# Why Do We Admit Criminal Confessions into Evidence?

*David Crump**

There is an enormous literature about the admissibility of criminal confessions.[1] But almost all of it deals with issues related to self-incrimination or, to a lesser extent, with hearsay or accuracy concerns.[2] As a result, the question whether we ever admit criminal confessions into evidence has not been the subject of much analysis. This gap is odd, since confessions are implicitly disfavored by a proportion of the literature and they often collide with exclusionary doctrines.[3] Furthermore, the self-incrimination issue sometimes is resolved by balancing,[4] and it would help if we knew what we were balancing. Therefore, one might ask: Why does the criminal justice system admit confessions into evidence at all?

This Article is an effort to address that strange gap in the literature. It should be pointed out that the description of supporting rationales for admitting a criminal confession certainly does not resolve the separate issue of admissibility.[5] There are constitutional and evidentiary principles that control that issue, and this consideration should constantly be borne in mind; but even so, the underlying rationales for confession admissibility may sometimes be relevant. Sometimes unique doctrines, which often are products of legislation, determine that confessions are inadmissible, such as requirements that statements be in writing, or recorded, or

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1. *See, e.g.*, Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. CRIM. L & CRIMINOLOGY 71 (2019); Raneta Lawson Mack, *These Words May Not Mean What You Think They Mean: Toward a Modern Understanding of Children and* Miranda *Waivers*, 27 B.U. PUB. INT. L. J. 257 (2018); Wes Reber Porter, *Reexamining the Admissibility of the Defendant's Non-Inculpatory Statements at Trial*, 24 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2019).

2. *See* authorities cited *supra* note 1.

3. *See* authorities cited *supra* note 1; *see also infra* Section IV(E).

4. *See, e.g.*, *infra* Section II(B) (discussing the balancing in *Harris v. New York*, 401 U.S. 222 (1971)); *infra* Section III(A)(1) (discussing the balancing in *California v. Byers*, 402 U.S. 424 (1971)).

5. *See infra* Part IV (discussing the effect of opposing considerations).

corroborated.[6] An understanding of the rationales for admitting confessions would assist in interpreting these kinds of doctrines, as well as informing the decision to legislate limits upon the use of confessions as evidence.

Part I of this Article discusses the basic or traditional arguments that might be said to support admitting confessions. First, this Part analyzes the claim that confessions are good evidence.[7] Some kinds of crimes are virtually impossible to prove without them. They come from the person who usually is the best witness to know the truth.[8] Or a confession may be a deliberate, self-serving, and exculpatory falsehood that serves as circumstantial evidence of guilt when disproved.[9] Their value is a mixed question, of course, because false inculpatory confessions also occur.[10] Furthermore, a confession that is ostensibly accurate sometimes is excluded by constitutional or evidentiary rules. And sometimes, the value of a truthful confession is indeterminate because the words are ambiguous or address only a relatively noncontroversial aspect of the alleged crime.

A second and very different traditional rationale, completely aside from truthfulness, is that the admittance of confessions is thought to be a consequence of the adversary system. It is said that confessions are "fair" evidence.[11] One of the rationales for admitting admissions as exclusions from the hearsay rule, including criminal confessions, is that if there are reasons for disbelieving them or otherwise putting them into context, the person who uttered a statement is usually the best witness to supply an explanation.[12] This rationale is itself limited by the privilege against self-incrimination, although challenging a confession normally means waiving the privilege. A related argument is that, if the confession arises in the absence of compulsion, the fairness rationale may be supported by the consideration that the accused has a ready way of avoiding the evidence, by not saying anything.[13] This argument depends, of course, on the condition that the decision to confess is made voluntarily.

Yet a third traditional argument is based on the idea that a citizen receives benefits from his or her society and owes a duty in return. The

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6. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 38.22 (West 2017) (allowing confessions, only if in writing [section 2], or recorded [section 3(a)], or corroborated [section 3(c)]).

7. *See infra* Section I(A).

8. *See infra* Section I(A).

9. *See infra* notes 29–31 and accompanying text.

10. *See infra* Section I(B).

11. *See infra* Section I(C).

12. *See, e.g.*, Drummond v. Executors of Prestman, 25 U.S. 515, 520 (1827) (discussing strength of evidence provided by a confession); State v. Shook, 393 S.E.2d 819, 826 (N.C. 1990) (Webb, J., concurring) ("Confessions can be good evidence and should not be restricted by an arbitrary rule."); People v. Farola, 109 N.E. 500 (N.Y. 1915).

13. In fact, this may be the most important of the *Miranda* warnings.

theory, then, is that one owes a duty to account for one's actions when there is a threshold basis for believing that one has engaged in wrongdoing.[14] This argument reaches an early limit as a principle of law precisely because the Constitution countermands the government's enforcement of any such duty in most criminal cases. The citizen's duty argument, therefore, remains largely a matter of persuasion or aspiration.

Part II contains what might be called process reasons for admitting confessions, although these rationales can be as important as the traditional ones in the right contexts. Thus, a fourth consideration, covered in this Part, is that widespread suppression of credible and voluntary confessions could bring the criminal justice system into justifiable disrepute.[15] Again, this point is a mixed one, because the law of evidence excludes many kinds of relevant evidence, and there usually are arguable reasons supporting this result. Fifth, a confession that is offered in rebuttal or impeachment of a contrary story by the accused is admitted to limit the utility of perjury and to obtain a more informed result.[16] This rationale, even if persuasive in the cases, is subject to the complaint that the confession itself may be false.

Part III discusses extrinsic or non-evidentiary reasons for generating confessions. Again, these rationales can be important. As a sixth example, laws requiring motorists to stop and render aid after collisions extract what amount to confessions; so do some kinds of required statements, even coerced statements, obtained for public safety reasons.[17] Seventh, law enforcement efforts to ensure accuracy in testimony against co-defendants sometimes produce confessions that are offered against the confessors.[18] Eighth, evidence of a confession or comment upon the absence of a defendant's statement may be offered as a matter of satisfying jurors' expectations for a full narrative.[19] Thus, for example, the government may sometimes argue to the jury that the evidence supporting conviction is uncontradicted.[20]

Part IV considers how these rationales fit, or do not fit, with other considerations.[21] In what circumstances do these reasons justify admitting confessions and avoid violating the Constitution or other persuasive reasons for exclusion? In what instances should the courts impose extraconstitutional safeguards for prophylactic reasons, and when should

14. *See infra* Section I(D).
15. *See infra* Section III(A).
16. *See infra* Section II(B).
17. *See infra* Section III(A).
18. *See infra* Section III(B).
19. *See infra* Section III(C).
20. *See infra* notes 110–11 and accompanying text.
21. *See infra* Part IV.

they avoid doing so? When do the policies for admitting confessions invoke balancing with other considerations, and when is balancing inappropriate?

A final Part summarizes the author's conclusions, which include recognition of multiple reasons for admitting confessions. Also, they include the insight that the rationales do not uniformly exist in every case. Furthermore, they include the idea that curtailment of admissibility of confessions ought to be informed by a consideration of the reasons for admitting confessions in the first place. All of these conclusions, however, depend upon the constitutional and evidentiary doctrines that limit this type of evidence.

## I. TRADITIONAL REASONS FOR ADMITTING CONFESSIONS

The most basic argument in favor of admitting confessions is that they are good evidence. But, another traditional argument is that completely aside from their value as evidence, admitting confessions is a fair consequence of the adversary system. Both of these rationales are limited by constitutional and evidentiary arguments. The traditional justifications are usually imbedded in discussions of evidentiary rules, particularly in rules about hearsay, which apply to both civil and criminal cases.[22]

### *A. Confessions as "Good Evidence"*

The first argument in favor of admitting inculpatory confessions is that they are good evidence.[23] They come from a person who usually knows the truth.[24] They oppose the declarant's penal interest, and this feature is thought to be a circumstantial guaranty of trustworthiness in the law of evidence generally.[25] They can be compared to otherwise known facts about the alleged crime[26] that are not publicly available and that would not be accessible to anyone but the perpetrator, and this factor enhances their reliability.

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22. *See* FED. R. EVID. 801(d)(2); FED. R. EVID. 801(d)(2) advisory committee's note to 2017 amendment.

23. *See, e.g.*, Drummond v. Ex'rs of Prestman, 25 U.S. 515, 520 (1827) (discussing strength of evidence provided by a confession); State v. Shook, 393 S.E.2d 819, 826 (N.C. 1990) (concurring opinion) ("Confessions can be good evidence and should not be restricted by an arbitrary rule."); People v. Farola, 109 N.E. 500 (N.Y. 1915).

24. This element, however, is not universally required. *See* FED. R. EVID. 801(d)(2); FED. R. EVID. 801(d)(2) advisory committee's note to 2017 amendment.

25. *Cf.* FED. R. EVID. 804 (admitting statements against penal interest).

26. *Cf.* People v. McGraw, Nos. E09905, E041480, 2007 WL 4396009, at *2 (Cal. Ct. App. Dec. 18, 2007) (explaining that the defense lawyer argued to the jury that a confession was false because the defendant put a "wrinkle" in it); Elery v. Commonwealth, 368 S.W.3d 78, 95 (Ky. 2012) (comparing confession to surrounding facts in deciding admissibility).

Support for inculpatory confessions can be found in court opinions, even though it appears less frequently than discussion of the limits of self-incrimination.[27] The doctrine is so well established that rationales are often omitted. One example of arguments favoring admittance of confessions appears in the opinion of a California court observing simply that an admission is "sufficiently reliable" to avoid exclusion by the hearsay rule.[28] An Illinois court explained the issue as follows: "Testimony regarding a confession . . . is admissible because . . . (1) it has circumstantial guarantees of trustworthiness; (2) it concerns admissions of a party; (3) it consists of admissions against the declarant's penal interest."[29]

Likewise, false exculpatory confessions can be good circumstantial evidence when subjected to disproof. A defendant who is not yet a suspect can be proved guilty with evidence including self-serving statements that are provably untrue. One spectacular example occurred during the trial of Ronald Clark O'Bryan, the so-called Halloween Candy Killer. When his son was poisoned by candy containing sodium cyanide, this defendant led police officers to a home where he alleged that a man had given the candy to the victim.[30] His false statement and its disproof were part of the evidence against him.[31] This kind of confession is analogous to evidence of evidence destruction or other obstructions of justice.

One argument related to these considerations is that some particular crimes are virtually impossible to prove without confessions. An example is arson.[32] The most telling evidence is obliterated by the crime itself. It may be possible to tell that the destruction in a particular building has been caused by a fire that was deliberately set, but identification of the perpetrator is a separate issue. In the experience of this author, that issue is usually incapable of proof without either a confession or the

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27. *Compare* authorities and accompanying text *supra* note 23, *with* authorities and accompanying text *supra* notes 1–2.

28. Fahlgren v. Dep't of Motor Vehicles, 186 Cal. App. 3d 930, 935 (1986).

29. People v. Uriostegui, No. 1-14-0835, 2016 WL 6879627, at *13–14 (Ill. App. Ct. Nov. 18, 2016) (quoting People v. Joya, 722 N.E.2d 891, 900 (Ill. App. Ct. 2001)).

30. *See* DAVID CRUMP & GEORGE JACOBS, A CAPITAL CASE IN AMERICA 120 (2000).

31. *See id.* at 139 (the defendant denied making the statement and continued to maintain that someone else had provided the poisoned candy).

32. The author, as an assistant district attorney, handled several arson cases and was a bystander to many others. As an example that probably was not arson (but no one knows with certainty), consider the disastrous fire that damaged the Cathedral Notre Dame. Investigators faced a "difficult task i[n] determining a cause." *See* Adam Nossiter, Aurelien Breeden & Elian Peltier, *Notre-Dame Appears Structurally Sound After Fire, as Investigators Look for Cause*, N.Y. TIMES (Apr. 16, 2019), https://www.msn.com/en-us/news/world/notre-dame-appears-structurally-sound-after-fire-as-investigators-look-for-cause/ar-BBVYTqC?ocid=spartandhp [https://perma.cc/4HS2-THAH]. The reason was "the apparent absence of evidence, destroyed by the roaring flames." *Id.*

circumstance that the perpetrator was himself caught within the conflagration.[33]

### *B. Contrary Arguments: When Confessions Are Not Good Evidence*

But false inculpatory confessions also occur, and this consideration is a limit on the good-evidence rationale. Some of these kinds of confessions are provided by individuals who may not be good suspects, but who falsely claim to have committed crimes for dysfunctional psychological reasons.[34] Perhaps these individuals can be culled out because of internal inconsistencies in their stories or contradiction by other known facts.[35] But the most stubborn kinds of false confessions probably arise from suspects who are induced to confess by interrogation tactics.

For example, the interrogation manuals emphasize that the questioner should convey an impression of knowledge about the crime.[36] The interrogator offers sympathetic interpretations of the suspect's alleged actions, such as understandable motivations,[37] while minimizing the evil of the crime.[38] Throughout, the interrogator appeals to the suspect's sense of duty, both to tell the truth and to help solve the crime.

The interrogator's strategy may include the conveyance of false or misleading impressions, sometimes without making the resulting confession inadmissible.[39] The interrogator projects friendliness and assurance rather than suspicion.[40] If the suspect is not identified as such, the appeal may be to help solve a crime with an ostensibly unknown perpetrator, even though the interrogator seeks inculpatory statements specifically from the questioned individual.[41] The interrogator may be able to allude falsely to nonexistent evidence of guilt, such as the inculpatory statements of a co-participant or crime-scene identifiers of the suspect.[42] Confessing may be presented as making things better for the suspect, or as enabling the interrogator to provide help or mitigation.[43] Obviously, the

33. *See* Nossiter et al., *supra* note 32.

34. *See* Allison D. Redlich et al., *Comparing True and Fake Confessions Among Persons with Serious Mental Illness*, 17 PSYCHOL., PUB. POL'Y & L. 294, 295 (2011) ("[P]ersons with mental illness and mental retardation are suspected to have even higher rates of confession[.]").

35. But perhaps not. False confessions share the same external appearances as, and are quite similar to, true confessions. *See id.* at 395, 397.

36. *See, e.g.*, CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 133 (1956).

37. *See* WILLIAM DIENSTEIN, TECHNICS FOR THE CRIME INVESTIGATOR 110 (1952).

38. *See id.*; O'HARA, *supra* note 36, at 104.

39. *E.g.*, State v. McKinney, 570 S.E.2d 238, 243 (N.C. 2002) (False statements concerning evidence, without threats or promises, do not exclude confessions.). *But see* Chambers v. State, 965 So. 2d 376, 378 (Fla. App. 2007) (threat to charge "fictional" crime made confession involuntary).

40. *See* O'HARA, *supra* note 36, at 102–04.

41. *See* DIENSTEIN, *supra* note 37, at 102–05.

42. *See* O'HARA, *supra* note 36, at 106.

43. *See id.* at 102–04.

persistence and length of the interrogation may help lead a suspect to confess as a matter of ending its oppressive unpleasantness.

These are all well-known strategies, referred to in *Miranda*.[44] They are supported by the psychological literature. The theory of cognitive dissonance means that a person struggles to reconcile contradictory ideas or dissonance,[45] and this effort motivates a suspect to conform behavior to his internal norms, such as appearing to tell the truth rather than lying. Conformity to examples from others, such as multiple officers, is another powerful motivator.[46] The experiments show that people are susceptible to suggestion by authority to a degree that can be labeled reasonably as scary, and investigating officers are certainly authority figures. Physical proximity enhances these effects.[47] One police officer told this author that the best interrogation tactic he knew was to sit so closely to a suspect that the investigator's legs are interlocked with the suspect's and to reach out and touch the suspect.[48]

These interrogation techniques produce true and reliable confessions in most cases, presumably, but they also are capable of producing false ones.[49] What is the solution? If a court decides that the tactics amount to compulsion, the answer is dictated by the Supreme Court's interpretation of the Constitution: the confession is inadmissible.[50] For interrogation tactics short of court-determined compulsion, commentators have suggested various approaches, including suppression of confessions produced by some kinds of false statements, such as confrontation of the suspect with nonexistent evidence.[51] This issue is discussed further in Part IV of this Article. But the traditional solution is for jury determination of the accuracy of the confession if it was not compelled.

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44. Miranda v. Arizona, 384 U.S. 436, 454–57 (1966).

45. *See* DAVID CRUMP, HOW TO REASON 350–52 (2014) (discussing Festinger's theory of cognitive dissonance).

46. *See id.* at 356–57 (discussing Asch's conformity studies).

47. *See id.* at 358–59 (discussing Milgram's authority studies). Milgram's experiment has been attacked as invalid because of alleged manipulation of results. *See All Things Considered: Taking a Closer Look at Milgram's Shocking Obedience Study*, NPR (Aug. 28, 2013), https://www.npr.org/2013/08/28/209559002/taking-a-closer-look-at-milgrams-shocking-obedience-study [https://perma.cc/JN5F-DZG6]. But it has been replicated with "fairly consistent results." *Id.*

48. The author cannot recall the officer but vividly recalls the message. It fits with psychological findings that proximity enhances conformity. *See* CRUMP, *supra* note 45, at 59.

49. *See supra* note 35 and accompanying text (showing that true and false confessions are produced by similar circumstances).

50. U.S. CONST. amend. V.

51. *See infra* Part IV.

### *C. The Fairness Rationale in an Adversary System*

A second traditional argument supporting the admissibility of confessions has nothing to do with accuracy or trustworthiness. It is that the American system of justice is adversarial, and admitting confessions is fair in the context of that system. Thus, the Advisory Committee on the Rules of Evidence explained the concept as follows:

> [The] admissibility [of confessions] in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.[52]

The fairness argument for admissibility is supported by the ability of the declarant to explain or deny the statement. One court put it this way: "[a]n opposing party may introduce out-of-court statements made by its opponent under the theory that the declarant party is in court and has the opportunity to deny or explain such statements."[53] Based in part on this principle, a majority of jurisdictions hold that admissions by a party-opponent need not be based on personal knowledge to be admissible.[54]

In addition, evidence of a confession may be said to be fair for another reason. The potential confessor can avoid creating the evidence by the expedient of saying nothing at all.[55] This rationale, however, is subject to the confession having been given in the absence of compulsion.

### *D. The Citizen's Duty to Account for One's Actions*

As is indicated above, an argument sometimes surfaces that is based on the citizen's asserted duty to the state to account for suspicious conduct.[56] This traditional rationale reaches an early limit because the Constitution countermands it in most criminal situations.[57] But the theory requires mention for two reasons. First, it is part of the justification for

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52. FED. R. EVID. 801(d)(2) advisory committee's note to 2017 amendment.

53. State v. McClaugherty, 64 P.3d 486, 493 (N.M. 2003).

54. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 265 (1962).

55. The accused, of course, has the "right to remain silent." Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

56. *Cf.* People v. Harpool, 541 P.2d 130 (Colo. App. 1975) (reporting prosecutor's argument about the "duty of citizens to accept responsibility" and disapproving it).

57. *See* authority cited *supra* note 55.

reports required of all citizens, from stop-and-identify laws invoked by automobile collisions to mandates for disclosure of pollution discharges.[58] These reports can amount to self-incrimination, and the justification for their use is related to the balancing rationale discussed below.[59] Second, criminal interrogation techniques often rely upon assertions of the citizen's duty to tell the truth,[60] and courts' allowance of resulting confessions may be based in part on an (unexpressed) recognition of the aspirational value of this rationale.[61]

## II. PROCESS REASONS FOR ADMITTING CONFESSIONS

### *A. Maintaining Respect for the Criminal Justice System*

Imagine that a monstrous, disgusting crime has been committed. A suspect is arrested, and the suspect confesses. The confession survives all constitutional exclusionary rules and is corroborated by extrinsic evidence, but a prophylactic rule imposed by the judiciary[62] excludes it for reasons inapplicable to the case.[63] The suspect is acquitted. People reading their newspapers are quickly and accurately informed. Next, imagine that this phenomenon recurs as a result of anti-confession doctrines. A disrespect of the entire criminal justice system results, and the electorate seeks new politicians and new laws—laws that are not friendly to civil liberties. These concerns underlie a fourth rationale for admitting confessions.

This respect-for-criminal-justice rationale is diffuse. It exists in intangible public attitudes about the criminal justice system as a whole. Its indicators are not legal sources, but public criticisms that do not often make their way into court opinions, statutes, or law review articles. An example is a long-ago and long-forgotten political cartoon showing a prisoner together with a jailer who tells him, in substance, "We're letting you go, Mr. Suspect. The officer who arrested you had dirty fingernails."[64]

Nothing of the kind can be shown to have ever been said, of course, and the source was, after all, just a cartoon. In the tradition of cartoons, it

58. *See infra* Section III(A)(1).

59. *See id*.

60. *See* O'HARA, *supra* note 36, at 102–06.

61. *Cf.* Frazier v. State, 107 So. 2d 16, 22 (Fla. 1958) (interrogation technique that amounted to a request for accused to tell the truth did not make confession inadmissible).

62. *Cf. supra* note 6 and accompanying text (referring to prophylactic rule examples).

63. In other words, an inflexible prophylactic rule designed to ensure accurate reporting of confessions or their circumstances excludes a confession that raises little actual concern about its validity.

64. The author recalls the cartoon but not its (long-ago) source.

was exaggerated; indeed, it was deliberately outlandish.[65] But that was the cartoonist's point. A segment of the population appreciated the cartoon because they thought that the performance of the criminal justice system had deteriorated through exclusions of evidence that were similar to a rule against dirty fingernails, even if not quite as foolish.

The Supreme Court has expressed the same idea at times. For example, in *Dutton v. Evans*, the Court reversed a decision excluding a co-conspirator's statement and invalidating a murder conviction with the observation that:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.[66]

This statement was quoted from the Court's much earlier decision in *Snyder v. Massachusetts*.[67] There, the Court had reversed a decision invalidating a murder conviction on the basis of the defendant's not having been present at a jury view of the scene, without any showing that his absence had any relevance to the outcome.[68]

Statements like these are anathema to some civil libertarians.[69] They are subject, always, to the principles that exclude confessions or other evidence on constitutional or valid evidentiary grounds. But they are a reminder that preventive grounds for excluding evidence should not be written or interpreted so broadly that they invalidate convictions that are not really objectionable.

Perhaps the best explanation of this concept is to be found in the writings of the sociologist Emile Durkheim, who proposed that one of the most important effects of criminal convictions and sentences was "upon upright people."[70] According to Durkheim, the "true function" of the criminal law:

> [I]s to maintain social cohesion intact, while maintaining all its vitality in the common conscience. . . . [That common conscience]

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65. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53–55 (1988) (discussing the nature and value of political cartoons).

66. Dutton v. Evans, 400 U.S. 74, 89–90 (1970) (quoting Snyder v. Massachusetts, 291 U.S. 97, 122 (1934)).

67. *Snyder*, 291 U.S. at 122.

68. *Id.*

69. *Cf.* Priscilla Budeieri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV.C.R.-C.L. L. REV. 157, 193 n.130 (1981) (ridiculing the statement in the context of guilty pleas).

70. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108 (George Simpson trans., 1933).

> would necessarily lose its energy, if an emotional reaction of the community did not come to compensate its loss, and it would result in a breakdown of social solidarity. . . .
>
> . . . Without this necessary satisfaction, what we call the moral conscience could not be preserved. We can thus say, without paradox, that punishment is above all designed to act upon upright people. . . .[71]

The example of the monstrous crime followed by a dubious suppression of the suspected perpetrator's confession is what Durkheim's explanation is about.

### *B. Confessions as Impeachment: Reducing the Utility of Perjury*

A line of cases, beginning with *Harris v. New York*,[72] admits some kinds of uncoerced confessions as impeachment even if they would not have been admissible in the government's cases in chief. *Harris* involved a confession obtained without proper *Miranda* warnings.[73] The State prosecuted its case without the confession.[74] After the defendant testified and denied the crime, the State offered the confession as impeaching evidence.[75] The Supreme Court held that the Constitution did not prohibit this use of the evidence, as a means of preventing perjury and assuring the integrity of the trial process.[76] This impeachment rationale is a fifth reason for admitting confessions.

More recently, in *Kansas v. Ventris*, the Court explained its rationale for the impeachment-by-confession doctrine as follows:

> This case does not involve . . . the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred. Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." . . . [citing *Stone v. Powell*, 428 U.S. 465, 488 (1976).] "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can . . . provide himself with a shield against contradiction of his untruths." . . . Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of

71. *Id.*
72. Harris v. New York, 401 U.S. 222 (1971).
73. *Id.* at 223–24.
74. *Id.*
75. *Id.* at 223.
76. *Id.* at 225–26.

> "the traditional truth-testing devices of the adversary process" . . . is a high price to pay for vindication of the right to counsel at the prior stage.[77]

The Court made it clear that its conclusion was based on a balancing process in which it considered the value of the confession as evidence against whatever deterrence of constitutional violations would result from exclusion.

> On the other side of the scale, preventing impeachment use of statements taken in violation of [the constitutional decisions] would add little appreciable deterrence. Officers have significant incentive to ensure that they and their informants comply with the Constitution's demands, since statements lawfully obtained can be used for all purposes rather than simply for impeachment. And the *ex ante* probability that evidence gained in violation of [the Constitution] would be of use for impeachment is exceedingly small. An investigator would have to anticipate both that the defendant would choose to testify at trial (an unusual occurrence to begin with) *and* that he would testify inconsistently despite the admissibility of his prior statement for impeachment.[78]

The balance, said the Court, meant that the possibility of any residual deterrent effect was insufficient to exclude the impeaching evidence.[79]

These conclusions are subject to several limits. First, obtaining a confession, even if only for impeachment, might seem to a particular officer to be better than no statement. The Court dealt forthrightly with this concern and simply said that it was a valid concern but not as great a concern as that of unaddressed perjury.[80]

A more important limit is that the impeachment-by-confession doctrine depends on the kind of constitutional violation committed.[81] A compelled confession, said the Court, is different: it not only cannot be used in the case-in chief, but it also cannot be introduced for impeachment. The difference, explained the Court in *New Jersey v. Portash*, is that a compelled confession directly violates the core of the Fifth Amendment, and it does not merely impinge upon a prophylactic rule designed to protect the privilege:

> The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary

77. Kansas v. Ventris, 556 U.S. 586, 593 (2009).
78. *Id.*
79. *Id.*
80. *Id.* at 593–94.
81. *Id.* at 590.

> in *Harris* . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.[82]

The Court concluded that "a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial."[83]

Yet another limit upon support of confessions as impeachment is created by the possibility that the defendant may have confessed falsely in the first place.[84] In that event, the defendant's exculpatory testimony at trial may be accurate, and the impeaching confession may be an evidentiary distraction from the truth. But this concern does not implicate either constitutional or evidentiary exclusionary rules, and it is a potential complaint against all types of impeaching evidence—from demonstrations of bias[85] to bad acts showing untruthfulness.[86] It appears that the only solutions given by the process, unfortunately, are the adversary methods for attacking or supporting any kind of evidence, together with the jury's evaluation of the results.

## III. EXTRINSIC AND NONEVIDENTIARY RATIONALES

### *A. Balancing: Compelled Self-Incrimination That Is Permissible for Extrinsic Reasons*

#### 1. Stop-and-Identify Laws and Other Compelled Disclosures

Laws requiring motorists to stop and identify themselves after collisions extract what may amount to confessions, and their admissibility reflects a sixth rationale. The motorist who stops may be self-identifying as the perpetrator of a crime such as driving while intoxicated, vehicular manslaughter, or any of a host of other offenses. The result is self-incrimination: in effect, a confession to an element of the potential offense, including driving the offending vehicle or possessing its contents. The Supreme Court considered this issue in *California v. Byers* and resolved it by balancing the values served by the statutory requirement against the privilege:

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82. New Jersey v. Portash, 440 U.S. 450, 459 (1979).

83. *Id.*

84. *See supra* Section I(B).

85. *Cf.* United States v. Abel, 469 U.S. 45 (1984) (explaining and admitting evidence of bias as impeachment).

86. *See* FED. R. EVID. 606(b) (allowing impeachment by inquiry into acts probative of truthfulness or untruthfulness).

> [These kinds of questions] must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly. . . .
>
> Information revealed by [such disclosures] could well be 'a link in the chain' of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.[87]

This rationale is related to the citizen's duty argument discussed above.[88] In this regard, the Court recognized that there are many disclosure requirements imposed by an organized society. The state:

> commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. . . . [I]ndustries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.[89]

But the result of the Court's balancing was that "[t]here is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement."[90]

This reasoning led to the conclusion that the statutory requirement was valid. But did it mean that the self-incriminatory evidence was admissible? The Court could have upheld the stop-and-identify requirement while excluding the identification from evidence in a criminal case. In the analogous situation of tax returns, the Court has in fact recognized a privilege to avoid making self-incriminatory statements.[91] But that arguably would have been nonsensical in the motorist situation; the defendant was at the scene, in possession of his automobile, and it would have been strange to tell witnesses that they could not be allowed to identify him. The Court's decision was that "there is no conflict between the statute and the privilege."[92] A part of the opinion reasons that the self-identification is not testimonial. This was another reason for the result.[93]

87. California v. Byers, 402 U.S. 424, 427–28 (1971).
88. *See supra* Section I(D).
89. *Byers*, 402 U.S. at 428.
90. *Id.* at 434.
91. *E.g.,* United States v. Marchetti, 390 U.S. 39 (1968).
92. *Byers*, 402 U.S. at 427.
93. *Id.* at 432–33.

2. The Public Safety Exception

A different kind of compelled but admissible confession arises when the statement falls within the public safety exception to the constitutional exclusionary rule. In *New York v. Quarles*, a police officer asked the defendant, at the crime scene, where his gun was located.[94] The Court held that the defendant's statements in response, and the gun itself, were admissible in the defendant's trial for criminal possession of a weapon even though the question had been asked and answered before the officer had given the defendant *Miranda* warnings, and even though the question followed a pursuit with the officer's gun drawn:

> We hold that on these facts there is a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers . . . the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in [this officer's] position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.[95]

This gunpoint confession (or more accurately, this immediately-post-gunpoint confession), like the confession in *Byers*, could have been approved as a matter of police policy but suppressed at trial. In fact, that is what the trial judge and state appellate courts had done.[96] But saying that the officer's conduct was proper and suppressing the result would have sent a message that could have undermined respect in criminal justice.

*B. Assuring Truthfulness in Accusations of Co-Participants*

A seventh reason for admitting confessions is raised by cooperation agreements with suspects. When a felon testifies against another felon, it stands to reason that the government would act reasonably to assure accuracy. One of the principal ways in which this goal is sought is exemplified by *United States v. Mezzanatto*.[97]

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94. *See* New York v. Quarles, 467 U.S. 649 (1984).
95. *Id.* at 655–56.
96. *Id.* at 653.
97. *See* United States v. Mezzanatto, 513 U.S. 196 (1995).

Gary Mezzanatto was charged with possession of methamphetamine, and thus began a story with Hollywood-style twists and turns. He entered into a cooperation agreement with the government, conditioned on "complete truthful[ness]."[98] The agreement was also conditioned on Mezzanatto's waiver of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6), both of which exclude from evidence statements made during plea negotiations.[99] The waiver was designed so that it did not result in admitting confessions in the government's case-in-chief if a trial followed, but it did allow their admission if used to impeach the defendant with contrary prior testimony.[100]

Mezzanatto agreed to the waiver and admitted his possession of the contraband, but in the course of his dealings with the government he also told falsehoods and included statements contradicted by surveillance photographs.[101] The government terminated its dealings with him. At trial, Mezzanatto opted to testify and told an outlandish story: that he was not involved in any cocaine dealings and thought that the methamphetamine laboratory operated by his codefendant was a factory making plastic explosives for the CIA.[102] The government then impeached Mezzanatto with his criminal admissions made during plea negotiations, which amounted to confessions to the charged crime, and the jury convicted him.[103]

The Ninth Circuit, which must have sampled some of the same Kool-Aid as Mezzanatto, held that the exclusion of plea negotiations in the Rules was absolute and non-waivable.[104] It reached this conclusion in spite of multiple decisions holding that a defendant can waive rights, even constitutional rights, and without any provision in these Rules making them non-waivable.[105] The Supreme Court reversed this decision and reinstated Mezzanatto's conviction. The Court reasoned as follows:

> . . . There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably "discredit[ing] the federal courts." . . . But enforcement of agreements like respondent's plainly will not have that effect. The admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts. . . . [M]aking the jury aware of the

98. *Id.* at 198–99.
99. *Id.* at 197–98.
100. *Id.*
101. *Id.* at 199.
102. *Id.*
103. *Id.*
104. *Id.* at 199–201.
105. *Id.* at 200–02.

> inconsistency will tend to increase the reliability of the verdict without risking institutional harm to the federal courts.[106]

Although the Court did not say so, it can be inferred that this "truth-seeking function" is especially important when an accused enters into a cooperation agreement that will produce evidence against other defendants.

The *Mezzanatto* decision has earned bitter denunciations from some commentators who fear its effects upon defendants and upon the plea-negotiation process.[107] Presumably, however, these are the same commentators who would howl if a turncoat witness were to obtain plea concessions and testify against one of their clients without government efforts to ensure truthfulness. Prosecutors cannot choose their witnesses. Often, they find it necessary to rely upon participants as witnesses to crime. A prudent prosecutor should, in the ordinary course of negotiations about cooperation, seek to ensure that the testimony he or she obtains from a co-participant is truthful. And that effort may include obtaining waivers from cooperating witnesses so that their confessions are admissible to impeach them if they testify inconsistently.

### *C. Juror Expectations for Coherent Narratives*

As the Supreme Court has recognized, jurors have expectations about the evidence they will hear.[108] They expect testimony from a witness stand that is reasonably complete and coherent. "A syllogism is not a story," as the Court put it, and the prosecution has the right to tell a complete story, even if a lesser version might convey all of the required elements of the crime.[109] This consideration would not override constitutional protections such as the prohibition on compelled testimony,[110] but it has resulted in

106. *Id.* at 204.

107. *E.g.*, Eric L. Dahlin, *Will Plea Bargaining Survive* United States v. Mezzanatto*?*, 74 OR. L. REV. 1365, 1366 (1995). This commentator complains that *Mezzanatto* "may allow prosecutors to use their power advantage to compel defendants to sign a waiver before entering plea negotiations, thus negating the effect of FRE 410, and frustrating the intent of Congress." *Id.* This reasoning is unfounded. The defendant has a range of "power advantages": to avoid pleading, to plead without cooperating, to avoid telling his story (especially since he has counsel), to avoid testifying, and to avoid testifying inconsistently. But Dahlin does not emphasize these powers. As for Congress, it did not make the Rules non-waivable, and it presumably would not condone false testimony from a pretended CIA associate.

108. *See* Old Chief v. United States, 519 U.S. 172, 186–89 (1997) (reasoning that the government usually has the right to refuse a stipulation and offer more complete evidence).

109. *Id.* at 189.

110. *Id.* at 190–92. In *Old Chief*, for example, the State's interest in showing evidence of a prior conviction did not override the defendant's interest in avoiding impermissible character inferences from such evidence.

admittance of evidence that contravenes some kinds of interests of the defendant.[111]

An example is the evidence in *New York v. Quarles*, which is discussed above.[112] The defendant's statements, without *Miranda* warnings, led to the finding of the defendant's gun. The Court upheld the use of the statement and the gun under the public safety exception to *Miranda*.[113] As is indicated in the discussion of that case above, the Court could have protected both the interest in public safety and the policies underlying *Miranda* by approving the officer's conduct but suppressing the confession. The combination of those two rulings, however, would have seemed to make little sense, especially since the exclusionary rule is premised at least in part on a purpose of deterring illegal police conduct.

In fact, there is more than this to the use of the defendant's statements here. Without providing the jury with the defendant's statements, the trial inevitably would have left a hole in the story. The officer would have described the pursuit and the arrest, and the next question, at trial, would have been: "And what did you do next?" The answer would be, "I went immediately to retrieve the gun to assure the public safety," leaving unanswered the question, "And how did you know where it was?"

In a driving under the influence or vehicular manslaughter case, the prosecution may be unable to produce a blood or breath test result because the defendant has, earlier, refused to allow it. The test result itself is justifiably admissible as nontestimonial even though it is compelled by statute.[114] But what about the refusal to allow it? The use of the refusal as evidence is sometimes justified on the ground that it too is nontestimonial, but this rationale seems dubious, because the refusal is communicative—arguably, a confession.[115] But without an explanation, jurors might ask, "Where's the breath test result?" The better rationale would be that the (wrongful) refusal is necessary to give the jury a coherent story.

Again, this concern for a complete narrative, and for satisfying the jury's expectations, is not an overriding purpose. It would not justify a frontal assault on fundamental values underlying the Fifth and Sixth Amendments. It may make a difference, however, in situations in which any alleged violation is indirect and non-flagrant.

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111. *E.g.*, Spencer v. Texas, 385 U.S. 554 (1967) (holding that the possibility of collateral prejudice did not provide reason for excluding evidence).

112. *See supra* Section III(A)(2).

113. *See id.*

114. *See* Schmerber v. California, 384 U.S. 757 (1966) (holding that the results of the compelled blood test are admissible because they are nontestimonial).

115. *E.g.*, State v. Burns, 661 So. 2d 842, 848 (Fla. App. 1995) (holding that the refusal is admissible because the test is physical evidence).

The same idea may underlie the allowance of a prosecutor's statement, during final jury argument, that evidence of the crime is "uncontradicted."[116] The ability of the prosecutor to comment in this way is hedged by requirements designed to protect the privilege against self-incrimination, but many jurisdictions recognize it.[117] If the prosecutor were to argue all of the evidence and reasonable inferences from it, but failed to point out that no one among multiple witnesses has testified inconsistently with guilt, listeners might well wonder what the opposing story would be.

## IV. HOW DO THESE RATIONALES FIT WITH POLICIES FOR EXCLUSION?

### *A. Rules That Do More Harm than Good, or "What Is a Technicality?"*

This is the most difficult question to be confronted in this Article. An overall principle probably can be articulated: The courts should exclude direct violations of the Fifth and Sixth Amendments and should create and interpret prophylactic rules so that violations and false inculpatory convictions are minimized, while retaining sound respect for the rationales that support confessions as evidence. But the devil, as they say, is in the details. Figuring out how a principle like this is to be applied, given its generality, may expand its ambiguities to a point at which little is left.

In other words, the point is to retain real protections of important rights while avoiding mere technicalities. It is fashionable to ask, "What is a technicality?," with the implication that all filigrees inserted into the law are useful and important.[118] Thus, among some people, the idea of jettisoning a technical interpretation evokes horror. Nevertheless the great English historian, James Stephen, explained it long ago:

> The answer is that technicalities, generally speaking, are unintended applications of rules intended to give effect to principles imperfectly understood, and that they are rigidly adhered to for fear departure from them should relax legal rules in general . . . . When once established, [they] are adhered to partly because they are looked upon as the outworks of the principles which they distort; partly from a perception of the truth that an inflexible adherence to established rules, even at the expense of particular hardships, is essential to the impartial administration of justice; and partly because to a certain

116. *E.g.*, State v. Smith, 743 S.W.2d 416, 417 (Mo. Ct. App. 1987) (upholding argument).

117. *E.g.*, State v. Streeter, 377 N.W.2d 498, 501 (Minn. Ct. App. 1985) (holding argument improper when defendant is only person who could be expected to dispute evidence).

118. *See* David Berg, *Is There a Future for Trial Lawyers?: An Open Letter to Law Students*, 40 S.D. L. REV. 228, 229 (1995) (advising against considerations of rules as technicalities). *But see* Leo Kearney O'Drudy, Jr., *The Offense of Perjury in the Military*, 58 MIL. L. REV. 1, 69–70 (1972) (recognizing technicalities as dysfunctional interpretations that become inflexible rules).

> kind of mind, arbitrary and mischievous rules are pleasant in themselves. There are persons, to whom it is a positive pleasure to disappoint natural expectations by the application of subtle rules which hardly anyone else understands.[119]

It should be added that there often are arguments supporting dysfunctional rules,[120] but lawmakers should ask whether those arguments make sense or whether they disproportionately create wrong results while adding relatively little to protections of rights.[121] In this regard, the law should avoid rules that produce many erroneous acquittals, but add little to citizens' security from the state. There are rules of this kind that are applied to confessions, and it is to be expected that discussions of reasons for removing them will produce rejection from some commentators.

### *B. Direct Constitutional Violations: Coerced Confessions and Refusals of Counsel*

This part of the analysis is easier than other parts. First, coerced confessions offered as primary evidence violate the Constitution.[122] So do deliberate denials of an assertion of the right to counsel.[123] The Supreme Court's decisions apply these rules squarely to the prosecution's case in chief.

On the theory that impeachment is different, the Court has faced the question whether coercion prevents the introduction of a confession after the defendant has testified inconsistently with it. The answer the Court has given is straightforward. A coerced confession is inadmissible for any purpose, including impeachment.[124] But what, then, about the use for impeachment of a confession induced by interference with the defendant's right to counsel? This situation is more ambiguous.

### *C. Impeachment by Confessions Inadmissible as Primary Evidence*

A voluntary confession obtained without required prophylactic safeguards presents a different question. At least two rationales for admitting confessions supports the use of the confession for impeachment, even if not as primary evidence. First, the confession can reduce the utility

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119. *See* JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 337 (1883).

120. *Cf. supra* note 104 and accompanying text (arguing for an inflexible rule of nonwaiveability of certain rights).

121. *Cf. supra* notes 104, 117, and accompanying text (arguing for an inflexible rule that the Supreme Court had rejected).

122. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

123. *Id.* at 445.

124. New Jersey v. Portash, 440 U.S. 450, 459 (1979); *see also* Section II(B) (discussing impeachment and *Portash*).

of perjury, as is pointed out above.[125] Second, the deliberate exclusion of evidence that would mitigate the perjury not only would interfere with the determination of truth, but also, it would decrease respect for the criminal justice system if widespread, as is also indicated above.[126] The Supreme Court's decisions in *Harris v. New York* and its progeny follow this reasoning.[127]

An impeaching confession obtained after interference with the right to counsel creates a more difficult question. On the one hand, the constitutional violation may be clear and direct, or it may be less so. For example, *Kansas v. Ventris* upheld the use for impeachment of a confession obtained by a jailhouse informant inserted by the state in violation of the right of counsel, when the suspect had a lawyer.[128] The Court's reasoning can be supported by the mitigation of perjury rationale as well as the maintenance of respect for criminal justice principle.

Perhaps the only way to make sense of these cases is to invoke the most basic kind of balancing. The denial of counsel in *Ventris* was indirect, and it did not involve the kind of invasion of rights that would ensue from coercion.[129] Furthermore, the issue was not the prevention of the violation; it concerned a remedial purpose: that of preventing future violations.[130] The Court's balancing is expressed in its conclusion that the modicum of expected deterrence here was "not worth the candle"[131] when compared, implicitly, with the perjury-prevention and respect-preserving rationales for admitting the confession.

Denials of the right of counsel come in various shades of seriousness. Arguably, the violation in *Ventris* was not as bad as some other government actions might be. Imagine a case in which, after hearing *Miranda* warnings and after having been questioned aggressively by a team of interrogators for many exhausting hours, the suspect at last says, "I want a lawyer." But interrogators respond, loudly and firmly, "No! You have no right to a lawyer. Answer our questions!" One might imagine that the courts would have a different answer than the holding in *Kansas v. Ventris*, even with respect to the use of a resulting confession for impeachment.

125. *See supra* Section II(B).
126. *See supra* Section II(A).
127. *See supra* Section II(B).
128. *See id.*
129. Kansas v. Ventris, 556 U.S. 586, 590–91 (2009).
130. *Id.* at 593.
131. *Id.*

### *D. Noncoercive Appeals to the Suspect's Moral Values and Tactical Interrogation*

Some commentators would tend to exclude evidence produced by an appeal to the suspect to tell the truth on moral grounds. For example, Professor Kyron Huigens argues that the "courts ought to . . . recognize that the interrogators' effective invocation of the duty to give evidence is compulsion."[132] This argument would apparently prohibit an officer's statement to a suspect saying, "You ought to tell us the truth." Even if the suspect feels internally a duty to tell the truth, if that sense of duty produces a confession after an appeal to it by an officer, it is compelled and inadmissible. Needless to say, the courts have generally disagreed.[133] In fact, Professor Hudgens disparages interrogation tactics generally, such as those that are described in this Article above.[134]

One response to this argument might be that the questioned interrogation tactics are not coercive and thus do not violate the Constitution, at least if they are not employed in a threatening or tiring manner. Yet, Professor Huigens avoids this argument by insisting that the issue is not coercion, but compulsion, to confess.[135] If the suspect is led to confess out of a sense of duty to which a police officer has appealed, the suspect has been compelled to confess, in this line of reasoning. Professor Huigens compares this kind of compulsion to a thirsty person's compulsion to drink water.[136]

This theory thus draws a distinction between appeals to the suspect's internal motivation to confess, which Huigens thinks can be sufficient "compulsion" to violate the Constitution, and external "coercion" by the government, which should not be required to support a finding that the Constitution has been violated. The distinction is mere wordplay, even if the Constitution's exact word is "compelled." Arguably, this terminology can be more sensibly read in its textual context as referring to external compulsion rather than to appeal to the suspect's own motivation to confess.[137] Every confession is produced by some motivation within the suspect, but it is not natural to read the Constitution's concern about compulsion as referring to every such motivation or appeal to it. Huigens'

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132. Kyron Huigens, Abstract, *Custodial Compulsion*, 99 B.U. L. REV. 523 (2019).

133. *See* Frazier v. State, 107 So. 2d 16, 22 (Fla. 1958) (interrogation technique that amounted to a request for accused to tell the truth did not make confession inadmissible); *see also* text accompanying *supra* note 61.

134. *See* Huigens, *supra* note 132, at 549–54.

135. *Id.* at 526.

136. *Id.* at 534–46.

137. *Cf.* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626 (1996) (stating that the distinction between the words "seems unimportant").

theory would equally regard as compelled a confession made after the suspect's friend has suggested that he tell the truth. The pre-constitutional history leaves little doubt that the concern underlying the privilege against self-incrimination was compulsion or coercion imposed by government.[138] The Supreme Court has used the words compulsion and coercion interchangeably.[139] There is little to recommend the internal compulsion theory.

Other commentators seem to argue that interrogation that persuades the subject to confess against his or her penal interest is suspect. This theory is supported by reliance on the Sixth Amendment basis of decisions like *Miranda.* In this view, the suspect can be denied the right to counsel by some kinds of interrogation tactics, such as false claims by interrogators about the evidence to which they have access. Thus, for example, Professor Tracy Pearl argues that a claim such as, "We have your DNA from the crime scene," or "Your partner has confessed to the crime" is more likely than some tactics to produce a false confession.[140] It also seems more likely to be coercive. Professor Pearl cautions that she would not advocate suppression of all confessions precipitated by interrogators' falsehoods.[141] It will be difficult, however, to conjure up principles that would separate tolerable falsehoods from illegal ones, unless one focuses upon whether, in the whole context, the tactics were coercive.

How should appeals to internal moral values or police tactics be treated as a whole in cases about admissibility of confessions? First, an interrogation that the evidence shows is coercive should ordinarily produce suppression of a resulting confession, as the Supreme Court has held. Second, appeals to the suspect's internal compass should not be regarded as coercive or as violative of the Constitution unless they are part of an interrogation that, taken in context, is coercive. "You should tell the truth" should not result in suppression of a confession. Third, although it is tempting to try to construct rules that would exclude confessions produced by some kinds of interrogation tactics, the adoption of categorical rules should be avoided. Inevitably, cases will arise in which suppression is mandated by such a rule but in which it is "not worth the candle," to borrow the Supreme Court's phrase.

What policies, then, support the use of confessions as evidence in these circumstances? First, there is the policy that confessions are good

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138. *See id.* (tracing the history).

139. *See* Huigens, *supra* note 132, at 545–49 (arguing that the Court "confused" the two terms).

140. Tracy Pearl, Professor of Law, Tex. Tech Univ., Speech at the Texas Tech Law Review Annual Criminal Law Symposium (Mar. 29, 2019) (transcript forthcoming in the Texas Tech Law Review).

141. *Id.*

evidence—evidence that is necessary to prove some serious crimes. Second, the use of confessions that are not coerced is a product of the adversary system. Third, uncoerced confessions diminish the value of perjury; and fourth, their reception can reduce the disrespect that courts would suffer from widespread suppression of valid confessions.

### *E. Varieties of Situations Involving Arguable Violations*

Infinite variations on these themes can arise. For example, in *Oregon v. Elstad*, the defendant had confessed without *Miranda* warnings.[142] Later, he was given valid warnings and confessed again. The Supreme Court held the second confession admissible as impeachment on the ground that the warnings and break in the stream of events made the later confession an act of free will.[143] *Lyons v. Oklahoma* was a more difficult case.[144] An involuntary confession was followed by a later, ostensibly voluntary one.[145] The Court held that the earlier confession was to be considered as a circumstance that might make the later one involuntary,[146] but whether the later confession could be voluntary was a question of fact.[147]

In these cases, the Court has avoided inflexible rules. The outcome depends on all of the circumstances. Either voluntariness or the balance of reasons for admitting confessions against the seriousness of violations may control the issue.

### *F. The Christian Burial Case: An Example of Tensions among the Policies*

In *Brewer v. Williams*, an officer (Detective Leaming) had a suspect in custody whom he knew to be deeply religious and who was suspected of abducting and murdering a child.[148] The suspect, Williams, had an attorney and had said that he would talk after consulting his lawyer. The lawyer had instructed the police that there was to be no interrogation as Williams was brought back from where he had fled.[149] En route, Detective Leaming made what has become known as the "Christian Burial" speech:

> . . . [S]ince we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents

142. Oregon v. Elstad, 470 U.S. 298, 298 (1985).
143. *Id.* at 310–11.
144. *See generally* Lyons v. Oklahoma, 322 U.S. 596 (1944).
145. *Id.* at 597.
146. *Id.* at 603.
147. *Id.*
148. Brewer v. Williams, 430 U.S. 387, 391–94 (1977).
149. *Id.*

> of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.[150]

Detective Leaming withheld any actual interrogation and said, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."[151] Some time later, Williams had thought about it, and he decided to lead Leaming to the girl's shoes and to a blanket in which she had been wrapped, but he could not find them. He then led the detective to the girl's body.[152]

These facts were part of the evidence that resulted in Williams's conviction for murder. The trial judge recognized that the defendant had counsel, but ruled that he had waived his right to counsel at the time he created the evidence.[153]

The Supreme Court held that the evidence should have been suppressed.[154] First, the appeal to the defendant's religious motives was equivalent to custodial interrogation.[155] Second, it was undertaken in violation of Williams's right to counsel.[156] But the Court divided sharply, with five in the majority and four in dissent. These dissents invoked some of the reasons for admitting confessions that are described here.

For example, Chief Justice Burger's opinion reasoned that the right to counsel was not a persuasive reason for reversal:

> [T]here is no more than there was in *Stone v. Powell*; that holding was premised on the utter reliability of evidence sought to be suppressed, the irrelevancy of the constitutional claim to the criminal defendant's factual guilt or innocence, and the minimal deterrent effect of habeas corpus on police misconduct.[157]

In other words, the defendant's conduct, if it amounted to a confession, was not just good evidence but very good evidence. On balance, this factor overcame the lesser and indirect factor of infringement on the right to counsel.

The opinion of Justice White also argued consistently with the "public safety" purpose of confessions described above:

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150. *Id.* at 392–93.
151. *Id.* at 393.
152. *Id.* at 393–94.
153. *Id.* at 394.
154. *Id.* at 427.
155. *Id.* at 403.
156. *Id.* at 397–98.
157. *Id.* at 426–27.

> Leaming's purpose was not solely to obtain incriminating evidence. The victim had been missing for only two days, and the police could not be certain that she was dead. Leaming, of course, and in accord with his duty, was "hoping to find out where that little girl was," but such motivation does not equate with an intention to evade the Sixth Amendment.[158]

The majority did not recognize this aspect of the case at all. And Justice Marshall, in condemning Detective Leaming in language that has to be read to be believed, castigated the officer for a relatively innocuous effort that might have saved this young girl.[159]

Justice White also reasoned that the suspect may have been impelled to his conduct by his own motivations rather than by coercion:

> [I]t seems to me that the Court is holding that [the Constitution] is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment. Such a rule is far too broad. Persons in custody frequently volunteer statements in response to stimuli other than interrogation.[160]

If Williams was motivated by religious conviction or a desire to do the right thing and waived his right to an attorney for that reason, this reason for his confession should not have caused its suppression.[161]

*Brewer v. Williams* is a case at the edge. The dissenters have good points, just as the majority justices do. The ultimate issue is that rule violations come in all shapes and sizes, and relatively slight reasons for suppression should be considered against the policies supporting the opposite ruling.

## CONCLUSION

The doctrines that exclude confessions often require consideration of opposing purposes: the reasons for admitting confessions. Many of the Supreme Court's decisions on the subject require explicit or implicit balancing, and therefore an understanding of the reasons for admitting confessions is important. The literature does not contain much that explains the reasons for admitting confessions into evidence, but there are sound rationales that apply in some cases.

First, confessions often are good sources of evidence. They can be false, but it is difficult to see how explicit rules could separate true from

158. *Id.* at 439.
159. *Id.* at 407–09.
160. *Id.* at 440.
161. *See supra* Section IV(D).

false confessions, and ultimately the decision will have to depend upon juries in the absence of applicable exclusionary rules. Second, admitting confessions has been described as a fair consequence of the adversary system, aside from trustworthiness; the confessor has created it and thus is the best person to qualify or dispute it. This rationale is limited in criminal cases, however, by the privilege against self-incrimination itself. Third, confessions can be used for impeachment as a means of limiting the utility of perjury. Fourth, widespread exclusion of valid and properly obtained confessions would probably bring the criminal justice system into disrepute. Fifth, self-incrimination can be a natural result of universally required reports and of the public safety exception, but the Court has avoided inflexible rules of exclusion in these areas. Sixth, some kinds of transitional information or commentary may be necessary to give the jury a complete picture of events. Finally, the idea of a duty of every citizen to account for suspicious circumstances sometimes is proposed as another reason for admitting confessions, although this rationale, too, reaches an early limit imposed by constitutional doctrines.

If any of these rationales is countermanded by valid exclusionary doctrines, the confession cannot be admitted. But in many instances, the solution that the Court has found is to balance the weight of exclusionary considerations against the reasons for admitting confessions. This approach has, for example, resulted in allowance of *Miranda*-noncompliant confessions as impeachment. This result can be justified by reference to several reasons for admitting confessions: that the deterrent value of exclusion does not counterbalance the resulting condonation of perjury, impairment of the truth-finding process, and degradation of the reputation of the criminal justice system. On the other hand, if the confession is involuntary, it is not usable even for impeachment, because use of the confession would squarely violate the constitutional prohibition.

These considerations also militate against the invention of additional prophylactic rules structured as inflexible prohibitions. The effort to identify particular tactics of interrogation as categorical reasons for exclusion, for example, would sweep too broadly. Thus, the suggestion that compulsion results, whenever an officer appeals to a subject of investigation to tell the truth, should be rejected. Such a rule would mean that if the suspect wants to protest innocence, the officer's effort to call for accurate information would exclude a resulting voluntary confession—a rule that seems disproportionate. A better approach would be to consider tactics that are more coercive, or less coercive, as weight factors in determining whether a confession is involuntary, even if the decision is complex. This inquiry will involve evaluation of some hard tactics, such

as false claims about highly inculpatory evidence in a lengthy interrogation. Nevertheless, advice on avoiding invalidating confessions on any and all such tactics is probably sound. Above all, the decision should not be made on the basis of a fine distinction between the words compelled and coerced, or on the concept that compulsion can arise from the subject's own motivations to tell the truth or appeals to that internal value.

The cases, as this Article shows, arise from many variations upon these circumstances. As the analysis here indicates, if admitting a confession violates the Constitution directly, or violates a rule such as those in *Miranda* that are interpretations of the Constitution, the confession must be suppressed even if it is valuable evidence, at least in the prosecution's case-in-chief. More intangible or distant possibilities of impingement on the privilege against self-incrimination should be dealt with by a consideration of the rationales for admitting confessions against the value of an exclusionary rule in the circumstances. This approach guarantees many close balancing cases, but it is probably the best course.