[i]nnocent suspects, probably more than guilty ones" resist invoking counsel).

[133] Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."); Dickerson v. United States, 530 U.S. 428, 444 (2000) (observing that *Miranda* provides some clarity for officers and that claims of involuntariness are rare once there is a valid waiver); Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1523 (2008) ("[I]t turns out that following *Miranda*'s hollow ritual often forecloses a searching inquiry into the voluntariness of a statement.").

thus replaced voluntariness' totality of the circumstances test that considered human frailties with a single-factor waiver standard that privileges the heartiest members of society—and the most likely guilty. Not only does *Miranda* do nothing to exclude unreliable confessions, it displaced a rule that indirectly considered factors that bore on reliability.

Recent cases of wrongful convictions have demonstrated, contrary to the supposition of many,[134] that false confessions do occur.[135] Factors suggesting false confessions have been identified from these exonerations and from statements given to police that subsequent investigation revealed to be false. The leading nature of the questioning, officers' suggestions that there is incontrovertible evidence of guilt such as scientific evidence, lack of knowledge by the suspect of non-public facts about the crime, and police use of trickery are indicators of a potentially false confession.[136] Practices compromising a confession's reliability do not, however, undermine the statement's admissibility under the Supreme Court's interpretation of the voluntariness rule.[137] State and federal rules of evidence exclude statements with indicia of unreliability only if a court finds the risk of prejudice from the statement substantially outweighs its probative value—a very difficult standard to satisfy.[138]

Some interrogation methods are producing false confessions.[139]

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[134] *See* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 433 (2012) ("[F]alse confession is not a phenomenon that is known to the average layperson as a matter of common sense.").

[135] *See* Drizin & Leo, *supra* note 126.

[136] *See* J.P. Blair, *The Roles of Interrogation, Perception, and Individual Differences in Producing Compliant False Confessions*, 13 PSYCHOL. CRIME & L. 173, 183–84 (2007) (noting that confrontation with false evidence is a common factor in false confessions); Frances Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCHOL. REV. 159, 176, 191–92 (2013) (identifying factors tending to produce false confessions); Richard J. Ofshe, Coerced Confessions*: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989) (explaining common features of false confessions).

[137] *See* Leo et al., supra note 16, at 778 ("Perversely, the constitutional rules of criminal procedure do not allow a trial judge to suppress confession evidence at trial on the grounds that it is false and unreliable. Worse still, the constitutional law of criminal procedure provides no doctrinal mechanism for either recognizing or suppressing contaminated and formatted false confessions.").

[138] *Id.* at 794–98; *see also* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 810–15 (1997) (criticizing then-current law that permitted lying to suspects).

[139] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920–21 (2004) ("[T]he research literature has established that [false] confessions occur with alarming frequency.").

Miranda says nothing about the officer's ability, post-waiver, to falsely inform a suspect that others have implicated him, to erroneously tell the suspect that forensic science has revealed his guilt, or to provide the suspect with sufficient details of the crime so that his confession has the ring of reliability. The substance of interrogations is largely unregulated. Police can lie to suspects and even present them with false evidence, though some courts exclude confessions when officers present suspects with false forensic reports.[140]

Prohibition both created search and seizure issues and prompted limits on searches and seizures. Brutal interrogation practices preceded the Eighteenth Amendment by decades. Prohibition did, however, acutely arouse concern about third-degree practices. The laudable desire to end such practices, irrespective of the accuracy of their results, refocused American confessions law in a way that would not account for twenty-first century interrogation practices that risk false confessions.

III. EFFORTS TO CABIN THE EXCLUSIONARY RULE LEAVE EYEWITNESS IDENTIFICATIONS UNDER-REGULATED

The Prohibition Era's most prominent rule certainly has not been uncontroversial, and judicial efforts to retreat from it have left a hodgepodge of police regulation. The exclusionary rule is justified by the incentives it creates for officers to follow rules of constitutional criminal procedure as they obtain evidence. When the evidence officers obtain may also be unreliable *because of the means used to obtain it*, the justification for the exclusionary rule would seem especially strong. While some degree of concern about eyewitness identification is long-standing, relatively new scientific research has demonstrated the severity of the problem with this method of proof.[141] By the time the Supreme Court considered whether the

[140] Thomas, *supra* note 132, at 1308–10. An awful example of a court's refusal to consider the potential impact of lying to a suspect about forensic evidence can be seen in *State v. Cope*, 748 S.E.2d 194 (S.C. 2013) (falsely reporting results of forensic test did not render statement inadmissible).

[141] In 1927, Felix Frankfurter observed that "[t]he identification of strangers is proverbially untrustworthy [and the] hazards of such testimony are established by a formidable number of instances in the records of English and American trials." FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1962). Nevertheless, it is clear that jurors tend to trust eyewitness testimony when they should not. *See* Wayne T. Westling, *The Case for Expert Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 95 (1992). In the last thirty years, scientists have taken a keen interest in the problem of eyewitness identification. In the 1970s, only four articles contained the words "eyewitness" and "identification" in the abstract, while more than two thousand studies were done of eyewitness

exclusionary rule should apply to the fruits of improper identification procedures, the Court's view of the exclusionary rule had shifted substantially.[142] The lack of regulation of eyewitness interrogation appears to be a function of the Court's discomfort with the rule that excluded reliable evidence and a respect for stare decisis that made the Court unwilling to overrule or overhaul the rule. In the 1970s, the Court was quick to cabin the exclusionary rule in ways that did not directly contradict prior cases to maximize the admissibility of evidence.[143]

Manson v. Brathwaite, the seminal case on eyewitness identifications, was decided during this period of frustration with the exclusionary rule.[144] Nowell Brathwaite's attorney quite understandably argued that the jury in the defendant's prosecution for selling heroin should not have heard testimony describing how a Connecticut State Trooper identified him.[145] Trooper Jimmy Glover, acting undercover, went to an apartment in Hartford where he purchased two glassine bags of heroin from a man he had never met.[146] Afterwards, he drove from the apartment to police headquarters and described the man, later believed to be Brathwaite, to Officer D'Onofrio from the Hartford Police Department. D'Onofrio thought he recognized the person Trooper Glover described.[147] Apparently the department had previously suspected Brathwaite of wrongdoing because Officer D'Onofrio was able to provide Trooper Glover with a picture of Brathwaite already in the department's possession.[148] No explanation was given for having Trooper Glover identify the suspect from a single photo rather than from an array of photos or a lineup of live persons.

Prior to its consideration of Brathwaite's claim, the Supreme Court had recognized that asking an eyewitness to confirm the identity of a single

testimony in the past three decades. State v. Henderson, 27 A.3d 872 (N.J. 2011).

[142] That the Supreme Court would back away from a degree and type of regulation that was designed for the Prohibition Era is quite consistent with what Orin Kerr describes as an equilibrium-adjustment theory of the Fourth Amendment. *See* Kerr, *supra* note 15, at 480–81 (arguing that "when new technology or social practice makes evidence substantially harder for the government to obtain" the Court relaxes Fourth Amendment protections; when evidence becomes easier to obtain, the Court makes the Fourth Amendment requirements more stringent). For a criticism of this view of the Fourth Amendment, see Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. F. 14 (2011).

[143] *See* Steiker, *supra* note 19, at 2507.

[144] Manson v. Brathwaite, 432 U.S. 98 (1977).

[145] *Id.* at 101.

[146] *Id.* at 99–101.

[147] *Id.* at 101.

[148] *Id.*

person "has been widely condemned" as risking an "irreparable mistaken identification."[149] The Court in *Stovall v. Denno* recognized, however, that there were times when these types of admittedly suggestive identification procedures, though fraught with the potential for error, are the best identifications possible.[150] In *Stovall*, for instance, the only witness to a murder was the victim's seriously wounded widow whose chances for survival were not good.[151] Due process, the Court reasoned, would not preclude the admission of such an identification that represented the only possibility for the only witness to exonerate or identify the suspect.[152] *Stovall* could have been deemed to create an exigent circumstance exception to a prohibition on suggestive identification procedures, but the Supreme Court subsequently took a different path, unmooring the regulation of eyewitness regulation from a deterrence model.

With its decision in *Neil v. Biggers*, the Court made clear that police procedures threatening misidentification would be less deterred than illegal physical searches that produced reliable evidence. In *Biggers*, decided five years before Brathwaite's case, a rape victim had come to the police station seven months after her attack to identify a person who may have been her assailant.[153] The victim had been unable to identify the attacker from previous lineups and photo arrays.[154] Unlike in *Stovall*, nothing explained why the victim was presented with only one person to identify. No exigent circumstances prevented the assembly of a traditional lineup, particularly given that the identification occurred in a police station. The Supreme Court in *Neil*, however, admitted the evidence, finding "the identification was reliable even though the confrontation procedure was suggestive."[155]

Notwithstanding the problematic precedent of *Biggers*, Nowell Brathwaite's lawyer understandably argued that the fruits of a suggestive identification procedure should be excluded unless the prosecution could explain why another procedure could not have been used. There was a lot to commend Brathwaite's argument. The identification in *Neil* had occurred before the Supreme Court's criticism of suggestive lineups in *Stovall* and, more importantly, there was a very compelling ring to Brathwaite's argument for deterring suggestive identification practices. The Second Circuit in this

[149] Stovall v. Denno, 388 U.S. 293, 302 (1967).
[150] *Id.* at 302.
[151] *Id.* at 295.
[152] *Id.* at 302.
[153] Neil v. Biggers, 409 U.S. 188 (1972).
[154] *Id.* at 194–95.
[155] *Id.* at 195.

case reasoned that by excluding all identifications obtained through "unnecessarily suggested confrontation procedures" it would deter subsequent suggestive procedures that might be unreliable and exclude identifications that may be inaccurate.[156] The Supreme Court had, in fact, used a similar argument to support the *Miranda* rule. The *Miranda* waiver requirement, the Court reasoned, would prevent the admission of confessions obtained by overbearing the suspect's will, even though the involuntariness of the statement may not be apparent from the circumstances.[157]

By 1977, when the Court decided *Manson v. Brathwaite*, however, the Supreme Court was not as sympathetic to the need to manage investigative techniques as it had been when *Miranda* was decided—at least not when the price of regulating police was the exclusion of reliable evidence. Richard Nixon's presidential campaign in 1968 placed no small emphasis on the damage he claimed the Court had done to law enforcement interests.[158] The Court, for reasons that are only partly attributable to Nixon's judicial appointees, began to retreat from many of the broad criminal justice principles announced by the Warren Court.[159]

The principle of stare decisis is, however, a fairly powerful one, even when courts fundamentally disagree with previous decisions.[160] An about-face even on very controversial decisions, perhaps especially on very controversial decisions, can undermine the legitimacy of the judiciary. The most controversial aspects of the Warren Court's criminal procedure jurisprudence—*Miranda* and the exclusionary rule—thus remained, but the principles underpinning these decisions were not taken to their logical conclusions—and a variety of decisions limited the scope of these rules.[161]

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[156] Manson v. Brathwaite, 432 U.S. 98, 110 (1977) (comparing the court of appeals' approaches).

[157] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

[158] *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 130 n.117 (1998) ("Richard Nixon made *Miranda* one of the centerpieces of his 1968 'law and order' campaign."); Steiker, *supra* note 19, at 2466 (noting that Nixon targeted "the Warren Court's controversial decisions" in the area of constitutional criminal procedure and that when he won the presidency and quickly replaced the Chief Justice and three Associate Justices with three appointees of his own, "it was widely predicted that the major innovations of the Warren Court in constitutional criminal procedures. . . would not long survive.").

[159] As early as 1969, the Supreme Court was attempting to cabin the scope of the exclusionary rule. *See* Alderman v. United States, 394 U.S. 165 (1969) (recognizing standing limits on the exclusionary rule to preserve reliability concerns).

[160] *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 653 (1999) ("Stare decisis is also thought to preserve the Court's legitimacy.").

[161] *See* Steiker, *supra* note 19, at 2480–85.

The Warren Court's restrictions on investigative procedures had been limited to those concerns that had lingered since Prohibition—search and interrogation practices. By the time identification procedures were considered in *Manson v. Brathwaite*, the Court's willingness to use the exclusionary rule to deter police misconduct had waned substantially—the momentum of Prohibition Era concerns did not extend to new concerns as the election of Richard Nixon changed the Court.

The Supreme Court's rejection of *Brathwaite*'s deterrence-based rationale for excluding the identification in his case reads like a broadside attack on the exclusionary rule generally. While the Court recognized the "surprising unanimity among scholars" in favor of excluding all suggestive identifications, such a rule would "keep[] evidence from the jury that is reliable and relevant."[162] The Court, citing *Brewer v. Williams* and *United States v. Janis*, recognized its own changing sentiment on the exclusionary rule, observing that "inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm."[163]

Certainly, the Court was correct that there were decisions prior to *Brathwaite* limiting the rule that denied reliable evidence to find-finders. Throughout the 1970s, the Court limited the scope of the exclusionary rule, finding that the costs of the rule exceeded its benefits.[164] The Court identified categories in which it concluded that the deterrent benefit of the exclusionary rule was outweighed by its costs, but, of course, the cost of losing convictions and the value of deterring misconduct are measured in very different ways.[165] In a 1969 case that would set the stage for limiting the scope of the exclusionary rule, the Court concluded that there was insufficient benefit to giving a remedy to anyone other than those whose rights had been violated:[166]

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of

[162] Manson v. Brathwaite, 432 U.S. 98, 111–12 (1977).

[163] *Id.* at 113.

[164] Arnold H. Loewy, *The Exclusionary Rule as a Remedy*, 46 TEX. TECH. L. REV. 369, 370 (2014) ("The Court does attempt to assess the value of the exclusionary rule on a cost-benefit basis, albeit . . . not very well."); Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 210–41 (2005) (describing the efforts of the Court to rein in the exclusionary rule using a cost-benefit analysis).

[165] Oliver, *supra* note 164, at 210–41.

[166] Alderman v. United States, 394 U.S. 165, 179–80 (1969).

> extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[167]

Prior to *Brathwaite,* the Court used this cost-benefit analysis to reject the application of the exclusionary rule to grand jury proceedings,[168] habeas corpus actions,[169] and civil tax actions.[170] Refusing to eliminate the exclusionary rule, the Court rejected the application of the rule to these circumstances not previously considered by the Court, finding that the deterrent benefit was not as strong when evidence was excluded in these proceedings as it was when the evidence was excluded from a criminal trial.[171] The Court's respect for precedent, in other words, allowed the exclusion of reliable evidence to continue, while the Court continued to balance cost and benefit in circumstances not previously held to require exclusion.

Timing is critical to understanding cases like *Manson v. Brathwaite.* The Court considered the constitutional limits on eyewitness identification procedures at the time when the Court was attempting to increase the amount of reliable evidence courts could hear, without disturbing the fundamental rule that perfectly reliable evidence could, under some circumstances, be excluded. As the fruits of an improperly conducted eyewitness identification had not previously been held subject to the exclusionary rule, *Brathwaite* offered another opportunity for an exception. In this case, the Court explained the exception for eyewitness identifications by observing that "[u]nlike a warrantless search, a suggestive pre-indictment identification procedure does not in itself intrude upon a constitutionally protected interest."[172]

Of course an un-*Mirandized* confession does not intrude on a constitutionally protected interest, either. Perhaps more importantly, and something for which the Court is criticized, it is the Court alone that defines which interests enjoy protection by deciding which expectations of privacy are reasonable.[173] Given the broad discretion the Court has allowed itself to

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[167] *Id.* at 174–75.

[168] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349–51 (1974).

[169] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 489–95 (1976).

[170] *See, e.g.*, United States v. Janis, 428 U.S. 433, 453–54 (1976).

[171] *See generally* Oliver, *supra* note 164 (explaining *Calandra*, *Stone*, and *Janis*). After *Brathwaite*, the Court found that preventing illegally obtained evidence from being used on cross-examination yielded insufficient deterrence to justify the loss of reliability. United States v. Havens, 446 U.S. 620, 627 (1980).

[172] Manson v. Brathwaite, 432 U.S. 98, 113 n.13 (1977).

[173] *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (observing that the Court's standard for privacy in the Fourth Amendment context, "whether the individual has an expectation of

determine which interests are protected, it would hardly be a stretch for the Court to conclude that the Constitution protects an individual against procedures that might lead to false evidence and, therefore, his wrongful conviction and incarceration.

Unwilling to use the exclusionary rule to deter suggestive procedures, the Court concluded that "reliability is the linchpin in determining the admissibility of identification testimony."[174] Thus, even if police use suggestive procedures that are highly criticized by the Supreme Court, the resulting identification is inadmissible only if it appears to be unreliable. To evaluate the reliability, courts are to look at the totality of circumstances, including the eyewitness' opportunity to view the suspect, the degree of attention the witness paid, the accuracy of the description the witness provided, the witness' level of certainty, and the length of time between the crime and the identification.[175]

Lack of reliability is, however, not enough to exclude an eyewitness identification. Just as the Supreme Court recognized in the interrogation context, the Due Process Clause does not bar the admission of unreliable evidence—this is the domain of evidence law—but instead limits improper police behavior.[176]

Thus, the Supreme Court held in *Perry v. New Hampshire* that the Constitution required no consideration of a lineup's reliability, even if the circumstances of the identification were suggestive, so long the identification was not coordinated by police.[177] In *Perry*, a witness to the theft of a car stereo was asked if she could identify the thief. She pointed out her window and said it was a man who happened, apparently coincidentally, to be standing next to an investigating officer in view of her window. Due process did not require an assessment of the reliability of this identification procedure, Justice Ginsberg concluded for the majority, because "law enforcement officials did not arrange the suggestive circumstances" of this identification.[178] The defendant in *Perry* argued that if "reliability is the linchpin in determining the admissibility of identification testimony," then the role police played, or didn't play, in an unduly suggestive identification should be irrelevant. The Court disagreed, observing that because one aim of

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privacy that society is prepared to recognize as reasonable," has "often been criticized as circular, and hence subjective and unpredictable").

[174] Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

[175] *Id.* at 114–16.

[176] *See* Colorado v. Connelly, 479 U.S. 157 (1986).

[177] Perry v. New Hampshire, 132 S. Ct. 716, 720–21 (2012).

[178] *Id.* at 725–26.

excluding improperly conducted unreliable identifications was still "to deter law enforcement use of improper lineups, showups, and photo arrays in the first place," unless there was misconduct in the identification process, issues of reliability were themselves of no constitutional significance.[179]

Eyewitness testimony may well be the least reliable form of evidence typically introduced in criminal trials.[180] Courts have not ignored our new understandings of the problems inherent in eyewitness identifications, but even when they demonstrate sensitivity to the issue, they often do less to deter police misconduct that produces suggestive identifications than they do to deter unlawful acts that produce physical evidence. The New Jersey Supreme Court has perhaps attracted the most attention of any court to consider this issue with its very thorough opinion, laden with references to empirical research on eyewitness identifications, in *State v. Henderson*.[181] *Henderson*, however, retained the basic scheme from *Brathwaite*. Identification procedures are excluded under *Henderson*, and *Brathwaite*, only if the identification procedures were suggestive and the resulting identification lacks reliability. *Henderson* used a sophisticated understanding of social science to guide trial courts in evaluating reliability, but it did not take a deterrence approach to police misconduct. *Henderson*, like *Brathwaite*, does not exclude the fruits of even intentionally suggestive lineups, if they appear reliable.[182] Police thus may be willing to chance a suggestive lineup before they would risk a questionable search. While both are appropriately deterred,

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[179] *Id.* at 726.

[180] *See* George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitness Testimony*, 39 AM. J. CRIM. L. 97, 102 (2011) (describing factors discovered from social science explaining "precisely why eyewitnesses are so often incorrect").

[181] State v. Henderson, 27 A.3d 872 (N.J. 2011). A number of law review articles recognized the thoroughness and groundbreaking quality of the opinion. *See*, *e.g.*, Amy D. Trenary, State v. Henderson*: A Model for Admitting Eyewitness Identification Testimony*, 84 U. COLO. L. REV. 1257 (2013); Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. REV. 1415, 1449–53 (2013) (describing "New Jersey as a model" because of the *Henderson* case); Benjamin Wiener, Comment, *Revisiting the* Manson *Test: Social Science as a Source of Constitutional Interpretation*, 16 U. PA. J. CONST. L. 861, 862–63 (2014) (describing *Henderson* as the notable amendment to the "due process test for the admissibility of eyewitness evidence" by a state court); Robert Couch, Comment, *A Model for Fixing Identification Evidence After* Perry v. New Hampshire, 111 MICH. L. REV. 1535 (2013) (celebrating *Henderson* decision). It is ironic that *Henderson* has received the bulk of the academic attention. Two states, Massachusetts and New York, automatically exclude lineups that are unduly suggestive. *See* Epstein, *supra* note 16, at 80 (2013) (citing Commonwealth v. Martin, 850 N.E.2d 555, 560 n.3 (Mass. 2006); People v. Duuvon, 77 N.Y.2d 541, 543 (1991)).

[182] *Henderson*, 27 A.3d at 928.

only the admission of the former risks a wrongful conviction.

CONCLUSION

The legacy of Prohibition is a system of police regulation that is completely backwards. Drugs found in an unlawful search of a trunk will be excluded even though highly probative of guilt and discovered through a procedure that was likely to disclose innocent behavior no more private than the possession of a jack and tire iron.[183] A confession containing no objectionable tactics, bearing no indications of unreliability, and corroborated by physical evidence, is excluded if police merely fail to provide the suspect with warnings that any American citizen with a television set could recite in his sleep. This sort of *reliable* evidence is excluded, according to hornbook constitutional criminal procedure, to discourage improper police conduct. Yet when police create suggestive lineups, or lie to suspects in interrogation rooms, when they engage in objectionable conduct that may create *unreliable* evidence, the deterrence rationale applicable to other police tactics does not require the evidence to be excluded. And as constitutional criminal procedure is designed to regulate police behavior, not ensure the reliability of evidence, a mere showing that an identification is unreliable, regardless of the method of the identification, is not a sufficient basis to exclude the identification. Yet, there is something quite bizarre about a system of police regulation that more carefully scrutinizes procedures that can only produce reliable evidence than processes that may produce false convictions.

Legal developments produce a momentum that can feel almost pre-ordained when its context is not understood. The fact that the origins of our unique concern about searches for reliable evidence lie in a quirky period in our nation's history provides a basis for overhauling our structure of criminal procedure to deter in equal measure police tactics that threaten to produce unreliable evidence. If we are to maintain a system of constitutional criminal procedure that is much more cautious about admitting reliable evidence than potentially unreliable evidence, we ought to have a better rationale than a historical practice that grew out of an idiosyncratic period of American history.

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[183] *Cf.* Stuntz, *supra* note 27, at 1019 (noting irony of the fact that current Fourth Amendment law allows police to uncover "a suspect's finances or phone calls" but not the contents of a lunch bag).