

## THE CONFSSIONAL PENALTY

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### I. INTRODUCTION

Confessions hold great promise and grave peril. Speaking against one’s interests and assuming responsibility for criminal actions is regarded as the most compelling sign of guilt. Moreover, true confessions contain valuable information about the crime, its circumstances, and perpetrators, which assist law enforcement

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officials in their investigations. Thus, the confession has justly earned its title “the queen of evidence.” Yet research from the past few decades has shown that a considerable number of confessions are in fact false, ranking them high among the factors leading to wrongful conviction. While it is hard to assess the magnitude of social harm caused by the widespread and continual reliance on confessions in the criminal justice system, most studies clearly indicate that they are currently used way beyond the optimal social level. The reasons for this overuse are varied: confessions are readily available to law enforcement officers; the cost of obtaining them is quite low; and judges and jurors, who lack the means to distinguish between true and false confessions, by and large tend to convict based on a confession, greatly overestimating their reliability.

Decision-makers have not been oblivious to the problem of false confessions. Various legal rules have emanated from both legislatures and courts over the years in an attempt to contend with this issue. Some, such as the *Miranda* rule, are designed to guarantee voluntariness of confessions, while others, such as *corpus delicti* and the trustworthiness doctrine, are aimed at excluding unreliable confessions at trial. But despite legislative and judicial initiatives, studies have unequivocally shown the persistence of the problem of false confessions, resulting in numerous wrongful convictions. The DNA revolution of the early 1990s substantiated these findings and ignited renewed academic interest in confessions. Attempts have been made, both by legal scholars and social scientists, to solve the problem of confession-based wrongful convictions; these include enhanced voluntariness requirements, such as mandatory videotaping of police interrogations and allowing expert witnesses to testify as to the voluntariness of a confession, as well as stricter corroboration rules and more rigorous reliability tests. The apparent differences among the various proposals notwithstanding, they all share one notable common feature: their attempt to use evidentiary means to repair the evidentiary flaws associated with confessions. In this article, we argue that evidentiary mechanisms, in their different variations, are unlikely to be successful. This is rooted in the fact that the entire criminal justice system is organized around confessions. Thus, further restricting admissibility through stricter voluntariness rules or corroboration requirements would not be sufficient to change the course of the criminal justice system. The lure of the confession is too strong to resist. Like the Sirens’ Song, it casts a spell on all those

who hear it. Contending with the problem of false confessions at its core entails crafting a measure that both strikes at the incentives police interrogators bring with them into the interrogation room as well as provides the triers of fact with a reliable method of distinguishing between true and false confessions.

This article proposes and outlines such a measure, one that relies on penal rather than evidentiary means. We suggest increasing the cost of confessions relative to other types of evidence by imposing a “penalty” on the state for using confessions to convict, in the form of a reduced sentence. This would be effected by introducing into the sentencing guidelines a mandatory reduction in the criminal sanction if the prosecution submits a confession as evidence. We will demonstrate how placing such a “sentencing price tag” on the use of confessions would alter the entire incentive structure within the criminal justice system: it would correct the current bias in favor of using confessions by making law enforcement officials internalize the social costs of confessions and thus induce them to find extrinsic evidence. Furthermore, we will also show how our model provides a sorting mechanism that would turn judges and jurors into forceful gatekeepers that can prevent false confessions from tainting the verdict.

The article proceeds in four parts. Part II begins by describing the benefits and costs of using confessions. We then claim that the criminal justice system currently overuses confessions beyond the social optimum and explain the two, complementary reasons for this overuse: problematic incentive structure and lack of a reliable sorting mechanism. Part III surveys and critiques the various legal mechanisms that have hitherto been proposed to grapple with the problem of false confessions. After presenting our own model, which we call “the Confessional Penalty,” and discussing its normative appeal in Part IV, the fifth and final Part of the article addresses possible critiques of our model, from utilitarian, retributive, and expressive perspectives.

## II. CONFESSIONS: THE PROMISE AND THE PERILS

Confessions play a paramount role in the criminal justice system.<sup>1</sup> Vast portions of criminal procedure doctrine are dedicated to the issue of confessions, with the *Miranda* rules at their forefront. The reasons for this are straightforward and

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<sup>1</sup> Kenworthy Bilz, *The Fall of the Confession Era*, 96 J. CRIM. L. & CRIMINOLOGY 367, 367 (2005).

intuitive. First, a perpetrator of a crime can provide law enforcement officials with valuable information concerning the circumstances surrounding its commission that can assist in solving the case. Second, a confession of guilt is considered “among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.”<sup>2</sup> The high probative value attributed to confessions derives from the widespread belief that people are unlikely to confess to crimes they did not commit.<sup>3</sup> It is common-sense to expect self-serving behavior in others, and the strong disincentives to self-incriminate lead many to conclude that confessions are a highly reliable proof of guilt and that false confessions are an extremely rare occurrence.<sup>4</sup> Ironically, it is these very elements that give rise to the danger of using confessions: wrongful conviction. It is the persuasiveness of a confession as evidence of guilt that has made false confessions one of the most common sources of erroneous proof of guilt.<sup>5</sup>

Questions soon arise as to the appropriate approach to confessions. Should their use as evidence be encouraged or discouraged? How extensive should their role be in the criminal justice system? Responding to these questions and then crafting legal regime accordingly entails first weighing the costs and benefits of using confessions. A balance must be struck between the competing social interests of, on the one hand, obtaining authentic confessions and using them to convict guilty defendants and, on the other, minimizing the incidence of confession-based wrongful

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<sup>2</sup> *Hopt v. Utah*, 110 U.S. 574, 585 (1884).

<sup>3</sup> Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 *HOW. L.J.* 31, 33 (2005) (“Almost everyone finds it counterintuitive that persons would confess to crimes they did not commit.”); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 *AM. CRIM. L. REV.* 1271, 1280 (2005) (“The idea that an individual would confess to a crime, particularly a horrific crime such as murder or rape, without being subject to physical torture, runs counter to the intuition of most people.”).

<sup>4</sup> See McMurtrie, *supra* note 3 (calling the contention that innocent people do not confess to a crime a “commonly held belief”). Welsh White, *False Confessions and the Constitutions: Safeguards Against Untrustworthy Confessions*, 32 *HARV. C.R.-C.L. L. REV.* 105, 108 (1997) (“Even in 1940, when police interrogation methods were less humane than they are today, the great evidence scholar, John Henry Wigmore, asserted that false confessions were rare.”).

<sup>5</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 *N.C. L. Rev.* 891, 921 (2004); SAMUEL R. GROSS & BARBARA O'BRIEN, FREQUENCY AND PREDICTORS OF FALSE CONVICTION: WHY WE KNOW SO LITTLE, AND NEW DATA ON CAPITAL CASES 25 (U. of Mich. Law Sch. Public Law Research Paper No. 93 & Mich. U. College of Law Legal Studies Research Paper N. 05-14 (working paper) (claiming that “precisely because most confessions are true—and exceptionally powerful evidence of guilt—those that are false are devastating”).

convictions.<sup>6</sup> Unfortunately, gathering the data that would answer these questions is implausible,<sup>7</sup> if only for the simple reason that false confessions and convictions remain, by and large, concealed from scrutiny.<sup>8</sup> As a result of the way the criminal justice system operates, "in most cases false convictions are not merely invisible but hard, if not impossible, to identify when we try."<sup>9</sup> And alongside the difficulties inherent to information-gathering on the extent and frequency of confession-based false convictions, there is the unfeasible task of collecting adequate data on confession-based truthful convictions.<sup>10</sup> This notwithstanding, the few pieces of the puzzle that have been exposed make it quite evident that there is an upward deviation from the desirable balance point, namely, that there is systematic overuse of the confession as a basis for conviction.

A 2005 study estimated that thousands of individuals in the United States have been wrongfully convicted over the past three decades, many on the basis of false confessions.<sup>11</sup> Numerous empirical studies have established a strong causal connection between police interrogation, false confessions, and wrongful convictions,<sup>12</sup> setting confessions as a major cause of erroneous conviction and

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<sup>6</sup> See Paul Cassell, *Balanced Approaches to the False Confession Problem*, 74 DENV. U. L. REV. 1123, 1123 (1997) (discussing the need to strike a balance between the competing concerns of protecting suspects and securing public safety).

<sup>7</sup> For an elaborate discussion on the difficulties inherent to the empirical study of wrongful convictions, see GROSS & O'BRIEN, *supra* note 5, at 1.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* (discussing the problems associated with obtaining data on police investigation processes and prosecutions).

<sup>11</sup> Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005); see also Edward J. Sackman, *False Confessions: Rethinking A Contemporary Problem*, 16 KAN. J.L. & PUB. POL'Y 208, 208 (2006).

<sup>12</sup> See Drizin & Leo, *supra* note 5, at 894-907 (surveying the research literature on false confessions and their effect on wrongful convictions). The causal link between police interrogation and false confessions is strongest when physical means of coercion are employed by the police, but is not limited to such circumstances. Psychological tactics employed by police also lead to high rates of false confessions. Many case studies have been devoted to the elucidation and description of the various processes leading to such false self-incrimination. For a survey of these studies, see Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 895 (2007). For further discussion of police-induced false confessions, see Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*]; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. in L. POL. & SOC'Y 189 (1997) [hereinafter Ofshe & Leo, *The Social Psychology of Police Interrogation*]; Saul M. Kassir, *The*

miscarriage of justice in the United States today.<sup>13</sup> False confessions and self-incriminating statements were found to be the evidentiary basis for 14% to 25% of the sampled cases of erroneous conviction.<sup>14</sup> For example, the most comprehensive study on the issue to date found that of 340 documented cases of “official exoneration” between 1989-2003, 15% were the direct result of a false confession.<sup>15</sup> The study further found that only 22% of the exonerated individuals who falsely confessed to the police had pled guilty at trial, with the vast majority recanting their confessions.<sup>16</sup>

The strong causal link between false confessions and wrongful convictions has been further substantiated in the DNA era. In the 1990s, advancement in DNA technology made it possible to determine with near certainty the identity of a perpetrator who left behind DNA evidence (such as blood or semen) at a crime scene. This technology led to the exoneration of scores of individuals,<sup>17</sup> including some on death row.<sup>18</sup> The first study to examine the use of DNA evidence for exoneration purposes revealed that approximately 20% of wrongful convictions had been the direct result of false confessions.<sup>19</sup> This figure has since risen. Contemporary studies report that 25% of wrongly convicted individuals who have been exonerated in the

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*Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 230 (1997) (discussing the effect of psychological coercion on the tendency to confess falsely). See also McMurtrie, *supra* note 3, at 1281 (“The literature regarding modern interrogation methods establishes that although the police no longer rely upon physical torture to obtain confessions, they are instead trained to employ a number of methods of psychological persuasion that are intended to compel a suspect to confess.”).

<sup>13</sup> See Drizin & Leo, *supra* note 5, at 920 (studies establish “the problem of false confessions as a leading cause of the wrongful convictions of the innocent in America”).

<sup>14</sup> According to the Innocence Project at Cardozo Law School, 25% of wrongful convictions are the result of false confessions, <http://www.innocenceproject.org> (last visited Nov. 14, 2007). See also McMurtrie, *supra* note 3, at 1280 (“In case studies of erroneous convictions, a false confession is identified as the cause of miscarriages of justice in numbers ranging from 14% to 25% of the cases studied.”); Drizin & Leo, *supra* note 5, at 901-07; Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (in a survey of 350 potentially capital cases during the twentieth century in which a miscarriage of justice had occurred, 14% the wrongful conviction has been caused by a police-induced false confession in 14% of the cases).

<sup>15</sup> Gross et al., *supra* note 11, at 544.

<sup>16</sup> *Id.*

<sup>17</sup> See Zalman & Smith, *supra* note 12, at 895.

<sup>18</sup> Drizin & Leo, *supra* note 5, at 904; see also Fernanda Santos, *Vindicated by DNA, but a Lost Man on the Outside*, N.Y. TIMES, Nov. 25, 2007 (claiming that 53 of the individuals exonerated through DNA evidence since 1989 had been convicted of murder and approximately 35% had spent more than 15 years in prison).

<sup>19</sup> EDWARD CONNOR ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 16-17 (U.S. Department of Justice, 1996).

United States as a result of DNA testing were originally convicted on the basis of their false confessions.<sup>20</sup> However, there is good reason to suspect that the cases of wrongful conviction exposed by this testing are only "the tip of the iceberg."<sup>21</sup> The actual figures are most likely substantially higher, in the range of thousands of cases a year.<sup>22</sup> DNA testing is the almost exclusive means of uncovering wrongful conviction; yet use of the technology is relatively new and the cases that lend themselves to testing are limited to very specific circumstances.<sup>23</sup> Moreover, it is important to recall that the impact of false confessions on wrongful conviction rates does not merely correlate with their documented number;<sup>24</sup> for a false confession runs the risk of falsely incriminating not only the confessor but also those implicated by his confession.<sup>25</sup>

Thus, although it is indeed impossible to accurately quantify the prevalence of false confessions or to assess the exact extent of their effect on wrongful conviction rates, it is quite evident from the numerous studies conducted that the number is high and unsettling. As noted by Drizin and Leo, "[T]he research literature has established that such confessions occur with alarming frequency."<sup>26</sup> In light of the great number of documented cases of wrongful conviction resulting from reliance on false confession, as well as the tremendous social damage caused by erroneously convicting an innocent defendant,<sup>27</sup> we accept as a premise the near-consensual<sup>28</sup>

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<sup>20</sup> See <http://www.innocenceproject.org> (last visited Nov. 14, 2007).

<sup>21</sup> Albert Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997). See also Drizin & Leo, *supra* note 5, at 920.

<sup>22</sup> Drizin & Leo, *supra* note 6.

<sup>23</sup> Hirsch, *supra* note 3. See also GROSS & O'BRIEN, *supra* note 5, at 9 ("[E]xonerations are clearly a small and unrepresentative sample of all false convictions ... almost all of the exonerations that have come to light since 1989 are for murder—where the likelihood of post conviction investigation is highest—and for rape, where untested DNA evidence can sometimes provide definitive proof of innocence. Rape and murder together constitute about 2% of felony convictions and a much smaller proportion of all convictions.").

<sup>24</sup> See Gross et al., *supra* note 11, at 545.

<sup>25</sup> *Id.*

<sup>26</sup> Drizin & Leo, *supra* note 5, at 920.

<sup>27</sup> For further discussion on the costliness of false convictions, see Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408-17 (1973); Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 (1996).

<sup>28</sup> One well known exception is Prof. Cassell, who does not agree with the quantification of false confessions in the studies conducted on the matter and objects to the call for policy reform. See Cassell, *supra* note 6; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—*

view within legal academia that confessions are overused in the criminal justice system<sup>29</sup> and that systemic change is required to reduce the incidence of wrongful confession-based convictions.<sup>30</sup>

#### A. The Problematic Incentive Structure of Law Enforcement Officials

The causes of confession-based wrongful convictions vary with the different phases of the criminal proceedings. Criminal guilt is essentially established in three phases.<sup>31</sup> The first phase is the police investigation, followed by the public prosecution phase, and then concluding at trial.<sup>32</sup> For our purposes, these three phases can be reduced to two: the pre-trial phase (encompassing the police investigation and prosecution phases) and the trial stage. At the pre-trial phase, the problem of false confessions derives from the incentives existing for police officials and prosecutors: "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence."<sup>33</sup> Although as a general rule, law enforcers do not elicit false confessions knowingly and intentionally,<sup>34</sup> there is reason to suspect that they neglect to take the necessary precautions to avoid them. This results from the current reality that law enforcement officials internalize the benefits of confessions but not the associated social costs. Confessions enable law enforcers to achieve high conviction rates while saving the resources entailed by a thorough independent investigation. At the same

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and from *Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998); Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999).

<sup>29</sup> Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 227 (2006) ("[T]he false convictions of even a relatively few number of defendants may be too much of a sacrifice for broader assurances of catching guilty suspects.").

<sup>30</sup> Drizin & Leo, *supra* note 5, at 997 ("... [I]nterrogation-induced false confessions may be a more serious problem than previously imagined. These cases ought to compel all who care about the credibility of the American criminal justice system to devise better ways to reduce or eliminate the number of false confessions and the risks they pose for the innocent. It behooves criminal justice officials not only to acknowledge and better understand the role that false confessions play in creating and perpetuating miscarriages of justice, but also to introduce meaningful reforms that will prevent false confessions from occurring or leading to the wrongful conviction and/or incarceration of the innocent.").

<sup>31</sup> See Gross & O'Brien, *supra* note 5, at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Haynes v. Washington*, 373 U.S. 503, 519 (1963).

<sup>34</sup> See Gross & O'Brien, *supra* note 5, at 3.

time, they externalize the enormous social costs of confessions, which include the pain and suffering of the wrongly convicted, the erosion of the criminal justice system's overall reliability, the stagnation of a law enforcement system that focuses almost exclusively on confessions, and the moral costs to a society in which self-incrimination is the rule rather than the exception.

This agency problem is further exacerbated in light of the personal benefits law enforcers may reap from use of confessions. In practice, the criminal process serves not only as an instrument to further social goals, but also one by which state agents such as police officers and prosecutors advance their private agendas.<sup>35</sup> The latter include building up a conviction record that bolsters their professional careers, reducing their workload, and solving cases as quickly as possible. Confessions have great appeal for police officers and prosecutors pursuing such ends: they are readily available, especially in situations of custodial interrogation; they significantly reduce the effort and costs of conducting independent investigations;<sup>36</sup> and they guarantee near certain conviction.<sup>37</sup> For these reasons, law enforcers tend to be overzealous in eliciting confessions and using them in court. The result, thus, is that the entire investigation apparatus typically revolves around eliciting confessions from suspects.<sup>38</sup> In fact, law enforcement officers who conduct interrogations rarely undertake objective fact-gathering missions; “rather, their only purpose is to obtain a confession from the suspect in order to bolster the prosecution's case.”<sup>39</sup> Once a confession is obtained, “the police typically close the investigation, clear the case as solved and make no effort to pursue other possible leads—even if the confession is internally inconsistent, contradicted by external evidence or the result of coercive

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<sup>35</sup> PETER LEWISCH, CRIMINAL PROCEDURE ENCYCLOPEDIA OF LAW AND ECONOMICS (1999). *See also* Keith N. Hylton & Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61, 72 (2007).

<sup>36</sup> The reduction in the costs of investigation due to the resort to confessions may, at times, be illusory, because confessions can entail long and intense interrogations. *See* Gross et al., *supra* note 11, at 544-45.

<sup>37</sup> Drizin & Leo, *supra* note 5, at 921 (“With the exception of being captured during the commission of a crime (whether by physical apprehension or electronically on videotape), a confession is the most incriminating and persuasive evidence of guilt that the state can bring against a defendant.”).

<sup>38</sup> McMurtrie, *supra* note 3, at 1281.

<sup>39</sup> *Id.*

interrogation.”<sup>40</sup> This is true not only with regard to the police but also of the prosecution. The fact that confessions lead to virtually assured conviction “blind[s] some prosecutors to their ethical obligation to pursue truth and seek justice,”<sup>41</sup> so much so that confessions have been termed “the golden ring for which prosecutors always reach.”<sup>42</sup>

## B. Judges and Jurors: The Gatekeeping Problem

The problematic incentive structure to which law enforcers are subject does not constitute the entire problem. Effective gatekeeping on the part of judges and jurors would prevent false confessions from impacting the outcome of trials, thus mitigating the impact of this incentive structure. However, judges and juries fail miserably in their role as gatekeepers. This failure has been confirmed in numerous empirical, experimental, and field studies,<sup>43</sup> which show unequivocally that judges and jurors alike tend to systematically overestimate the probative value of confessions.<sup>44</sup> Once admitted as evidence at trial, confessions overshadow all other evidence,<sup>45</sup> especially evidence of innocence,<sup>46</sup> and significantly impair the decision-makers' ability to objectively assess the defendant's culpability.<sup>47</sup> According to one

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<sup>40</sup> Drizin & Leo, *supra* note 5, at 922. *See also* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 984. *See also* Boaz Sangero, *Miranda Is Not Enough: A New Justification For Demanding "Strong Corroboration" To Confession*, 28 CARDOZO L. REV. 2791, 2817 (2007) ("A legal system that is based heavily on confessions encourages law enforcement officials to focus their investigative measures on extracting confessions from suspects instead of directing their efforts towards gathering intrinsic evidence.").

<sup>41</sup> Drizin & Leo, *supra* note 5, at 1006.

<sup>42</sup> Bilz, *supra* note 1, at 367.

<sup>43</sup> For a survey of this literature, see Drizin & Leo, *supra* note 5, at 922; *see also* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 741 (1997); McMurtrie, *supra* note 3; Richard A. Leo & Richard A. Ofshe, *False Confessions: Causes, Consequences, and Solutions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 36-37 (Saundra D. Westervelt & John A. Humphrey eds., Rutgers University Press 2001) [hereinafter Leo & Ofshe, *False Confessions*].

<sup>44</sup> Drizin & Leo, *supra* note 5, at 921. This phenomenon is not unique to triers of fact and is also attributable to police, prosecutors, and even defense attorneys.

<sup>45</sup> Drizin & Leo, *supra* note 5, at 923 ("One biased piece of evidence, such as a false confession, is likely to contaminate the perception and treatment of a case as it makes its way through the entire criminal justice process."). The authors cite George Castelle and Elizabeth Loftus, who claimed that the defendant's confession can taint all other pieces of evidence, in George Castelle & Elizabeth Loftus, *Misinformation and Wrongful Convictions*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 30 (Saundra O. Westervelt & John Humphrey eds., 2001).

<sup>46</sup> Drizin & Leo, *supra* note 5, at 893.

<sup>47</sup> Drizin & Leo, *supra* note 5, at 995-96.

study, jurors view confessions as the piece of evidence most indicative of a defendant's guilt.<sup>48</sup> They tend to significantly undermine the problematic nature of self-incriminating statements and are willing to base convictions exclusively on confessions, even when uncorroborated by extrinsic evidence<sup>49</sup> and even “in the face of contradictory evidence.”<sup>50</sup> Another study indicated that judges rarely discard a confession, even when it is patently dubious.<sup>51</sup> In a recent study, Drizin and Leo found that 81% of all convicted defendants whose confessions were ultimately proven to be false were convicted at trial on the basis of their confessions.<sup>52</sup> The confession’s allure for triers of fact can be attributed to people’s difficulty in imagining themselves confessing to a crime they did not commit, in the absence of force or threat of force.<sup>53</sup> When faced with a non-coerced confession, the intuitive assumption is, therefore, that the confessor must be guilty.<sup>54</sup>

The persistent and recurring nature of this evidentiary fallacy can seem rather puzzling. One would expect the clear indications reported in the literature of the systematic over-valuation of the probative weight of confessions by triers of fact to filter into the criminal justice system and set in motion a learning process that would make judges and jurors less susceptible to such errors of judgment. The most plausible explanation for why such a process does not occur and they continue to be biased by confessions is that triers of fact lack a panoramic view of the criminal justice system. The criminal justice system individuates cases, and triers of fact as a consequence react on a case-by-case basis. Hence, even if judges and jurors are theoretically aware of the problem of wrongful convictions based on false confessions in the aggregate of cases, they typically fail to identify its concrete manifestation in the particular case before them. Suppose, for instance, that a judge is aware of the fact

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<sup>48</sup> Saul Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997).

<sup>49</sup> *Id.*

<sup>50</sup> Davies, *supra* note 29, at 236.

<sup>51</sup> Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1329 (1997); Hirsch, *supra* note 3, at 33 (tracing and describing the fading of the awareness in the modern judiciary that “certain interrogative practices create an unacceptably high risk of false confessions”).

<sup>52</sup> Drizin & Leo, *supra* note 5, at 960.

<sup>53</sup> Davies, *supra* note 29, at 225.

<sup>54</sup> See Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Safeguards Against False Confession*, 1984 WIS. L. REV. 1121, 1189 (1984).

that 1 out of 20 confessions is false. Since the cases are tried individually and are often indistinguishable from one another, the judge's underlying assumption in each is that the confession is 95% true. The result is that she is likely to convict all 20 defendants.

The defects of confessions—the incentives of law enforcement officials to elicit confessions and the excessive probative value they are assigned by judges and jurors—lead to their overuse above and beyond the socially optimal level. It is therefore essential that a legal mechanism to tackle these issues head on be introduced and the law pertaining to confessions reformed accordingly.

### III. LEGAL DOCTRINE AND REFORM PROPOSALS—A CRITIQUE

The risks inherent to using confessions have not gone unnoticed. Jurists and academics have long grappled with the problem of false confessions and attempted to devise legal mechanisms that would enable the state to continue using confessions while mitigating their negative potential. The following section describes and critiques the various legal doctrines and mechanisms that have been proposed.

#### A. The Legal Doctrine on Confessions

The legal doctrine governing confessions can be divided roughly into two sets of rules designed to alleviate two kinds of concerns regarding confessions.<sup>55</sup> The “voluntariness rule” addresses the potential abuse of power that may arise during a suspect's interrogation with the aim of preventing coerced involuntary confessions. It allows only confessions obtained voluntarily to be admitted at trial and bars the admission as evidence of confessions obtained through torture, threat of harm, psychological pressure, or other coercive police procedures.<sup>56</sup> The second rule, the “corroboration rule,” is designed to reduce the possibility of wrongful conviction based on a false confession. This rule requires the corroboration of confessions by

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<sup>55</sup> Major Russel L. Miller, *Wrestling with MRE 304(G): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 3-4 (2003).

<sup>56</sup> See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 485-86 (2006) [hereinafter Leo et al., *Bringing Reliability*]; Davies, *supra* note 29; Ayling, *supra* note 54, at 1123; Sangero, *supra* note 40, at 2801.

independent evidence as a condition for conviction.<sup>57</sup> Below, we further elaborate on these two types of rules and demonstrate their failure to reach their intended goals.

## 1. The Voluntariness Rule

The voluntariness rule originates in English common law. In 1783, the King's Bench was the first to declare, in *The King v. Warickshall*,<sup>58</sup> the inadmissibility of involuntary confessions, grounding its decision on the greater goal of excluding untrustworthy evidence.<sup>59</sup> A hundred years later, the American Supreme Court followed suit. Citing *Warickshall* approvingly, the Court declared in *Hopt v. Utah*<sup>60</sup> the exclusion of involuntary confessions to be the law of the land. Constitutional fortification of the ruling was quick to follow. In *Bram v. United States*,<sup>61</sup> the Supreme Court interpreted the Fifth Amendment protection against self-incrimination as extending also to forced confessions. And some forty years later, in *Brown v. Mississippi*,<sup>62</sup> the Court held that the use of involuntary confessions at trial violates due process.<sup>63</sup> These landmark cases established the constitutional foundations for the exclusion of involuntary confessions. In the 1950s and 1960s, the voluntariness doctrine continued to evolve as the Supreme Court came to realize that false confessions not only emanate from overtly coercive means, such as the use of physical force, threat of harm, or denial of food or sleep, but also from psychological pressures that overbear the suspect's will. Accordingly, the notion of "coercion" was extended to include psychological torment and even, in some circumstances, simple police deceit.<sup>64</sup>

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<sup>57</sup> Sangero, *supra* note 40, at 2803; Leo et al., *Bringing Reliability*, *supra* note 56, at 486.

<sup>58</sup> 168 Eng. Rep. 234 (K.B. 1783).

<sup>59</sup> Leo et al., *Bringing Reliability*, *supra* note 56, at 489.

<sup>60</sup> 110 U.S. 574 (1884).

<sup>61</sup> 168 U.S. 532 (1897).

<sup>62</sup> 297 U.S. 278 (1936).

<sup>63</sup> The use of the Fourteenth Amendment marks a shift in focus away from the reliability rationale as the sole rationale for the exclusion of involuntary confessions and a move towards deterrence against offensive police behavior as an additional rationale for the exclusionary rule. *See Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confessions are inadmissible and merit reversal even when there has been sufficient independent evidence to support conviction). For a description of this shift, see Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314-20 (1998).

<sup>64</sup> *See Penney, supra* note 65, at 341-61. A good depiction of the evolution of the Court's conception of involuntariness arises from the following line of cases: *Brown v. Mississippi*, 297 U.S. 278 (1936)

In 1966, the Warren Court revolutionized the course of modern confession law.<sup>65</sup> In *Miranda v. Arizona*,<sup>66</sup> the Court acknowledged that the level of protection provided to suspects was insufficient. Custodial police questioning was characterized as manipulative, heavy-handed, and oppressive and, as such, threatened to debilitate the rational decision-making capacity of suspects generally ignorant of their constitutional rights.<sup>67</sup> The Court also deemed the traditional judicial attempts to identify "coercion" in the inherently coercive atmosphere of custodial interrogation largely ineffective.<sup>68</sup> Seeking to counteract the overpowering psychological pressures of such interrogation, the Court set the *Miranda* warnings, whereby suspects must be informed by police of their constitutional rights to silence and appointed counsel before any custodial interrogation can begin.<sup>69</sup> Henceforth, the police could question only after obtaining the suspect's voluntary, informed, and intelligent waiving of his or her rights. Failure to do so now would result in the inadmissibility of any confession made by the suspect, which would be deemed "involuntary." Thus, rather than attempting to accurately assess the point at which a suspect's will is overborne by police tactics, as dictated by the pre-*Miranda* voluntariness doctrine, *Miranda* sought to strengthen the preference not to risk self-incrimination at all.<sup>70</sup>

Despite the high hopes pinned on *Miranda*, it has been deemed a "spectacular failure."<sup>71</sup> Notwithstanding the widespread outcry the ruling initially provoked among

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(confession deemed involuntary where defendant tortured over several days); *Leyra v. Denno*, 347 U.S. 556 (1954) (confession deemed involuntary where suspect questioned on different days for prolonged hours, when during final session, police psychiatrist, posing as medical doctor called to treat suspect's sinus condition, attempted to hypnotize suspect); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (confession deemed involuntary where suspect's apartment surrounded by police and suspect was threatened that financial aid to her children would be cut off and her children taken from her unless she cooperated); *Haynes v. Washington*, 373 U.S. 503 (1963) (confession deemed involuntary where suspect held in isolation for sixteen hours and told he would be not be allowed to call wife or lawyer until he confessed).

<sup>65</sup> Richard A. Leo, *Criminal Law: The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 621 (1996).

<sup>66</sup> 384 U.S. 436 (1966).

<sup>67</sup> *Id.* at 448-55.

<sup>68</sup> *See id.* at 445. *See also* William T. Pizzi & Morris B. Hoffman, *Taking Miranda's Pulse*, 58 VAND. L. REV. 813, 817 (2005).

<sup>69</sup> *See Miranda*, 384 U.S. 436, at 467-74.

<sup>70</sup> *See* George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room, Miranda's Waning Protections*, 81 TEX. L. REV. 1091, 1103 (2003).

<sup>71</sup> *Id.* at 1092, 1094 n.16 (reviewing Welsh White's book *Miranda's Waning Protections* and citing other authors arguing that *Miranda* has failed to achieve its goals). *See also* Sandra G. Thompson,

police, prosecutors, politicians, and the media,<sup>72</sup> which gave rise to Congress' failed attempt to overturn it,<sup>73</sup> the *Miranda* protections did not turn out to be a boon for defendants, certainly not innocent ones. While scholars disagree as to *Miranda's* precise impact on confession rates, there is consensus that it is minimal at best. Most suspects (approximately four out of five) waive their *Miranda* rights and answer police questions,<sup>74</sup> and even though invocation is allowed after waiver, suspects rarely exercise this option.<sup>75</sup> Moreover, a finding of voluntary waiver of rights leads courts to assume any confession given after waiver also to be voluntary. In theory, the two voluntariness questions are separate and distinct; thus, when deliberating an involuntariness claim, courts should look beyond the warning and scrutinize the interrogation process itself. But in reality, courts rarely do so in the presence of a *Miranda* waiver.<sup>76</sup> Professor William Stuntz has speculated that *Miranda's* shifting of the focus from the interrogation process to the pre-interrogation warnings provides little protection from error and might in fact make getting confessions from the guilty harder and from the innocent easier.<sup>77</sup> Consequently, a rather bleak reality has emerged: abundant evidence shows that, despite the voluntariness rule, false confessions are regularly admitted into court to convict innocent defendants.

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*Evading Miranda: How Siebert and Patane Failed to "Save" Miranda*, 40 VAL. U. L. REV. 645, 645 (2006); Michael E. O'Neill, *Undoing Miranda*, 2000 B.Y.U. L. REV. 185, 185 (arguing that *Miranda* is "teetering on the brink"); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 309 (2003) (arguing that "*Miranda v. Arizona* is a hoax" that has had almost no effect on police behavior); Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 YALE L.J. 447, 452 (2002) (arguing that the future of *Miranda* is both uncertain and bleak).

<sup>72</sup> See Leo, *The Impact of Miranda Revisited*, *supra* note 65, at 622.

<sup>73</sup> The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 3501 (1968). Title II purported to undo *Miranda* by making voluntariness the sole factor in determining the admissibility of a confession or statement in federal criminal cases. The Act was by and large ignored and was declared unconstitutional in *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that section 3501 was an unconstitutional invasion of the Court's exclusive power to interpret and apply the Constitution).

<sup>74</sup> See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 860 tbl. 3 (1996) (finding that 83.7% of the suspects waived their *Miranda* rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl. 3 (1996) (finding that 78% of the suspects waived their *Miranda* rights).

<sup>75</sup> See Leo, *supra* note 77, at 275 tbl. 2 (reporting invocation after waiver in 1% of his sample).

<sup>76</sup> See Thomas III, *supra* note 70, at 1092.

<sup>77</sup> William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 47 n.160 (1997).

## 2. The Corroboration Rule

The corroboration rule prevents a conviction from being secured based solely on a confession, requiring that it be corroborated by independent evidence. The purpose of this rule is to guarantee the reliability of confessions. The original common law corroboration rule evolved into two distinct forms in American law. The majority of state courts apply the traditional rule requiring proof of the *corpus delicti*, while a minority, along with the federal courts, follow the federal rule, which requires independent evidence to establish the trustworthiness of the defendant's out-of-court statement.<sup>78</sup>

### a) *Corpus Delicti*

Most jurisdictions require that a confession be corroborated with independent proof of the *corpus delicti*, or "the body of the crime." The common law doctrine of *corpus delicti* was originally aimed at preventing conviction for a crime that was never committed based solely on the accused's confession.<sup>79</sup> In contrast to the English approach, which reserved the *corpus delicti* rule for homicide cases, American courts extended the rule to nearly all crimes, requiring that, before a defendant's confession can be admitted into evidence, the prosecution must provide external evidence in two matters: first, the occurrence of a death, injury, or loss constituting the crime, and second, criminal agency must be shown to have been involved. The *corpus delicti* rule was adopted by all fifty states over the years, with Massachusetts the last to adopt, in 1984.<sup>80</sup>

With time, however, it became apparent that the rule provides insufficient protection for innocent defendants against false confessions. The *corpus delicti* rule

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<sup>78</sup> Maria L. Crisera, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8*, 78 CAL. L. REV. 1571, 1572-73 (1990).

<sup>79</sup> The historical origins of the *corpus delicti* rule can be traced back to a seventh-century English case, a murder trial, known as *Perry's Case* (14 Howell St. Tr. 1312 (1660)). A man by the name of William Harrison disappeared, and after some of his personal possessions were found on a highway, suspicion fell on his servant, John Perry. Perry initially denied any wrongdoing, but after a prolonged (and probably coercive) interrogation, he confessed to robbing and murdering Harrison, implicating his mother and brother in the crime as well. Even though Harrison's body was never found in the swamp where Perry had said he dumped the body and despite the vigorous denials of both the mother and brother, the three were convicted of murder based on Perry's confession and were executed. Several years later, the "victim" showed up alive and well. See David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 828 (2003).

<sup>80</sup> See Leo et al., *Bringing Reliability*, *supra* note 56, at 501-05.

requires corroborating evidence indicating that a crime was committed; it does not entail proof that the defendant was the perpetrator, nor support for any other element of the crime.<sup>81</sup> In most cases, the prosecution can easily establish the *corpus delicti* with independent evidence, and thus a confession is hardly ever excluded on this ground.<sup>82</sup> And yet a false confession can give rise to a host of difficulties with regard to the identity of the perpetrator of the proven crime. Since the *corpus delicti* rule centers on the occurrence of the crime rather than the reliability of the confession, it is clearly an inadequate tool for weeding out false confessions.<sup>83</sup> Despite this criticism, however, most state courts continue to apply this traditional rule.<sup>84</sup>

b) *The Trustworthiness Doctrine*

*Opper v. United States*<sup>85</sup> and *Smith v. United States*,<sup>86</sup> both decided by the Supreme Court in 1954, replaced the *corpus delicti* rule with the "trustworthiness doctrine" in federal courts and in the few state courts that chose to adopt it.<sup>87</sup> Unlike the *corpus delicti* rule, this doctrine requires that a confession be corroborated by "substantial independent evidence which would tend to establish the trustworthiness of the statement" before it can be introduced as evidence.<sup>88</sup> In making a trustworthiness determination, judges are instructed to consider the "totality of the circumstances" and not to admit the confession unless it is deemed trustworthy by a preponderance of the evidence.<sup>89</sup>

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<sup>81</sup> Sangero, *supra* note 40, at 283-04. See also Leo et al., *Bringing Reliability*, *supra* note 56, at 506.

<sup>82</sup> Crisera, *supra* note 78, at 1581.

<sup>83</sup> See Leo et al., *Bringing Reliability*, *supra* note 56, at 506-07.

<sup>84</sup> For a list of the many states that still follow the *corpus delicti* rule, see Miller, *supra* note 55, at 9 n.44.

<sup>85</sup> 348 U.S. 84 (1954).

<sup>86</sup> 348 U.S. 147 (1954).

<sup>87</sup> The state courts that adopted the trustworthiness doctrine are: Texas, New Mexico, Hawaii, and the District of Columbia. A few state jurisdictions have created hybrid rules that include elements of both the *corpus delicti* rule and the trustworthiness doctrine, among them New Jersey, Wisconsin, and Iowa. See Miller, *supra* note 55, at 9.

<sup>88</sup> *Opper*, 348 U.S. at 93.

<sup>89</sup> See Leo et al., *Bringing Reliability*, *supra* note 56, at 508-09.

## B. Reform Proposals in the DNA Era

Concerns about the legal doctrine's failure to prevent unreliable confessions from infiltrating the criminal justice system were raised as early as the 1980s. Anecdotal stories about false confessions that led to wrongful convictions circulated, but since there was no reliable method for confirming these stories, the issue did not stir much public or academic interest.<sup>90</sup> In the 1990s, with the advent of the DNA Revolution,<sup>91</sup> it soon became apparent that these concerns were not only justified but also extremely understated.<sup>92</sup> It has been unequivocally proven that a significant number of confessions deemed by the court to be “voluntary,” “corroborated,” and thus reliable were in fact false and led to wrongful conviction. Since the 1990s, then, researchers from the legal academia and the social sciences have been attempting to formulate viable reforms in both police practices and the legal doctrine. The following sections briefly survey some of these proposals.

### 1. Reinforced Voluntariness Rules

#### a) *Electronic Recording of Interrogations*

Mandatory recording of police interrogations, probably the most popular of the reform proposals, has already been implemented in some form in several jurisdictions. A growing body of academic literature as well as case law and legislation encourage or mandate electronic recording of police interrogations.<sup>93</sup> According to advocates of the measure, innocent suspects, the police, prosecution, and triers of fact all stand to gain from recording interrogations.<sup>94</sup> Electronic recordings supply accurate information about the conditions in which interrogations took place and allow judges

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<sup>90</sup> See Ayling, *supra* note 54, at 1155.

<sup>91</sup> See Zalman & Smith, *supra* note 12, at 895.

<sup>92</sup> See discussion at *supra* Part II.

<sup>93</sup> See Julie Renee Linkins, *Satisfy the Demands of Justice: Embrace Electronic Recording of Custodial Investigative Interviews Through Legislation, Agency Policy, or Court Mandate*, 44 AM. CRIM. L. REV. 141, 143 (2007). Academic literature advocating the use of electronic recording in police interrogations in the past decade includes the following: Leo, *The Impact of Miranda Revisited*, *supra* note 65, at 681-92; Johnson, *supra* note 43; Drizin & Leo, *supra* note 5, at 997; Slobogin, *supra* note 71; Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (2005); Walter F. Bugden, Jr. & Tara L. Isaacson, *Crimes, Truth and Videotape: Mandatory Recording of Interrogations at the Police Station*, 19 UTAH BAR J. 28 (2006); Sackman, *supra* note 11, at 228-32.

<sup>94</sup> See Sackman, *supra* note 11, at 228-29.

and juries to better evaluate the voluntariness of confessions.<sup>95</sup> They provide the prosecution with incriminating evidence in cases where the defendant is guilty and the defense with exonerating evidence where he or she is innocent.<sup>96</sup> Moreover, electronic taping inhibits the police from using manipulative and potentially coercive techniques to elicit confessions, while at the same time protecting law enforcement officers against frivolous claims of misconduct.<sup>97</sup>

Electronic recording of police interrogations currently enjoys quite widespread use. The legislatures in Illinois, Texas, Maine, New Mexico, and the District of Columbia have mandated electronic recording for certain crimes and/or in certain circumstances.<sup>98</sup> The state supreme courts in Alaska, Minnesota, Massachusetts, New Hampshire, New Jersey, and Wisconsin have all taken similar action, requiring electronic recording in all or some types of police interrogation.<sup>99</sup> Furthermore, a policy of recording police interrogations has been voluntarily adopted in over 350 local jurisdictions.<sup>100</sup>

*b) Neutral Waiver Proceedings before a Magistrate*

Professor Edward Sackman argues that the current regime places too much pressure on the police. It is unfeasible to expect police officers, who are responsible for conducting an effective interrogation and solving crimes, to protect the suspect's rights as well. Therefore, it is vital that the waiver proceedings is taken out of the hands of the police and made the responsibility of a neutral party. Sackman proposes conducting a waiver hearing before a magistrate prior to, and as a condition for, commencing the interrogation of a suspect. The hearing would be extremely brief, with the magistrate posing one simple question to the suspect: "Do you waive your rights?" If the suspect answers in the affirmative, the police will be able to interrogate him in line with current practice.<sup>101</sup>

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<sup>95</sup> See Thurlow, *supra* note 93, at 807.

<sup>96</sup> See WILLIAM A. GELLER, *VIDEOTAPING INTERROGATIONS AND CONFESSIONS* 6 (Nat'l Inst. Just., Washington, D.C., Mar. 1993).

<sup>97</sup> See Linkins, *supra* note 93, at 149-50.

<sup>98</sup> See *id.* at 153-54.

<sup>99</sup> See Thurlow, *supra* note 93, at 772-73.

<sup>100</sup> See <http://www.innocenceproject.org> (last visited Nov. 14, 2007).

<sup>101</sup> Sackman, *supra* note 11, at 232-36.

c) *Expert Witnesses*

Another proposal made for reinforcing voluntariness rules is to broaden the admissibility of expert witness testimony regarding the circumstances and likelihood of false confessions in disputed confession cases.<sup>102</sup> Advocates of this reform maintain that such testimony would counterbalance the current procedural insufficiencies in safeguarding against wrongful convictions based on unreliable confessions. Permitting the defense to present expert testimony could reduce the number of wrongful convictions based on false confessions by dispelling the common misperception that an innocent person would not confess to a crime committed by another.<sup>103</sup> An additional advantage to admitting expert witness testimony on this issue is its educational impact. The expert can assist the triers of fact in understanding general findings and social-scientific research regarding interrogation processes and the causal connection between such processes and false confessions.<sup>104</sup> In recent years, courts have exhibited greater openness to expert witness testimony with regard to false confessions and are increasingly likely to rule such testimony admissible.<sup>105</sup> They now acknowledge that social scientists have uncovered findings that are counter-intuitive and that, consequently, expert testimony can assist judges and juries in better distinguishing between false and true confessions.<sup>106</sup>

d) *Education and Training Police officers, Prosecutors, and Judges*

Professors Drizin and Leo claim, quite optimistically, that one of the causes of false confessions is law enforcement officials' lack of understanding as to how certain methods of psychological interrogation can lead innocent people to falsely confess. The police, they assert, "are poorly trained to understand the psychology of interrogation, suspect decision-making and confession; to evaluate the likely unreliability of confession statements; and to recognize and prevent false

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<sup>102</sup> See, e.g., Leo & Ofshe, *False Confessions*, *supra* note 43, at 43; Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783 (2003); Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191 (2005).

<sup>103</sup> Soree, *supra* note 102, at 261-62.

<sup>104</sup> Leo & Ofshe, *False Confessions*, *supra* note 43, at 51.

<sup>105</sup> A recent study found that fifteen state jurisdictions out of the twenty-five surveyed allow some type of expert testimony to contest the credibility of the confession, Soree, *supra* note 102, at 238-55.

<sup>106</sup> See McMurtree, *supra* note 3, at 1273-74.

confessions."<sup>107</sup> Police interrogators are overconfident in their "lie detecting" skills and wrongly succumb to the commonly held myth that they are capable of telling false from true confessions. Therefore, the incidence of false confessions could be reduced through improved training of police interrogators as to the existence, variety, and causes of false confessions as well as the indicia of reliable and unreliable statements and how to properly distinguish between them. Prosecutors and judges should be similarly trained, to enable them to block admission of false confessions into evidence.<sup>108</sup>

## 2. Reinforced Corroboration Rules

### a) *Mandatory DNA Testing*

The innovations in DNA technology in the 1990s have enabled identification of the perpetrator of a crime based on DNA evidence at the crime scene, making it a powerful tool for exonerating those who have falsely confessed. This has led researchers to recommend that DNA testing be conducted in all confession cases in which testable evidence exists or, at the very least, when the confession has been disavowed before a pre-trial motion to suppress it.<sup>109</sup>

### b) *Reliability Tests*

Professors Ofshe and Leo have proposed evaluating the reliability of a suspect's confession by analyzing its correspondence (or lack thereof) with the actual "crime facts." A guilty suspect's statement would be expected to reveal nonpublic information about the crime known only to the perpetrator and the police (such as the location of the weapon, specific elements of the crime scene, and items taken during the crime), thereby corroborating the reliability of his confession with objective evidence; in contrast, an innocent suspect's confession would contain no such special knowledge.<sup>110</sup> Accordingly, courts should scrutinize whether the defendant's

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<sup>107</sup> Drizin & Leo, *supra* note 5, at 1001.

<sup>108</sup> See Drizin & Leo, *supra* note 5, at 1001-06. See also McMurtrie, *supra* note 3, at 1282.

<sup>109</sup> See Drizin & Leo, *supra* note 5, at 1006. See also Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1032408> (arguing that our criminal justice system still lacks sufficient procedures to ensure full access to DNA testing that could serve as evidence of innocence at the time of trial and then fails to properly assess claims of innocence brought during appeals; in the absence of such procedural protections, DNA exonerations may persist for decades to come).

<sup>110</sup> See Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 990-97.

confession corresponds with the objective facts of the crime and insist on a minimum standard of reliability before admitting the confession into evidence.<sup>111</sup>

*c) Strong Corroboration Requirement*

Another proposal, advocated by Boaz Sangero, calls for replacing the current corroboration rules with a stricter corroboration requirement, which Sangero calls “strong corroboration” and defines as “independent evidence derived from a source extrinsic to the source of the evidence that requires corroboration, relating to a central question upon which the trial revolves and implicating the accused person in the commission of the offense.”<sup>112</sup> Under the this standard, the prosecution would have to provide corroborative evidence in support of all three elements that it must prove in order to secure conviction, namely: (1) the occurrence of the injury or harm; (2) that this injury or harm was done in a criminal manner; and (3) that the defendant is the person who inflicted the injury or harm.<sup>113</sup>

C. Chronicle of a Failure Foretold—A Structural Critique

Each of the proposed measures described above can be criticized independent of one another.<sup>114</sup> We would like, however, to present a different and more

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<sup>111</sup> See Ofshe & Leo, *The Social Psychology of Police Interrogation*, *supra* note 12, at 239. Leo and Ofshe specifically pointed to three indicia of reliability that can and should be evaluated by courts in reaching a conclusion about the truthfulness of the confession: (1) Does the statement lead to the discovery of evidence unknown to the police? (2) Does the statement include identification of highly unusual elements of the crime that have not been made public? (3) Does the statement include an accurate account of the mundane details of the crime? Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438-39 (1998). A modified reliability test was introduced in 2006 by a group of academics (led by Professor Richard Leo) who argued that judges evaluating the reliability of confession before admitting it into evidence should weigh three factors:

1) whether the confession contains nonpublic information that can be independently verified, would only be known by the true perpetrator or an accomplice and cannot likely be guessed by chance; 2) whether the suspect's confession led the police to new evidence about the crime; and 3) whether the suspect's post admission narrative “fits” (or fails to fit) with the crime facts and existing objective evidence.

Leo et al., *Bringing Reliability*, *supra* note 56, at 531. They also proposed that all custodial interrogations be electronically recorded in order to prevent the police from incorporating nonpublic information into the suspect's confession (*id.* at 528-31); in the absence of such a recording, judges should apply a stricter reliability test that strongly links the suspect to the crime, *id.* at 533-35.

<sup>112</sup> Sangero, *supra* note 40, at 2818.

<sup>113</sup> See Sangero, *supra* note 40, at 2818-19.

<sup>114</sup> The electronic recording initiatives, for instance, were criticized both for their manipulability and the prohibitively hefty budgetary increase they would entail. See, e.g., Thurlow, *supra* note 93, at 791-93; Sackman, *supra* note 11, at 229, 231; Ayling, *Corroborating Confessions*, *supra* note 54, at 1192.

fundamental critique, one that takes issue with the essential feature common to all the measures proposed, despite their divergences: they are all mechanisms that rely on evidentiary tools to remedy the false confession problem,<sup>115</sup> and as such, they all represent only partial solutions. To be sure, we do not oppose most of the proposed measures; some are undoubtedly a step in the right direction and could produce some marginally positive changes. Nevertheless, they all fall short of contending with the overarching problem, in their failure to tackle it at its root, which is of a structural nature. The source of the false confession problem lies in the interaction between the incentive structure to which law enforcement officials are subject and the tendency of triers of fact to give high probative value to confessions. As long as the decision-making power vis-à-vis the “value” of confessions rests exclusively in the hands of judges and jurors, the entire criminal justice system will continue to revolve around the confession. Restricting the admissibility or weight of confessions with video

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The reliability tests proposed by Ofshe and Leo have been criticized on a number of grounds, including: the police's ability to "suggest" nonpublic information to the suspect or incorporate it into his or her confession; the vagueness of the "fit" standard—how strong a showing must the government make for the confession to be admissible; and the substantial expenditure of judicial resources their implementation would require. See Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 201, 204-28 (1998). Moreover, this proposal, as well as the proposal to require strong corroboration, is also subject to the erosion critique discussed at *infra* text accompanying notes 122-129. The expert witness testimony proposal has been criticized for its potential for abuse, as well as the “battle of the experts” it would lead to. See Kastenber, *supra* note 102, at 813. The proposal to conduct a neutral waiver proceedings before a magistrate prior to any police interrogation has yet to be taken up, and we therefore find it important to elaborate on it, especially since it claims to “address the conflicting incentives an investigator brings with her into the interrogation room.” Sackman, *supra* note 11, at 232. This measure is likely to fail for two reasons. First, the waiver proceedings would be either too burdensome or totally redundant. Conducting a serious waiver proceeding would extremely cumbersome for the criminal justice system and its adoption implausible in a system that is already overburdened. If, on the other hand, the waiver proceedings were to be "brief," as proposed by Sackman, without an instruction issued to suspects as to the dangers of police interrogation and without an attempt to understand their reasons for waiving their rights, the process would be not only futile but also dangerous. Second, a waiver proceeding would not solve the incentive problem Sackman is troubled by. Law enforcement officers and prosecutors would remain just as interested as they are now in obtaining confessions. It would, however, shift the balance between innocent and guilty suspects to the detriment of the innocent. Innocent suspects would probably waive their rights even following a "brief" proceeding before a magistrate, mistakenly believing that they have nothing to fear or hide—after all they are innocent. See Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33, 40 (2004). After a waiver has been given, the police would be able to interrogate the suspect just as they do now, thus eliciting false confessions from some of the innocent suspects. But since the waiver proceeding would make the confession airtight, it would be nearly impossible to contest it later in court. Guilty suspects, on the other hand, would be far more likely to lawyer up and invoke their right to remain silent following the waiver proceeding. Paradoxically, the probable result would be that the number of true confessions leading to conviction of actual perpetrators would decrease to a level below the optimum, while the number of false confessions would increase.

<sup>115</sup> The proposal to educate and better train police officers, prosecutors, and judges is the exception, but it is unlikely, on its own, to effect much change.

recordings, expert testimony, or stronger corroboration or reliability standards is unlikely to alter the course of the criminal justice system. Indeed, the system is "addicted" to confessions, and it will find ways to adjust to the new rules and enable the various participants to continue to rely on confessions. Thus, for example, requiring electronic taping of custodial interrogations would most likely only induce police to seek more sophisticated and covert means of eliciting confessions. Just as they successfully adapted their interrogation practices to satisfy the demands of *Miranda*,<sup>116</sup> they unfortunately would likely be no less successful in adapting to the recording requirement.<sup>117</sup>

The same is true with regard to a stronger corroboration requirement. Whatever the degree of corroboration required, the police will always stop their investigation right after obtaining the minimum amount of evidence necessary to convict. This argument has been substantiated by empirical evidence indicating that "contrary to the assumptions behind the corroboration rule, the rule does not motivate police to gather independent evidence."<sup>118</sup> Making do with the required minimum is problematic as this does not adequately distinguish the guilty from the innocent. As a

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<sup>116</sup> See WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* 60-75, 77-106 (2001) ("within a few years after the *Miranda* decision, it became obvious that those who had predicted the decision would have a crippling effect on law enforcement had miscalculated, the police were able to comply with *Miranda* and still obtain confessions.").

<sup>117</sup> This should not be too difficult to achieve due to the manipulability of electronic recording. Manipulability includes both intentional manipulation by the police as well as intentional and unintentional manipulation caused by biases inherent in this specific medium. First, videotaping may be employed selectively and sporadically. The police control the recording device and can easily turn it on and off, thus enabling officers to elicit confessions by coercive means while the recording device is turned off and, only after a confession is obtained, turn it on and stage a non-coercive interrogation leading to a "voluntary" confession. A requirement to videotape the interrogation in its entirety, as suggested by Thurlow, *supra* note 93, at 803, will not do either, because in many cases, there is no way of knowing whether or not the recording reflects the entire interrogation. Moreover, even if we could find a way to place recording devices outside the control of the police interrogators (which is doubtful), they could always conduct the interrogation elsewhere and enter the interrogation room only after a confession has already been obtained, *see id.* at 791-93; it would be impossible to supervise police action in any place an interrogation takes place, which could be practically everywhere. In other words, asking police officers to record their interrogations is like asking the cat to watch the cream.

Second, electronic recording is not free of biases inherent to the medium, and it can be manipulated in a way that is detrimental to the defendant. For example, research indicates that the video-camera should be fixed upon both the interrogator and the suspect or, alternatively (and counter-intuitively), only upon the investigator, because "when the video camera is fixed only upon the suspect, the problem of false confession is exacerbated, prompting jurors to disregard the appearance of the interrogator and conclude that the confession was given freely," <http://www.innocenceproject.org> (last visited Nov. 14, 2007). *See also* Sackman, *supra* note 11, at 231 (warning about objectivity issues raised by the method of recording, including the camera focusing on suspects and the "recap bias" that arises from showing the judge or jury only parts of the recorded interrogation).

<sup>118</sup> Ayling, *supra* note 54, at 1193 (citing research conducted by W. Macdonald & J. Cramer).

general rule, it is easier to uncover incriminating evidence against the guilty than against the innocent. However, different types of incriminating evidence have diverging patterns of distribution vis-à-vis the guilty and the innocent. Weak incriminating evidence is distributed almost evenly between guilty and innocent defendants. The stronger the incriminating evidence, the more uneven the distribution becomes in favor of the innocent.<sup>119</sup> To illustrate, let us imagine that a murder occurs in a cinema that can seat 100 people. The weakest piece of evidence available is that the murderer is one of those people who were watching a movie at the time of the murder. This evidence will hold with regard to each of the 100 members of the audience, even though 99% of them are innocent. Let us further assume eyewitness testimony identifying the perpetrator as a man. Now we have somewhat stronger evidence that excludes all of the female moviegoers, leaving only the men as suspects, and it applies to about 50 people instead of 100. If eyewitnesses saw a tall Caucasian man, the incriminating evidence gets even stronger and implicates, say, 20 out of the 100. The strongest type of evidence, of course, is information that can single out the murderer, such as DNA evidence. A stronger corroboration requirement therefore entail a greater chance of separating the guilty from the innocent. However, since as a general rule, the stronger types of evidence are more difficult and costly to uncover than the weaker pieces of evidence, law enforcement officials would tend to satisfy the corroboration requirement using a weaker type of evidence that does not necessarily single out the actual perpetrator.

There is another reason why stronger corroboration rules and stricter reliability tests will fail to prevent false confessions from infiltrating the system. For their goals to be met, these measures rely on judges' acting as gatekeepers and applying the evidentiary rules, which are inherently vague (What does "strong corroboration" mean? How robust a showing is required of the government under the "fit" standard?) and unfavorable towards disavowed confessions.<sup>120</sup> In this context, we are reminded that the biggest danger with corroboration requirements, such as the trustworthiness doctrine, "lie[s] in the trial court judges' potential to be cavalier about what constitutes sufficient independent corroborative evidence (by rubber stamping the prosecution's

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<sup>119</sup> See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 96-104 (2002).

<sup>120</sup> Sharon Davies proposes using judges as gatekeepers, Davies, *supra* note 29, at 230-31.

motions) or in failing to act as gatekeepers at all.”<sup>121</sup> Experience across time and space has taught us that such worries are, unfortunately, not unwarranted. Insofar as confessions are concerned, judges make lousy gatekeepers. Due to the powerful impact of the confession, discussed at length above, “once the judge hears the confession, her judgment as to the sufficiency of corroboration will be colored by her reluctance to disconfirm the hypothesis of guilt that the confession creates.”<sup>122</sup> This reluctance gives rise to an “erosion phenomenon” that makes any attempt to fortify the rights of defendants by evidentiary means an exercise in futility. Every evidentiary rule is bound to fall prey to the unwillingness of judges to set aside confessions, which they believe to be watertight proof of guilt. Over time, they tend to interpret the rule narrowly and carve out many exceptions, until it has eroded into near nothingness.

Erosion has been the fate of each and every evidentiary rule in the realm of confessions, both of the voluntariness and corroboration types. *Miranda* is one such case in point. Many a commentator has convincingly shown how the Supreme Court eroded *Miranda* over the years, to such an extent that it actually unraveled the ruling,<sup>123</sup> transforming it from a safeguard for suspects to an interrogation tool for the police.<sup>124</sup> Some even argue, cynically, that the only reason the Rehnquist Court “saved” *Miranda* by deeming it “a constitutional decision” in *Dikerson v. United*

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<sup>121</sup> Leo et al., *Bringing Reliability*, *supra* note 56, at 510.

<sup>122</sup> Ayling, *supra* note 54, at 1189 (citing research conducted by Nisbett and Ross that shows that individuals are overly reluctant to abandon an initial hypothesis of guilt); *see also* Leo et al., *Bringing Reliability*, *supra* note 56, at 519 (arguing that “a confession creates its own set of confirmatory and cross contaminating biases, leading both officials and jurors to interpret all other case information in the worst possible light for the defendant”).

<sup>123</sup> *See, e.g.*, O’Neill, *supra* note 71; Lesley A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727 (1999); Zalman & Smith, *supra* note 12; Jeremy M. Miller, *Law and Disorder: The Court’s Hasty Decision in Miranda Leaves a Tangled Mess*, 10 CHAP. L. REV. 713 (2007) (arguing that *Miranda* “was filled with dictum that was inexorably eroded from its birth to the present”).

<sup>124</sup> Thompson, *supra* note 71, 657. Examples of the erosion of *Miranda* include the following:

[P]olice are not required to clarify a suspect’s inarticulate question about obtaining counsel if it is not an explicit request for a lawyer; questioning by a probation officer bent on obtaining an incriminating statement and turning it over to the police does not require a *Miranda* warning; a suspect who has claimed the right to silence may be re-interrogated under certain conditions despite *Miranda*’s categorical prohibition; and misleading warnings have all been upheld. These and other cases are straightforward attempts to interpret *Miranda* so as to weaken its legal controls on police interrogation.

*See* Zalman & Smith, *supra* note 12, at 881-82.

*States*<sup>125</sup> was that the rules had been gutted to the point where they no longer posed any obstacle to police interrogations.<sup>126</sup> The *corpus delicti* rule was also inevitably defanged once judges were “faced with the prospect of reversing a conviction because one trivial element remain[ed] uncorroborated”;<sup>127</sup> and the trustworthiness doctrine was construed so narrowly that it now provides even less protection against false confessions than the already very weak *corpus delicti* rule.<sup>128</sup> The erosion phenomenon has manifested not only in the United States. The Israeli Supreme Court, for example, has ruled that the statutory corroboration requirement can be satisfied with evidence that is as “light as a feather.”<sup>129</sup>

In order to effectively address the problem of false confessions, a policy measure must be crafted that strikes at the incentives driving investigators and prosecutors in the interrogation room and the courtroom and that provides judges with a reliable tool for distinguishing true from false confessions.<sup>130</sup> Part IV sets out our proposal for such a measure.

#### IV. THE “CONFESSSIONAL PENALTY”—A REFORM PROPOSAL

In this Part, we propose and outline a mechanism to alleviate the problem of false confessions by “penalizing” the state for using confessions at trial.<sup>131</sup> We thus call our model the “confessional penalty.” It would contend with the problem by, on the one hand, forcing law enforcement officials to internalize the social costs of false confessions, thereby diminishing the current over-reliance on confessions as the central piece of evidence, and, on the other hand, providing triers of fact with a sorting mechanism for distinguishing between true and false confessions, thus curbing

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<sup>125</sup> 530 U.S. 428 (2000).

<sup>126</sup> See Zalman & Smith, *supra* note 12, at 884.

<sup>127</sup> See Ayling, *supra* note 54, at 1145-46.

<sup>128</sup> See Sangero, *supra* note 40, at 2805; see also Miller, *supra* note 55, at 15 (arguing that military courts eroded the corroboration rules that were supposed to provide protection against false confessions).

<sup>129</sup> See Sangero, *supra* note 40, at 2813; see also Ehud Kamar, *Corroborating Confessions by the Defendant's Own Statements*, 5 ISRAEL J. CRIM. JUST. 277 (1996).

<sup>130</sup> See Sackman, *supra* note 11, at 210.

<sup>131</sup> For the purposes of our model, the term “confessions” refers solely to out-of-court confessions recanted at trial. In addition, we use a narrow definition of the term that relates only to those in which the suspect acknowledges in his statement all facts necessary for conviction of a crime.

their tendency to uncritically accept confessions. This would be effected by increasing the cost of relying on confessions relative to other types of evidence. Under our model, sentencing guidelines would mandate a reduction in the punishment when a confession was introduced into evidence at trial.<sup>132</sup> For example, if a defendant were standing trial for theft and the punishment prescribed in the sentencing guidelines for such an offense is 10 years in prison, the maximum punishment that a judge would be allowed to impose on him, if a confession had been submitted as evidence in his trial, would be reduced significantly. The level of reduction would vary among *categories* of offenses based on certain factors, such as the level of difficulty in uncovering extrinsic evidence and the severity of the sanction.<sup>133</sup> To be sure, the prescribed “confessional penalty” would not necessarily replace the measures described in Part II (electronic recording, stricter corroboration rules, expert testimony, etc.), but would, rather, operate concurrently. In fact, as we shall demonstrate shortly, some of the limitations of these mechanisms can be remedied if applied in tandem with our confessional penalty.

#### A. Breaking the Cycle that Leads to Wrongful Convictions

As was shown, the current evidentiary regime creates a vicious circle. The police and prosecution both have strong incentive to elicit confessions from suspects and not enough incentive to seek extrinsic evidence of guilt. Again, this is due to the fact that law enforcement officials internalize the benefits of confessions while externalizing their social costs. Because the likelihood of conviction with a confession is extremely high,<sup>134</sup> in conditions of budgetary constraints, pursuing extrinsic

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<sup>132</sup> In legal systems without sentencing guidelines or other mechanisms limiting the discretion of judges in the sentencing process, the confessional penalty would have to be measured using the *actual* punishment imposed on convicted defendants in similar cases and not only the maximum punishment allowed by the law, for otherwise, the penalty will be of no effect..

<sup>133</sup> See discussion in *infra* Part IV.A.4.

<sup>134</sup> See Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1844-45 (1987) (“Once a suspect confesses ... to police, the subsequent trial is often merely a formality; the suspect bears the almost impossible burden of countering the statement and establishing her innocence.”). See also Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, in LAW AND ORDER IN A DEMOCRATIC SOCIETY 74, 79 (M. Summers & T. Barth eds., 1970) (“Once a suspect has made a pre-arraignment confession which a court can hold ‘voluntary’ and an informed renunciation of constitutional rights, the rest of the judicial trial is largely form.”); Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1121 (2003) (“Studies have demonstrated that jurors consider confessions to be the most persuasive evidence of a defendant's guilt. In one study, mock jurors were given either: (1) circumstantial evidence; (2) eyewitness testimony from either a stranger or acquaintance; or (3) testimony that the accused had confessed to the police. The subjects who received the confession were

evidence is unreasonable from the perspective of the police and prosecution, and the minimum evidentiary standard (usually, a confession plus proof of *corpus delicti* or light corroboration) becomes, de facto, the maximum requirement.

Judges and jurors faced with cases founded exclusively on confessions<sup>135</sup> are generally unable to resolve whether they could have been corroborated by extrinsic evidence. They routinely make the implicit assumption that the police could have uncovered extrinsic evidence had they only looked for it and, therefore, regularly convict based on the defendant's confession. As noted, any attempt to fill the holes of this regime by evidentiary means is doomed to failure, because of the presumption of guilt borne by the confession for judges and jurors and their unwillingness to relinquish it "even in the face of contradictory evidence and a lack of corroboration."<sup>136</sup> This, of course, reinforces the strong incentive of the police and prosecution to focus exclusively on confessions and completely forego any attempt at uncovering extrinsic evidence, which, in turn, further entrenches the practice and strengthens the dependence of judges and jurors on confessions. And so the system spirals down in an endless pattern, leading to the high rate of false confessions and wrongful convictions. It is our claim that the confessional penalty could stop this detrimental phenomenon.

#### 1. Overcoming the Incentive Problem: Take One

Assuming that the prosecution is interested in maximizing the expected punishment imposed on guilty defendants and not maximizing convictions,<sup>137</sup> the

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significantly more likely to view the defendant as guilty than those who received the other evidence."); C.T. McCormick, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972) ("the introduction of a confession makes the other aspects of a trial in court superfluous").

<sup>135</sup> See LAWRENCE S. WRIGHTMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 2 (1993) (arguing that confessions are introduced as evidence in court "with relentless regularity").

<sup>136</sup> Davies, *supra* note 29, at 236. See also Kassin & Sukel, *supra* note 48, at 44. A study conducted by the authors showed that a confession increased the conviction rate even when it was recognized "as coerced, even when it was ruled inadmissible, and even when participants claimed that it did not affect their verdicts".

<sup>137</sup> This assumption is grounded on the following: First, a prosecutor's prestige and, therefore, also her advancement are determined not only by her conviction rate but also by the severity of punishment imposed on those she successfully convicts. For example, if a convicted rapist is sentenced to serve only 2 years, public and professional criticism will be directed both at the court and the prosecutor. Second, the prosecution operates under budgetary constraints. When prosecuting cases, which is an expensive and time-consuming endeavor, prosecutors are interested not only in convicting and punishing the particular defendants but also in deterring potential offenders. Deterrence is, in turn, a function of, among other things, the severity of punishment to which convicted felons are sentenced.

confessional penalty would alter dramatically the prosecution's incentive structure. As opposed to the present state of affairs, law enforcement officials would pay a significant price for using confessions, in the form of reduced sentences. And since this penalty could only be avoided by providing extrinsic evidence sufficient to convict without resorting to a confession, the prosecution would direct the police to gather such evidence even after a confession has been obtained. As a result, instead of being the prosecution's evidentiary centerpiece, confessions would be relegated to a residual role, to be used when the police are unable to unearth enough extrinsic evidence to secure a conviction or when the cost of obtaining a level of extrinsic evidence sufficient to convict outweighs the marginal benefits of imposing "full" punishment.<sup>138</sup>

## 2. Providing a Reliable Sorting Mechanism

As a result of the shift it would generate in the structure of the prosecution's incentives, the confessional penalty would also create a sorting tool for judges and jurors to distinguish between true and false confessions, turning them into formidable gatekeepers. This would paradoxically be achieved by making the confessional penalty non-discretionary: if a confession is entered as evidence and conviction ensues, the triers of fact will be *obligated* to reduce the sentence in the amount

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If, for example, 50% of all perpetrators of a certain crime (say, tax evasion) are caught by the police and convicted by the courts, but the level of punishment is very low (say, a small fine), people will continue to commit this crime despite the high conviction rate. In light of the general goal to increase law enforcement, the prosecution's motives can be best described as directed at maximizing the expected punishment or "cost of offense" for each specific defendant (within the limits of the formal legal sanction) rather than maximizing convictions. Moreover, in addition to the harm to deterrence, there is also an expressive toll to over-lenient punishment, which the prosecution would seek to avoid. For a reduced sentence for a convicted offender would be perceived as improper by the public. As Dan Kahan argues, different punishments have distinct expressive messages, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). People have certain conceptions as to what is an appropriate punishment for a certain offense. Too great a divergence from that perceived "appropriate" level may trigger public concern that prosecutors, as important actors in the criminal justice system, would want to prevent. Therefore, even assuming that police officers care little about the severity of the punishment imposed on convicted offenders and are concerned only with getting enough evidence to convict and close cases, the prosecutors directing the investigation would not be satisfied with only a confession and would return the case to the police to complete the investigation. For a supplementary argument, see *infra* Part IV.A.3.

<sup>138</sup> A third possible scenario, which is irrelevant for our purposes, is when securing a conviction is of utmost importance to the prosecution while the punishment of the offender is marginal. Cases that fall into this category are those in which the morality and/or legality of the act for which the defendant has been indicated is ambiguous and there is a need for a clear precedent that will determine its criminality. These cases are irrelevant to the context of our discussion because, typically, the identity of the perpetrator is not at dispute, but rather, the only contested issue is the legal and/or moral culpability of the defendant.

prescribed in the sentencing guidelines, even if convinced beyond any doubt of the defendant's guilt. Removing this discretion from the hands of judges and jurors will guarantee that the "erosion phenomenon" discussed above, which stems from confessions' appeal and the tendency to overrate their probative value, will not affect the proposed mechanism.

With this penal toll in the background, the mere submission of a confession will signal judges and jurors that the police failed to uncover enough extrinsic evidence to convict the defendant and, therefore, the confession should be ascribed lower probative weight.<sup>139</sup> The less extrinsic evidence presented to the triers of fact, the more suspicious they will become of the confession's unreliability. Indeed, the absence of corroborating evidence will serve as a powerful indicator of the falsity of the confession.<sup>140</sup>

Making the reduction in sentence mandatory will solve the collective action problem of a discretionary regime and will move the equilibrium to a more efficient point. Individual judges cannot single-handedly alter the incentive structure of law enforcement officials; an effective sorting mechanism would require that they act collectively. But under a discretionary regime, judges cannot count on reciprocity from colleagues. Thus, the collective action problem can be resolved only through imposition of a mandatory confessional penalty upon the entire class of judges. This would enable judges to draw an evidentiary conclusion of probative weakness vis-à-vis confessions where there is a lack of supporting extrinsic evidence.

To be sure, judges and juries would still, in some cases, convict based on confessions corroborated by the minimum extrinsic evidence required by the law. This would still be within their discretion. But the prosecution would face a difficult question whenever it would choose to introduce a disavowed confession at trial: Why haven't the police, after conducting a thorough investigation, uncovered enough extrinsic evidence to convict the defendant? The absence of a convincing response will cast doubt on the veracity of the confession; the less extrinsic evidence presented

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<sup>139</sup> Another possibility is that the cost of obtaining a level of extrinsic evidence sufficient to convict outweighs the marginal benefit of inflicting "full" punishment. We discuss this option further on.

<sup>140</sup> See Ayling, *supra* note 54, at 1186 (arguing that "the absence of any corroboration may be powerful evidence that the confession is unreliable" but that, under the current regime, this is not reflected in judicial decision-making).

by the prosecution, the more inclined the triers of fact will be to doubt the confession and acquit the defendant. Our model would, therefore, breathe new life into the currently stagnant corroboration requirement. Once judges and jurors begin to lose faith in uncorroborated or minimally corroborated confessions, they will differentiate among confessions based on the corroborating evidence and acquit or convict accordingly. Since confessions would thereby become residual evidence, their use relegated to instances in which the extrinsic evidence is either weak or nonexistent, judges and jurors, as well as the public, would come to associate confessions with weaker rather than stronger cases against defendants. This will alter the conceptualization of the confession as the "queen of evidence," and its currently exaggerated probative value will drop to a level closer to the optimum.

### 3. Overcoming the Incentive Problem: Take Two

Turning judges into effective gatekeepers by providing them with a reliable sorting mechanism will reinforce the incentives of the police and prosecution to search for evidence extrinsic to confessions. One of the premises of our model is that the prosecution is interested in guilty defendants getting maximum punishment. But even assuming that some prosecutors are more interested in their conviction rates than in maximal punishment of the convicted, as long as there are enough prosecutors with a utility function defined as maximization of the expected punishment, all prosecutors would still be induced to avoid using confessions, for over time, they will lose much of their power to convict.

Consequently, the confessional penalty model will invert investigation practices. At present, once a confession has been obtained, the police investigation comes to a halt. Moreover, even if the prosecution does take the corroboration requirement seriously, the more extrinsic evidence found against the defendant, the less of an incentive there is to continue the investigation. Our model will reverse the process: the more extrinsic evidence uncovered, the greater the police's incentive to seek further evidence, in order to ensure that there will be no need to resort to the confession at trial.

It should be stressed that our proposed model is not designed to prevent, nor discourage, the police from eliciting confessions from suspects. Confessions are a valuable investigative tool. "A confession, quite unlike most forms of evidence, is

capable of supplying ‘ways of verifying itself.’”<sup>141</sup> A guilty suspect's confession can lead the police to incriminating evidence<sup>142</sup> (such as the location of the body, weapon, or contraband or the identity of accomplices and witnesses) and thus significantly lowers investigation costs. Hence, the confessional penalty would apply with regard to the *introduction* of confessions as evidence, not to *obtaining* them.

#### 4. Refining the Sorting Mechanism

Under a confessional penalty regime, the mere submission of a confession at trial as well as the level (or lack of) of extrinsic evidence provided to corroborate it will be good indicators that lower probative weight should be attributed to it. Triers of fact will, in most cases, be correct in assuming that, in light of the penal toll, the police made serious efforts to find extrinsic evidence sufficient to convict, and their inability to uncover such evidence signals that the confession is less reliable. At times, however, this could be misleading. As stated above, an alternative explanation for the police's refraining from collecting extrinsic evidence is that the marginal cost of obtaining a level of extrinsic evidence sufficient to convict exceeds the marginal benefit of the imposition of "full" punishment. In such cases, we will be faced with the mirror-image of the problem afflicting the current regime:<sup>143</sup> namely, the possibility that judges and jurors will overwhelmingly infer from the introduction of a confession at trial that there is no extrinsic evidence out there that could prove the defendant's guilt, even when this is misplaced. In other words, the confessional penalty has the potential to create a pooling problem, grouping together cases in which seeking extrinsic evidence is too expensive with cases in which such evidence is nonexistent. Setting a fixed uniform penalty would, therefore, result in inefficiencies. For some offenses, the penalty would not generate strong enough incentives for law enforcement officials to look for extrinsic evidence, thus leading to under-deterrence, while for other offenses, the incentives would be too strong, leading to overinvestment of law enforcement resources.

In order to avoid such a pooling problem, and given the implausibility of tailoring the penalty to each individual offense, we propose differentiating among

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<sup>141</sup> O'Neill, *supra* note 71, at 190.

<sup>142</sup> See also Leo et al., *Bringing Reliability*, *supra* note 56, at 521.

<sup>143</sup> See *supra* text accompanying notes 135-136.

*categories* of offenses based on certain criteria. One such criterion would be the level of difficulty entailed in uncovering extrinsic evidence sufficient for proving guilt beyond a reasonable doubt. For some categories of crimes, extrinsic evidence (both physical evidence and witness testimony) is easily available. This is true of "messy" crimes like murder, which inevitably leave traces to be found, such as blood, a body, or a murder weapon; likewise offenses such as theft and smuggling, which involve stolen goods and contraband, and crimes in which there are accomplices who can testify against one another. The confessional penalty should be relatively high for this category of offenses, under the assumption that investing reasonable resources in an investigation will yield, in most cases, enough evidence to convict. There are, however, certain categories of offenses in which collecting enough extrinsic evidence to convict is extremely tricky. These encompass the category of "special intent" crimes, which include knowledge possessed exclusively by the perpetrator as one of the elements of the crime. Proving special intent with extrinsic evidence would be very expensive and, in some cases, even impossible. Consequently, for such offenses, a high confessional penalty would likely lead to either overinvestment or under-deterrence, and therefore the penalty should be set relatively low.

Another parameter by which our model could distinguish among offenses is the severity of the sanction. For example, it could differentiate between offenses punishable by imprisonment and those punishable by fines, imposing a higher confessional penalty in the former and a lower one in the latter. The social cost of wrongful convictions for offenses punishable by a fine is much lower than that for offenses punishable by imprisonment. Accordingly, it might not be in the public interest to invest many resources in investigating the former type, and this should be manifested in a lower confessional penalty. The two criteria we have raised are far from an exhaustive list, and our model certainly would accommodate others.

## B. Alternative Mechanisms

There are two legal mechanisms that could be raised as alternatives to our proposed mechanism: outlawing confessions and applying a sliding scale to the confessional penalty. In describing them, we will illustrate the advantages of our model.

## 1. Outlawing Confessions

This obvious alternative would exclude confessions altogether by making them inadmissible at trial. Indeed, it could be argued that, if confessions are on the whole unreliable, we should not merely reduce the punishment for confession-based convictions, but their use should be completely prohibited. To the best of our knowledge, this option has yet to be out-and-out advocated, though some proposals have come pretty close. For example, Leiken's suggestion to recognize a nonwaivable right to counsel during interrogation would effectively eliminate the incidence of confessions.<sup>144</sup>

We believe that outlawing confessions is too harsh a remedy. While the empirical evidence does point to an overuse of confessions and their lack of reliability to merit serious legal intervention, this does not justify their total abolition as evidence. The goal should be to offset their overuse and lower their probative value, not eliminate confessions altogether. The confessional penalty model is intended and formulated to do just that: it strikes a balance between the competing concerns of securing public safety (by locking guilty defendants behind bars and deterring potential offenders) and of protecting innocent defendants (by providing the police with incentives to conduct thorough investigations and decision-makers with a good sorting mechanism). Outlawing confessions would tip the scale too far in favor of "protecting the innocent." This would impair the fundamental objectives of criminal law—deterrence, incapacitation, and retribution—thereby harming the very public interest we seek to protect.

## 2. The Confessional Penalty with a Sliding Scale

Another alternative mechanism would be to apply the confessional penalty with a sliding scale of punishment. Our proposed model would have uniform application: the full confessional penalty would be imposed if a confession was introduced as evidence and whether corroborated by extrinsic evidence or not; this could be avoided only by presenting enough extrinsic evidence to convict without resort to a confession. In contrast, the sliding-scale mechanism is based on a continuum: instead of imposing one fixed, indiscriminate penalty for using a

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<sup>144</sup> See Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1, 46-51 (1970).

confession, there would be a sliding scale of punishment based on the amount and strength of the extrinsic evidence brought to corroborate the confession. Thus, if a confession were to be introduced at trial and corroborated by the minimum extrinsic evidence required by law, the full confessional penalty would be applied. If, however, the confession were to be corroborated by considerable and weighty extrinsic evidence, yet such evidence alone could not prove guilt beyond a reasonable doubt, a lower confessional penalty would be applied. The more compelling the evidence presented to the triers of fact, the less severe the confessional penalty, with the continuum reflecting the relative strength or weakness of the extrinsic evidence brought to corroborate the confession.

The sliding scale model, however, fails to overcome hurdles that our model resolves. It is subject to the erosion problem inherent to the use of evidentiary mechanisms such as strict corroboration and reliability requirements. As we have emphasized, the success of the confessional penalty is directly related to its nondiscretionary nature. Only by stripping judges and jurors of their discretion to deem corroborating evidence sufficient can the mechanism be protected from erosion and thus would be able to provide law enforcement officials with adequate incentives and decision-makers with an effective sorting tool. Reintroducing a discretionary element into the mechanism, in the form of a sliding-scale of punishment, would both diminish its strength and reinstate the collective action problem.

## V. DEFENDING THE CONFESSIONAL PENALTY—POSSIBLE CRITIQUES

A wide range of concerns and criticisms can be raised with regard to the confessional penalty model. Some are rooted in utilitarianism, others are retributive in nature, and yet others derive from the expressive function of criminal law. This Part attempts to address the entire gamut of possible criticisms, classified based on their philosophical foundations.

### A. The Utilitarian Critique

#### 1. The Adverse Impact on Deterrence

One possible line of criticism against the model is that the proposed penal structure—a mandatory reduction of the criminal sanction with the submission of a confession—would adversely affect the goal of optimal deterrence. Under the

proposed procedure, even in situations in which the prosecution proves its case beyond a reasonable doubt, merely bringing a confession into the courtroom necessarily entails a reduction in the criminal sanction. Such a systematic, all-encompassing downward shift in the general level of punishment might lead, it could be claimed, to under-deterrence.

This critique can be challenged on two fronts: First, there is ample room to contest its underlying assumption that the present overall level of punishment is consistent with utilitarian objectives and the goal of optimal deterrence. The high incidence of confession-based wrongful convictions, coupled with the enormous social costs wrongful convictions entail, suggests otherwise – that the present situation is sub-optimal and must change. It is important to bear in mind that the social costs generated by false convictions are not limited to the pain and suffering or opportunity costs borne by the wrongfully convicted; rather they also undermine deterrence. Indeed, wrongful convictions reduce the marginal cost of choosing to engage in criminal activity relative to choosing the alternative legal activity.<sup>145</sup> Since introducing the confessional penalty could be expected to reduce the occurrence of wrongful convictions, this will improve deterrence in that the marginal cost of engaging in criminal activity would rise as compared to legal activity. On the whole, the penalty's negative impact on deterrence due to its reduction of the overall level of punishment may be partially offset by the benefits resulting from the parallel reduction in the wrongful conviction rate.

Second, the confessional penalty model does not necessarily entail a reduction in the overall level of punishment. For it easily accommodates a penal scheme that keeps intact the current general level but reallocates punishments and “punishment resources” (such as the total number of imprisonment years imposed for all prosecuted crimes) according to the type of evidence used to convict defendants. Under this version of the confessional penalty, the criminal punishment in cases of confession-based convictions would still be reduced relative to the current situation. However, the punishment resources, which would be saved due to the diminished sentences, could then be reallocated to enhance the sentences in convictions secured

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<sup>145</sup> Henrik Lando, *Conflict or Credibility: Does Wrongful Conviction Lower Deterrence?*, 35 J. LEGAL STUD. 327, 327 (2006) (“The traditional view is that wrongful conviction lowers deterrence by lowering a person's payoff for being innocent without affecting the payoff of being guilty.”).

on extrinsic evidence. To illustrate, let us assume that, under the current regime, a conviction for crime X results in three years jail time and that 50% of convictions for crime X rest on a confession and 50% are based on extrinsic evidence, such as DNA. Let us further assume that the confessional penalty would reduce prison time by one year. One outcome of implementing this model, then, would be that it results in two-year imprisonment sentences in confession-based convictions and three-year sentences when the prosecution relies on extrinsic evidence. However, there are other possible applications of the model. An alternative would be that the confessional penalty would redistribute the imprisonment years between the two categories of cases, so that the punishment in confession-based convictions remains two years, but increases to four years in convictions secured on extrinsic evidence.

Thus, given that that implementing criminal punishment is costly to society (a most plausible assumption vis-à-vis imprisonment), such a reallocation of punishment resources would actually advance the goal of deterrence relative to the current regime, under which punishment is allocated uniformly regardless of evidentiary route taken. The underlying reason is quite simple: As demonstrated, under the confessional penalty model, the mere submission of a confession, as opposed to extrinsic evidence such as DNA tests, would serve as an indicator of the relative evidentiary weakness of the given case. Thus, even if, at the end of the day, both evidentiary premises would have crossed the reasonable doubt threshold, in the confession-based conviction, the evidentiary foundation would be relatively weaker and closer to the threshold (for instance, rendering a 90% certainty of guilt), whereas in the DNA-based conviction, the reasonable doubt threshold would be more compellingly exceeded (for instance, rendering a 99% certainty of guilt).

The utility of the criminal sanction, in terms of deterrence, is contingent upon the actual culpability of the individual on whom it is imposed. Thus, a year of imprisonment imposed on the guilty bears greater utility than a year of imprisonment imposed on the innocent. It follows, then, that the utility of a year of imprisonment imposed on a defendant whose certainty of guilt is 99% is greater than its utility when imposed on a defendant whose certainty of guilt is only 90%. Reducing the imprisonment term in the latter instance and shifting the saved imprisonment

resources to the former could further the goal of deterrence.<sup>146</sup> Accordingly, deterrence would be promoted by reallocating imprisonment years from conviction-based confessions, in which certainty of guilt tends to be *a priori* lower, to convictions based upon extrinsic evidence, in which the likelihood of guilt is typically greater. This variance in criminal sanction according to type of evidence establishing guilt (and, derivatively, strength of the evidentiary case against the defendant) would enable a higher level of deterrence per any given amount of punishment costs.

But the rosy depiction of the confessional penalty must be taken with a grain of salt. As argued, under the confessional penalty model, introducing a confession into evidence is a proxy for the evidentiary strength of the case, but it does not serve as a perfect proxy. For instance, the mandatory reduction in sentence will be applied also to cases of a conviction based on both DNA evidence and a confession where the probability of guilt is close to 100% and possibly higher than the probability in cases where conviction is based solely on extrinsic evidence.<sup>147</sup> However, this is a problem only from an *ex-post* perspective. From an *ex-ante* point of view, the confessional penalty is necessary to initiate the process resulting in more diligent investigations. Moreover, such cases would be relatively rare, for our confessional penalty model would lead the prosecution to refrain from introducing confessions into evidence when there is strong extrinsic evidence.<sup>148</sup>

## 2. The Adverse Impact on the Legitimacy of the Criminal Justice System

Another point that can be raised against the confessional penalty model is anchored in the institutional perspective.<sup>149</sup> Namely, it might be asserted that our proposed penal structure could challenge the legitimacy of the criminal justice system

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<sup>146</sup> See Henrik Lando, *The Size of the Sanction Should Depend on the Weight of the Evidence*, 1:2 REV. L. & ECON. 278 (2005); Talia Fisher, Probabilistic Punishment (Tel Aviv University Faculty of Law working paper series) (on file with authors).

<sup>147</sup> As previously explained, the reason for reduction in all cases in which a confession is introduced into evidence, irrespective of the strength of the corroborating evidence, is rooted in the biases of triers of fact and from their tendency towards over-evaluation of confessions.

<sup>148</sup> Other complicating factors relate to the quantification of the confessional penalty, but this is a technical implementation problem that commonly arises when formulating sentencing guidelines.

<sup>149</sup> This critique challenges our claim that the extent of sanction should be relative to the probability of guilt and that there should be a lower cost to convictions based on confessions than convictions based on extrinsic evidence. From the institutional perspective, discussed below, accuracy and public acceptability may occasionally clash.

in the eyes of the public and thereby indirectly undermine general deterrence.<sup>150</sup> This critique is linked conceptually to Professor Charles Nesson's well-known article *The Evidence or the Event?*,<sup>151</sup> which addresses the issue of judicial legitimacy in the context of compromise verdicts and where he claimed that a central goal of the criminal justice system is the fostering of public trust in its efficacy and reliability.<sup>152</sup> Such public legitimacy is achieved in individual cases by producing “acceptable verdicts,” that is, decisions that are publicly perceived as “statements about what actually happened.”<sup>153</sup> Such statements validate the notion that the system is capable of uncovering the truth and that it is devoted to this cause.<sup>154</sup> In contrast, verdicts that emphasize proof rules “transform the substantive message from one of morality ... to one of crude risk calculation.”<sup>155</sup> Following Nesson's argument, it might be claimed that the criminal justice system's mere admission to the uncertainty of confession-based convictions will take a toll on the public acceptability of convictions and the system's legitimacy as a whole.<sup>156</sup> Adopting the confessional penalty model, which emphasizes proof rules by explicitly creating two sets of evidence (and by continuing to allow convictions to be based on the inferior set, albeit accompanied by a penalty), could, then, in fact dilute public confidence in convictions across all categories of cases. Consequently, the public's faith in the criminal justice system would also be shaken, as judicial verdicts would be shown to be based on a probabilistic continuum rather than on certainty or full proof.

This legitimacy objection collapses on a number of levels. First, we categorically reject the claim that public trust in the criminal justice system, per se, is an intrinsic normative end of the system. Rather, the desired goal is that the system warrant public trust. The issue of the public legitimacy of the criminal justice system

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<sup>150</sup> For a similar discussion regarding compromise verdicts, see Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CAL. L. REV. 231, 239 (2001).

<sup>151</sup> Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

<sup>152</sup> *Id.* at 1358. See also Abramowicz, *supra* note 150, at 255-57.

<sup>153</sup> Nesson, *supra* note 151, at 1358 n.4.

<sup>154</sup> Lillquist, *supra* note 119, at 176.

<sup>155</sup> Nesson, *supra* note 151, at 1362. See also Lawrence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

<sup>156</sup> Abramowicz, *supra* note 150, at 262 (discussing the claim that the mere admission of uncertainty imposes a cost in terms of public confidence).

is not independent of the system's actual objective performance. Second, even if we were to accept that public legitimacy constitutes a normative end in and of itself, it would be questionable that the fitting way to achieve this goal is to obscure reality and deny the risks inherent to judicial fact-finding. The assumption that securing public confidence is contingent on creating such fictitious notions seems implausible and lacks empirical support.<sup>157</sup> On the contrary, there are numerous indications that the public in fact does not hold such misguided views regarding the judicial system. The public's understanding that the system is prone to error is manifested, for example, in the popular demand that capital punishment be contingent on exceptionally high certainty of guilt.<sup>158</sup> Moreover, it could be argued that it is actually the current dissonance between the very high conviction rate that confessions yield and their probative vulnerability (as evidenced in the many publicized exonerations) that has resulted in the most overwhelming public distrust in the criminal justice system and has shaken the general legitimacy of the judicial system. Indeed, it is the very transparency of the confessional penalty regime that may, in fact, restore public confidence in the process.<sup>159</sup> Stated simply, the best way to create the impression of system efficacy and verdict accuracy is to create such a reality.<sup>160</sup>

Finally, the legitimacy critique can be contested even if we assume that public trust is an intrinsic normative end and systemic acknowledgement of probative weakness is a factor hindering that goal. Indeed, the possibility of an erosion of confidence in confession-based convictions would not mean that the confessional penalty model could not enhance criminal convictions' overall legitimacy. For the confessional penalty would create a sorting mechanism separating criminal convictions into two groups: less certain, confession-based convictions and highly-certain extrinsically-based convictions. This disentanglement of the two types of convictions, while it could, indeed, partially delegitimize convictions based on confessions, would in fact lead to a boost in public confidence with regard to

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<sup>157</sup> Abramowicz, *supra* note 150, at 259.

<sup>158</sup> See Lando, *supra* note 146, at 279.

<sup>159</sup> See Abramowicz, *supra* note 150 (claiming that "even if legal institutions have developed methods of fooling the public because such fooling in individual cases increases the prestige of the courts, the general practice of trying to fool the public may decrease prestige even more").

<sup>160</sup> Daniel Shaviro, *Statistical Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 544 (1989).

convictions grounded on extrinsic evidence. And it is reasonable to assume that the cost entailed by diminished public confidence in confession-based convictions would be outweighed by the benefit generated by greater confidence in all other convictions. Returning to Nesson's argument, we thus maintain that acknowledging the fact that the criminal verdict is all about the evidence in some cases would lend credibility to the claim that it is all about the event in others.<sup>161</sup> This, in turn, would increase public confidence in the criminal justice system and its overall legitimacy.

## B. The Retributive Critique

The most robust opposition to the confessional penalty model would most likely originate from the deontological school. In contrast to consequential theories, which take a prospective view of criminal punishment and focus on its instrumentality in furthering the social "good," be it deterrence, incapacitation, or rehabilitation, retributivist theories take a retrospective view of punishment and focus on the "just."<sup>162</sup> Central to deontological theories is the notion that the criminal justice system, like any other social institution, must produce morally correct decisions, irrespective of the ultimate end results or their effects on society.<sup>163</sup> In the context of criminal punishment, this conception finds expression in the principle of just desert. According to this principle, punishment cannot be inflicted to further social ends, but rather solely because the punished individual deserves it, and the punishment should be proportionate to the harm created by the offense. This normative requirement of proportionality in punishment can be traced back to Kant and his *lex talionis* principle,<sup>164</sup> under which those convicted of crimes of comparable gravity must receive equal punishment that befits the crime, no more and no less.<sup>165</sup>

The confessional penalty model undermines these retributive goals and jeopardizes just desert. The more lenient and partial punishment that would result

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<sup>161</sup> Abramowicz, *supra* note 150, at 262-63.

<sup>162</sup> Erik Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 216 (2003).

<sup>163</sup> *Id.*

<sup>164</sup> Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1204 (2007).

<sup>165</sup> Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 206 (1998); *see also* Luna, *supra* note 162, at 223 (stating that "a core command of retribution" is "treating like cases alike"). For further discussion of this claim, *see* Thomas E. Hill, *Kant on Wrongdoing, Desert and Punishment*, 18 L. & PHIL. 407 (1999).

from using a confession as evidence would be disproportionate to the offender's moral blameworthiness and to the harm caused by her wrongdoing. One of the central tenets of just desert is that external social ends should not be a factor in criminal punishment, even if they are constructive goals, such as creating incentives for law enforcers to seek extrinsic evidence or supplying judges with effective sorting mechanisms. Moreover, our proposed model would create an inherent variability in the sanction applied to identical offenses, based on the evidentiary premises of the convictions. Retributivists<sup>166</sup> would surely denounce rectifying evidentiary defects by way of mitigating the criminal sanction and treating like cases differently.<sup>167</sup>

We concede that, from an internal deontological viewpoint, our model is, indeed, problematic. We reject, however, the proposition that retributivist theories offer the conclusive and all-encompassing perspective for evaluating criminal law in general and our model in particular. Retributivist theories have an individualistic focus: they concentrate on justice being done to the particular defendant in a specific case.<sup>168</sup> And for the individual defendant, both false acquittal and false conviction constitute a deviation from just desert; likewise, both a too harsh sentence and an overly lenient one constitute injustices. But retributivist theories fail to provide a normative infrastructure for distinguishing among different instances of failure of desert and determining, vis-à-vis the general class of cases, the relative preferability of each type of deviation. In this sense, retribution is utopian and oblivious to real world constraints. Retributivist theories assert a moral duty to ensure just punishment,

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<sup>166</sup> It is true that, even under the current situation, the criminal justice system is not immune to possible unjust desert, overly lenient sanctions, or wrongful acquittal. In the real world of the criminal justice system, criminal sentences are likely to diverge from what retributivists might consider to be just, and similar cases may be treated in significantly different manners. However, there is a material difference between such real world failings and the model in this paper. Under the deontological paradigm, the moral legitimacy of the criminal process is contingent on steps being taken to prevent unjust desert or wrongful acquittals, not on real world end results. A wrongful acquittal is not an inherent part of the criminal proceedings, but, rather, a regrettable error that reflects how the case was perceived by the triers of fact. The confessional penalty, on the other hand, is an inbuilt mechanism of the criminal process and can therefore be considered unjust from the perspective of the decision-making process itself. For an analogous discussion relating to compromise verdicts, see John E. Coons, *Compromise as Precise Justice* 68 CAL. L. REV. 250, 258 (1980). See also Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1384 (2003) ("There is something profoundly troubling about knowingly facilitating injustice, more so than inadvertently allowing it to happen.").

<sup>167</sup> For a similar discussion relating to the mitigation of punishment on evidentiary grounds, see Abramowicz, *supra* note 150, at 278.

<sup>168</sup> Bierschbach & Stein, *supra* note 164, at 1203.

but completely ignore the fact that the criminal process is fraught with uncertainties and inevitably administered by imperfect beings operating under conditions of limited resources.<sup>169</sup> The harsh reality of the criminal justice system entails making difficult choices for the general class of cases and trading off among various types of injustices. These compromises include reducing the incidence of false convictions at the cost of enhancing the overall rate of wrongful acquittals and lowering the extent of punishment in confession-based convictions in order to minimize wrongful convictions. Retributivist theories completely overlook these issues, failing to prescribe a framework for choosing among legal rules that affect the overall incidence of deviation from just desert.<sup>170</sup>

This silence regarding the impact of different legal regimes (either evidentiary or penal) on the overall incidence of false convictions makes the retributivist critique of the confessional penalty redundant. Perhaps from a retributive perspective, punishment that fails to render just desert is, indeed, problematic. When evaluating the desirability of the confessional penalty model, however, no less important is its contribution to the reduction of the overall incidence of false convictions in society, for the latter also constitutes a substantial infringement of justice. As significant as the notion of just desert is for the individual defendant, the overall rate of false convictions is also a key moral issue not to be overlooked.

Thus, the confessional penalty would be no more problematic from a retributive vantage point than is the current legal regime, in which sentences do not correspond, either *de facto* or *de jure*, with the notion of just desert.<sup>171</sup> Under this regime, the gravity of a defendant's particular criminal conduct is not the sole determinant of his or her punishment. For example, a defendant's rehabilitative potential is a variable that has been officially incorporated into sentencing guidelines

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<sup>169</sup> Luna, *supra* note 162, at 220; Bierschbach & Stein, *supra* note 164, at 1205.

<sup>170</sup> Bierschbach & Stein, *supra* note 164, at 1200 (“Conviction and punishment of the undeserving and failure to convict and punish the deserving are both instances of injustice which retributivism abhors. Retributivism provides no framework for determining which of these failures of desert is worse. Thus to the extent that rules of criminal evidence work to shift the balance between false positives and false negatives in the substantive law's application, retributivism has little to say about which particular evidentiary rules are best.”).

<sup>171</sup> For a comprehensive discussion of the inherent tension between deterrence and retribution and how each is reflected in the criminal law apparatus, see Bierschbach & Stein, *supra* note 164, at 1200-07.

and thus affects the magnitude of punishment handed down.<sup>172</sup> Another extrinsic social factor that has infiltrated the *de facto* sentencing framework is plea bargaining, with approximately 95% of criminal cases culminating in plea bargains.<sup>173</sup> This phenomenon, the benchmark of the criminal law system, has paved the way for systematic deviation from just desert and inherently differential treatment of similarly situated individuals who have engaged in comparable conduct.<sup>174</sup> The flourishing market of “deals to turn state’s evidence”<sup>175</sup> and the “fruits of the poisonous tree doctrine” reflect yet another overall deviation from just desert. On such a background, the confessional penalty would hardly stand out as an exception to the norm.

### C. The Expressive Critique

A third line of criticism turns to expressive theories, specifically, on the expressive function of punishment. Expressive theories of law are concerned with the expression of collective attitudes and commitments through legal acts.<sup>176</sup> The expressive function of criminal law is particularly compelling, as criminal law is a natural arena for the clarification of and reflection on social values. Since criminal law is the source of momentous social norms, its violation elicits strong collective disapproval and the punishment imposed on the offender serves an important expressive function in this context. Punishment is not just a way of making offenders suffer or deterring them, as well as others, from committing similar offenses in the future. Rather, it also serves to signal resentment and indignation towards the convicted person and condemn his or her wrongdoing.<sup>177</sup> The expressive function of punishment is of paramount value, as it enables the state to generate a public sense of

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<sup>172</sup> Find source

<sup>173</sup> Ross, *supra* note 38, at \_\_ (“In the criminal justice systems of the 50 states, over 95 percent of all criminal cases are disposed of without a trial through the entry of a guilty plea. In the federal system the percentage of bargained-for convictions is even higher.”).

<sup>174</sup> See also Lando, *supra* note 146, at 284.

<sup>175</sup> For a description of the thriving market for defendant cooperation in the federal criminal justice system, see Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 563 (1999).

<sup>176</sup> See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. PA. L. REV.* 1503, 1510 (2000).

<sup>177</sup> See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 593 (1996). See also Joel Feinberg, *The Expressive Function of Punishment*, in *READINGS IN THE PHILOSOPHY OF LAW* 467, 470 (Jules L. Coleman ed., 1999) (“Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.”).

moral indignation towards the offense and offender and public acceptance and internalization of social norms.<sup>178</sup>

From this perspective, one could argue that the confessional penalty risks diluting the expressive value of criminal liability and punishment. Dan Kahan has asserted that different types of punishment convey different expressive messages. Whereas the message of condemnation is very clear when society deprives an offender of his liberty, a very different and, from an expressive standpoint, usually unsatisfactory message is likely to be conveyed when it merely fines him for the same act.<sup>179</sup> In a similar vein, Professors Bierschbach and Stein explain that “the accepted social meaning of punishment imposes expressive limitations on authorities’ abilities to manipulate criminal sanctions.”<sup>180</sup> Thus, it could be argued that, in reducing sentences significantly for evidentiary advantages, the confessional penalty detracts from the expressive role of punishment as a publicly acceptable sanction method. Punishment will, consequently, fail to convey the message it is supposed to communicate and will instead undercut the condemnatory message of criminal law. “Indeed, doing so not only would dilute the expressive force of the criminal sanction in the particular case, but it also could work to undermine the criminal law’s more general moralizing, educative, and norm-building function in the long term.”<sup>181</sup>

This critique is appealing solely from an *ex-post* perspective; it loses much of its bite from an *ex-ante* vantage point.<sup>182</sup> Indeed, *ex post*, the reduced sentences under the confessional penalty model could entail expressive costs in specific cases. However, from an *ex-ante* perspective, rather than an unintended adverse consequence of the proposed model, these costs are a necessary outcome. Law enforcement officials’ *ex-ante* awareness of the expressive cost they will have to pay for using a confession as evidence (alongside the damage to their personal prestige and to deterrence) will induce them to search hard for extrinsic evidence,<sup>183</sup> thus

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<sup>178</sup> See Nesson, *supra* note 151, at 1359-60.

<sup>179</sup> Kahan, *supra* note 177, at 593.

<sup>180</sup> Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749 (2005).

<sup>181</sup> *Id.* at 1750.

<sup>182</sup> For a good analysis of the *ex-post/ex-ante* conflict in the procedural context that advocates a preference for an *ex-ante* perspective, see Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997).

<sup>183</sup> See discussion at *supra* note 137.

initiating a process that will eventually yield a reliable sorting mechanism. Moreover, if the model works well, the *ex-ante* incentives triggered by the confessional penalty will turn confessions into residual evidence; *ex-post* expressive costs will become a quite rare and, therefore, negligible phenomenon.

More importantly, the enormous expressive costs of the currently prevailing system, which virtually revolves around confessions, far outweigh any such costs that could be generated by our model. A system that makes broad reliance on confessions is rendered less reliable in the public's eyes. In Justice Goldberg's words in *Escobedo v. Illinois*, "A system of criminal law enforcement which comes to depend on the confession will in the long run be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."<sup>184</sup> The many publicized instances of false confessions, some of them very high-profile, such as the Central Park Jogger case,<sup>185</sup> eat away at public confidence in the criminal justice system far more than a reduced sentence would in certain specific instances. The result is public skepticism regarding the reliability of convictions in general and a dilution of the stigmatizing effect of criminal branding. The confessional penalty model will elevate the reliability of the criminal justice system as a whole and, with it, the stigmatizing value of conviction. This will certainly compensate for any minor expressive deficit that may stem from the reduction in punishment in specific cases.

## VI. CONCLUSION

In conclusion, we offer two closing remarks. The confessional penalty model proposed in this article is far from being intuitive and requires a certain degree of conceptual flexibility. Lawyers tend to think about the law according to ready-made taxonomies. Thus, they treat evidentiary issues in evidentiary terms and substantive issues in substantive terms. They try to solve problems that arise in any given legal category by using tools from the internal arsenal of that same category. It is not surprising, therefore, that when faced with the unreliability of confessions, a lawyer's first instinct would be to try and solve the problem using evidentiary means, such as

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<sup>184</sup> 378 U.S. 478, 488 (1964).

<sup>185</sup> See Davies, *supra* note 29. See also Fernanda Santos, *Vindicated by DNA, but a Lost Man on the Outside*, N.Y. TIMES, Nov. 25, 2007.

constraining police interrogations by devising a better method of rights instruction or requiring greater corroborating evidence to bolster confessions. Yet, in some cases, problems cannot be solved with internal remedies. In certain circumstances, it is better to mend legal problems arising in one legal category by using tools that originate in another, such as employing procedural rules to overcome substantive law shortcomings. For example, in their recent article, Bierschbach and Stein claim that in some cases high expressive costs make it impossible to reduce the level of punishment imposed for certain offenses, thereby risking over-deterrence. In order to correct the situation and achieve optimal deterrence, they propose to adjust evidentiary or procedural rules in a manner which makes criminal liability less probable.<sup>186</sup> This article advocates a structurally similar, albeit reverse argument: adjusting the sanction imposed on convicted defendants in order to correct evidentiary deficiencies. As we have established, the evidentiary problem of false confessions is unlikely to be solved by evidentiary means. Therefore, we propose turning to substantive-penal tools. We further maintain that "mixing" legal categories, which is currently not very popular among lawyers, should not be restricted to confessions. In fact, this approach offers a remedy for many cases that do not lend themselves to resolution by conventional means. Thinking outside the conventional legal boxes could be the key to beneficial consequences.

To those unconvinced by the arguments in this article and who find the price society would have to pay for instituting the confessional penalty too steep to bear and the balance tipped too much in favor of defendants, we suggest that the model nonetheless be implemented in one set of circumstances: capital punishment cases. We strongly urge the removal of capital punishment from the table once a confession has been introduced into evidence at trial. According to recent studies, a not insignificant number of exonerated defendants who had been convicted based on their own confessions had been sentenced to death.<sup>187</sup> Since science has yet to find a way of bringing back the dead and in light of the proven unreliability of confessions, it behooves society to ensure that capital punishment not be imposed if a conviction follows the submission of a confession at trial. Under the confessional penalty model, if law enforcement officials plan on asking for the death penalty, they will be

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<sup>186</sup> See Bierschbach & Stein, *supra* note 180.

<sup>187</sup> See Gross et al., *supra* note 11, at \_\_\_\_.

compelled to conduct a thorough and diligent investigation and to seek extrinsic evidence sufficient to convict the defendant, without resort to a confession.