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Confessions in an International Age: Re-Examining Admissibility Through the Lens of Foreign Interrogations

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NOTE

Confessions in an International Age: Re-Examining Admissibility Through the Lens of Foreign Interrogations

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In Colorado v. Connelly *the Supreme Court held that police misconduct is necessary for an inadmissible confession. Since the* Connelly *decision, courts and scholars have framed the admissibility of a confession in terms of whether it successfully deters future police misconduct. As a result, the admissibility of a confession turns largely on whether U.S. police acted poorly, and only after overcoming this threshold have courts considered factors pointing to the reliability and voluntariness of the confession. In the international context, this translates into the routine and almost mechanic admission of confessions—even when there is clear indication that the confession is coerced or unreliable. Confessions obtained by foreign officers seldom meet the* Connelly *threshold because the United States has neither the ability, nor the goal, of controlling foreign police conduct. In light of the international context, courts should reexamine the* Connelly *test, which is not in line with the fundamental ideals of justice and fairness that the U.S. Constitution protects. Courts should tailor a test focused on the reliability of the confession in order to protect the defendant's fundamental rights.*

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INTRODUCTION

A defendant is brought to trial in a U.S. court. He was interrogated overseas, and the key piece of evidence against him is a confession extracted by foreign law enforcement agents. The confession was obtained under coercive circumstances, and the defendant was interrogated for hours—perhaps even tortured—before confessing. Despite the coercive circumstances, under *Colorado v. Connelly*[1] the court admits his confession. This fact pattern recurs frequently in cases involving confessions obtained by foreign law enforcement.[2] Once the confession is admitted and used against the defendant, it significantly increases the likelihood of conviction.[3]

Confessions are one of the most powerful forms of evidence introduced in court[4] because jurors, judges, and the public often believe confessions betray guilt.[5] For those who have never undergone a police interrogation, it is difficult to understand why anyone would falsely confess. False confessions happen somewhat regularly, however, particularly when police use coercive or overbearing tactics.[6] It is also much more likely for those who are mentally or emotionally vulnerable to confess falsely.[7] Because confessions have a large impact on the outcome of a case, it is essential that courts adequately

1. 479 U.S. 157 (1986).

2. *See, e.g.*, United States v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998) (finding a confession to Egyptian authorities admissible); United States v. Marzook, 435 F. Supp. 2d 708, 741, 777 (N.D. Ill. 2006) (finding a confession obtained by Israeli authorities admissible); *see also* discussion *infra* Section II.B.

3. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429 (1998) (discussing the fact that confessions are "likely to dominate all other case evidence" and will "lead a trier of fact to convict the defendant").

4. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 296 (1991); *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) ("[I]ntroduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained." (quoting EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972))).

5. *See* Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 68 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* PSYCHOLOGY IN THE LEGAL PROCESS 19, 19–38 (Bruce Dennis Sales ed., 1977) (discussing a mock trial experiment where subjects were exposed to different types of evidence including a confession, and finding that the subjects were significantly more likely to view the suspect's confession, rather than other evidence, as establishing guilt); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 298 (1996).

6. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 12-14 (2010); Leo & Ofshe, *supra* note 3, at 430.

7. *See* CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" 144 (Donald S. Connery ed., 1996); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 721–30 (1997); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV.

balance the admission of a confession with the risks that the admission poses to a defendant in trial.

Historically, the admissibility of a confession turned on its voluntariness.[8] Courts believed that admitting an involuntary confession violated the defendant's fundamental Fifth and Fourteenth Amendment rights.[9] Courts cited to the Due Process Clauses of the Fifth and Fourteenth Amendments[10] and the Fifth Amendment's privilege against self-incrimination[11] as reasons for excluding confessions.[12] Courts analyzed the totality of the circumstances to determine whether the defendant's confession was involuntary and violated these rights.[13]

But courts struggled to apply the totality-of-the-circumstances approach—it was too vague to provide a clear standard for admissibility.[14] In response, the Supreme Court announced a new standard in *Colorado v. Connelly*, where it found that the admissibility of a confession is predicated on harmful state action.[15] *Connelly* requires that courts find confessions inadmissible *only if* police use coercive conduct, effectively creating a state- action threshold.[16] As a result, other concerns animating the traditional totality-of-the-circumstances analysis, such as the reliability of the confession and free will of the defendant,[17] are pushed into the background.[18]

105, 108–09, 121–28 (1997); Sharon Cohen, *"Ringmasters" Unlock Truth, Free Man Who Confessed to Murder*, L.A. Times, Mar. 31, 1996, at A2, http://articles.latimes.com/1996-03-31/news/mn-53274_1_false-confessions [https://perma.cc/FP38-UG7W].

8. Kassin & Wrightsman, *supra* note 5, at 70 ("In a nutshell, *voluntariness* had emerged as the primary criterion for the admission of evidence.").

9. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 58–59 (1964) (citing cases dating back to the Court of Exchequer to support the holding that the privilege against self-incrimination protects a witness from being compelled to give testimony); Jackson v. Denno, 378 U.S. 368, 376 (1964) ("It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . . ."); Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) ("[C]onvictions following the admission into evidence of confessions which are involuntary . . . cannot stand . . . . [because they] fail[ ] to afford him that due process of law which the Fourteenth Amendment guarantees."); United States v. Davidson, 768 F.2d 1266, 1269 (11th Cir. 1985).

10. U.S. Const. amends. V, XIV (protecting against the deprivation "of life, liberty, or property, without due process of law").

11. *Id.* amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

12. *See* sources cited *supra* note 9.

13. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 224–26 (1973) (noting that the concept of voluntariness "has reflected an accommodation of the complex of values implicated in police questioning" and that the Court has assessed "the totality of all the surrounding circumstances" in making determinations as to whether a defendant's will was overborne); *see also infra* Section I.A.

14. *See infra* text accompanying notes 56–67.

15. *See* Colorado v. Connelly, 479 U.S. 157, 163–67 (1986).

16. *Id.* at 167.

17. See *infra* Section I.A for rationales underlying the totality-of-the-circumstances approach.

18. *See infra* Section I.B.

Connelly established a police conduct test that has made it challenging for courts to develop a coherent body of law regarding the admissibility of confessions. The difficulties courts face in evaluating confessions obtained by foreign police in particular illuminate the *Connelly* test's shortcomings.[19] *Connelly* places a limiting principle on the exclusion of confessions. Under *Connelly*, confessions may only be excluded if the inculpatory statements are produced at least in part by coercive police conduct.[20] Further, this limit has come to mean that deterring police misconduct is one of the primary goals of excluding confessions.[21] But in the context of interrogations conducted by foreign law enforcement, the deterrence of police misconduct is impossible, since U.S. courts have neither the ability nor the responsibility to deter foreign police authorities.[22] Therefore, *Connelly* is a bad fit.[23] Applying *Connelly* in the international context leads to the routine admission of confessions, moving the analysis away from the defendant's rights in favor of examining the interrogator's conduct.[24]

This Note contends that the current framework for assessing the admissibility of confessions is problematic. By examining the admissibility of confessions in the international context, this Note highlights the inadequacies of the *Connelly* analysis and recommends a more coherent test.[25] Part I examines the evolution of constitutional confession law culminating in the *Connelly* decision. Part II highlights the inconsistencies and inadequacies of the *Connelly* analysis by looking at the test's shortcomings in the context of confessions obtained by foreign authorities. Part III contends that courts must refocus their analysis on the defendant's underlying Fifth and Fourteenth Amendment rights by creating a reliability-based test. Courts should consider the reliability of a confession, despite the fact that doing so will not always be easy. The current test—which admits confessions obtained by foreign law enforcement even when those confessions appear manifestly unreliable—has purchased a small measure of doctrinal simplicity at a large cost

19. *See infra* Section II.B.

20. *Connelly*, 479 U.S. at 167.

21. *See infra* notes 107–109 and accompanying text.

22. *See infra* Section II.A.

23. *See infra* Section II.A.

24. *See infra* Section II.B.

25. This paper will not address the extraterritorial concerns of imposing U.S. criminal justice standards on the conduct of foreign states. These issues are explored in various scholarly works and have been debated extensively. *See, e.g.*, Zachary D. Clopton, Bowman *Lives: The Extraterritorial Application of U.S. Criminal Law after* Morrison v. National Australia Bank, 67 N.Y.U. Ann. Surv. Am. L. 137, 184–90 (2011) (arguing that only crimes that are committed within the "focus" of a statute should be prosecuted if committed extraterritorially); David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 Loy. U. Chi. L.J. 71, 86–92 (2013) (arguing that the presumption against extraterritorial application should apply to criminal as well as civil statutes); *cf.* Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 Cardozo L. Rev. 2143, 2165–85 (2004) (arguing for extraterritorial application even when Congress is silent as to a statute's extraterritoriality).

to the values of justice, fairness, and liberty that the Fifth and Fourteenth Amendments are intended to serve.[26]

I. The Current Confession-Law Framework

Since the ratification of the Constitution, courts have determined the admissibility of confessions based on either the Fifth or Fourteenth Amendments of the Constitution. The Due Process Clause of the Fifth Amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property, without due process of law,"[27] and the Due Process Clause of the Fourteenth Amendment provides that "[no state] shall . . . deprive any person of life, liberty, or property, without due process of law."[28] The privilege against self-incrimination of the Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[29] While the sources of law have remained constant over time, the rationales behind *why* confessions should be inadmissible have changed. Historically, courts found confessions inadmissible if they were involuntary—an inquiry enveloping a wide range of factors, and resulting in a totality-of-the-circumstances approach.[30] In the totality-of-the-circumstances analysis the court examined a "complex of values" to determine admissibility.[31] However, *Colorado v. Connelly* changed this analysis, creating a test primarily dependent upon the presence of coercive police action.[32]

This Part examines the history of constitutional confession law and the diverse set of rationales informing the admissibility of confessions. Section I.A discusses the origins of confession law and its culmination in a totality-of-the-circumstances test—a test that encapsulated multiple rationales but was too vague and inconsistent. Section I.B details *Connelly*'s impact on the voluntariness test, which shifted the voluntariness inquiry from a multifaceted approach to an analysis based on police conduct.

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26. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). The *Murphy* Court framed the privilege against self-incrimination as reflecting:

> many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice . . . [and] our sense of fair play which dictates "a fair state-individual balance . . . ."

Id. (citation omitted); *see also, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 586–87 (1961) (explaining the court's role in "safeguarding the criminal defendant's rights to procedures consistent with fundamental fairness"); Chambers v. Florida, 309 U.S. 227, 240–41 (1940) (finding that the Fourteenth Amendment stands for the principle that "all people must stand on an equality before the bar of justice"); Bram v. United States, 168 U.S. 532, 544 (1897) (finding that the Fifth Amendment perpetuates "principles of humanity and civil liberty, which had been secured in the mother country").

27. U.S. Const. amend. V.

28. *Id.* amend. XIV.

29. *Id.* amend. V.

30. *See infra* Section I.A.

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

32. 479 U.S. 157, 167 (1986).

A. *The Rise and Fall of the Totality-of-the-Circumstances Test*

At common law, involuntary confessions were considered inadmissible because they tended to be false and unreliable.[33] This conception of voluntariness was transported to the United States from England.[34] Scholars accepted the idea that voluntariness was based solely on whether the confession was reliable and trustworthy.[35] Confessions were excluded not because of police tactics themselves but rather because the tactics were more likely to produce false or unreliable confessions.[36]

The idea that involuntary confessions should not be admitted first emerged in *Bram v. United States*,[37] an extraterritorial case in which Canadian police interrogated Bram, a crewman on a U.S. ship.[38] Bram made several incriminating statements to Canadian officers, and U.S. prosecutors used them as evidence in his trial.[39] The jury found Bram guilty, but he appealed, contending that the admission of his confession violated his Fifth Amendment privilege against self-incrimination.[40] The Supreme Court reversed Bram's conviction, holding that "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[41] After *Bram*, courts

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33. *See, e.g.*, R. v. Scott [1856] 169 Eng. Rep. 909, 914 [hereinafter "*Scott's Case*"].

34. *See, e.g.*, *id.* at 914. In *Scott's Case*, the court explained:

> It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon.

Id.; *see also, e.g.*, SIDNEY LOVELL PHIPSON, THE LAW OF EVIDENCE 248 (8th ed. 1942); Charles T. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 245–46 (1946).

35. *See, e.g.*, 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822 (3d ed. 1940) ("The principle . . . upon which a confession may be excluded is that it is, under certain conditions, testimonially untrustworthy." (emphasis omitted)); *see also* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 11 (1980) ("[W]hatever the current meaning of the elusive terms 'voluntary' and 'involuntary' confessions, originally the terminology was a substitute for the 'trustworthiness' or 'reliability' test." (emphasis omitted)).

36. *See* Lyons v. Oklahoma, 322 U.S. 596, 605 (1944) (holding that coerced confessions are offensive "not because the victim has a legal grievance against the police" but because one cannot infer guilt based on confessions obtained through torture); OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 17 (1973) ("The common-law rule . . . . was based on the assumption that a criminal suspect subjected to threats or other forms of intimidation might make a false confession to save himself from further coercion.").

37. 168 U.S. 532 (1897).

38. *Bram*, 168 U.S. at 536-37.

39. *See id.* at 537–42.

40. *See id.* at 540–42.

41. *Id.* at 542–43, 569 (quoting 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANOURS 478 (6th ed. 1850)).

used both the Fifth and the Fourteenth Amendments to decide confession cases,[42] predominantly using the due process voluntariness analysis.[43]

By the mid-twentieth century, the Supreme Court turned its focus away from the idea of reliability and toward the conduct of interrogators. This shift stemmed from a fundamental concern with the coerciveness of police interrogation.[44] In 1929, President Hoover appointed George W. Wickersham as the director of an eleven-member commission tasked with investigating U.S. police practices.[45] This commission, dubbed the Wickersham Commission, found that police officers were using brutal interrogation practices throughout the country.[46] The commission's findings had a profound impact. Scholars vehemently opposed the brutal interrogation tactics uncovered by the commission,[47] and the Supreme Court began citing the commission's findings when holding confessions inadmissible.[48]

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42. *See* United States v. Carignan, 342 U.S. 36, 41 (1951) ("Whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy, these uncontradicted facts do not bar this confession as a matter of law."); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 Ohio St. L.J. 497, 500 (1992) ("[A]s late as 1951, it was not clear whether the exclusion of involuntary confessions in federal cases was based on the Fifth Amendment's self-incrimination provision, the Fifth Amendment's due process provision, or the common law confession rule." (emphasis omitted)).

43. *See* Dickerson v. United States, 530 U.S. 428, 433–34 (2000) ("[F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process."); Herman, *supra* note 42, at 499 ("Between 1936 and 1964, the Court gave the confession rule its greatest development and direction by deciding more than thirty state cases involving claims of involuntariness. It resolved all of them under the Due Process Clause.").

44. Yale Kamisar et al., Modern Criminal Procedure 510 (14th ed. 2015); Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 Am. J. Crim. L. 309, 335 (1998).

45. *See* Samuel Walker, *Records of the Committee on Official Lawlessness*, *in* Records of the Wickersham Commission on Law Observance and Enforcement, at v–vi (Kermit Hall ed., 1997), http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf [https://perma.cc/4TEL-Z2ET].

46. Richard A. Leo, Police Interrogation and American Justice 70 (2008); Walker, *supra* note 45, at ix ("[T]he *Report on Lawlessness in Law Enforcement* concluded that '[t]he third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread.' " (quoting National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 4 (1931))).

47. *See, e.g.*, John Ballard Bennett, *The Decade of Change Since the Ashcraft Case*, 32 Tex. L. Rev. 429, 439 (1954) (stating that prolonged interrogation tactics are "universally condemned and violate the common-law principles on which our system was founded"); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224, 1224-25 (1932) (stating that coercive police practices are "evil" and must be remedied by careful judicial examination of the accused); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 431 (1954) (proposing an additional exclusionary principle based solely on "police methods" applied independently of the "trustworthiness" test).

48. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 240 n.15 (1940).

Courts began analyzing police interrogation tactics when determining the admissibility of confessions. *Spano v. New York*[49] cemented the shift to a police-conduct-based rationale. In *Spano*, the Supreme Court stated that whether a confession is admissible "does not turn alone on [its] inherent untrustworthiness" but "also turns on the deep-rooted feeling that the police must obey the law while enforcing the law."[50] The Court went even further in *Rogers v. Richmond*, finding that a confession's admissibility should depend on whether the suspect's will was overborne by police interrogation tactics—"a question to be answered with complete disregard of whether or not petitioner *in fact* spoke the truth."[51] Some scholars have called *Rogers* "the death knell" of the reliability rationale.[52]

The Court continued to infuse the due process voluntariness test with other factors, chipping away at the reliability rationale. In *Blackburn v. Alabama*, the Court considered free will and rational choice when determining the admissibility of a confession.[53] This holding extended *Lisenba v. California*, in which the Court found that the aim of due process is to prevent "fundamental unfairness in the use of evidence."[54]

This evolution ultimately resulted in a multifaceted totality-of-the-circumstances test, in which courts considered a wide range of factors in determining the admissibility of a confession. Under this test, courts determined whether the defendant's will was overborne[55] by examining a "complex of values."[56] This included analyzing factors such as the age, background, and education of the suspect as well as the length and nature of the interrogation.[57] The test "made everything relevant and nothing determinative."[58] While courts considered reliability and offensive police conduct, judges could include other considerations when deciding whether to admit a confession.

The subjective and fact-intensive totality-of-the-circumstances test resulted in case-by-case adjudication, failing to provide clear guidance to both law enforcement and courts. Police officers could not foresee how a court

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49. 360 U.S. 315 (1959).

50. *Spano*, 360 U.S. at 320–21.

51. 365 U.S. 534, 544 (1961) (emphasis added).

52. Stephens, *supra* note 36, at 117; Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 Mich. L. Rev. 929, 940 (1995).

53. 361 U.S. 199, 207–08 (1960).

54. 314 U.S. 219, 236 (1941).

55. *See, e.g.*, Reck v. Pate, 367 U.S. 433, 440 (1961) ("The question in each case is whether a defendant's will was overborne at the time he confessed."); Ferguson v. Boyd, 566 F.2d 873, 877 (4th Cir. 1977) ("The ultimate question is whether the pressure, in whatever form, was sufficient to cause the petitioner's will to be overborne and his capacity for self-determination to be critically impaired.").

56. *Blackburn*, 361 U.S. at 207.

57. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

58. Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859, 907 (1979).

would evaluate a confession,[59] and lower courts could "pick and choose" which cases to rely on.[60] The test was unpredictable, becoming a "hazy composite influenced by multiple animating concerns."[61] The Supreme Court recognized the test's shortcomings in *Miller v. Fenton*.[62] And the Court's jurisprudence on confessions during this time demonstrates that it, too, lacked a coherent philosophy for deciding when to exclude a confession.[63] In practice, the ambiguity of the totality-of-the-circumstances test meant very few confessions were excluded, even when they seemed to be products of coercion.[64] Under the totality of the circumstances, police brutality was not the sole measure of admissibility[65] and neither was reliability.[66] The test allowed trial court judges to give weight to their own subjective preferences, which tended toward admitting confessions.[67] The frequent admission of confessions may have stemmed from judges' inability to determine the proper standard, which allowed them to make personal determinations about which facts they found to be dispositive.[68] Alternately, it could have been because judges, like jurors, found it difficult to believe anyone would

59. *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981) (highlighting the lack of guidance to police officers).

60. H. Frank Way, Jr., *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53, 62 (1963).

61. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 11 (2015); *see also* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471 (1999) ("The pre-*Miranda* 'voluntariness' test was too mushy, subjective, and unruly to provide suspects with adequate protection").

62. 474 U.S. 104, 116 n.4 (1985) ("The voluntariness rubric has been variously condemned as 'useless,' 'perplexing,' and 'legal double-talk.' " (citations omitted)).

63. *See* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 749 (1987).

64. Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 643 (2006); *see also* White, *supra* note 7, at 117.

65. Marcia Wade, Comment, People v. Connelly*: Taking Confession Law to the Outer Limits of Logic*, 57 U. COLO. L. REV. 909, 914 (1986).

66. 2 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(c) (4th ed. 2015) (identifying three different ideals embedded in the totality-of-circumstances test, including reliability, free and rational choice, and offensive police conduct).

67. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 470 (2005) ("[T]he vast 'wiggle room' inherent in the highly subjective voluntariness test offers judges free rein to interpret the facts of an interrogation in a myriad of ways, thus making a finding that a confession was made involuntarily very rare in practice.").

68. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 625 (3rd Cir. 1986) (Gibbons, J., dissenting) ("The majority does not even recognize [the defendant's] collapse into a catatonic state and his transportation to a hospital as relevant circumstances in its totality of the circumstances analysis!"); *id.* at 613 ("[T]he majority opinion carefully selects among the totality of the circumstances . . . and attaches no significance to strong evidence that [the defendant's] will was overborne.").

falsely confess.[69] The weight of each individual factor was unclear, making it hard to determine how and why judges made their determinations. Further, appellate courts were unlikely to overrule trial court judgments because they viewed the application of the test as a fact-based inquiry that received deference at the appellate level.[70]

The totality-of-the-circumstances test did not mark the end of courts considering police conduct in admissibility determinations. The Supreme Court continued to recognize the problem with abusive police tactics, and in *Miranda v. Arizona*,[71] the Court created a new constitutional safeguard to protect defendants against coerced confessions. *Miranda* created the rule that, when a defendant gave a confession in custody, the court would presume that the confession was involuntary unless the police gave four specified warnings: that the defendant has the right to remain silent, that any statements could be used against him, that he has the right to an attorney, and that an attorney would be appointed to him if he could not afford one.[72] This test focused on creating a uniform, bright-line rule to protect suspects from the pressures of interrogation.[73]

The *Miranda* standard was much easier to apply than the enigmatic totality-of-the-circumstances test. Many welcomed this rule because it provided much-needed predictability, informing both courts and police what types of conduct would render confessions inadmissible.[74] The Supreme Court often referenced this bright-line rule as the decision's central "virtue" because it provided the police and prosecutors with a clearer picture of what constituted a coerced confession.[75] Once the *Miranda* threshold is satisfied, the court looks to the totality of the circumstances to determine admissibility.[76]

But *Miranda*'s bright-line rules do not apply to every defendant. They do not apply when foreign law enforcement agents interrogate defendants,

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69. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2023–24 (1998) ("[J]udges—like juries—may find it difficult to believe that a suspect would confess to a crime that he did not commit.").

70. *See* Schulhofer, *supra* note 59, at 870.

71. 384 U.S. 436 (1966).

72. *Miranda*, 384 U.S. at 444.

73. *See* Arizona v. Roberson, 486 U.S. 675, 680 (1988) ("A major purpose of the Court's opinion in *Miranda v. Arizona* was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' " (citation omitted) (quoting *Miranda*, 384 U.S. at 441–42)).

74. *See, e.g.*, Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 123 (1998) (arguing that many supported *Miranda*'s creation of bright-line rules).

75. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."); *see also* Moran v. Burbine, 475 U.S. 412, 426 (1986) (quoting *Fare*, 442 U.S. at 718, for the same contention); Berkemer v. McCarty, 468 U.S. 420, 430 (1984) (same).

76. *See Moran*, 475 U.S. at 420–21.

for example.[77] The rules generally pertain to confessions obtained in U.S. custody.[78] In recent years, the Supreme Court has explicitly narrowed the scope of *Miranda*,[79] further eroding the decision and decreasing its protection.[80]

B. Colorado v. Connelly *and the State-Action Requirement*

For those defendants who fell outside the narrow scope of *Miranda*'s rules, the "mushy" and "unruly"[81] totality-of-the-circumstances test was still the only protection against the admission of a coerced confession. Dissatisfied with the totality-of-the-circumstances analysis,[82] the Supreme Court decided on a new, seemingly more comprehensive test in *Colorado v. Connelly*.[83] *Connelly* replaced the broad totality-of-the-circumstances test with one focused predominantly on a single rationale—offensive police conduct.

Connelly involved a mentally ill defendant who confessed to a murder he had committed nine months earlier.[84] He claimed that God told him to fly to Denver, revisit the scene of the crime, and either confess or commit suicide.[85] After flying to Denver, Connelly confessed to a police officer, detailing where and how he had committed the murder.[86] At the time of the confession, however, Connelly was suffering from chronic schizophrenia.[87] He had been hospitalized several times, and when he confessed he was not taking his medication.[88] When an expert testified to his condition, both the trial court and the Colorado Supreme Court concluded that his confession should be

77. *See, e.g.*, United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1985) (finding that *Miranda* is not applicable to interrogations performed by foreign police officers acting in their own country); Roberto Iraola, *Self-Incrimination and the Non-Resident Alien*, 22 PACE L. REV. 1, 24 (2001) ("When foreign law enforcement officials are involved, however, courts unanimously have ruled that *Miranda* warnings are 'not essential to the validity of a confession which has been given in a foreign country.' " (quoting United States v. Mundt, 508 F.2d 904, 906 (1974))).

78. *See* Minnesota v. Murphy, 465 U.S. 420, 430 (1984).

79. Dickerson v. United States, 530 U.S. 428, 443–44 (2000) ("[O]ur subsequent cases have reduced the impact of the *Miranda* rule . . . while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.").

80. For an account of how the Rehnquist and Roberts Courts have diluted and eliminated much of the *Miranda* protections, see Primus, *supra* note 61, at 14–22, and White, *supra* note 7, at 113–17.

81. Kamisar, *supra* note 61, at 471.

82. *See* Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985).

83. 479 U.S. 157 (1986).

84. People v. Connelly, 702 P.2d 722, 724–25 (Colo. 1985), *rev'd sub nom.* Colorado v. Connelly, 479 U.S. 157 (1986).

85. *Id.* at 725.

86. *Id.*

87. *Connelly*, 479 U.S. at 174 (Brennan, J., dissenting).

88. *Id.*

excluded because it was not a "product of [the defendant's] rational intellect and . . . free will."[89]

The Supreme Court reversed, finding the confession admissible.[90] According to the *Connelly* majority, the voluntariness analysis should only be triggered if the confession is the result of government misconduct—that is, it must include the "crucial element of police overreaching."[91] State action in the form of coercive police tactics became a threshold question for excluding a confession.[92] Only if law enforcement uses coercive tactics may courts examine other factors[93] to decide whether admitting the confession would violate a defendant's constitutional rights. In the words of the majority, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[94]

Scholars disagree about whether *Connelly* means an end to reliability completely, or whether reliability and trustworthiness concerns, while subordinate to state action, still animate the test. One view is that *Connelly* essentially marks the end of reliability concerns. *Connelly* explicitly rejected reliability as a reason for excluding confessions, claiming that reliability inquiries should be left to state evidence rules.[95] Some scholars interpret this portion of *Connelly* to mean reliability is no longer a legitimate or fundamental goal of the Constitution.[96] From this perspective, Connelly prevents *any* reliability justification for the exclusion of a confession, even if it meets the state-action threshold.[97]

The other view is that reliability still plays a role—that once the state-action threshold is overcome, courts can balance reliability, free and rational

89. *Id.* at 162 (majority opinion) (quoting *Connelly*, 702 P.2d at 728).

90. *Id.* at 164–67.

91. *Id.* at 163–64.

92. *See id.* at 176–77 (Brennan, J., dissenting) ("Today's decision restricts the application of the term 'involuntary' to those confessions obtained by police coercion.").

93. *Id.* at 164–65 (majority opinion) (acknowledging that mental condition is "surely relevant" in determining the susceptibility to coercion but "mere examination of the confessant's state of mind can never conclude the due process inquiry").

94. *Id.* at 167.

95. *Id.* ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." (citation omitted)).

96. *See, e.g.*, George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 273 (1988) ("*Connelly* treats its assumption that reliability is of no independent significance as too obvious to require explanation or defense . . . ."); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 499 ("Thus, the Court made clear that the Constitution is not concerned with unreliable confession evidence, and does not require state courts to undertake a reliability analysis prior to admitting a confession at trial.").

97. *See* Leo et al., *supra* note 96, at 498–99 ("Any remaining question about whether the Constitution is concerned with the reliability justification for the voluntariness rule was put to rest in 1986 in *Colorado v. Connelly*.").

will, and other concerns that animate the totality-of-the-circumstances analysis.[98] In this view, the fact that a confession is unreliable still matters, but if, and only if, there is sufficiently offensive police action.[99] The *Connelly* Court suggested that factors such as the defendant's mental condition were "relevant to an individual's susceptibility to police coercion," and thus relevant to the voluntariness inquiry.[100] These scholars believe that *Connelly* did not intend to preclude courts from considering reliability, and that the case does not significantly change the underlying analysis.[101]

Under either view, the result is the same in the international context. Courts currently interpret state action to mean U.S. police conduct, and thus confessions obtained by foreign officers are deemed admissible without any consideration of the secondary concerns.[102] While scholars have explored the domestic implications of the test and analyzed the actions of U.S. officials interrogating non-U.S. citizens,[103] little has been written about the implications of *Connelly* when confessions are obtained by *foreign* law enforcement officials.[104] A more thorough analysis of the cases involving foreign law enforcement will highlight the failings of the current analysis, supporting the need for a new framework that captures the fundamental fairness and justice concerns of the Constitution.[105]

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98. Other factors include overborne will, fundamental fairness, and decreasing the chances of false confessions. *See supra* Section I.A.

99. *See* Scott A. McCreight, Comment, Colorado v. Connelly*: Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 Iowa L. Rev. 207, 208, 216 (1987) (noting that police coercion is a "threshold" or "prerequisite" and *Connelly* does not overrule any previous Supreme Court confession cases); Primus, *supra* note 61, at 32.

100. *Connelly*, 479 U.S. at 165.

101. Welsh S. White, *Miranda*'s Waning Protections 198 (2001).

102. *See infra* Sections II.A & II.B.

103. *See, e.g.*, Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 Geo. L.J. 851 (2003).

104. While scholars frequently discuss *Connelly*, most scholarship does not focus on the international aspect, given the confusing role that *Connelly* plays and the uncertainty as to whether it should apply. *See, e.g.*, Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. Rev. 801, 832-33 (2013) (questioning whether *Connelly* should apply to confessions made to foreign officials, because the Supreme Court has not addressed the issue and lower courts have avoided deciding the question). Notwithstanding, there are several accounts that do consider extraterritorial confessions. *See, e.g.*, Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 Rutgers L. Rev. 647 (2008); Geoffrey S. Corn & Kevin Cieply, *The Admissibility of Confessions Compelled by Foreign Coercion: A Compelling Question of Values in an Era of Increasing International Criminal Cooperation*, 42 Pepp. L. Rev. 467 (2015).

105. The idea that an involuntary confession should not be admitted stems from fundamental fairness, freedom, and justice concerns that underlie the U.S. Constitution. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 587 (1961); Chambers v. Florida, 309 U.S. 227, 240–41 (1940); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857 (1995).

II. The Failures of the System

This focus on police misconduct has diluted the voluntariness inquiry in the international context—so much so that seemingly involuntary confessions are routinely admitted as evidence.[106] The *Colorado v. Connelly*[107] test unravels in the context of international confessions because there is necessarily no state action. This Part argues that the *Connelly* framework is ill-suited for the international context because it fails to provide adequate protection for defendants interrogated abroad. Section II.A highlights how courts' interpretations of *Connelly* are not applicable in the international context because deterring foreign law enforcement is not a constitutional concern. Section II.B contends that the current framework has resulted in the systematic admission of unreliable foreign confessions, endangering the fundamental values underlying the U.S. criminal justice system. Section II.C argues that the lower courts' break with *Connelly* suggests that considerations other than police misconduct should animate the voluntariness inquiry.

A. *Failure of Deterrence in the Foreign Context*

After *Connelly*, the admissibility of confessions became tied to whether exclusion would deter future police misconduct. While the *Connelly* Court found that the aim of due process is to prevent fundamental unfairness and did not directly mention an interest in deterring police misconduct,[108] the Court referenced the Fourth Amendment, stating that evidence seized by the police is excluded only if it would deter future violations of the Constitution.[109] It also determined that Connelly's confession should be admitted because suppressing his statements would not serve a similar constitutional purpose.[110] Partly based on this language, both courts[111] and scholars[112] have interpreted *Connelly* as establishing a deterrence-based test, where even

106. *See infra* Section II.B.

107. 479 U.S. 157 (1986).

108. *Connelly*, 479 U.S. at 167.

109. *Id.* at 166.

110. *Id.*

111. *See, e.g.*, United States v. Yousef, 925 F. Supp. 1063, 1073 (S.D.N.Y. 1996) (citing *Connelly* when noting the Supreme Court has provided measures to "deter law enforcement agents from obtaining custodial statements through unduly coercive means"); State v. Sanders, 452 S.W.3d 300, 315–16 (Tenn. 2014) (citing to *Connelly* to hold that confessions obtained by private parties are admissible because the purpose of exclusion is to "substantially deter future violations").

112. *See, e.g.*, Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 Val. U. L. Rev. 1, 10–11 (2006) (citing *Connelly* for the proposition that one recognized benefit of suppressing confessions is "deterring police misconduct"); Alex Stein, *Constitutional Evidence Law*, 61 Vand. L. Rev. 65, 70 n.11 (2008) (noting that after *Connelly* constitutional rules suppressing coerced confessions primarily serve to "deter police misconduct").

confessions coerced by the police may be admitted when excluding them would not serve any deterrent purpose.[113]

Under a deterrence-based reading of *Connelly*, when foreign interrogators obtain a confession, the test does not apply. The U.S. Constitution does not, and should not, have the goal of controlling foreign law enforcement, at least in the context of the Fourth and Fifth Amendments.[114] *Miranda* does not extend to foreign officers' interrogations because enforcing *Miranda* warnings will not change the conduct of foreign officials.[115] In *United States v. Welch*, the Second Circuit found that a foreign officer's failure to provide *Miranda* warnings should not pertain to the admissibility analysis because *Miranda* was designed to prevent U.S. police officers from using improper interrogation methods.[116]

Because *Miranda* is inapplicable in the foreign interrogations context, *Connelly* must also be inapplicable. *Miranda* does not apply in the foreign context because excluding a confession based on a failure to provide *Miranda* warnings would not convince foreign law enforcement to administer the warnings in the future.[117] Contrast this with U.S. police, who would be more careful about providing *Miranda* warnings if they knew that failure to provide warnings would render the evidence inadmissible. Since *Connelly* is also interpreted as a deterrence-based test, it follows that *Connelly* does not apply in the foreign context because finding a confession inadmissible would not deter foreign police from future misconduct.[118] This leaves no workable

113. *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 179 (1987).

114. In the context of the Fourth Amendment, courts and scholars have found that the United States has neither the ability nor the goal of deterring foreign police misconduct. *See* United States v. Janis, 428 U.S. 433, 455 n.31 (1976); Rosado v. Civiletti, 621 F.2d 1179, 1189 (2d Cir. 1980); 1 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(h) (5th ed. 2015); Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1683 (1989). *But see* Harry S. Chandler, Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials*, 53 CORNELL L. REV. 886, 896–98 (1968) (noting that while there is no evidence that admission of illegally seized evidence has hindered foreign law enforcement, there is evidence that it leads to more frequent violations of the Fourth Amendment).

115. *See, e.g.*, United States v. Martindale, 790 F.2d 1129, 1132 (4th Cir. 1986) ("[T]he exclusionary rule has little or no effect upon the conduct of foreign police." (quoting United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971) (per curiam))); United States v. Emery, 591 F.2d 1266 (9th Cir. 1978); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1, 24–25 (2001) (stating that courts unanimously agree that *Miranda* does not extend to foreign police because it will not affect their conduct); Alex R. Stalvey, Miranda *and Exceptions*, S.C. LAW., March 2015, at 24, 28 ("Since the United States cannot dictate the protections provided to criminal suspects by foreign nations . . . . incriminating statements obtained from a defendant by foreign law enforcement officers in violation of that individual's constitutional rights are generally admissible . . . .").

116. *Welch*, 455 F.2d at 213.

117. *See supra* notes 114–116 and accompanying text.

118. *See* M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 365 (2003) (stating that if the purpose of due process is to deter police misconduct, confessions would only be involuntary if they would in fact deter misconduct in the future).

test in the foreign arena. This framework, which would provide no protections for extraterritorial confessions obtained by foreign officers, is a problematic framework in need of reform and redevelopment.

B. *Systematic Admission of Coerced International Confessions*

After *Connelly*, some courts merely look at whether there is compliance with the local country's law when determining the admissibility of a confession.[119] If a suspect confesses to a foreign official while the official is following local rules, it is much more likely to be admitted even if there is some indication that it was coerced. For example, in *United States v. Bary*, a confession was deemed admissible because British law enforcement agents were acting in compliance with British law.[120] The district court reasoned that because British officers gave Bary the appropriate warnings under British law the confession was admissible.[121] The court only mentioned in passing, however, that the interrogators insinuated Bary might be punished for not speaking.[122]

In fact, some courts have explicitly cited *Connelly* to hold that there is no basis for finding a confession inadmissible absent any misconduct by U.S. officials. In *United States v. Marzook*, the defendant claimed that a confession he made to Israeli authorities was involuntary.[123] The court stated that determining admissibility is "[f]irst, and most importantly" based on coercive police activity.[124] The court, quoting *Connelly*, found that confessions will only be excluded as violations of due process when there is an element of police overreach involved.[125] Similarly, in *United States v. Salameh* one of the defendants, Abouhalima, claimed he confessed following torture in an Egyptian jail.[126] The Second Circuit, citing *Connelly*, held that "one's mental state does not become part of the calculus for the suppression of evidence unless there is an allegation that agents of the United States engaged in some type of coercion."[127] The court did not explore the defendant's contention of Egyptian torture because there was no allegation that U.S. agents coerced his remarks.[128] Several other cases have questioned whether *Connelly* should apply absent allegations of U.S. police misconduct.[129]

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119. *See, e.g.*, United States v. Bary, 978 F. Supp. 2d 356, 362–66 (S.D.N.Y. 2013); United States v. Clarke, 611 F. Supp. 2d 12, 40–44 (D.D.C. 2009).

120. *Bary*, 978 F. Supp. 2d at 365–66.

121. *Id.*

122. *See id.* at 363.

123. 435 F. Supp. 2d 708, 740–41 (N.D. Ill. 2006).

124. *Marzook*, 435 F. Supp. 2d at 741.

125. *Id.*

126. 152 F.3d 88, 117 (2d Cir. 1998).

127. *Salameh*, 152 F.3d at 117.

128. *See id.*

129. *See, e.g.*, United States v. Wolf, 813 F.2d 970, 972 n.3 (9th Cir. 1987); United States v. Suchit, 480 F. Supp. 2d 39, 59 (D.D.C. 2007).

The focus on U.S. conduct means courts routinely admit foreign confessions despite the possible use of coercive police methods by foreign law enforcement. Under *Connelly*, as long as a foreign officer complies with local laws, a court need not extensively examine the officer's conduct. There is minimal inquiry into the *actual* voluntariness of the statements—as one scholar noted, the effect of the decisions "has been to allow trial judges to admit into evidence confessions that have multiple indicia of unreliability, often under an artificial aura of voluntariness."[130]

Foreign countries do not afford their citizens the same protections as the U.S. Constitution, and in other nations, it is not uncommon for law enforcement officers to force a confession. For example, in the United Kingdom, the Financial Conduct Authority ("FCA"), which is responsible for regulating financial institutions, has broad powers, including the power to compel suspects to respond to questions.[131] Once the FCA compels a suspect to appear, they may not exercise their privilege against self-incrimination.[132] Failing to answer questions can lead to imprisonment.[133] Similarly, in Nigeria officers can compel suspects to disclose information related to participation in corrupt practices.[134] In China, the privilege against self-incrimination does not exist, and prosecutions are often successful because defendants are urged to confess.[135] Indeed, confessions are considered a desirable, if not essential, step toward a defendant's reconciliation with society.[136]

The fact that courts only look to foreign officers' compliance with their local laws, and in some cases do not apply a test at all, poses a problem. Each country has a different standard for whether compulsion is acceptable, and the *Connelly* test allows for the admission of a confession even when an officer follows a standard that falls below U.S. constitutional requirements.[137] The repeated admission of allegedly coerced confessions suggests that the *Connelly* test is objectively unworkable for confessions obtained by foreign law enforcement. A new test that affords more protections for suspects interrogated abroad, and that is in line with the values of fairness and justice of the U.S. Constitution, must be put into place.

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130. Daniel Harkins, *Revisiting* Colorado v. Connelly*: The Problem of False Confessions in the Twenty-First Century*, 37 S. ILL. U. L.J. 319, 330 (2013).

131. Financial Services and Markets Act 2000, c. 8, §§ 171, 172 (UK).

132. *See id.*

133. *See id.* § 177.

134. Corrupt Practices and Other Related Offences Act (2000) Cap. (A5), § 28.

135. Yingyi Situ & Weizheng Liu, *An Overview of the Chinese Criminal Justice System*, *in* COMPARATIVE & INTERNATIONAL CRIMINAL JUSTICE SYSTEMS: POLICING, JUDICIARY, AND CORRECTIONS 125, 130 (Obi N. Ignatius Ebbe ed., 1996); Louise Watt, *Police in China Abuse Suspects to Extract Confessions, Human Rights Watch Says*, TORONTO STAR (May 13, 2015), http://www.thestar.com/news/world/2015/05/13/police-in-china-abuse-suspects-to-extract-confessions-human-rights-watch-says.html [https://perma.cc/S7B2-4K8X] (quoting a researcher at Human Rights Watch stating that in China confessions are "highly valued" and "[t]here is nothing that really holds a police officer accountable for torture or coercion").

136. *See* Situ & Liu, *supra* note 135, at 133.

137. *See supra* notes 131–136 and accompanying text.

C. *Lower Courts' Break with the* Connelly *Framework*

Recent lower court cases highlight the unworkability of the current test in the foreign context. In several recent cases, lower courts have disregarded the *Connelly* test when analyzing the admissibility of confessions obtained abroad. Two alternative tests have emerged: the "shocks the conscience" test and a resurrected totality-of-the-circumstances test. Both analyses center on the idea of voluntariness rather than coercion, breaking away from *Connelly*.

Some courts have used the "shocks the conscience" test, finding that confessions must be excluded in cases of clear egregious misconduct by law enforcement. In *United States v. Karake*,[138] the District Court for the District of Columbia excluded the confessions of Karake and the other defendants after extensively analyzing the "horrifying stories" of the use of "physical and psychological torture" by Rwandan officials.[139] But the court broke with the *Connelly* logic, finding the confession involuntary and inadmissible because the Rwandan interrogators' abuse "shock[ed] the conscience."[140] According to the *Karake* court, the goal of the Fifth Amendment is to assure trustworthy evidence *apart* from any deterrent effect, and the court suggested that a confession made under coercive circumstances might be unreliable.[141]

The Fourth Circuit's decision in *United States v. Abu Ali*[142] marked another break with the *Connelly* framework. Rather than analyzing the confession using *Connelly*, both the trial court and the Fourth Circuit analyzed the confession using the traditional totality-of-the-circumstances approach.[143] In *Abu Ali*, the defendant, who had been arrested by Saudi Arabian officials, claimed that the officials repeatedly tortured and interrogated him until he confessed.[144] The Fourth Circuit found that there was no significant U.S. law enforcement involvement in the case.[145] If the court was working within the current *Connelly* framework, the inquiry should have ended there, because the confession did not meet the threshold state-action requirement. The Fourth Circuit, however, assessed the voluntariness of the confession based on whether the defendant's "will [was] overborne," looking to the "totality of the circumstances."[146] After considering all of the evidence—including

138. 443 F. Supp. 2d 8 (D.D.C. 2006).

139. *Karake*, 443 F. Supp. 2d at 54.

140. *Id.* at 86; *see also* United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003); United States v. Marzook, 435 F. Supp. 2d 708, 744 (N.D. Ill. 2006); United States v. Fernandez-Caro, 677 F. Supp. 893, 895 (S.D. Tex. 1987).

141. *Karake*, 443 F. Supp. 2d at 50.

142. 528 F.3d 210 (4th Cir. 2008).

143. *Abu Ali*, 528 F.3d at 232–33.

144. United States v. Abu Ali, 395 F. Supp. 2d 338, 367–68 (E.D. Va. 2005).

145. *Abu Ali*, 528 F.3d at 230 n.5.

146. *Id.* at 232–33.

evidence pointing to Abu Ali's intelligence and the conditions of his confinement—the court concluded that his statements were voluntary and therefore admissible.[147]

Abu Ali and *Karake*'s outright disregard of the *Connelly* test makes *Connelly*'s weaknesses more apparent. These cases suggest that judges believe there are concerns other than police deterrence that should play a role in determining admissibility. Even the prosecution in the Fourth Circuit *Abu Ali* case acknowledged that the "crucial inquiry" was whether the defendant's "will has been overborne,"[148] an inquiry that includes factors other than police deterrence. Thus, lower courts struggle to determine which test to apply to confessions obtained by foreign officials.[149] These tests are not solutions, but rather highlight the ineffectiveness of the current *Connelly* framework in addressing the underlying constitutional concerns of the Fifth and Fourteenth Amendments.[150] The "shocks the conscience" test only protects against the most egregious cases, and the traditional totality-of-the-circumstances test is too fuzzy.[151] In light of *Connelly*'s inadequacies set forth in this Part, the Supreme Court should reevaluate the test's continued viability, particularly in the context of confessions obtained by foreign law enforcement.

III. A New Way Forward

The *Connelly* test's extensive implications for extraterritorial confessions highlight the need for a more coherent test. Courts should create a comprehensive test that would work in both domestic and international contexts, and that builds on the fundamental rights that the U.S. Constitution protects. This test should encompass the goal of reliability in addition to the goal of deterring police misconduct. Most importantly, it should protect defendants' core right to not have a coerced or involuntary confession used against them.

This Part proposes a new voluntariness rule that fulfills the objectives of the Fifth and Fourteenth Amendments. It establishes a multifactor test that

147. *Id.* at 234.

148. *Id.* at 232.

149. *See, e.g.*, United States v. Straker, 596 F. Supp. 2d 80, 106 (D.D.C. 2009) ("The second issue is whether—in the absence of any U.S. involvement—the admissibility of a defendant's statement should be assessed under the Due Process Clause by the traditional 'voluntariness' standard or a 'shocks the conscience' standard, or instead is admissible without regard to either standard."); United States v. Karake, 443 F. Supp. 2d 8, 53–54 (D.D.C. 2006) ("While both parties agree that it is the government's burden to prove by a preponderance of the evidence that the statements were voluntary, exactly what this burden entails has become somewhat muddled with respect to statements made abroad to foreign officials." (citation omitted)).

150. *See* McCreight, *supra* note 99, at 208 (arguing that *Connelly*'s threshold is "constitutionally incorrect"); *The Supreme Court, 1986 Term—Leading Cases*, *supra* note 113, at 185 (arguing that *Connelly* used "unnecessarily broad principles" that will lead to "substantial unfairness").

151. *See supra* Section I.A.

considers the defendant, the interrogator, and the outside evidence, and that requires judges to rank each using a point system. Unlike the current *Connelly* test, which has been interpreted to focus solely on U.S. police conduct, the interrogator portion of this test would consider actions of officials regardless of whether they are U.S. or foreign officers. Section III.A contends that *Connelly*'s state-action threshold should be interpreted broadly to extend to the prevention of any offensive action, and should be included as one factor in the newly proposed test. Section III.B introduces the new test and discusses how it encompasses the fundamental reliability and trustworthiness goals underlying the exclusion of involuntary confessions.

A. *Reinterpreting the State Action Requirement*

As currently interpreted, *Connelly*'s police misconduct-based rationale fails to provide protection to defendants who have undergone interrogation by foreign law enforcement. In order to ensure fundamental protections—protections that should be afforded to any criminal defendant standing trial in a U.S. courtroom—courts should reinterpret the *Connelly* state-action requirement more broadly to encompass both U.S. and non-U.S. government action. This would be in line with cases that have historically excluded confessions based on police misconduct.

It is clear that courts used the police methods rationale long before *Connelly* was decided, even if it was not to the same degree. Preventing harmful police action has long been a central consideration in the admissibility analysis.[152] In *Watts v. Indiana,* the Court reversed three convictions resting on coerced confessions, stating that the Due Process Clause bars improper police conduct.[153] Other Supreme Court cases have found confessions inadmissible on similar grounds.[154]

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152. *See* KAMISAR ET AL., *supra* note 44, at 509 (stating that while, "[a]t the outset . . . the primary . . . basis for excluding confessions . . . was the 'untrustworthiness' rationale," the admissibility test has "three underlying values or goals," one of which was barring use of confessions "produced by offensive methods" (emphasis omitted)).

153. 338 U.S. 49, 55 (1949). The *Watts* Court explained:

> In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken.

Watts, 338 U.S. at 55.

154. The Court in *Rogers v. Richmond* reasoned:

> Our decisions under [the Fourteenth Amendment] have made clear that convictions following the admission into evidence of [involuntary confessions] . . . cannot stand . . . . not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . . .

365 U.S. 534, 540-41 (1961); *see also, e.g.*, Spano v. New York, 360 U.S. 315, 320–21 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . ."); Rochin v. California, 342 U.S. 165, 173 (1952) ("[E]ven

Cases decided under the police methods rationale before *Connelly*, however, do not suggest that the primary reason for excluding confessions is to deter subsequent misconduct. These earlier cases instead focused on the brutality of the conduct, and excluded confessions because they had been "extracted by police methods which create too great a danger of falsity."[155] Confessions were excluded to ensure that "the means used" were proportional to the defendant's "probable power of resistance."[156] They examined the defendant and his constitutional right not to be forced to confess.[157]

Connelly should be interpreted in line with other police-methods-based cases, which focus on whether the actions of the interrogator created the possibility of an involuntary confession. The Court suggests in *Connelly* that the decision should be read consistently with settled law.[158] Thus, *Connelly*'s state-action requirement should not be limited to U.S. police conduct, but rather it should be extended to any official or state-sponsored action more generally, including conduct by foreign government agents and officials. Focusing on state action is appropriate because "tactics and procedures that gratuitously add to the danger of unreliable convictions cannot be justified."[159]

Courts should also refrain from interpreting *Connelly*'s state-action requirement as a deterrence-based rule. Analyzing confessions based on deterring future action would cut confessions obtained by foreign law enforcement out of the discussion.[160] Rather than focusing on the notion that the state-action threshold is concerned with "substantially deter[ring] future violations of the Constitution,"[161] courts should focus on the analysis used prior to *Connelly*, in which confessions obtained through coercion were excluded not with the goal of deterring future misconduct, but with the goal of ensuring fairness and justice for the defendant.[162]

Applying a broader reading of *Connelly* would bring the analysis in the foreign context in line with domestic cases. This interpretation would prevent confessions from being admitted based on the mere absence of U.S. police misconduct. It would ensure that confessions obtained through brutal practices would be excluded, regardless of whether a U.S. or foreign officer performed the interrogation. It would also advance a fundamental purpose

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though statements contained in them may be independently established as true. . . . to sanction the brutal conduct . . . would be to afford brutality the cloak of law.").

155. Paulsen, *supra* note 47, at 429.

156. *Id.*

157. *See, e.g.*, *Rogers*, 365 U.S. at 544; Chambers v. Florida, 309 U.S. 227, 240–41 (1940) ("The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court.").

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

159. Grano, *supra* note 58, at 921.

160. *See supra* Section II.A.

161. *Connelly*, 479 U.S. at 166.

162. *See supra* notes 152–157 and accompanying text.

of the due process inquiry—namely, preventing confessions extracted by coercive and offensive means from being admitted into U.S. courtrooms.

B. *Building Reliability-Based Rules*

The new state-action analysis should be part of a broader and multifactored evaluation of the reliability and trustworthiness of confessions. The general failure of the totality-of-the-circumstances approach[163] suggests that courts need concrete rules to determine whether a confession is admissible. Courts should refocus the voluntariness inquiry by establishing a reliability-focused test that includes, but is not limited to, the interrogator's misconduct. Courts should look to three factors to determine admissibility: (1) the intelligence of the defendant, (2) penalties or threats imposed by the interrogator, and (3) outside evidence that sheds light on the confession. Each factor would be weighed on a scale of points based on degree,[164] and above a certain threshold, the confession would be deemed inadmissible. This new test would prevent the admission of confessions that are inherently unreliable or untrustworthy when evaluated as a whole.

A point system would provide an objective standard for determining the voluntariness of a confession and prevent disparate results across courts. One of the main goals of the Sentencing Guidelines, which implemented a similar point system, was to create uniformity in sentencing while maintaining a fair system.[165] The point system was implemented because, under the prior system, judges did not have to justify their sentencing decisions and appellate review was rare.[166] With a sentencing table, judges could gauge the "similar characteristics of crimes" and determine sentences proportional to the defendant's crime.[167]

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163. *See supra* Section I.A.

164. Courts also use a point threshold to determine sentences under the U.S. Sentencing Guidelines. Many courts use a sentencing table or grid to determine the recommended sentence once a defendant has been convicted. One axis ranks the severity of the crime using a point system, starting with an assigned number for each offense and adding or subtracting points based on specific factors such as the harm caused and range of activity. The other axis assigns a point value to the defendant based on his or her criminal history, and the intersection of these two scores is the recommended range of the sentence. 6 LaFave et al., *supra* note 66, § 26.3(e); *see also* U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2015). The Sentencing Guidelines provide a recommended sentence but are not binding on judges. United States v. Booker, 543 U.S. 220 (2005).

165. U.S. Sentencing Guidelines Manual § 1A1.3.

166. Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 Pepp. L. Rev. 615, 617, 621 (2006) ("Prior to the Guidelines, judges were not required to state their reasons for imposing a particular sentence and, often, the sentence reflected the judicial philosophy and even the prejudices of the individual judge."); Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 Loy. U. Chi. L.J. 359, 365–66 (2003) ("In the pre-Guidelines era, the sentencing judge had unlimited discretion to impose any sentence that fell at or below the statutory maximum . . . . As long as a district court's sentence did not violate broad notions of due process, it was unreviewable on appeal.").

167. Ramirez, *supra* note 166, at 370.

The pre–Sentencing Guidelines framework paralleled the totality-of-the-circumstances approach in the context of confessions, since both provided judges with a range of possible rationales and results.[168] Similar to the indeterminate sentencing system, the totality-of-the-circumstances approach provided no clear rules or guidelines, and did not require judges to explain their reasons for why they excluded a confession.[169] Implementing a points system similar to the Sentencing Guidelines would provide bright-line rules and standardization across courts. Further, focusing on three factors—the defendant, the interrogator, and the objective evidence—would bring the focus of the test back to the defendant, ensuring that the defendant receives fair and equal treatment.

1. Intelligence of the Defendant

The first prong of the rule should take the defendant's mental capacity into account—determining his or her ability to comprehend the situation, and in turn, the likelihood of the confession being unreliable. Intelligence, measured through objective factors such as IQ, should be reframed as one of the three main factors in the new framework. Those with higher levels of education should be given a low number of points, and those who are less intelligent or mentally handicapped should be considered a much higher risk for unreliable confessions and therefore given more points—making it more likely that the evidence will be excluded.

Low intelligence can be a severe impediment to understanding, which in turn can affect the reliability of confessions. Many scholars agree that police interrogation methods are more likely to be successful when the defendant is young or lacks intelligence.[170] Defendants with low IQs are overrepresented in the current criminal justice system,[171] and some suggest that this is because they are more likely to be coerced into confessing to a crime.[172] The Inbau Manual—one of the most widely used police interrogation manuals—

168. *See supra* Section I.A.

169. *See supra* Section I.A.

170. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 Fordham Urb. L.J. 791, 824 (2006) (claiming most scholars are in consensus that coercion is more successful if the suspect is "especially vulnerable to manipulation," and that these factors include youth, naïveté, and lack of intelligence).

171. Michael J. O'Connell et al., Miranda *Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 L. & Hum. Behav. 359, 359 (2005) (stating that those with low IQs represent 1–2% of the general population while they constitute close to 4.2% of those in prison).

172. *See id.* at 359 ("For instance, compared with higher IQ individuals, those with [low intelligence] are . . . more likely to be tricked by police interrogators into confessing or taking the blame for criminal offenses."); Donna M. Praiss, Note, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 Am. J.L. & Med. 431, 432 (1989) (stating that low IQ individuals are "abnormally susceptible to coercion and pressure and, consequently, are more likely to give a confession that is not voluntary").

warns against the use of techniques that would influence those who are "unintelligent, uneducated, and come from a low cultural background."[173] This is also true with children, who may lack the education and experience to fully comprehend the implications of their statements.[174] A suspect's intelligence can play a significant role in his or her susceptibility to police interrogations and should be a factor in determining the admissibility of a confession.

Courts have often considered intelligence as a factor when determining the admissibility of a confession. They have found relevant factors to include "defendant's demeanor, coherence, articulateness, his capacity to make full use of his faculties, his memory, and his overall intelligence."[175] Scholarship before *Connelly* suggests that subnormal intelligence was one factor in the totality-of-the-circumstances test that would impact the admissibility of a confession.[176] Some courts post-*Connelly* have also suggested that intelligence may be a factor.[177] In *Abu Ali*, the Fourth Circuit stated that Abu Ali was "an intelligent, well-educated man with a rich and graphic vocabulary"[178] and "Abu Ali's personal characteristics did not render him particularly susceptible to coercion or pressure."[179] While courts recognize that intelligence may not be dispositive,[180] it is accepted as a significant factor in determining admissibility.

In this prong, courts should consider the intelligence of a defendant through examining his or her educational background, age, and IQ. While the number of points remains within the judge's discretion, questions of education and IQ are easy to measure and provide clear guidance for judges to consider. Courts have examined defendants' work experience, educational

173. Fred E. Inbau et al., Criminal Interrogation and Confessions 333 (5th ed. 2011).

174. *See, e.g.*, Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 Loy. U. Chi. L.J. 487, 509 (2002) ("While not all juveniles are in awe of police officers, the differences in age, experience, and knowledge between police officers and most juveniles creates an intimidating environment.").

175. United States v. Arcediano, 371 F. Supp. 457, 466 (1974) (D.N.J. 1974); *see also, e.g.*, Escute v. Delgado, 282 F.2d 335, 339 (1st Cir. 1960) (finding that whether there is coercion depends on age, intelligence, education, and experience).

176. *E.g.*, Charles C. Marvel, Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession*, 8 A.L.R. 4th 16, § 3 (1981).

177. *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 213 (2d Cir. 2008); United States v. Murphy, 107 F.3d 1199, 1206 (6th Cir. 1997); United States v. Bary, 978 F. Supp. 2d 356, 363 (S.D.N.Y. 2013).

178. United States v. Abu Ali, 528 F.3d 210, 233 (4th Cir. 2008) (quoting United States v. Abu Ali, 395 F. Supp. 2d 338, 376 (E.D. Va. 2005)).

179. *Id.*

180. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (listing intelligence as one factor in determining voluntariness), *with* Moore v. Dugger, 856 F.2d 129, 132 (11th Cir. 1988) (finding that mental deficiencies of a defendant not sufficient to render a confession involuntary, relying heavily on *Connelly*'s holding that there must be improper police action).

background, and sophistication in determining admissibility in the past,[181] suggesting those factors would not be too difficult to measure. Further, by balancing the defendant's intelligence with the other two prongs, the test would ensure that a defendant's intelligence is not the sole factor in determining admissibility—and that it would not result in over- or under-inclusive results. To assure that vulnerable defendants receive adequate protections, the intelligence and the competence of the defendant should be one factor in the new voluntariness test.

2. Penalties Imposed by the Interrogator

Secondly, courts should consider whether an interrogator imposed any objective threats or penalties, such as threatening a defendant with being hit, being taken away from family, or being cut off from communication. *Connelly*'s state-action requirement would be part of this prong, which considers the interrogator's tactics. The points afforded would mirror the severity of the penalty, creating a more standardized, but still tailored, means of determining admissibility.

The Supreme Court has defined the meaning of "compulsion" in the context of formal proceedings to mean actions that impose some type of objective penalty on a defendant.[182] Scholars have recognized that penalties play a role in determining whether there was compulsion.[183] Penalties have been demonstrated to exist when a prosecutor commented on a defendant's failure to speak during trial,[184] when a police officer was fired by the state for refusing to testify,[185] and when officers were told they would lose their jobs if they did not testify.[186] When a defendant or a witness is punished for his or her failure to testify, the court considers this a penalty.

Using a similar test in the context of confessions would help determine whether the confession was compelled—and, ultimately, whether the confession is unreliable and inadmissible in a courtroom. Courts already view threats as an indicator of an involuntary confession. In *Haynes v. Washington*, the Supreme Court found a confession inadmissible when the interrogator prevented the defendant from calling his wife unless he confessed.[187] The

181. *See, e.g.*, *Schneckloth*, 412 U.S. at 248; *In re Terrorist Bombings*, 552 F.3d at 215; *Abu Ali*, 528 F.3d at 233; *Bary*, 978 F. Supp. 2d at 363.

182. *See* Godsey, *supra* note 103, at 897–900 (explaining that in the context of formal proceedings the privilege prohibits the government's use of "objectively identifiable penalties").

183. *See, e.g.*, Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 184 (1988) ("[T]he issue of what constitutes an impermissible penalty must have something to do with the issue of what constitutes compulsion."); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 444 (1987) ("At trial, any penalty imposed on a witness for refusal to testify constitutes 'compulsion' and is impermissible if there is potential self-incrimination.").

184. Griffin v. California, 380 U.S. 609 (1965).

185. Gardner v. Broderick, 392 U.S. 273 (1968).

186. Garrity v. New Jersey, 385 U.S. 493 (1967).

187. 373 U.S. 503, 512–13 (1963).

Court reasoned that it was understandable that the defendant chose to confess when he was faced with such severe threats.[188] Given the unfair and coercive context of the confession, the Court found the confession involuntary and inadmissible.[189] Similarly, in *Lynumn v. Illinois*, the Court found a confession inadmissible when police officers told the defendant that her children's financial aid would be cut off if she did not confess.[190]

Whether the interrogator imposed a penalty informs the degree of coercion, which in turn can be determinative of the reliability of a confession. Merely questioning a suspect may not be coercive. Threatening to take something away from a suspect, however, asserts the interrogator's power, putting suspects in a position where complying is difficult to resist.[191] As the Supreme Court has said, the suspect would have "no reason not to believe that the police had ample power to carry out their threats."[192] Following this logic, courts should consider the use of threats in determining the admissibility of a confession.

Some have argued that the presence of a penalty should be the sole test for determining admissibility.[193] But merely focusing on penalties would create an interrogator-focused test—one similar to *Connelly* that focuses solely on police conduct.[194] Rather, this Note argues that penalties, while important, should be only one of the three factors in a comprehensive voluntariness analysis.

3. Evaluating the Fit of the Confession

The last prong of the test would evaluate the consistency of the confession with other evidence. One method courts can use to evaluate the reliability of a confession is by analyzing the fit, or lack of fit, between the description of the crime offered by the defendant and the other known facts of the crime. The extent to which a confession matches with the other evidence, and the level of detail that the confession provides, can be strong indicators of whether a confession is reliable.[195] The idea that the fit of a

188. *Haynes*, 373 U.S. at 514.

189. *Id.* at 514–15.

190. 372 U.S. 528, 532–34 (1963).

191. *See Lynumn*, 372 U.S. at 532–34.

192. *Id.* at 534.

193. *See, e.g.*, Godsey, *supra* note 103.

194. *See id.* at 910 n.344 (describing the test as one that "looks solely at the police conduct involved"). For discussion of *Connelly*'s police-conduct focus, see *supra* Section I.B.

195. Richard J. Ofshe and Richard A. Leo have argued for the use of pretrial reliability assessments where trial courts draw on existing rules of evidence. They have suggested using a modified balancing test under Rule 403 of the Federal Rules of Evidence to determine a confession's reliability, and to do this through examining the fit of the confession with the other evidence. 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, 792-98 (2013); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990-97 (1997).

confession is connected to reliability—a test known as the "Ofshe-Leo Test"[196]—would be the third prong, providing an additional, objective perspective in the analysis.

Leo and Ofshe, prominent researchers on interrogation and confession, have argued that the fit between a confession and other objective evidence can illuminate whether the defendant was innocent or guilty.[197] According to them, assessing the fit of a confession can help determine whether the suspect "possesses the sort of accurate, personal knowledge of the specifics of the crime that the perpetrator would be expected to have."[198] Through matching the suspect's recollection of events with other evidence obtained during the investigation, Leo and Ofshe have found several cases in which the suspect told investigators false information, and in one such case, the defendant was later pardoned.[199]

If this test can be used to signal the guilt or innocence of a defendant, it can also be used to judge the admissibility of a confession. Courts could examine testimony and other objective evidence to determine the fit of the confession, and rank the fit in the third portion of the test. One court has cited Leo and Ofshe for the proposition that the fit of a confession is "critical" because it "determines whether a confession should be deemed trustworthy."[200] This would also be in line with *Abu Ali*, where the Fourth Circuit analyzed the testimonies of other witnesses in its admissibility evaluation.[201]

There have been several critiques of this fit test. One scholar responded that the test would not prevent unreliable confessions from being admitted because police officers may naturally suggest or imply facts during the course of an interrogation.[202] The suspect may have heard information from the media or other outside sources.[203] Further, some critics claim that it is unclear how the test would work in practice,[204] and that it could lead to the exclusion of truthful confessions by guilty defendants.[205]

Even though the fit may not always accurately determine whether a defendant is innocent or guilty, it can indicate whether a suspect confessed

196. Leo et al., *supra* note 96, at 520.

197. *Id.*

198. Leo & Ofshe, *supra* note 3, at 438.

199. Ofshe & Leo, *supra* note 195, at 994.

200. State v. Mauchley, 67 P.3d 477, 489 (Utah 2003).

201. United States v. Abu Ali, 528 F.3d 210, 232–33 (4th Cir. 2008).

202. White, *supra* note 69, at 2025.

203. *Id.*

204. Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1127 (1997) ("Evaluating the proposal is quite difficult because Ofshe and Leo do little to explain how it would work in practice.").

205. *Id.* at 1131 (highlighting a finding by Britain's Royal Commission on Criminal Justice that a rule requiring corroboration of a confession for a conviction would reduce convictions of seemingly guilty defendants by as much as 3.1%).

under coercive or unreliable circumstances. Apart from whether the defendant was truly innocent, variations in a confession may inform the reliability, and in turn the voluntariness, of a confession.[206] While small errors may not indicate a coerced confession, large discrepancies between the confession and other evidence can be strong indicators of coercion.[207] Further, the test proposed in this Note would not *require* corroboration, but rather would use outside evidence as one factor, balanced by the other two prongs, when determining reliability. The fit would provide a third—and equally important—perspective to the test, that of objective outside evidence.

Using these three benchmarks, courts could apply a more comprehensive voluntariness test in a hard-lined, standardized manner. Some have argued for a retreat to the totality-of-the-circumstances test,[208] and some have argued for the continuance of a narrow, *Connelly*-centered interpretation.[209] Still others have called for reliability assessments under the Federal Rules of Evidence[210] or required electronic recording of confessions.[211] But few scholars consider the implications of a new voluntariness standard in the context of foreign confessions.[212] The totality-of-the-circumstances test allowed for too much flexibility;[213] the *Connelly* test has quashed a meaningful inquiry into voluntariness in the context of foreign confessions;[214] and the Federal Rules of Evidence alone have not been effective in excluding unreliable confessions.[215] The multifactor test would capture the underlying fairness and

206. *See* Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1127–28 (discussing how corroboration rules are primarily concerned with the reliability of confessions).

207. Ofshe & Leo, *supra* note 195, at 1077–88 (listing examples of confessions in which defendants made up answers in response to police coercion).

208. *E.g.*, McCreight, *supra* note 99, at 223.

209. *E.g.*, Donald W. Macomber, *A Call For Consistency:* State v. Caouette *Is No Longer Viable in Light of* Colorado v. Connelly *and* State v. Eastman, 50 ME. L. REV. 61, 80 (1998).

210. *See, e.g.*, Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209 (2006) (proposing a broader interpretation of Rule 602); Leo et al., *supra* note 96, at 531–33; Leo et al., *supra* note 195, at 805–08.

211. *See* Leo et al., *supra* note 96, at 528–35.

212. There are a handful of pieces that do consider confessions obtained by foreign law enforcement, but most do not deal with the *Connelly* framework itself. *See, e.g.*, Condon, *supra* note 104, at 685–704 (focusing on the need to consider internationalization and human rights records); Corn & Cieply, *supra* note 104, at 510–15 (calling for a statutory exclusionary rule for statements obtained by foreign government coercion); Evan Ezray, Note, *The Admissibility of Foreign Coerced Confessions in United States Courts: A Comparative Analysis*, 52 COLUM. J. TRANSNAT'L L. 851, 864–95 (2014) (proposing a comparative methodology). Others discuss *Connelly* but do not provide a test. *See, e.g.*, Darmer, *supra* note 118, at 363–72.

213. *See supra* Section I.B.

214. *See supra* Part II.

215. *See* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 33–41 (2008) (describing the Rules of Evidence and their inability to keep unreliable confessions out of evidence).

justice concerns that the *Connelly* test has not,[216] while providing clarified rules to determine admissibility in both the domestic and international contexts. This would help courts ground their admissibility analysis and provide law enforcement with understandable limits, while retaining the underlying values of the criminal justice system that the totality-of-the-circumstances approach was designed to protect.[217]

Conclusion

The conception of voluntariness in confession law has a complex history, that at times has pitted different rationales and concerns against each other. *Connelly* established a path for courts to follow, arguably ending the confusion of the totality-of-the-circumstances approach. When viewed through the lens of confessions obtained by foreign law enforcement, however, the *Connelly* path is also unsustainable. What *Connelly* has come to stand for—a deterrence-based voluntariness approach—is only workable in a narrow set of circumstances. Further, in focusing solely on the interrogator, the courts lose the perspective of the defendants and their underlying rights. Establishing a more comprehensive and objective voluntariness test can bring the focus back to defendants. Courts can, and should, perform a deeper evaluation of confessions in order to protect defendants' constitutionally mandated rights and to ensure that the U.S. criminal justice system stays true to its underlying values.

216. *See* Grano, *supra* note 58, at 923 ("Establishing proper standards of police conduct and disciplining police for 'offensive' conduct, however, are objectives beyond the courts' constitutional function.").

217. *See* Culombe v. Connecticut, 367 U.S. 568, 605 (1961) ("No more restricted scope of review would suffice adequately to protect federal constitutional rights."); Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence . . . ."); Chambers v. Florida, 309 U.S. 227, 240–41 (1940); *see also* George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash. U. L.Q. 275, 328–38 (discussing the objectives of the voluntariness analysis, including reliability, fairness, freedom of choice, and freedom not to be exploited).