THE REALITY OF FALSE CONFESSIONS—LESSONS OF THE CENTRAL PARK JOGGER CASE

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I.
INTRODUCTION

"If there are lessons to be learned from this case, we invite them."
–New York Police Department Police Commissioner Raymond Kelly[1]

On April 19, 1989, shortly after 9:00 p.m., a woman jogger was snatched from her run on the 102nd Street transverse of Central Park in New York City. She was beaten, raped, and left for dead. At and around the same time, in the same park, several other courageous souls given to using the park at night were attacked or harassed by packs of teenage boys. Some escaped merely frightened; others were seriously injured. Remarkably, the significance of that series of violent acts would continue to unfold days, months, and even years later.

Indeed we might think of the events of April 19, 1989 in Central Park as spawning, at once, several different realities. One of those realities (and at the time, it seemed, the most important one) was that of the jogger herself, as nearly eighty percent of the blood in her body seeped from her wounds into grass and sticks and dirt, all that was left to cushion her battered body.[2] If we could picture her body discarded there, alone, in a secluded patch of darkened urban wood, we might find it strangely quiet in the midst of the busy metropolis, at least after her attacker had delivered his last violent blow and the sound of his retreating footsteps had faded into the night. At that moment we might have perceived that the jogger's reality was one that teetered on the very precipice of death. For how easy would it have been to have slipped beyond the boundary of

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1. So wrote the Police Commissioner in a two-page statement issued after New York District Attorney Robert Morgenthau urged the New York Supreme Court to vacate the convictions of five teenage defendants who were convicted and sentenced to lengthy prison terms after they confessed, apparently falsely, to raping the so-called "Central Park jogger." *See* Walter Ellis, *Gangs of New York*, HERALD SUN (Melbourne, Austl.), April 5, 2003, at W04.

2. TIMOTHY SULLIVAN, UNEQUAL VERDICTS, THE CENTRAL PARK JOGGER TRIALS 50 (1992). I rely heavily upon Sullivan's book in the descriptive portions of this article. It is an excellent account of the evidence concerning the victim, the crime, the confessions and the trials of the five teenagers in the Central Park jogger case. I am deeply grateful for Sullivan's comprehensive and balanced treatment of the complex actors and issues involved in this high-profile case.

life? How preferable to returning to news of her attack? News that she had been beaten so badly that even those closest to her were able to recognize her only by her ring, a band of gold twisted into a strangely pretty bow. News of what she was told was her gang rape. News that her windpipe had been crushed; her brain damaged; that she needed to be physically restrained to stop her limbs from flailing about uncontrollably.

Perhaps it is not surprising that the jogger took some time to decide whether to come back to face that news. For twelve days she lay in a coma in a downtown hospital bed where an army of doctors, nurses, and loved ones hovered attentively, ministering to her needs, coaxing her back toward life—and notoriety as the "Central Park jogger."

But the ordeal of the female jogger and her struggle for life was not the only reality ushered in by the events in the park that night. A second reality was lived by nearly thirty Black and Latino boys who for a variety of reasons decided that night to claim the park as their own. On that night the actions of the boys seemed silently to shout their power to a city of deaf millions, me among them. I have often wondered since that evening what might have happened had we heard the boys' message for what it truly was. Would we have detected that their words were filled as much with a message of deafening, overwhelming powerlessness, as youthful bravado? Would we have heard them proclaim, "I am here! I am powerful! I am in control!" and known that they felt, mostly, the opposite? For they were, at once, all of what they proclaimed themselves to be, and none of it.

A third, quieter, and infinitely more dangerous reality was that lived by another young man, Matias Reyes, who moved alone through the shadows of the park on a collision course with the route taken by the female jogger. Unlike the other boys in the park on the same night, Reyes was more accustomed to traveling alone. More inclined to do his violent deeds under cover of solitude, a solo dance with his chosen prey. For Reyes had no need of an audience. No need to broadcast to others that his brutal acts proved his strength. No need to receive validation from onlookers. Whatever validation he required he took from the terror of his victims, from their degradation, their resistance, and ultimate, unconsenting, submission.

More realities than even these were spawned at the violent moment the jogger rendezvoused with her attacker. A police officer patrolling the park would find the jogger's bloodied body; a force of elite homicide detectives would be called upon to help apprehend her attacker; a talented young prosecutor would be called upon to prove what they discovered, to deliver justice, and ultimately, to right the wrongs done to her. Looking back now, some seventeen years later, we can see how each of the actors involved in the attack and rape of the Central Park jogger, its investigation, and the prosecution of its perpetrators, was involved in an intricate dance of proclaimed and conflicting power. And we could conceive of each of their proclamations of power as a separate arc of

movement, a graceful turn, a spontaneous flowing of human bodies, moving together, then apart. Now violent, now quiet, now desperate, now determined. Each proclamation playing a critical role in the unfolding of the ultimate performance.

The female jogger declared her power when each night she entered the darkened park alone. Her solitude a proclamation of individual courage, she beat back fear; she conquered her demons; she proclaimed her worth. She declared to the city and the world that she was a woman runner. That she had a right to use the park and to use it when it best suited her life as a working professional. She declared that she would not be deterred by the possibility of danger; she would not allow fear to rule her life. She would run, at night, and alone, because it felt good to do so, and because it was her right.

Unlike this claim of personal, individual power, the boys declared their power when they entered the park *en masse*. Bent on a night of violence against strangers, the boys gathered their strength and courage from numbers. In such numbers they became visible in a city that normally denied them visibility. They became a force with which their victims had no choice but to reckon. They traveled in packs, for they knew that only in such numbers would urbanity be denied its power to deny them what, they believed, it denied them routinely: their importance as beings. To the extent that the jogger's (or anyone else's) assertion of personal power to be and to run unhindered in the park conflicted with their assertion of strength and control, the boys were prepared to declare their power superior to all other personal claims.

In contrast to the power claims of the jogger and the youths, the police claimed their power institutionally. Through the exercise of this official power, they re-established calm in the wake of the park attacks and asserted their authority over those suspected of involvement. After receiving reports of attacks in the park, the police approached and questioned Black and Latino boys found in its vicinity and followed leads that took them to the homes of additional suspects. Unlike the declarations of the jogger and the boys, the declaration of power from this official corner was firm and incontestable. It brooked no argument and moved relentlessly toward its goal: to discover the perpetrators of the attack, to build the case against them, and to assist the prosecutor in vindicating the wrong done to the jogger and others. To the extent that the boys' assertion of supposed power conflicted with this goal, the declaration of power of the police was prepared to stand supreme.

As in any human endeavor, the dance of the Central Park jogger's attack was capable of an endless array of endings, and its ending, some fourteen years ago, seemed appropriate to the varying roles played by each of these dancers. When five boys confessed to and were convicted for the jogger's attack and sexual assault, for all intents and purposes, the dance was over. Though perhaps it would be more accurate to say that the lives that the convicted boys (later men) subsequently lived in prison was the dance's real ending. But, if so, that was an

ending danced offstage, away from the public eye. Thus, for the public, the ending was signaled by the final sound of the trial judge's gavel, the pronouncement of the boys' sentences, the anguished but expected cries of their families, and the city's sigh of relief. The ending of the dance was a good one, most thought, for justice had been done.

We now know, of course, that the dance of the Central Park jogger was not really over in 1990 when five boys were sentenced to lengthy prison terms. It was merely stalled. Perhaps by virtue of its very intensity the dance demanded a respite, to permit the dancers to catch their breath. Perhaps an intermission was required to permit others to join the original cast for the dance's surprising finish. Or perhaps some passage of time was necessary to provide the audience sufficient distance from the extreme brutality of the crime to be able to think the unthinkable: that we might have been wrong about who raped the Central Park jogger, and that not one, but five teenage boys might have confessed to a crime that they did not commit.[3]

In the end, if there are lessons to be learned from the attack on Central Park jogger, they will come only from honest and engaged reflection about a final uncomfortable reality: the reality of false confessions. In this article I sketch out a proposal that hopes to reduce the admission of false confessions in criminal trials. The proposal would charge judges with new gatekeeping responsibilities to guard against the admission of untruthful confessions, and specifies the type of inquiry that trial judges should (but do not currently) conduct whenever a confession is challenged on grounds of falsity. The proposal thus envisions a new role for judges: one that would proceed in tandem with, but separately from, the judiciary's current responsibility to exclude from evidence unconstitutionally secured confessions. In part II below, I begin to make the case for the necessity of reform by reviewing the extraordinary facts of the Central Park jogger case; a case so compelling that, by itself, it may convince some of the need to address the problem of false confessions. Part III supports this intuition with a brief discussion of the evidence accumulated by legal scholars and social scientists over the last two decades that points to a conclusion that false confessions happen, and they happen in the cases where the stakes are highest—in high-profile cases involving the most serious criminal offenses, cases in which the public's interest in apprehending and punishing the *actual* wrongdoer is arguably at its highest. Upon this platform, part III makes the case for a particular kind of reform—trial court assessments of the reliability of confessions claimed to be false—and demonstrates that support for this gatekeeping idea can be found in existing rules of evidence, in the way in which common-law courts historically resolved falsity claims, and in a series of more modern statements of the United

3. The man now believed to be responsible for the rape of the Central Park jogger eluded police attention and continued his reign of terror on the Upper East Side of Manhattan for another four months. His violent acts during that period included rapes, slashings, and a murder. *See* Jim Dwyer, *Verdict that Failed the Test of Time*, N.Y. TIMES, Dec. 6, 2002, at A1.

States Supreme Court concerning the proper basis for challenging such evidence. Finally, part IV considers and offers some preliminary thoughts about the likely criticisms of this proposal.

II.
THE INVESTIGATION AND PROSECUTION OF THE CENTRAL PARK JOGGER CASE

After having witnessed the tense developments following the discovery of the near-fatally injured "Central Park jogger," second-guessing the conclusion that the five boys who confessed were in fact guilty would have been improbable. Even had I not been an avid runner myself at the time, given to running the same 102nd Street transverse near where the jogger was attacked, I am sure that the heinous details that filled every news report about the attack on the twenty-eight-year-old investment banker would still have made me anxious for a speedy conviction and resolution of the case. And even had I not been appointed to serve as a federal prosecutor just after the trial of the first three of the defendants began, I am sure that I would have found (as so many others found) the teenagers' confessions to the crime sufficiently trustworthy, and their pre-trial recantations of those confessions sufficiently implausible, to justify their convictions. It was simply impossible for many to believe that anyone could be compelled to falsely admit to having participated in such a vicious attack.[4]

Indeed the horrendous details of the attack on the female jogger on April 19, 1989 defied anyone to take credit for it. At the time of her attack, the Ivy League–educated Solomon Brothers employee lived in a high-rise apartment on the Upper East Side of Manhattan, on East 83rd Street. The building was conveniently located near Central Park, where she enjoyed running, often at night, and almost invariably along the same five-mile loop that generally took her less than forty minutes to complete. This loop avoided the uppermost portion of the park, which many thought was too dangerous to run at night alone.[5]

On the night of her attack, the jogger actually completed very little of her route. She left her apartment building just before 9:00 p.m.—a time that should have had her back home well before a scheduled meeting with a friend at

4. Welsh White discusses the widespread skepticism that an innocent suspect can be compelled to confess falsely (absent physical abuse) in WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS 139 (2001) ("Even if the police employ interrogation techniques that exert considerable pressure, most people believe that a normal suspect would not confess to something he did not do.").

5. Any runner familiar with the park could visualize it immediately: the jogger entered the park at 84th Street, then proceeded north along East Drive, the road that runs the full length of the park's east side. When she reached the 102nd Street transverse she turned sharply left and followed the handy, if isolated, shortcut to West Drive, the road that runs along the western edge of the park. There she turned south and ran to and along the bottom of the park, then north again along East Drive to return home. See the New York Road Runners map, *at* http://www.nyrr.org/divisions/training/cpdistances.html.

10:00 p.m.—but made it only as far as the transverse at 102nd Street.[6] On that secluded roadway the jogger was waylaid, beaten, and then dragged into the woods[7] where she was raped and bludgeoned so badly that medical professionals who attended to her injuries later that evening doubted she (or anyone) could survive them.[8] Her skull had been cracked from the force of a blunt object, perhaps a rock or brick.[9] The bones in one of her eyes had exploded from the incredible force against her face, dislodging her eyeball.[10] Her body was covered with bruises and scratches.[11] She was virtually unrecognizable, even to those who knew her well.[12]

Later investigation offered at least a partial explanation for the extensiveness of these injuries: the ability of the Central Park jogger to fight off her attacker or call for help had been severely compromised by the peculiar way in which she had been bound and gagged.[13] Her shirt had been fashioned into a tightly rolled ligature. Starting from behind her head, the shirt was crisscrossed around her neck and into her mouth. The remainder of the shirt was used to bind the jogger's hands and wrists in a prayer-like formation in front of her face.[14] Her windpipe was almost crushed, she had slipped into a coma, and she was not expected to live.[15]

In addition to the attack on the jogger, several other patrons of the park met

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6. A neighbor of the jogger had conversed with her in the hallway of her building at approximately 8:55 p.m., just before she left for her run. Jim Dwyer & Kevin Flynn, *New Light on Jogger's Rape Calls Evidence Into Question*, N.Y. TIMES, Dec 1, 2002, at A1. Patrick Garrett, a friend and colleague of the jogger, was due to meet her at her apartment after her run at 10:00 p.m. When he arrived there was nobody home. SULLIVAN, *supra* note 2, at 140 (summarizing Garrett's testimony).

7. Photographic evidence admitted at the trial showed "blood on the asphalt" of the cross-drive and a "trail of blood stretching more than two hundred feet" to the spot where her body was found. SULLIVAN, *supra* note 2, at 135. All of the jogger's clothes save her bra had been removed. Her bra had been pushed up above her breasts. *Id.* at 19, 126.

8. *Id.* at 130. The surgeon who attended the woman jogger some hours after the attack described her condition in the most dire terms, saying she was "in deep shock" and "barely alive." *Id.* at 129. Her blood pressure was nearly undetectable, he reported, and her body temperature was below normal. She was unable to breathe without assistance. *Id.* The blows to her head had fractured her skull and caused extreme damage to her brain. *Id.* at 50, 130. This brain damage caused her limbs to flail about and required the application of physical restraints. *Id.* at 129.

9. *Id.* at 130, 136–37.

10. *Id.* at 130. At the trial, Dr. Robert Kurtz, the surgeon at Metropolitan Hospital in charge of the jogger's care, testified that he had to perform complicated surgery to "rebuild" that portion of her face and set her eyeball into its proper place. *Id.*

11. *Id.* at 136.

12. Her friend and colleague Patrick Garrett was able to positively identify the patient as his friend only after noticing a distinctive ring she was wearing that he recognized as hers. *Id.* at 140–41.

13. *See id.* at 126.

14. *Id. See also* Affirmation of Nancy E. Ryan, Assistant District Attorney, In Response to Motion to Vacate Judgment of Conviction ¶ 8 n.*, People v. Wise, 752 N.Y.S.2d 837 (Sup. Ct. 2002) (No. 4762/89), *available at* http://news.findlaw.com/hdocs/docs/crim/nywiseetal-120502aff.pdf [hereinafter Ryan Aff.].

15. SULLIVAN, *supra* note 2, at 50.

with violence the same night.[16] They included a fifty-two-year-old homeless man named Antonio Diaz, whom a gang of boys punched and kicked repeatedly on East Drive, just south of the 102nd Street transverse. Some minutes later, farther south along East Drive, many of the same boys attempted unsuccessfully to assault several cyclists who escaped unharmed. Later still, several boys attacked and beat a number of male joggers along the northern tip of the running track that circles the park's reservoir. This group of victims included a former U.S. Marine named John Loughlin, who at the time of the attack measured an imposing six feet, four inches tall, 190 pounds. Loughlin saw a group of boys attack another runner and went to his aid. He was attacked from behind with a blunt instrument and suffered severe injuries to the head, face, shins, ribs, and back. The officer who helped arrange Loughlin's transportation to the hospital later that evening testified that he had to hose down the back seat of the police cruiser to remove all of the blood from where Loughlin had sat.[17]

A. The Investigation

Although the jogger did live, she remained in a coma for twelve days. In this comatose state, she was unaware of the tremendous attention her attack was generating throughout the city (and indeed the nation) as the police and representatives of the District Attorney's Office scrambled to find her attackers unguided by what she might be able to tell them.[18] An elite corps of homicide detectives began to question a number of Black and Latino male teenagers who had been in the park at the time of the attack.[19] In all, nearly thirty boys were questioned about their activities in the park on that night.[20]

Demonstrating remarkable efficiency, within forty-eight hours of the attack, the detectives assigned to the case had secured written, oral, and/or videotaped confessions from five teenage suspects.[21] Antron McCray, Raymond Santana,

16. See Ryan Aff., *supra* note 14, ¶ 7. For a lengthier description of the series of attacks that night, see SULLIVAN, *supra* note 2, 113–24.

17. *See* SULLIVAN, *supra* note 2 at 121–23.

18. This was just as well, for when the jogger did finally regain consciousness, it quickly became clear that she would be able to provide very little assistance to the police search. The severity of the blows to her head and resulting damage to her brain had erased all memory of her run. Despite a slow but almost-full recovery from her other wounds, she has never been able to recall what happened to her that night, or who was responsible for it. *See* TRISHA MEILI, I AM THE CENTRAL PARK JOGGER: A STORY OF HOPE AND POSSIBILITY (2003). Though a blessing to herself, the jogger's amnesia would leave the police with no choice but to determine what had happened to her through less direct means, and the prosecutors with no choice but to prove what they learned through largely circumstantial evidence.

19. Santana and Richardson were arrested at approximately 10:15 p.m. at the western edge of the park; McCray, Salaam and Wise were brought in for questioning the next day after other detainees provided their identities to the police. *See* Ryan Aff., *supra* note 14, ¶ 9.

20. *Id.* ¶ 24.

21. *See* SULLIVAN, *supra* note 2, at 51. Kevin Richardson and Antron McCrary each made a written and videotaped statement; Raymond Santana wrote two statements and made a videotaped statement; Kharey Wise made two statements that were videotaped and made two more written

Yusef Salaam, Kevin Richardson and Kharey Wise ranged in age from fourteen to sixteen.[22] Each of them admitted involvement in the jogger's attack and supplied details about his own and others' respective roles.[23] Some of the boys also admitted that they had engaged in the other violent assaults in the park that same night, including the attacks on Antonio Diaz, the cyclists, and John Loughlin.[24] Before making these admissions, each of the five teens had been advised of his right to remain silent and to speak with an attorney, yet each agreed to speak to the police and the prosecutor without counsel present.[25]

Despite being warned, it is quite possible that the boys did not fully appreciate the gravity of their admissions at the time, particularly with respect to their statements concerning the female jogger. While each of the teens admitted *some* involvement in this assault, each minimized his own role and none admitted to actually having had intercourse with her. In the boys' minds this qualification might have caused them to believe they were not actually confessing to "rape." If so, they were mistaken. The boys' statements plainly made them accomplices to rape under the state's "acting in concert" law.[26] That is, if a jury credited their statements as true, each could be found guilty of the crime of rape because the acting in concert provision made each teen vicariously responsible for the most serious actions of those he willingly assisted.

On the basis of their admissions, the New York District Attorney sought and obtained indictments charging McCray, Santana, Salaam, Richardson, and Wise with the attempted murder, rape, sodomy, and assault of the female jogger. Additional counts in the indictment charged the five teenagers with assaulting two other male joggers that same night, robbing one of them, and committing the general crime of riot.[27]

B. The Trial and Conviction of the Central Park Five

There can be no doubt that in the absence of the confessions of the five defendants charged with the rape of the jogger, there would have been no case against them for that crime. From the very beginning of the investigation, the

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statements; and Yusef Salaam made an oral statement which the police reduced to writing but he would not sign. *See* Ryan Aff., *supra* note 14, ¶ 23 n.*. *See also* SULLIVAN, *supra* note 2, at 24–28.

22. *See* Ryan Aff., *supra* note 14, ¶¶ 10–11.

23. *See id.* ¶ 10. The sixth suspect, Steven Lopez, proved less cooperative and refused to admit to involvement in the rape of the Central Park jogger. Without his confession, the state was forced to abandon its desire to prosecute him for that crime. The prosecutor ultimately agreed to accept Lopez's plea to a far less serious crime. *See* SULLIVAN, *supra* note 2, at 35–37, 307–11.

24. *See* SULLIVAN, *supra* note 2, at 33, 46, 67, 73.

25. *See id.* at 42.

26. For New York cases discussing the application of this theory, see People v. Camacho, 802 N.Y.S.2d 165, 166 (N.Y. App. Div. 2005); People v. Smith, 756 N.Y.S.2d 255 (N.Y. App. Div. 2003).

27. Ryan Aff., *supra* note 14, ¶ 11.

boys' confessions were the centerpiece of the prosecution's proof. Due to the jogger's brain injuries, she was unable to identify her attackers, and no other eyewitness placed them at the scene.[28] Unless and until the blood and semen found inside and near the jogger's body was determined to corroborate their accounts, the boys' words of admission constituted the strongest proof the prosecutor had of their involvement in the attack. It was thus a great blow to the state's case when pre-trial tests run on those blood and semen samples failed to link the boys to the jogger's rape and assault.[29] At best, the samples from the scene were inadequate to support a conclusion one way or the other about the boys' involvement. At worst, the test results raised serious questions about their professed participation in the jogger's rape.

Although plainly a setback, the prosecution did not consider the failure of science to confirm the boys' accounts to be fatal to its case against them. After all, DNA tests in 1989 were still in their infancy, and it was not uncommon for the results of such analyses to be inconclusive. Nor did it seem critical that the *conclusive* results of DNA tests performed on the biological evidence seemed to point to another unknown male, for the boys' own statements had led the prosecutor to believe that not all of the participants in the jogger's rape had been caught. That being the case, the DNA evidence seemed simply to confirm that at least one other offender—the source of the semen found at the scene—had, as yet, eluded detection. While this was disappointing, the scientific evidence certainly did not have to be understood to mean that the five males, who *had* been apprehended and who had *confessed* to taking part in the jogger's rape, were innocent.[30]

In the end, if guilty verdicts were to be delivered in the case they would be by virtue of the defendants' own words. In pretrial hearings, the defense attempted to suppress the videotaped statements as the product of coercion.[31] Failing this, defense counsel stood ready to bring to the juries' attention numerous inconsistencies that existed in and among the boys' accounts.[32] Indeed, the statements of the teens reflected important disagreements about nearly every part of the attack on the jogger, including where the attack had

28. *See* SULLIVAN, *supra* note 2, at 54, 153.

29. Ryan Aff., *supra* note 14, ¶ 34 ("Ultimately, there proved to be no physical or forensic evidence recovered at the scene or from the person or effects of the victim which connected the defendants to the attack on the jogger[.]"); *id.* ¶ 95 ("[T]he defendants' statements about the rape could not be corroborated by DNA evidence.").

30. Nevertheless, to bolster the credibility of those confessions, the prosecutors did the best they could to corroborate the accounts the boys had given of the rape with the remaining physical evidence available to the state. They introduced a hair that had been found on one of the boy's shirts, a blond hair that was at least "consistent with" the hair of the jogger, even if DNA tests could not establish that it actually came from her. *See id.* ¶¶ 35–36.

31. *See* SULLIVAN, *supra* note 2, at 79.

32. *See* Ryan Aff., *supra* note 14, ¶ 86 ("[T]he accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime[.]").

occurred,[33] who had initiated it and knocked the jogger to the ground,[34] who had struck her, what weapons had been used in the assault,[35] and which of them had had intercourse with her.[36]

These inconsistencies spelled some trouble for the prosecution, but the defense had a bigger problem—there was no plausible explanation for why the boys had said they had raped the jogger if they had not. In the absence of any evidence that the teens had been physically forced to make those statements, it would be hard to convince a jury that the police had coerced the boys to confess falsely to such a heinous crime. And although the boys would argue at trial that their confessions were coerced, videotapes of the prosecutor's interviews with the boys revealed no physical injuries that might suggest that the police had physically forced them to say what they said.[37]

On the contrary, when asked by the prosecutor during each of the videotaped interview sessions about their treatment to that point, each of the teenagers specifically stated on tape that the police had not abused them. If their statements can be believed, this meant at worst the police pressure on the boys had been psychological, not physical. But how aggressive could the police questioning have been? Several of the defendants were accompanied by adult family members when they waived their rights to remain silent and have counsel present during questioning.[38] Had the pressure been as overwhelming as the indicted defendants later claimed, surely those family members would have put a stop to the interrogations and sought counsel for the young suspects. Moreover, even if one were to believe that the boys had felt psychologically pressured by

33. *Id.* ¶ 97.

34. Kevin Richardson said that Antron McCray, Raymond Santana, and Steve Lopez knocked the jogger to the ground. Antron McCray stated that everyone did it. Yusef Salaam stated he did it himself. Kharey Wise claimed first that it was Raymond Santana, but later named Steve Lopez. *Id.* ¶ 87.

35. The boys' statements about the physical assault on the jogger were a jumbled, conflicting mess. According to Kevin Richardson, an unindicted boy named Michael Briscoe first struck the jogger with his fist. Raymond Santana insisted Steve Lopez struck the jogger with a brick. Antron McCray claimed that every one of the boys hit her and that a "tall, skinny, black male struck her" with a pipe. Yusef Salaam muddied the waters further by claiming that he was the person who hit her with a pipe while another hit her with a brick. Kharey Wise stated that Steve Lopez cut her with a knife and that Kevin Richardson wielded a "handrock." *Id.* ¶ 88.

36. There was remarkably little agreement among the boys' statements about who had had intercourse with the jogger. Richardson pointed to McCray, Santana, and Lopez. McCray said it was Richardson, and according to Assistant District Attorney Ryan, also implicated "a tall, skinny black male, a Puerto Rican with a black hoodie, [and a teen named] Clarence." Santana claimed Richardson raped her. Salaam said it was Richardson, Wise, and other unidentified males. Wise named Lopez, Santana, and Richardson. *Id.* ¶ 89. As noted by the District Attorney's Office in its later investigation of the confessions, Kevin Richardson was the only defendant named in all the statements, except his own. Assistant District Attorney Ryan speculates that because Richardson was the first to implicate other members of the group, they were motivated to point the finger at him. *Id.*

37. *See* SULLIVAN, *supra* note 2, at 92–94.

38. *See* SULLIVAN, *supra* note 2, at 42.

the police to cooperate, it would be hard to swallow the defense's claim that that pressure had led all five teens to fabricate in separate interrogation rooms the same basic story of guilt—a story that detailed (at least when considered in combination) how the boys first attacked and then took turns raping the female jogger.

In the end, the state had little trouble rationalizing the discrepancies between the teenagers' statements. As prosecutors are accustomed to pointing out, it is rare for two people to perceive or remember things in precisely the same way. To the contrary, differences among statements of eyewitnesses or participants in a single event are not only common, but are to be expected. It is quite normal for people to see, recall, and recount details of events in different ways. This is especially true when the subject is asked to describe a particularly stressful event.

Thus, it seemed quite reasonable for Elizabeth Lederer, the talented lead Assistant District Attorney assigned to the Central Park jogger case,[39] to invoke a favorite prosecutorial argument to turn the many inconsistencies among the boys' statements to her favor. There would have been more cause for worry that the police had force-fed the young suspects their statements had those statements been verbatim duplicates of each other, she argued. Had the police coerced the boys into making statements that were untrue, why wouldn't the officers have cleared up the inconsistencies between the statements first and forced the boys to tell a single inculpatory story about what happened?[40] Rather, it was reasonable to conclude that the opposite was true. They confessed that they raped the jogger because they did rape the jogger, and whatever discrepancies existed between their accounts of how that sexual assault unfolded could be explained by the normal perception-skewing effects that brutality, adrenaline, and plain old youthful inattentiveness engender.

C. The Verdicts

It can be no surprise that the deficiencies in the state's evidence proved too trivial to derail its case against the Central Park defendants. As the prosecutor pointed out, the boys had confessed. The guilty verdicts obtained against them were testament to the true power of confession evidence, the *crème de la crème* of prosecutorial proof. As described by one legal scholar, confession evidence "has for centuries been regarded as the 'queen of proofs' in the law: it is a statement from the lips of the person who should know best."[41] With a

39. Lederer was assisted by a second talented prosecutor, Arthur "Tim" Clements. *See id.* at 39.

40. *See* MICHAEL F. ARMSTRONG, STEPHEN L. HAMMERMAN & JULES MARTIN, N.Y. POLICE DEP'T, CENTRAL PARK JOGGER CASE PANEL REPORT 3 (2003) ("[C]onsistency would be a feature of planted rather than spontaneous information."), *available at* http://www.nyc.gov/html/nypd/pdf/dcpi/JoggerReportfinal.pdf [hereinafter POLICE PANEL REPORT].

41. PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000).

confession, the jury is relieved of the need to accept the prosecutor's word about who did what to whom, because the accused himself provides the jury with all they need to know.

For this reason, once the trial court ruled the confessions admissible, the teens were between a rock and a hard place: to get around the confessions they had to admit that they had lied. But admitting that was a catch-22. If the boys would lie to the police, why wouldn't they also lie to the jury? And if they would lie, which was the more likely lie—the statements in which those accused accepted responsibility for the assault (statements against their self-interest), or the statements in which they attempted to distance themselves from it (statements that were undeniably self-serving)? To the majority of observers in and around New York City at the time (including, apparently, the jurors) the answer seemed obvious. Together, the boys *had* raped and beaten the jogger, just as they had said initially, and it was right that they be convicted for it.

And convicted they were.[42] At the conclusion of two severed trials, Antron McCray, Raymond Santana, Yusef Salaam, Kharey Wise, and Kevin Richardson were convicted and sentenced to lengthy terms of imprisonment.[43] The boys went off to prison, and the case of the Central Park jogger was successfully closed—or so everyone thought.

D. Matias Reyes Confesses

Thirteen years after the five teenagers were convicted, a known serial rapist and convicted killer named Matias Reyes confessed that he, and he alone, was responsible for the rape and beating of the Central Park jogger. Unfortunately, by the time of Reyes's act of contrition, all but one of the five convicted youths had served their sentences and been released. This meant that even if Reyes's confession were credited as truth, with the exception that the convictions could be erased *ex post facto* from the boys' records, any remedial effect arising out of Reyes's belated confession (if any) would be limited to the policy changes his revelation might provoke.

DNA analysis of the semen that had been found at the scene of the rape quickly confirmed that, just as he had claimed, Reyes was in fact its source.[44]

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42. All of the defendants were convicted of charges related to the jogger's rape and assault. Four of the defendants (Richardson, McCray, Salaam, and Santana) were convicted for the assault and/or robbery of the male joggers. Kharey Wise was convicted both of assault and sexual abuse with respect to the jogger's rape, and of first-degree riot. Ryan Aff., *supra* note 14, ¶¶ 4, 20–21.

43. McCray, Santana, Salaam, and Richardson (all either fourteen or fifteen years old at the time of arrest) were each sentenced to serve five to ten years in prison for their roles in the rape and other offenses. Kharey Wise (the oldest at the time of arrest, at age sixteen) received a slightly stiffer sentence of five to fifteen years. *Id.* ¶¶ 10, 20–21. The trial judge remanded each of the defendants into custody pending the resolution of their appeals and all of their appeals were ultimately defeated. *See* People v. Salaam, 629 N.E.2d 371 (N.Y. 1993); People v. Wise, 612 N.Y.S.2d 117 (App. Div. 1994); People v. McCray, 604 N.Y.S.2d 93 (App. Div. 1993).

44. Ryan Aff., *supra* note 14, ¶¶ 69–71.

Other evidence corroborated Reyes's belated claim of responsibility for the crime, including his ability to correctly explain when, how, and where the attack occurred (which differentiated him from the convicted teens).[45] Furthermore, evidence from the marks made in the grass when the jogger was dragged off the transverse into the woods suggested a lone attacker rather than a gang of five or more.[46] Upon further investigation, it also became clear that Reyes was no stranger to the type of violence involved in the jogger's attack and rape. Reyes had been a suspect in the rape and brutal beating of another woman in the same part of the park only two days before the rape of the more famous jogger.[47] In addition, Reyes's attacks had a "signature" quality—he was known for his practice of binding his victims with the same type of knot that had been used to secure the hands of the jogger.[48]

As a result of this new information, the five wrongfully convicted defendants petitioned the New York County Supreme Court to vacate their guilty verdicts and grant proper relief.[49] On December 5, 2002, in response to the defendants' motions, the Manhattan District Attorney filed a fifty-eight-page memorandum[50] that outlined the results of its investigation of Reyes's claims and re-evaluated the deficiencies of the proof offered at the trials of the five Central Park defendants in light of those claims.[51] The memorandum concluded that if the evidence implicating Reyes had been presented at trial, it would have posed serious enough doubts about the boys' guilt to have affected the outcome.[52] The District Attorney's office, representing the People of New York, consented to the defendants' motions to vacate the earlier convictions,[53] and made the following statement:

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45. Blood evidence had been found in each one of the significant areas Reyes described, including on the 102nd Street transverse where he stated he clubbed the jogger on the back of the head, and two places deep in the woods where he claimed to have dragged her. Jim Dwyer, *One Trail, Two Conclusions: Police and Prosecutors May Never Agree on Who Began Jogger Attack*, N.Y. TIMES, Feb. 2, 2003 at 35.

46. The drag marks were measured at approximately sixteen to eighteen inches in width. In its post-conviction review of the evidence, the District Attorney's report concluded that the size of the path was "more consistent with a single attacker dragging an inert form than with a group." Ryan Aff., *supra* note 14, ¶ 64(4).

47. *Id.* ¶ 59.

48. *See id.* ¶¶ 55(3) n.3, 67

49. *See id.* ¶ 3.

50. This memorandum is the Ryan Aff., *supra* note 14.

51. *See* Ryan Aff., *supra* note 14, ¶ 42 ("[I]nvestigation has led to the conclusion that Reyes' account of the attack and rape is corroborated by, consistent with, or explanatory of objective, independent evidence in a number of important respects.").

52. *See id.* ¶ 118 ("Assessing the newly discovered evidence, . . . we conclude that there is a probability that the new evidence, had it been available to the juries, would have resulted in verdicts more favorable to the defendants, not only on the charges arising from the attack on the female jogger, but on the other charges as well.").

53. *See id.* ¶ 5 (consenting to the defendants' motions).

> A self-confessed and convicted serial rapist—who habitually stalked white women in their 20's; who attacked them, beat them, and raped them; who always robbed his victims, and frequently stole Walkmans; who tied one of his victims in a fashion much like the Central Park jogger; who lived on 102nd Street; who beat and raped a woman in Central Park two days before the attack on the transverse; whose DNA was the only DNA recovered inside and alongside the victim; whose narrative of events is corroborated in a number of significant ways; who had no connection to the defendants or their cohorts; and who committed all of his sex crimes alone—has come forward to say that he alone stalked, attacked, beat, raped, and robbed a white woman in her 20's, who was set upon on the 102nd Street transverse, was missing her Walkman, and was left tied in a way that has never before been explained.[54]

After considering the memorandum, on December 19, 2002, Judge Tejada vacated each of the five convictions on all counts.[55]

E. "If there are lessons to be learned from this case, we invite them."[56]

The extraordinary turn of events in this well-known case provides important reason to reconsider the accuracy of our beliefs about the power of standard interrogation practices to produce false confessions. Even if it is fair to conclude that the police obtained the defendants' confessions in good faith, without force, and in full compliance with all constitutional commands, it is also reasonable to conclude that some time after their arrival at the station house, not one but five boys were questioned without resort to violence (some in the presence of concerned family members) and still decided that it was in their best interests to confess to a crime they did not commit. Had the interrogation techniques used by the police in obtaining those confessions been novel, we might be tempted to explain the teens' decisions as aberrations. There was nothing particularly unusual, however, about the manner in which the police questioned the five young suspects in the Central Park jogger case. Indeed, in a careful review of the interrogation methods used to secure the statements before the trials began,

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54. *Id.* ¶ 104.

55. *See* Ellis, *supra* note 1, at W04.

56. *Id.* at W05 (statement of NYPD Commissioner Raymond Kelly after New York District Attorney Robert Morgenthau urged the New York Supreme Court to vacate the convictions of the five teenage defendants). Despite this statement, it seems unlikely that the NYPD has learned any real lessons from this case. Unhappy with the District Attorney's decision, Commissioner Kelly quickly appointed a panel of his own to conduct an independent investigation of Reyes's confession. That panel later issued a report refusing to accept the conclusion that Reyes's confession and DNA corroboration exculpated the boys. While the report conceded that evidence confirmed Reyes had raped the jogger, it argued that the consistencies in the boys' confessions made it more likely than not that the boys somehow participated. It theorized that the boys could have attacked the jogger before Reyes arrived, with Reyes, or after Reyes had left the scene. *See* POLICE PANEL REPORT, *supra* note 40, at 4, 7–8.

the trial judge issued a lengthy memorandum finding these methods complied with all existing state and federal constitutional demands.[57]

If the trial judge was right that the police and prosecutor violated no constitutional commands when securing the five confessions, it follows that it is possible for the police to obtain a confession that is false without constitutional error. This acknowledgment has potentially devastating implications for a system committed to taking all proper steps to bringing the guilty to justice while avoiding the conviction of the innocent. If the time-tested interrogation techniques used in the Central Park case could produce five false confessions within a forty-eight hour period, it is likely that the same techniques produced similar results in the past,[58] and will produce them again.[59] This alone should convince us of the necessity to explore where the fault lines of interrogation techniques lie and what can be done to minimize their most harmful consequences.

III.
THE CASE FOR GATEKEEPING CONFESSIONS CLAIMED TO BE FALSE

"William III tried the thumbscrews on his own thumbs, and said another turn would make him confess anything."[60]

It is easier to imagine that one might be convinced to confess falsely to a crime not committed when the methods of persuasion involve physical abuse.[61]

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57. SULLIVAN, *supra* note 2, at 92–94. Although the defense lawyers argued that aspects of the interrogations violated the boys' constitutional rights, the trial court's rejection of those claims was not a constitutional "stretch." The court simply applied existing constitutional tests in the same way other courts had done under Supreme Court interrogation law doctrine.

58. A large body of empirical and scholarly work exists documenting and analyzing cases involving false confessions. *See* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 564–571 (1998) (presenting and analyzing cases involving false confessions); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) (analyzing why police tactics cause intellectually normal individuals to falsely confess, and proposing techniques to better identify false confessions and reduce their frequency); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 131–35 (1997) (discussing verified false confessions and recommending permissible interrogation tactics to reduce the likelihood of a false confession) [hereinafter White, *False Confessions*]; Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2053–56 (1998) (examining "trickery" that is likely to precipitate false confessions) [hereinafter White, *Involuntary Confession*].

59. Indeed, in this case alone it appears to have happened five times. Moreover, scholars have argued for some time that false confessions are not all that unusual. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 58, at 983 ("[C]onfessions by the innocent still occur regularly, and will likely continue . . . .").

60. Zechariah Chafee, Jr., Walter H. Pollak & Carl S. Stern, *The Third Degree*, *in* U.S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13, 181 (1931) [hereinafter WICKERSHAM COMMISSION REPORT].

61. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 282 (1936) (describing how two black men were whipped continuously until they confessed to murder).

Although courts have not always done so,[62] when faced with evidence that bodily abuse occurred during the interrogation process today, courts now routinely suppress whatever confessions resulted therefrom. The Due Process Clauses of the Fifth and Fourteenth Amendments mandate such orders of exclusion, under the doctrine of "voluntariness."[63] According to this doctrine, only confessions obtained "voluntarily" by the police are admissible at trial; confessions beaten out of suspects are paradigmatically involuntary.[64]

It is more difficult to suppress false confessions where, as was the case with the Central Park jogger prosecutions, there is no allegation that the police resorted to physical abuse. Yet, there is no outright bar to pressing a claim that it was the overbearing *mental* stresses of interrogation that convinced a suspect to confess.[65] In fact, the voluntariness doctrine has long contemplated the possibility that a false confession could result from mental rather than physical pressure in the interrogation room.[66] Still, compared to those who claim physical coercion, far fewer defendants succeed in getting a confession suppressed on mental coercion grounds.

This difficulty may be explained by the method of analysis courts use.

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62. Through the 1930s, it was not unusual for state courts to admit confessions in cases involving criminal allegations against young black men despite strong evidence that physical torture was used to extract them. *See* WICKERSHAM COMMISSION REPORT, *supra* note 60, at 52–83.

63. *See Brown*, 297 U.S. at 286 (finding due process guarantees incorporated through Fourteenth Amendment to apply to action of state police officers who secured confessions through physical torture, thus ending practice of admitting such confessions).

64. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 23.02–.03 (3d ed. 2002).

65. Yale Kamisar demonstrated to his students the powerful impact of mental stress during interrogation by playing for them "portions of a tape-recorded six-hour interrogation [of a murder suspect]. . . .The interrogators neither engaged in nor threatened any violence, but their urging, beseeching, wheedling, nagging [the suspect] to confess is so repetitious and so unrelenting that *two hours of listening* is about all most students can stand." YALE KAMISAR, *Fred E. Inbau: "The Importance of Being Guilty," in* POLICE INTERROGATION AND CONFESSIONS 95, 98–99 (1980). Where interrogation methods "overbear the [suspect's] will to resist and bring about a confession not freely self-determined," the confession may be ruled involuntary, and thus inadmissible. *See* Rogers v. Richmond, 365 U.S. 534, 544 (1961). Of concern to some, though, is the lack of Supreme Court review over state confession cases and the conservatism of that review when it happens. A review of the Supreme Court docket prior to *Miranda* revealed that while the Supreme Court occasionally found a confession involuntary, only an estimated one-eighth of capital cases with serious allegations of coercion were reversed. E.B. PRETTYMAN, JR., DEATH AND THE SUPREME COURT 297–98 (1961). The vast majority of confession disputes are left in the hands of state and lower federal court judges who seem willing to forgive the stresses inherent in lengthy interrogations provided a defendant was advised that he need not make a statement and that whatever statements he made could be used against him. For example, in *Davis v. North Carolina*, the police obtained the defendant's confession after questioning him for forty-five minutes to an hour or more every day for sixteen consecutive days. 384 U.S. 737, 746–47 (1966). The Superior and Supreme Courts of North Carolina saw no constitutional problem with the use of the confession; nor did the federal district court or the Fourth Circuit Court of Appeals, which considered the case on *habeas*. The U.S. Supreme Court reversed. *See id.* at 738–39.

66. *See Rogers*, 365 U.S. at 540–41, 548 (suggesting that psychological pressure could be used to unconstitutionally extort confessions, but refraining from reaching the question whether psychological pressures in this case constituted coercion).

Currently, a court faced with an involuntariness claim will utilize a "totality of the circumstances" approach,[67] weighing all facts relating to the interrogation. Indications of verbally coercive techniques can be offset by showing that the police *did not* rough up the defendant to convince him to confess, and that the defendant was advised of his rights. Because police forces have come to understand how police behavior in the interrogation room can impact later admissions,[68] they rarely fail to give a suspect his *Miranda*[69] warnings, offer a drink or a restroom break, or extend some other act of "kindness." A prosecutor can later point to these acts as evidence that the police presence was *not* so dominating, the pressure *not* so relentless, that an innocent (or non-innocent) person would have felt compelled to confess because his will was overborne.

Court resistance to suppressing confessions of guilt in the absence of physical abuse mirrors public confidence in the quality of such proof. Most people have a hard time imagining themselves ever being persuaded, in the absence of force or threat of force, to confess to a crime they did not commit. Even a young child will loudly proclaim her innocence ("*I didn't do it!*") when accused of a wrong not her doing. This instinct to assert one's innocence when one *is* innocent thus leaves many people skeptical of false confession claims resulting from questioning unaccompanied by force. The contemporary voluntariness doctrine puts this skepticism into legal operation.

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67. Under this totality approach, assessments of the voluntariness of a confession are not unlike the credit and debit columns of an accountant's ledger. On the debit side of that ledger, reviewing courts tally the factors weighing against the confession. These might include: the length of time it took the police to secure the confession (if it was long), the number of officers involved in the effort (if there were many), the decision to keep the suspect *incommunicado* (if non-police personnel were excluded), exaggerations of the evidence connecting the suspect to the crime, promises of leniency in exchange for the confession, express or implied threats against the suspect or a loved one, and any other psychological pressure that could overbear the will of the suspect. On the credit side, many of the same factors could appear provided they made the police behavior look better rather than worse. Thus, courts routinely determine whether the police provided the suspect with a break or food or drink during questioning, whether their weapons were drawn or holstered, whether their questioning was especially hostile and aggressive, and whether the officers administered proper *Miranda* warnings. None of these factors is dispositive, and courts rarely agree about whether any of the factors is entitled to greater or lesser weight. Despite the mathematical veneer of this approach, the ultimate decision as to a confession's voluntariness is often fairly fuzzy. So fuzzy, in fact, that the Court moved away from the voluntariness test in *Miranda*, in part due to its skepticism that the test provided a workable means to assess a suspect's decision to talk. *See* DRESSLER, *supra* note 64 § 24.02, at 457 ("Based upon thirty years of struggle with the doctrine—with a test in which '[a]lmost everything was relevant, but almost nothing was decisive'—the court concluded that the test resulted in 'intolerable uncertainty,' and that a bright-line rule was needed.") (citations omitted).

68. Welsh White explains how police have successfully adjusted their interrogation methods to satisfy the demands of the due process test and the once-feared requirements of the *Miranda* decision. *See* WHITE, *supra* note 4, at 60–75, 77–106 (2001). Professor White writes, "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." *Id.* at 60.

69. *See* Miranda v. Arizona, 384 U.S. 436, 467–79 (1966) (requiring that persons subjected to custodial interrogation first be informed of their rights).

Nevertheless, the fact that false confessions are obtained in the absence of physical violence is undeniable. History is replete with examples of such perplexing incidents, where facts discovered after confessions were obtained left no doubt that the admissions of guilt were false. In the well-known Wickersham Commission Reports published in the early 1930s, for example, a summary of cases involving false confessions included an early common-law case in England where the defendant, who had confessed to a murder under promise of pardon, was ordered released after the "victim" showed up alive.[70] Unpersuaded by Wigmore's easy assurance that claims of false confessions were exaggerated and "of the rarest occurrence,"[71] the Commission wrote, "so many instances [of the "danger of false confessions"] have been brought to our attention during this investigation that we feel convinced not only of its existence but of its seriousness."[72] Although the Commission might have confined this conclusion to cases involving physical violence or threats of physical violence by the police, it did not. Rather, included among its summary of examples of false confessions were statements of guilt obtained without any allegation of police violence.[73] Since the publication of the Wickersham Commission Report, legal scholars and social scientists have continued to study false confessions and disagree about their real prevalence. Thanks to the fine work of Richard Ofshe, Richard Leo, Welsh White, and others, hundreds of false confessions affecting case outcomes have been documented (both within and without the context of physical violence).[74] Nevertheless, it has proved exceedingly difficult to pinpoint precisely how frequently false confessions occur, even for those who have studied the area extensively.[75] If anything,

70. WICKERSHAM COMMISSION REPORT, *supra* note 60, at 182–87 (citing, *inter alia*, Rex v. Warickshall, 1 Leach Cr. L. 263, 264 note).

71. 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 820c (1970) [hereinafter WIGMORE, EVIDENCE IN TRIALS]. Wigmore held this view despite discussing in his treatise several known examples of false confessions. *See* JOHN HENRY WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF § 224 (2d ed. 1931) [hereinafter PRINCIPLES OF JUDICIAL PROOF].

72. WICKERSHAM COMMISSION REPORT, *supra* note 60, at 182.

73. *Id.* at 182–85.

74. *See supra* note 58.

75. Richard Leo and Richard Ofshe have greatly advanced our understanding of how certain widely used interrogation techniques can produce false confessions. *See* 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 (1998) (analyzing sixty cases in which they believe sufficient evidence proves or makes it probable that wrongful convictions were obtained on the basis of coerced or unreliable confessions) [hereinafter Leo & Ofshe, *Consequences of False Confessions*]. But even they acknowledge that precision in this area is impossible. *See id.* at 431–32 (conceding that no one can authoritatively estimate either how often false confessions occur or the number of convictions based on such confessions). *See also* Paul G. Cassell, *Protecting the Innocent from False and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 520–24 (1998) (estimating that the number of wrongful convictions resulting from police-induced false confessions each year may range from as low as 10 to as high as 394, but also cautioning that precision is not possible based on existing usable samples) [hereinafter Cassell, *Protecting the Innocent*].

the general consensus is that false confessions are fairly rare.[76]

A. Is the Frequency of False Confessions a Big Enough Problem for Reform?

The apparent rarity of false confessions leads to the question whether systemic reform is needed. Former professor Judge Paul Cassell thinks not, arguing that the small number of individual injustices cannot justify widescale changes to interrogation practices.[77] He posits that what little is known about false confession figures is most likely inflated and that the false confessions statistics accumulated by Ofshe, Leo, and others are based on a faulty comparison because they fail to balance the number of purported false confessions against the much greater number of truthful ones.[78] The inference is that reforms that would restrict interrogation practices which currently enable prosecutors to secure numerous defensible convictions, would indeed benefit some innocent suspects, but would not be worth the greater cost to the system's effectiveness.

While Cassell's point has some logical utilitarian force, the question of whether the incidence of false confessions is great enough to warrant reform will always lead us to a second equally important question: great enough for whom? The Central Park jogger case alone may have been enough to convince many that the problem warrants some kind of responsive action. Surely the five teenagers who spent five to fourteen years of their young lives in prison on false convictions would say that the reality of false confessions *is* a big enough problem to warrant reform. On principle, the false convictions of even a relatively few number of defendants may be too much of a sacrifice for broader assurances of catching guilty suspects. The conviction of innocents erodes the integrity of the justice system along with public confidence in the courts.

Moreover, the question Cassell presses most vehemently—what portion of *all* confessions are false confessions?—may be the wrong question, for at least two reasons. First, reform may be justified in situations where questionable policing practices impose oversized harms on those actually convicted. Second, there is cause to act if policing practices impact a disadvantaged group of

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76. Certainly evidence theorist Wigmore considered the phenomenon of false confessions a rarity. *See* WIGMORE, EVIDENCE IN TRIALS, *supra* note 71, § 820c. *See also* Cassell, *Protecting the Innocent*, *supra* note 75, at 506–07 (emphasizing that "quantitatively speaking," the cases of false confessions leading to wrongful convictions constitute "a few drops in [a] very large bucket"); WHITE, *supra* note 4, at 139–55 (concluding that widely employed interrogation practices create a significant risk of false confessions in a *small* but significant category of cases).

77. *See* Cassell, *Protecting the Innocent*, *supra* note 75, at 506–07.

78. *See id.*; Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123 (1997) [hereinafter Cassell, *Balanced Approaches*]; Paul G. Cassell & Bret S. Hayman, Dialogue on Miranda, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996). For example, Judge Cassell notes that each year in the United States, while there may be a total of ten people being convicted on the basis of false confessions, fifty people are killed by lightning strikes. Cassell, *Protecting the Innocent*, *supra* note 75, at 519–20.

individuals in especially egregious ways, even if most others emerge unscathed.

As to the first reason, it is important to understand that false confessions are obtained more frequently in high-profile or capital cases than in cases involving less serious crimes.[79] Although a false confession works an injustice in either type of case, high-profile and potentially capital cases, if proved, carry punishments of the highest order. The sentences imposed in such cases inflict the greatest interference with individual liberty, cause people the most serious stigmas, and may even deprive persons of life itself. While the American criminal justice system is prepared to accept the imposition of such liberty-curbing and potentially life-ending punishments, we cannot be complacent about any possibility that they might be unjustly enforced. Hence, special efforts to identify and protect against the wrongful conviction of people accused of serious offenses are entirely justifiable.[80]

Furthermore, the criminal justice system might rightly choose to undertake reform measures where there is evidence that a particular police policy or practice disproportionately affects members of particular groups, such as persons of color, the poor, the young, or the mentally impaired. While literature concerning police use of violence has reported a successful reduction in physical coercion during interrogations, there have been findings that such brutality is now merely more selectively inflicted.[81] Accounts of the use of torture by police officers on the South Side of Chicago during the 1970s and 1980s under the supervision of Commander John Burge reveal that such physical abuse continues to occur in cases involving minority suspects.[82] This is consistent with the conclusions of studies of infamous "third degree" practices in the past, such as the Wickersham Commission report, which observed that abusive questioning practices played a particularly prominent part in the interrogation of Blacks and

79. *See* White, *False Confessions*, *supra* note 58, at 133–34.

80. Professor Welsh White has thus argued that the number of estimated false confessions need not be analyzed against the universe of all confessions. It is enough when considering the advisability of reform, he thinks, to determine the frequency with which false confessions are obtained in a smaller subset of cases, such as a sample of wrongful convictions in serious "high-profile cases" (like the Central Park jogger case) and "potentially capital cases." WHITE, *supra* note 4, at 141–42 ("If wrongful convictions in high-profile or potentially capital cases occur with sufficient frequency to provoke societal concern, a finding that police-induced false confessions precipitate a significant proportion of such wrongful convictions should be sufficient to show that police-induced false confessions is [*sic*] a problem that mandates attention."). While such an approach would admittedly "make it impossible to draw from the results any conclusions as to how frequently police-induced false confessions occur in all cases[,]" the results of such a study could still provide valuable information about the frequency of false confessions in that category of cases about which our system may quite legitimately have special concerns. *Id.* at 142. As Professor White puts it, the conclusions made possible by the study of such a selective sample of wrongful conviction cases, though limited, are "significant" if "they indicate that a problem exists in a population that is of sufficient magnitude to warrant concern." *Id.*

81. *Id.* at 133–34.

82. *See id.* at 128–30, 133 ("In deciding when to extract confessions through torture, [Burge's] detectives were selective, reserving their abusive interrogation practices exclusively for poor black suspects and primarily for gang members with criminal records.").

"the poor and uninfluential."[83] Accordingly, even if it is true that most interrogations are conducted today without violence, it may also be true that when interrogative violence occurs it is most often directed at minority or poor suspects. This discriminatory policing pattern alone justifies reform.

The falsely convicted defendants in the Central Park jogger case, as minority suspects in a high-profile case, fell under both of the aforementioned high-risk categories for false confessions. Additionally, they were juveniles. Social scientists who have studied false confession cases have noted the special vulnerability of juveniles and the mentally retarded to standard interrogation techniques, particularly in high-profile cases.[84] A 1963 Presidential Panel on Mental Retardation once observed that mentally retarded suspects' unusual eagerness to please authority figures meant they often would "gladly" confess falsely to crimes[85]—an occurrence that has happened even in the face of "relatively benign interrogation methods."[86] Welsh White suggests that juveniles may be more easily overwhelmed than adults by a very common interrogation strategy—repeated assertions by interrogators that the evidence proves their guilt.[87] Reform may be justified if only to provide some additional protection for those who are especially vulnerable.

B. Protecting Against False Confessions—Taking the Road Less Traveled

If reform is warranted, there are two approaches that we might take to remedy the problem. The approach that has attracted the support of most pro-reform scholars would modify existing constitutional tests for voluntariness (under the Due Process Clause) and compulsion (under the Fifth Amendment privilege against self-incrimination) to increase the number of confessions suppressed under those tests.[88] An alternative approach, which I advance here,

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83. WICKERSHAM COMMISSION REPORT, *supra* note 60, at 158–59.

84. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 30 n.4, 62–63 (1987); Paul Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1473, 1492–94 (1995); Leo & Ofshe, *Consequences of False Confessions*, *supra* note 75, at 430 ("Police elicit false confessions so frequently that social science researchers, legal scholars, and journalists have discovered and documented numerous case examples in this decade alone."); *id.* n.4 (citing studies and case examples); WHITE, *supra* note 4, at 180–81 (citing example cases and discussing scholarly consensus on this point).

85. PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963).

86. WHITE, *supra* note 4, at 180.

87. WHITE, *supra* note 4, at 181 ("These . . . cases . . . suggest that youthful suspects may be especially vulnerable to the powerful influences exerted by one of the most well established interrogation techniques. When interrogators forcefully suggest to suspects that there is no doubt as to their guilt and that some advantage—either tangible or psychological—may result from them admitting their guilt, there is a significant danger that youthful suspects—whether guilty or innocent—will yield to the interrogators' suggestion and admit their guilt.").

88. Several legal scholars have advanced such constitutional critiques of standard interrogation practices. *See, e.g.*, Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 58;

favors a more robust construction of existing rules of evidence as a means to guard against the introduction of insufficiently reliable confessions at trial.[89] Specifically, I argue that evidentiary rules, rather than constitutional law, can and should serve as the bulwark against false confessions. This can be achieved if trial judges act as gatekeepers for disavowed confessions, acting as more watchful sentries against the admission of confessions sufficiently shown to be false.[90] The sections that follow defend this evidentiary gatekeeping approach, and part IV explains why an emphasis on evidentiary safeguards is preferable to

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White, *False Confessions*, *supra* note 58; White, *Involuntary Confession*, *supra* note 58.

89. Although I prefer an evidentiary approach to the problem of false confessions over a constitutional one, I am agnostic as to whether the constitutional critiques advanced by others sufficiently make the case for reforms to widely-used interrogation practices as a means to addressing the problem.

90. In 1965, before the Warren Court delivered its famous and controversial decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), Professor Yale Kamisar critiqued the remarkable contrast between the rights afforded criminal defendants at trial (which Kamisar famously dubbed the "mansion") with those they enjoyed during a typical station house interrogation (which he called the "gatehouse"). YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* POLICE INTERROGATION AND CONFESSIONS 27, 28–32 (1980). At trial, Kamisar observed, an impartial judge stood ready to mediate any and all conflicts that might arise between the accuser and the accused; the entire proceeding unfolded in the presence of many witnesses, including the judge, legal counsel, a jury and a court reporter who transcribed every word; the accused, presumed innocent, was represented by counsel who would guide the accused's decisions and protect him against any oppressive or deceptive prosecutorial tactics; and the accused could stand mute against the state's charges and his decision to do so could not be used against him. By contrast, the suspect inside the interrogation room (the "gatehouse") would journey alone. No judicial officer would be present to help him negotiate the conflicts that arose between his claims of innocence and his interrogators' suspicions of guilt; no third party would be present to record or witness how those conflicts played out; the accused's well-trained interrogators, rather than presuming the suspect to be innocent, would resolutely proclaim their belief in his guilt, and any statements the accused might offer inconsistent with guilt would be rejected out-of-hand. The suspect's access to legal counsel would be blocked, which would prevent him from receiving advice about strategy (such as whether to respond to questions), as well as information about the propriety of his interrogators' methods, or the actual rather than pretended strength of the state's evidence against him. Moreover, unlike the trial, where steps could be taken to protect the accused against the introduction of insufficiently reliable evidence, in the interrogation room, the police were free to exaggerate the nature of the proof that pointed to the suspect's guilt, on the theory that such "false evidence" would not convince one who was innocent to confess guilt. Professor Kamisar summed up this remarkable study in contrasts in the following way:

> In this "gatehouse" of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics and techniques most appropriate for the occasion"; he is "game" to be stalked and cornered. . . . Once he leaves the "gatehouse" and enters the "mansion"—if he ever gets there—the enemy of the state is repersonalized, even dignified, the public is invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated. *Id.* at 31–32.

The next year, the Supreme Court responded to Professor Kamisar's and others' concerns about the "gatehouse" by holding in *Miranda* that police interrogators of persons in custody must take certain prophylactic steps to avoid compelling suspects to incriminate themselves in violation of the Fifth Amendment privilege. Ironically, as I show below, in the context of allegations of *false* confessions, the constitutional tests developed in *Miranda* and elsewhere provide defendants only limited protection.

the constitutional approach advocated by so many other criminal procedure scholars.

C. *Creating a New Judicial Role—Gatekeepers for the Fruits of the Gatehouse*

Evidence theorist Dale Nance has written in the past of the "worst evidence principle" that runs through contemporary codes of evidence.[91] That principle strives, through a collection of exclusionary norms, "to prevent jury error by filtering out the really bad evidence that is likely to lead the jury astray."[92] Included within this umbrella of exclusionary rules are categorical prohibitions against the admission of evidence of "prior bad acts" to show propensity,[93] the admission of a rape complainant's sexual history or predisposition,[94] the admission of subsequent remedial measures to show negligence,[95] the admission of settlement negotiations or the payment of medical expenses to show liability,[96] and the occurrence of plea discussions to show guilt.[97] There are other rationales for these exclusionary principles beyond concerns that the jury will overvalue the evidence as proof of negligence, culpable conduct, liability, or guilt, of course, such as the public policy interests in encouraging rape victims to file reports, and to promote subsequent remedial measures, settlements, and pleas. Nevertheless, a primary concern reflected by each of these exclusionary rules is the fear that juries will put too much stock in such evidence as proof of unwanted conclusions.[98]

An additional layer of prophylaxis against insufficiently reliable or trustworthy evidence is supplied by other rules which do not automatically exclude categories of proof but which require pre-admission preliminary showings, such as proof of personal knowledge by lay witnesses, proof of the use of valid methodologies by expert witnesses, and the special screening of evidence provided by "infants" or the very young to ensure against the dangers of suggestibility. In the sections that follow, I will show how a more robust construction of these existing prophylactic rules and an application of their attendant exclusionary principles would not only provide needed safeguards against the admission of false confessions, but would resurrect a role played in the past by common-law judges and simultaneously respond to statements of the Supreme Court that the law of evidence (rather than constitutional law) is the

91. *See* Dale A. Nance, *Naturalized Epistemology and the Critique of Evidence Theory*, 87 VA. L. REV. 1551, 1555 (2001).

92. *Id.*

93. FED. R. EVID. 404(b).

94. FED. R. EVID. 412.

95. FED. R. EVID. 407.

96. FED. R. EVID. 408, 409.

97. FED. R. EVID. 410.

98. *See generally* CHRISTOPHER B. MULLER & LAIRD C. KIRKPATRICK, EVIDENCE §§ 4.23 at 231 (subsequent remedial measures), 4.25 at 241–42 (settlements/medical payments), 4.28 at 251–52 (plea bargains) (3d ed. 2003).

better means by which to police insufficiently reliable confession evidence. As we shall see, the personal knowledge requirement has a particularly direct role to play.

1. The Requirement of "Personal Knowledge"

The "personal knowledge" requirement—the evidentiary norm establishing that before a witness may give trial testimony concerning a matter it must be shown that the witness has personal knowledge of what she speaks—supports the idea that judges should play a more active role in the gatekeeping of disavowed confession evidence. In the federal system, this requirement is captured by Rule 602 of the Federal Rules of Evidence, which states: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Where the witness's "knowledge" is based on the beliefs, perceptions, or memories of others, Rule 602 (and its state analogues) requires exclusion of her evidence.[99] At its core, the knowledge requirement demands personal competency.

Given the minimal nature of this standard of personal competency, in the run-of-the-mill case, the evidentiary requirement of personal knowledge creates no especially stringent obstacle to the admission of witness testimony. Judges simply ensure that enough evidence has been (or will be) offered to enable the finder of fact to conclude that the witness's knowledge about some matter is in fact based on her own personal perceptions.[100] Provided some (even circumstantial) evidence shows that the witness had the "ability and opportunity" to perceive the event in question, the personal knowledge requirement can be satisfied and, assuming no other obstacles, the evidence may get before the jury.[101]

It should be apparent from this description that an accused's personal knowledge of the matter about which she speaks is called into question whenever the accused disavows her confession of guilt and contends that what she said during an interrogation was not only false but that the facts surrounding the criminal incident were in actuality unknown to her. Suppose that in such a case the state nonetheless offered the confession into evidence as a part of its case-in-chief. At this point, defense counsel or the judge could cite the rules requiring a showing of personal knowledge to argue for an evidentiary hearing

99. *See, e.g.*, McCrary-El v. Shaw, 992 F.2d 809, 810–11 (8th Cir. 1993) (excluding prisoner's testimony where evidence established that he could not have seen the event about which he was prepared to testify).

100. *See, e.g.*, United States v. Hickey, 917 F.2d 901, 904 (6th Cir. 1990) (holding that testimony should be allowed under Rule 602 "unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event").

101. FED. R. EVID. 602 (commentary). Rule 602 makes expressly clear that a witness's personal knowledge may be established through "the witness' own testimony." *See Hickey*, at 904. *See generally* Ronald Raitt, *Personal Knowledge Under the Federal Rules of Evidence: A Three-Legged Stool*, 18 RUTGERS L.J. 591 (1988).

prior to admission that would test whether the confessional statements were in fact based on the declarant's actual experience.

The personal knowledge rules are not currently used to require such a finding or to impose any burden in the confession context. Yet it is reasonable to construe them as imposing such an obligation. Such a reading of the "personal knowledge" rule makes sense in light of the fact that other evidentiary rules have been construed as categorical prohibitions of evidence in which the jury is likely to entrust too much confidence,[102] and in light of recent statements of the Supreme Court in confession cases stressing evidentiary law as the prophylaxis against unreliable inculpatory statements.[103] Reading the rule in this way would allow trial judges to screen any disavowed statement evidence to determine if the accused in fact had the ability and opportunity to "know" what she earlier claimed to know in response to her interrogator's questions. If a judge were to perform such a gatekeeping role, it is certainly possible that she would conclude that a defendant had personal knowledge about the crime to which he confessed—but she might also discover that the confession originated from information relayed to the defendant by his interrogators.

Exactly this kind of "information transfer" appears to have happened in the Central Park jogger case. During the interrogations, the police quickly established the boys' presence in the park and their involvement in the assault and harassment of a number of people close to the time that the jogger was attacked and left for dead. The detectives were plainly unconvinced by the boys' denials of knowledge,[104] so in the course of attempting to undermine those denials they (and later the prosecutor) confronted the young suspects with a wide array of facts, including facts about (and even photos of) the crime scene, the nature and extent of the jogger's injuries, her state of undress, the location of the attack, and the fact that she had been raped as well as physically assaulted.[105] It is not difficult to understand the detectives' skepticism. After all, what were the odds that at or around the same time the boys were wreaking havoc in other parts of the park, another more deadly assailant would be waylaying the female jogger in the middle of her run? The detectives found this implausible, and they were not too timid to act on this belief. Utilizing an assortment of time-tested interrogation techniques well known for their power to persuade reluctant suspects to admit their wrongdoing, the interrogators advised the teens that their denials of

102. *See supra* text accompanying notes 93–97.

103. *See infra* text accompanying notes 116–18.

104. Professor White explains that industry practice is for interrogators to only use their strongest tactics when they strongly believe the suspects are guilty. As he concludes, this means false confessions are more likely when "police have erroneously decided that a suspect is guilty." White, *False Confessions*, *supra* note 58, at 132.

105. *See, e.g.*, SULLIVAN, *supra* note 2, at 24–39, 44 (describing how the police shared details about the rape with the teens and how the prosecutor showed Kharey Wise photographs of the crime location). One of the boys was even transported back to the park and walked through the crime scene before he made his videotaped statement. *See* Ryan Aff., *supra* note 14, at 47 (noting that Kharey Wise "had been taken to the scene prior to his videotaped statements").

involvement in the rape were not convincing, and would not be convincing to a jury either.[106] Why not just be cooperative, demonstrate remorse, and put the whole bloody mess behind them, the detectives prodded.

Once each boy was persuaded that it was in his best interest to accept responsibility for the jogger's rape as well as the other assaults,[107] he was able to insert into the recorded statements enough facts consistent with the rape to satisfy the authorities, and ultimately the juries, that he and the other boys were responsible for the brutal attack. This sequence of events turns out to be straight from Erroneous Convictions 101. As stated by two legal scholars:

> Students of the problem of erroneous convictions have characterized many erroneous outcomes as being the result of a "presumption of guilt." Reviews of such cases often have found that investigators too hastily and on too little evidence came to believe in their own hypothesis of guilt, searched for facts consistent with that hypothesis, and on finding some of those facts came to believe more firmly in the suspect's guilt. Had they proceeded by subjecting their hypothesis to potential disconfirmation they would have been more likely to discover its weaknesses, and an erroneous prosecution and conviction would have been less likely.[108]

The requirement of a "personal knowledge" preliminary finding by the trial judge could have counteracted the tendency toward a "presumption of guilt" in the Central Park jogger case in one of two ways. First, after conducting an independent gatekeeping review of the evidence, the judge might have excluded the confessions himself. But even if he did not, the knowledge that the presiding trial judge might conduct such an inquiry before permitting the confessions into evidence would have spurred the police and prosecutors to take additional steps to find other evidence to corroborate the details of the statements (and thereby establish that the boys *did* have personal knowledge of the crime). This might have led them to discover other evidence that not only contradicted those statements, but also shined a spotlight on another, more deadly aggressor, Matias Reyes.

At minimum, knowledge that a pre-admission screening will occur when a confession is challenged should cause police and prosecutors to think more critically about interrogation procedures and the reality that sometimes those procedures can cause innocents to confess. Just as the decision in the famed

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106. *See* SULLIVAN, *supra* note 2, at 24–25, 29–33, 174–75.

107. I use the phrase "accept responsibility" loosely here. It seems quite likely that when the boys confessed to *some* awareness of and participation in the attack of the jogger, they had no idea of the full legal implications of those statements. They may well have believed that their denials of actual *intercourse* with the woman shielded them from a rape charge. Under New York's "acting in concert" provisions, that would not be so.

108. Michael J. Saks & D. Michael Risinger, *Baserates, the Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1056 (2003) (internal citations omitted).

Miranda case caused shifts in the way interrogations were conducted, a rigorous application of the personal knowledge rules to disavowed confessions is bound to influence police and prosecutors in important ways as well. This could manifest in a variety of ways, including a lessened resistance to videotaping entire interrogations (rather than just a suspect's confession) and concrete steps to minimize the dangers of police-to-suspect "information transfers" in the interrogation room.

2. *The* Daubert *Analogy—Gatekeeping Expert Evidence*

Up to this point I have argued that existing rules of evidence could and should be understood to require trial judges to make a preliminary finding of reliability whenever a disavowed confession is challenged on grounds of falsity. Such a finding would only be proper if the "facts" making up the confession came from the suspect and not her questioners (or other sources). There is important precedent for such gatekeeping in the law of evidence under a separate "knowledge" rule: Federal Rule of Evidence 702, which governs the admissibility of evidence reflecting scientific, technical, and other specialized knowledge.

Treating Rule 602 like Rule 702—that is, using it to impose a gatekeeping obligation—makes sense both as a matter of rule construction and policy. In its 1993 landmark decision in *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court read the "knowledge" requirement of Rule 702 of the Federal Rules of Evidence to require proponents of scientific expert evidence to satisfy a "standard of evidentiary reliability."[109] According to the *Daubert* Court, Rule 702's use of the word "knowledge" requires more than an expert's personal "subjective belief or unsupported speculation"; it requires that the expert's facts, ideas, or inferences be supported by "good grounds."[110] To ensure that such good grounds exist, and that the expert's proposed testimony is "supported by appropriate validation,"[111] trial judges must serve as gatekeepers of expert evidence. Judges should allow the introduction of expert testimony only where the science underlying the expert's opinion is sufficiently reliable to warrant the factfinder's consideration.[112] Although technically binding only on the federal

109. 509 U.S. 579, 590 (1993).

110. *Id.*

111. *Id.*

112. Since 1993 the Court has resolved a number of questions left open in *Daubert*, including whether that gatekeeping function extends to ensuring the reliability of non-scientific as well as scientific expert evidence. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (answering affirmatively). *See also* General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997) (extending the judicial focus on reliability to conclusions, not just methodology). Congress subsequently codified the rule of *Daubert* in an amendment to Rule 702, signaling its approval of the trial court's role as "gatekeeper" in the Advisory Committee's Note to the amendment. The Committee also affirmed the general standards by which trial courts were "to assess the reliability and helpfulness of proffered expert testimony" which had been discussed in *Daubert* and *Kumho Tire* (such as whether the expert's theory had been tested empirically, whether it had been

system, the *Daubert* rule has had substantial influence over state approaches to the question of expert evidence as well. One recent review of post-*Daubert* decisions has determined that twenty-six states have imposed a similar gatekeeping role on trial judges, and eight states have reserved decision on the question.[113] Another sixteen declined to follow *Daubert*, but many in that group discussed the *Daubert* reliability factors as relevant to decisions to exclude or admit contested scientific evidence.[114]

Borrowing from the nation's experience under the scientific knowledge rule, there is good reason to read the personal knowledge requirement of Rule 602 as the lay equivalent to Rule 702. On their face, both rules speak in terms of "knowledge," and as the above discussion shows, *Daubert* and its progeny are skeptical of what "knowledge" means in the context of expert evidence: hence, they impose a gatekeeping responsibility on trial judges to ensure that the "knowledge" experts claim to possess is both reliable and relevant to the issues involved in a case. Under *Daubert*'s exacting reading of Rule 702, judges must shield juries from the corrupting influences of insufficiently trustworthy expert testimony ("junk science"). It is reasonable that trial judges should protect juries from the corrupting influences of insufficiently reliable confession evidence in the same way.

I recognize, of course, that some might favor gatekeeping in the expert opinion context but resist a similar gatekeeping approach to the personal knowledge contained in confession evidence. There is legitimate concern that the words of so-called "experts" have disproportionate power to sway the deliberations of lay jurors who lack the training and background necessary to sift through complex and often conflicting scientific or technical claims. But there is little reason to think that the testimony or opinions of an expert, no matter how eloquent, can trump the persuasive power of a confession of guilt. To the contrary, confessions are roundly considered to sit at the apex of prosecutorial proof, and substantial empirical evidence now shows that juries are especially vulnerable to their charms, even in the face of contradictory evidence and a lack of corroboration.[115] Therefore, the reason for gatekeeping disavowed confessions is as strong as, if not stronger than, the justification for gatekeeping expert evidence—particularly when it is possible to interpret existing rules

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subjected to the rigors of peer review, whether it had resulted in publication, and whether information was available about its established error rates). *See Daubert*, 509 U.S. at 592–95; *Kumho Tire*, 526 U.S. at 149–52. The amendment also offered other standards of its own. *See* FED. R. EVID. 702 advisory committee's note, 2000 amendments. The Committee also made clear that questions about the admissibility of expert testimony after *Daubert* were to be resolved by reference to Federal Rule of Evidence 104(a), which placed the burden of establishing that the standard of reliability had been met on the proponent of the evidence. *See id.* (citing Bourjaily v. United States, 483 U.S. 171 (1987)).

113. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE, § 7.17, at 660, & n.29 (3d ed. 2003).

114. *Id.*

115. *See infra* text accompanying notes 160–67.

of evidence to provide a legal basis for doing so.

In summary, the personal knowledge rules imposed by federal and state evidence codes, read rigorously, provide the legal means to direct our nation's trial judges to serve as gatekeepers of confessions challenged as false. The way in which common-law courts historically resolved requests to suppress confessions in criminal cases lends further support to this gatekeeping idea, as does a statement by the Supreme Court about the proper basis for suppressing unreliable statements of guilt.[116]

D. Historical Support for an Evidentiary (Gatekeeping) Approach to the Exclusion of False Confessions on Grounds of Unreliability.

Historically, judges at common law played an active role in shielding trial juries from insufficiently reliable confession evidence. Recognizing the unique power of confession evidence to persuade the factfinder of the guilt of the accused, the early common-law courts barred the introduction of such evidence whenever the facts or circumstances surrounding the giving of the confession made its reliability uncertain. Although normally the confession of a criminal defendant was believed "deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt,"[117] this presumption was warranted, the courts warned, only if the confession was "freely and voluntarily made."[118] If it appeared instead that the confession had been obtained by "inducements . . . by one in authority" or by "a threat or promise" that "operat[ed] upon the fears or hopes of the accused . . . [and thereby] deprive[d] him of that freedom of will or self-control essential to make his confession voluntary,"[119] that presumption of validity was lost, and the statement would be suppressed no matter how helpful it was to the prosecution's case. In short, before permitting a jury to consider a confession in a criminal case, the English common-law courts considered the circumstances under which the confession was obtained to determine whether it was sufficiently trustworthy to be introduced. Where a confession had been obtained under circumstances that raised an undue risk that the accused had confessed falsely, it would be suppressed.[120]

Although the "voluntariness" terminology of the common-law courts bears

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116. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (stating that the reliability of a confession secured by acceptable police methods is a matter appropriately "governed by . . . evidentiary laws").

117. The King v. Warickshall, 168 Eng. Rep. 234, 235 (K.G. 1783).

118. Hopt v. Utah, 110 U.S. 574, 584 (1884). The court in *Hopt* also reasoned that an innocent would "not imperil his safety or prejudice his interest by an untrue statement." *Id.* at 585.

119. *Id.* at 585.

120. *See* WIGMORE, EVIDENCE IN TRIALS, *supra* note 71, § 815 (1970); Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452 (1964) ("As developed by English courts, the confessions rule was designed to increase the accuracy of the guilt-determining process by excluding from evidence confessions obtained under pressure which, as viewed retrospectively and unscientifically by judges, was sufficient to create a fair risk of falsity.").

the same name as the voluntariness standard utilized by American courts today,[121] there are two critical differences between the early common law and the contemporary voluntariness doctrines. First, the early common-law voluntariness doctrine was a rule of evidence rather than a rule of constitutional law.[122] Accordingly, if a confession were excluded from a criminal trial, it would not be due to the violation of some constitutional right of the accused, but rather be due to some doubt about the confession's evidentiary integrity, i.e., its truthfulness. This suggests that an evidentiary approach that contemplated judicial gatekeeping could work to curb the introduction of false confessions today, just as it has done more informally in the past.

Second, while British (and later, early American) jurists used the voluntariness doctrine to resolve questions about a confession's *reliability*, American jurists today apply the test to evaluate the acceptability of the *methods* used to obtain the confession. Thus, even if there was no reason to question the reliability of a confession, it might still be excluded due to the repugnant means used to obtain it. Put slightly differently, whereas the early exclusion rule for confession evidence responded to a concern about the reliability of the confession, contemporary voluntariness inquiries seek primarily to restrict the methods by which confessions may be secured—the emphasis is on the process of the interrogation, rather than on the substance (or reliability) of what was obtained thereby.[123]

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121. *See supra* text accompanying notes 61–64.

122. Legal scholar Otis H. Stephens, Jr. has described the difference in this way:

> Current Supreme Court restrictions on the admissibility of confessions bear little resemblance, either in scope or in purpose, to the original English common-law rule excluding involuntary confessions. . . . The common-law rule was designed primarily to guard against the introduction of *unreliable* evidence. It was based on the assumption that a criminal suspect subjected to threats or other forms of intimidation might make a false confession to save himself from further coercion. The common-law rule was thus aimed not at *objectionable interrogation practices* per se, but at the protection of the defendant against an erroneous conviction.

OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 17 (1973) (emphasis added). *See also* Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 93 (1989) (noting that the earliest "concern with 'voluntariness' stemmed from the recognition that a tortured confession might be false"); George E. Dix, *Federal Constitutional Confession Law: The 1985 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 256 (1988) (noting that common-law courts attempted to protect criminal "defendants' interest in trial accuracy" by "impos[ing] the condition of voluntariness on the admissibility of defendants' confessions").

123. *See* STEPHENS, JR., *supra* note 122, at 17 ("The Supreme Court . . . has been more concerned with the basic fairness of proceedings against the individual, irrespective of the authenticity of the statement resulting from interrogation.") This was not always the case. The confessions doctrine of the early American colonists was similar to the English common-law rule, an approach that continued through the end of the 1800s. Confessions were acknowledged to be extremely powerful indicators of guilt provided they were "freely and voluntarily" obtained. *See* Hopt v. Utah, 110 U.S. 574, 584–85 (1884) ("[A] deliberate, voluntary confession of guilt is among the most effectual proofs in the law[.]"). Although the Court sometimes considered the propriety of the methods used by interrogators to obtain a confession, during this period it focused on those methods purely as a means of deciding whether the statements that resulted from them

The shift from reliability to police methods as the primary rationale for suppressing confession evidence occurred during the early part of the twentieth century, after the Supreme Court began to base its orders of exclusion on Fifth Amendment privilege and due process grounds rather than evidentiary grounds, thereby "constitutionalizing" the law of confessions.[124] Although in the early cases in this trend, reliability concerns continued to play an important role in the Court's rationale, eventually the Court jettisoned reliability concerns from its constitutional analyses of purported involuntary and coerced confessions.[125] The Court became increasingly concerned about curbing abusive police practices that, like the torture and threats characteristic of "Jim Crow justice," violated due process guarantees and compelled self-incrimination.[126]

By the 1960s it was becoming clear that rather than supplementing the original reliability rationale for suppressing confessions of guilt, the police methods rationale was effectively *replacing* the reliability rationale as the basis for excluding confessions under the due process voluntariness test. In *Rogers v. Richmond*, for example, the Court rejected the state's argument that lack of reliability was the most important ground for suppressing confession evidence, holding that scrutiny of the methods the police used to secure the confession was the proper constitutional basis for excluding a confession under the due process

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were sufficiently reliable to play a part in the prosecution's criminal case against the accused. Thus, as with the English common law, the reliability of confession evidence was still the Supreme Court's central concern and the phrase "involuntary confession" was used to denote a confession which was unreliable, untrustworthy, or false. *See* Herman, *supra* note 120, at 453; White, *False Confessions*, *supra* note 58, at 112 (explaining that at common law "the term involuntary could . . . be equated with untrustworthy"); WIGMORE, EVIDENCE IN TRIALS, *supra* note 71, § 822, at 329–30, § 826, at 350 (explaining that at common law courts excluded confessions only when concerned about their trustworthiness).

124. The central role of reliability in determining the admissibility of confession evidence began to shift in the 1930s. During that decade the Supreme Court began to expand its prior definitions of "voluntariness" to exclude confession evidence which, *even if true*, had been obtained in a manner that so offended the sensibilities that its admission violated fundamental principles of fair process. *See* Brown v. Mississippi, 297 U.S. 278 (1936).

125. During this period the Court searched for a legal rationale to overturn state convictions of black men who had been brutally tortured until they confessed. Having already held that the Fifth Amendment privilege against self-incrimination did not apply to the states, the Court turned to the Due Process Clause of the Fourteenth Amendment to end such state-sanctioned violence. *See id.* (reversing the convictions of three black defendants who state police authorities had whipped and repeatedly hung from a tree until they agreed to confess). Finding it "difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners," the *Brown* Court struck down the convictions, holding that, as in the federal system, due process required state action to be "'consistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.'" *Id.* at 286 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). Over the next several decades, through a series of state confession cases, the Court developed this somewhat primitive "shocks the conscience" standard into the contemporary due process "voluntariness test," a test that has come to prohibit, at least in theory, not just instances of extreme physical force, but official acts of psychological coercion as well. For a helpful compilation of these cases see DAVID M. NISSMAN, ED HAGAN, & PIERCE R. BROOKS, LAW OF CONFESSIONS app. B (1985).

126. WHITE, *supra* note 4, at 40.

voluntariness test.[127] If the police methods were such "as to overbear [the suspect's] will to resist and bring about confessions not freely self-determined," the Court wrote, the confession was involuntary and inadmissible, "whether or not [the suspect] in fact spoke the truth."[128]

At the time of the *Rogers* decision, many considered the Court's new emphasis on police methods to be a positive development, as it permitted courts to respond to disfavored interrogation techniques even in those cases in which there was no hard evidence that the confessions that resulted from those techniques were in fact false. Others, however, worried about the Court's direction and warned that, taken to its logical conclusion, the *Rogers* reasoning would ultimately "sound the death knell of the rule of 'trustworthiness'" as a separate constitutional basis for excluding confession evidence.[129]

This prediction was proven right in the 1980s when, in *Connelly v. Colorado*, the Court rejected a state court's decision to suppress a confession obtained from a man who, while suffering from chronic schizophrenia, approached a police officer and confessed to a murder. The Due Process voluntariness doctrine, explained the Court, is aimed at protecting suspects from police overreaching, not at protecting suspects from themselves.[130] Thus, despite plausible evidence that at the time Connelly approached the officer he was suffering from command hallucinations that ordered him to confess, his confession could not be deemed involuntary absent coercive police activity.[131]

As for the separate trustworthiness concern—the worry that a person who was hearing voices and following the commands of those voices might also be making statements that were not sufficiently *reliable* to warrant their admission—the *Connelly* Court was plainly less concerned, at least as a constitutional matter. "A statement rendered by one in [Connelly's] condition . . . might be proved to be quite unreliable," the Chief Justice acknowledged, "but this *is a matter to be governed by the evidentiary laws of the*

127. Rogers v. Richmond, 365 U.S. 534, 544 (1961).

128. *Id.* Rogers had reportedly confessed to a murder after the police threatened to take his arthritic wife into custody. *Id.* at 535–36. Applying a reliability rationale, the trial court had refused to suppress Rogers's confession on the ground that there was insufficient evidence that the officer's interrogation technique had any "tendency to produce a confession that was not in accordance with the truth." *Id.* at 541–42. The Supreme Court disagreed, holding that confessions should be suppressed under the voluntariness test "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system[.]" *Id.* at 540–41. Thus, even if "independent corroborating evidence left little doubt of the truth of what [a] defendant had confessed[,]" his confession might still be suppressed if it "were found to be the product of constitutionally impermissible methods." *Id.* at 541.

129. STEPHENS JR., *supra* note 122, at 117; *see also* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH L. REV. 929, 940 (1995).

130. 479 U.S. 157, 165–66 (1986).

131. *Id.* at 167.

forum . . . not by the Due Process Clause[.]"[132] "'The aim of the requirement of due process is not to exclude presumptively false evidence,'" Rehnquist stressed, but "'to prevent fundamental unfairness in the use of evidence, whether true or false.'"[133]

As this history and the Court's pointed statements reveal, in the same series of cases in which the Court has denigrated the importance of constitutional challenges to the reliability of confession evidence, it has simultaneously pointed to the law of evidence as the means by which the admission of unreliable statements of guilt might be avoided. It is time for those who would prevent the introduction of false confessions in criminal trials to take the Court's admonitions on this score seriously and to consider how the law of evidence might be of service. The Court itself has failed to articulate precisely how "the evidentiary laws of the forum" might be used to guard against the admission of insufficiently reliable statements of guilt, and legal scholars have yet to explore the question. This article, therefore, sets out a detailed proposal for requiring trial judges to assess the reliability of confessions claimed to be false.

E. The Gatekeeping Proposal—How It Would Work

In keeping with the thrust of most contemporary evidence codes, the gatekeeping role imagined here would be a "flexible" one.[134] For example, if adopted in the federal system, a trial court asked to admit a confession challenged on grounds of falsity would first determine, pursuant to Rule 602, whether a reasonable jury could conclude from the available evidence that the statements contained in the accused's confession originated from the accused's personal knowledge of the events described.[135] If the court were to conclude that a reasonable jury could trust the confession, then the evidence would be admitted, and the finders of fact would make the final determination about its trustworthiness after considering all of the evidence and weighing the arguments of counsel.[136]

By contrast, if a court were to conclude that the accused lacked first-hand knowledge of the matters described in the statement, then the confession could properly be kept from the jury. This might occur, for instance, where the interrogation methods used by the police so fully revealed the facts surrounding the offense to the suspect that the confession showed more about the officers' suspicions than the accused's personal perceptions, or where the

132. *Id.* (emphasis added).

133. *Id.* (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

134. *See supra* notes 109–16 and accompanying text for a discussion of the gatekeeping role imposed in the expert evidence context.

135. In state systems, analogous rules controlling the resolution of preliminary questions could provide the normative basis for such a preliminary inquiry.

136. Assuming proper and diligent police work, it is reasonable to expect that sufficient corroborating evidence would be available in most cases to enable a court to quickly dispose of challenges on the grounds of falsity.

accused's statements were belied by other facts and evidence upon which the prosecutor intended to rely.[137]

To ensure that trial judges are not left at sea when called upon to consider the reliability of a particular challenged confession, interpretations of existing rules of evidence to impose such a gatekeeping responsibility could and should be accompanied by a non-exclusive list of factors designed to guide judges in this new role.[138] In the confession context, that list might include such questions as:

- whether the confession was obtained only after initial claims of innocence;
- whether the accused's statements about the offense were corroborated or contradicted by other evidence;
- whether the accused described facts surrounding the offense before or after being informed about those facts by his interrogators (e.g., did the officers show the suspect photographs of the victim or crime scene during questioning, and if so, at what point?);
- whether the statement was internally consistent and coherent, or shifted during the course of the interrogation as inconsistencies and discrepancies between what the accused said and the facts known to the police were pointed out;
- whether the accused's statements were externally consistent (whether they were consistent with other physical evidence known to the police);
- in multiple-confession cases, whether each confession was consistent with the others;
- whether the suspicions of the interrogators regarding the accused were based on concrete evidence pointing to the accused's guilt, or on hunch or speculation;
- whether the accused provided details or information about the crime that only the perpetrator of or a participant in the crime would be likely to know (e.g., location of the victim's body, location of the offense weapon, etc.);
- whether the case involved a *modus operandi* (signature) crime, and if so, whether there was evidence that pointed to the accused's involvement in other, similar offenses;

137. As to the question of who would bear the burden of establishing reliability under such a rule, there seems little reason to deviate from standard rules respecting the admissibility of other types of evidence. Normally the burden of proof respecting the resolution of preliminary questions concerning challenged evidence is carried by the proponent of the evidence. The interest in the internal coherence of an evidence code alone would justify a similar rule when a confession is disputed on grounds of falsity. Therefore, in such a case, the burden would be on the prosecutor offering the evidence to prove its reliability by a preponderance of the evidence.

138. This would be similar to the factors supplied by the majority in the Supreme Court's *Daubert* decision. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592–94 (1993).

- whether the signature crimes ceased after the accused's apprehension; and
- whether the case involved a serious, high-profile crime.[139]

Questions such as these would *supplement* rather than replace the types of questions trial courts currently ask whenever a confession is challenged on constitutional grounds of involuntariness under the totality of the circumstances test.[140]

F. The Gatekeeping Proposal in Operation—Applying the Proposal to the Central Park Jogger Facts

It is useful at this point to consider how a reliability assessment might have affected the Central Park jogger prosecutions. As discussed in part II, all five teens accused of involvement in the jogger's rape recanted their confessions almost immediately after counsel were assigned to their defense. Under the proposal advanced here, these recantations would have automatically triggered a preliminary inquiry by the trial court into whether sufficient evidence existed to permit the juries to consider the confessions (i.e., whether a reasonable jury could find that the statements were in fact based on the boys' personal knowledge of the rape). The trial court did not conduct this inquiry because no existing test required it to do so; instead, it focused solely on whether the boys had voluntarily decided to talk with their interrogators. In the absence of evidence of police abuse, the court reached the fairly uncontroversial conclusion that the confessions were voluntary.[141]

Had the court conducted the type of reliability assessment proposed here, however, there is good reason to believe that the confessions would have been suppressed. Such an assessment would have been guided by the non-exhaustive list of questions set forth above, which in turn would have illuminated a number of facts that provided reason to doubt the confessions' truthfulness. All five of

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139. I developed this list of questions after considering the investigative decisions and behaviors present not only in the Central Park jogger case, but also in hundreds of other cases where confessions have been obtained and are now known or strongly believed to be false. *See* WHITE, *supra* note 4, at 139–59 (discussing characteristics common to false confession cases).

140. Unlike contemporary constitutional tests, the core concern of the "reliability" inquiry envisioned here is the truth or falsity of confessional evidence. By contrast, as discussed above, the central concern of the "voluntariness" and "coerced confession" doctrines, at least as those doctrines are currently applied, is the acceptability of the investigative methodology used to obtain the challenged confessions. Typically, a court called upon to resolve an involuntariness challenge will consider such things as the length of the interrogation, the forcefulness of the interrogation methods used, whether the suspect was Mirandized, and characteristics of the suspect which might have made him particularly susceptible to having his will overborne (e.g., youth, lack of education, insobriety, history of mental illness, etc.). *See* DRESSLER, *supra* note 64, § 23.03.

141. I recognize that some would argue that juveniles are easily overwhelmed by the psychological pressures of official interrogation. My point that the court's conclusion was "uncontroversial" is simply that, as the totality of the circumstances test is currently applied by courts across the country, the trial judge's decision to allow the teens' confessions to be introduced was what experienced criminal lawyers would have expected.

the boys initially denied any knowledge of a woman's rape even while admitting involvement in and knowledge of a number of the other assaults that occurred in the Park that night.[142] When they eventually did admit to being involved in the rape, their statements about that crime lacked both internal[143] and external[144] consistency. They provided descriptions of that crime only after police interrogators had shared specific, detailed information about the attack with them.[145] Moreover, not only did the state fail to shore up those statements with corroborating evidence,[146] the evidence that it did have pointed to another perpetrator who, when the evidence was examined closely, appeared to have acted alone.[147] None of the boys' confessions supplied the kind of unique details about the victim, the way in which the crime occurred, or the crime scene that only the actual perpetrator of the crime would be likely to know.[148] Finally,

142. *See* Ryan Aff., *supra* note 14, ¶ 10.

143. For example, Kharey Wise gave two written statements to the police before being questioned by prosecutor Elizabeth Lederer. The statements conflicted with each other in significant respects, and conflicted as well with the statements Wise made to Lederer later on videotape. *See* SULLIVAN, *supra* note 2, at 19–20 (noting that during his videotaped interrogation, Wise "went off on tangents and created completely implausible explanations for the myriad contradictions in his tale").

144. *See* Ryan Aff., *supra* note 14, ¶ 86 (describing in detail the "troubling discrepancies" among the boys' accounts of the rape of the jogger). The Assistant District Attorney wrote:

> Using their videotaped statements as the point of comparison, analysis shows that the accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place.

Id. See also supra notes 33–36 (describing some of the many discrepancies between the boys' accounts). Other statements of fact made by the boys turned out to be "simply wrong." Ryan Aff., *supra* note 14, ¶ 93. For example, Kharey Wise stated that the jogger's clothes had been cut off with a knife and her legs cut as well; this was not true. Richardson claimed that her bra had been removed; she was found wearing it. Santana claimed that she was left naked; this was also incorrect. *Id.*

145. *See, e.g.*, SULLIVAN, *supra* note 2, at 43 (describing how the police shared details about the rape with the teens and how the prosecutor showed Kharey Wise photographs of the crime location); Ryan Aff., *supra* note 14, ¶ 92 (noting that Kharey Wise "had been taken to the scene prior to his videotaped statements"). Moreover, none of the teens provided the kind of detail one would expect the perpetrator of a crime to be able to provide, such as "where the jogger was coming from, what direction she was running in, . . . how they happened to catch sight of her[,] . . . the area where she was attacked, the terrain, or the crime scene." *Id.*

146. *See* Ryan Aff., *supra* note 14, ¶¶ 94–95.

147. DNA tests established that the semen found at the scene "was not a mixture; it was from a single source, meaning that only one individual had ejaculated." *Id.* ¶ 32. A pubic hair found at the scene was inconsistent with each of the five defendants. *Id.* It was later determined to be a match to Reyes. *Id.* ¶ 71.

148. Not even Kharey Wise, who was physically walked through the crime scene before making his videotaped statement, could provide such detail about the jogger's assault. *See id.* ¶ 92. In sharp contrast, Matias Reyes provided the police new and explanatory information that "fit" with information known to the police about the crime. For example, the jogger had been robbed of her Walkman, but none of the boys mentioned a Walkman nor identified who among them was responsible for taking it. Matias Reyes mentioned the musical device straight away. *See*

further investigation by the police might have revealed that the jogger's rape was actually a signature crime, and crimes like it occurred after the boys' arrests.[149]

IV.
DEFENDING THE GATEKEEPING PROPOSAL—LIKELY CRITICISMS

I have set forth a proposal that judges serve as gatekeepers of confessions claimed to be false. Part III provided support for this proposal by showing that it dovetails with existing evidence rules, is consistent with the historical role played by judges at common law when faced with concerns about a confession's reliability, and is supported by Supreme Court pronouncements about the appropriate means of resolving reliability concerns. Part III also showed how such a gatekeeping function might have avoided the convictions of the five teens in the Central Park jogger case either by the formal action of the trial judge, or by a more cautious "hypothesis-challenging" investigative approach by the police. Either might have led to the arrest and punishment of Matias Reyes, the man the District Attorney eventually came to acknowledge as the actual perpetrator.

Next, I explore some of the objections that might be leveled against my proposal for a new gatekeeping role. While I suggest that reform is best targeted at the courtroom, other scholars maintain that a better place for reform is the interrogation room. Additionally, some readers may be concerned that additional gatekeeping responsibilities for trial judges would intrude unduly upon the normal province of the jury. Finally, there is a question of whether judges would be any more skilled than lay jurors in determining the reliability of a challenged confession.

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id. ¶¶ 64(3), 42 (noting the investigation of Reyes's confession "led to the conclusion that Reyes' account of the attack and rape [was] corroborated by, consistent with, or explanatory of objective, independent evidence in a number of important respects[,]" and noting that the District Attorney's investigation of Reyes's criminal history "resulted in the discovery of important additional evidence"). *See also id.* ¶¶ 63–64 (describing the highly detailed and consistent account Reyes gave of his attack and rape of the jogger). This is precisely the type of detail and new information that is normally offered into evidence to corroborate truthful confessions, and its utter absence should be considered a red flag.

149. Matias Reyes raped another woman jogger along the same stretch of road in Central Park two days before the more famous jogger's rape. He raped and robbed numerous other women over the next four months. *See id.* ¶¶ 55–61. In addition to the similar locations, a *modus operandi* of his sexual assaults was the way in which he bound his victims, by using their clothing to hold their hands in prayer formation in front of their bodies while using other portions of the clothing as a gag. *See id.* ¶¶ 42 (noting the District Attorney's investigation of Reyes's criminal history "revealed significant parallels with the jogger attack"), 67 ("Corroboration of Reyes' account of the crime is found both in the pattern of his sexual attacks and in some of their specific facts."). Had the police not been convinced of the veracity of the boys' confessions, the department might have taken notice of the similarity between the jogger's rape and others in which Reyes was involved, which were in and around the same locality.

A. The Proper Forum for Reform—The Courtroom or the Interrogation Room?

Even if we find reform justifiable—because the harms that flow from convicting innocents on the basis of false confessions is alarming, or potentially capital cases are serious enough to provide strenuous safeguards against false convictions, or we have special concern because false confessions impact especially vulnerable groups disproportionately[150]—it is still advisable to respond to the concerns of skeptics by cabining the reach of the reform. Certainly there is good reason to resist reform that would impose broad restrictions on largely effective interrogation practices if it is possible to achieve our objective (the reduction of the number of false confessions affecting criminal trials) while leaving unaffected the far greater number of true confessions obtained by the same practices. Unfortunately, most of the reform proposals advanced to date have neglected to adequately consider this criticism,[151] and thus imply that the loss of truthful confessions is an inevitable byproduct of reform. This has provided fodder for those like Judge Cassell who would argue that reform will do more harm than good.[152]

For example, arguments for broad changes in the way interrogations are

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150. *See* discussion, *supra* part III.A.

151. Most scholars concerned about the reality of false confessions have favored stiffer regulation of the way in which the police *gather* confessional evidence inside the interrogation room, rather than making the process for *admitting* such evidence during a criminal trial more rigorous. *See, e.g.*, WHITE, *supra* note 4, at 200–15 (proposing a series of reforms to police interrogation practices). *See also* Cassell, *Balanced Approaches*, *supra* note 78, at 1133 (arguing for videotaping, but only with the relaxation of *Miranda* protections). The videotaping proposal, of course, might best be thought of as a hybrid reform—though technically directed at the interrogation room, it would also impact the courtroom, as the availability of such recorded evidence would enable a trial court to resolve more readily questions about the voluntariness (and hence admissibility) of a confession challenged on grounds of falsity. At least in part as a result of the fallout from the belated confession of Matias Reyes, a New York Assemblyman sponsored a bill to mandate the videotaping of interrogations in all felony investigations from the moment a person is subjected to interrogation and "is not free to leave." A similar bill was introduced in the New York City Council. Frank Lombardi, *Pol Pushes Cops to go to Videotape*, N.Y. DAILY NEWS, Jan. 10, 2003, at 4.

Far fewer legal thinkers have proposed reforms aimed at the courtroom, and those who have done so have grounded their arguments on constitutional rather than evidentiary grounds, an argument that to date has had little success. None of these scholars has developed a proposal calling for the institutionalization of such a more active judicial role on nonconstitutional grounds, as I do here, through the creation of a new gatekeeping role for trial judges that conditions the admission of a confession on a specific judicial finding of reliability.

152. Judge Cassell argues that it is best to leave interrogation practices unobstructed to prevent the police from focusing their attention on innocents who might be charged and even convicted in the absence of a confession from the real offender. *See* Cassell, *Protecting the Innocent*, *supra* note 75, at 538–44. It is difficult to see how resisting changes to available interrogation practices would prevent this danger. As illustrated by the sequence of events in the Central Park jogger investigation, the danger that the police will focus on an innocent is always a possibility. Officers in this situation will more often become convinced of the innocent's guilt, *not* because (as Cassell speculates) the real offender has been questioned and refused to confess, but because, for any number of possibly valid or invalid reasons, the police *began* with the wrong person.

conducted have allowed Judge Cassell to point out that such reform would result in fewer true confessions, fewer convictions of the guilty, fewer vindications of crime victims and greater dangers for the law-abiding who are left to cope with serious offenders in their midst. These are serious concerns. We must remember, though, that the same concerns are also present when existing interrogation practices generate false confessions. That is, when suspects give false confessions, victims go unvindicated, crimes go unsolved, and society remains exposed to the continuing dangers presented by the real offender. This is in fact what happened in the Central Park jogger case. Once the police secured the confessions of the five teens, efforts were made to secure corroborating evidence of their guilt and to identify others who might have acted in concert with them, but little was done to probe the veracity of the confessions.[153] Meanwhile, Matias Reyes remained at large to continue his reign of terror.

Nevertheless, it is hard to dispute Judge Cassell's more fundamental point—that greater restrictions on the way in which the police conduct interrogations would inevitably result in a loss of true as well as untrue confessions.[154] If it is true that the overwhelming majority of confessions secured by standard interrogation practices are true (as all who have studied the problem seem ready to concede),[155] there is a risk that restricting those practices in any significant way will result in fewer truthful confessions. While it is also reasonable to believe (and indeed hope) that such restrictions would result in the obtainment of fewer false confessions as well, this salutary fact cannot prevent the proposed

153. This is not atypical. As put by Professor Richard A. Leo, one of the nation's leading scholars on false confessions:

> A suspect's confession sets in motion a virtually irrefutable presumption of guilt among criminal justice officials and lay jurors. . . . Consider police and prosecutors. Once police obtain a confession (and their preconceived bias is confirmed), they invariably shut down their investigation, clear the case as solved, and—even if the suspect's guilt is far from certain—make no effort to pursue other possible leads. Because they are reluctant to admit their mistakes and are committed to the belief that innocent people do not falsely confess, police almost never consider the possibility that they may have mistakenly elicited or coerced a false confession from an entirely innocent suspect[.]

Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 36, 45 (Saundra D. Westervelt & John A. Humphrey eds., 2001) [hereinafter Leo, *False Confessions*].

154. *See also* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168 (2001) (arguing that deception should continue to be permitted as a common interrogation practice until it can be shown that the practice creates an unreasonable risk that innocents will be caused thereby to confess falsely; until statistically sound research demonstrates a sizeable number of false confessions due to the technique, no drastic limit should be placed on it); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997) (defending the use of deception on suspects where the police begin the interrogation with strong independent grounds to suspect guilt, and rejecting arguments that would broadly ban the practice).

155. *See* WHITE, *supra* note 4, at 141 (acknowledging that "no one seriously contends that standard interrogation practices are likely to precipitate false confessions during routine interrogations," but also arguing that this is the wrong question).

reforms directed at the interrogation room from being attacked on grounds of overbreadth. Thus, by adopting such a reform we would make it more difficult for the police to gather *both* true and false confessions.

It is possible to avoid this overbreadth problem by directing the reform at the courtroom rather than the interrogation room.[156] The gatekeeping proposal advanced here does just that. As gatekeepers, trial judges will continue to monitor police behavior in the interrogation room just as they do now (in the context of constitutional challenges), but with one critical difference. When a confession is challenged on grounds of falsity, the judge will make a preliminary finding as to its reliability. Indirectly, this approach should also create positive incentives for the police and prosecutors to improve their investigative behaviors and resolve any concerns they have about the strength and reliability of their proof before trial. In short, the gatekeeping approach will lead to better investigations and to more accurate—and therefore more just—trial outcomes.

B. Invading the Province of the Jury?

Even if the reader is persuaded that reforms directed at the courtroom would avoid the overbreadth problem discussed above, it is possible to have other reservations about the gatekeeping proposal. A likely objection to my proposal is that the truthfulness of a confession is essentially a question of fact, which is a matter normally reserved for the jury.

It is certainly true that rules of evidence express a strong preference for leaving questions of fact to the jury,[157] despite the danger that the jury will

156. It is important to emphasize here that the preference for changes in trial procedure over interrogation procedures is related to reliability concerns, rather than concerns about abusive police methods. As discussed in part II, the criminal justice system is also rightly concerned about a separate category of confessions, namely, true confessions obtained by unacceptable police methods. We may be, and often are, concerned about confessions for reasons other than their lack of reliability. *See* Rogers v. Richmond, 365 U.S. 534 (1961) (barring use of confession obtained through a false order to arrest the suspect's ill wife). A confession beaten out of a suspect may turn out to be true, but it is nevertheless rightly excluded from evidence. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (holding physical torture made a confession "involuntary"). Moreover, while confessions obtained by torture or other physical abuse may set the high water mark for unacceptable police methods, other, less severe questioning methods may also be so offensive to a civilized system of justice that they too will not be tolerated.

157. For example, we normally leave contested questions of fact about the reliability of eyewitness evidence to juries. How is the concern about false confessions any different than concerns about other sources of conviction error, such as faulty eyewitness identifications? There is pretty good evidence that jurors fail to appreciate the possibility that eyewitness identifications are often flawed, so overpowered are they by the force of eyewitness testimony. *See, e.g.*, Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 671 (1989) (arguing that judges should adopt clearer jury instructions on the dangers of faulty eyewitness identifications); Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 259 (1988) (same). No one argues that judges should be gatekeepers for that type of evidence and withhold such proof from the jury when they are convinced that the eyewitness could not have seen what she claims. Although the related problem of faulty eyewitness identifications is beyond the scope of this article, my tentative response is that many of the same concerns which lead to a

occasionally be misled by evidence that appeals to their emotions or even prejudices. Thus, as a general matter, rather than relying on a network of exclusionary rules to safeguard against these possibilities, modern courts rely on trial counsel to highlight the deficiencies in proof offered at trial. As put by evidence scholar Dale Nance, "a justificatory premise of the adversary system is that the clash of opposing, relevant evidence will yield accurate results, at least frequently enough to render that system superior to the alternatives."[158] This means that, on the whole, our system prefers that judges admit evidence if it meets the threshold of being relevant, but prefers that triers of fact determine the amount of confidence or "weight" to which the evidence is entitled.[159]

There are exceptions to the rules expressing this preference, however, when sufficient countervailing interests outweigh it. This happens particularly where the evidence in question is especially likely to affect the jury unduly,[160] or where the evidence involves a statement which, when made, may have been the result of another's influence, however well-intentioned.[161] Necessarily, a collateral consequence of such heightened review is that juries will sometimes be denied the opportunity to consider proof that they might find persuasive, or even compelling. But that is precisely the point of these evidentiary bars. Sometimes the value of exposure to relevant evidence is outweighed by the dangers associated with it. As discussed in part III, the Supreme Court has made clear that a relevant expert opinion may be excluded from evidence if it is insufficiently reliable, even though that gatekeeping function will "on occasion . . . prevent the jury from learning of authentic insights[.]"[162] Similarly, courts routinely test the reliability of the out-of-court statements of young children before deciding whether to allow their introduction. This is done on the ground that such statements may have resulted from the suggestions of the

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heightened gatekeeping role for judges in the false confession context might support a similar role in the eyewitness identification context.

158. Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 195 (2003).

159. *See id.* ("[T]he system provides a trier of fact capable of shouldering the responsibility of determining what inferences from the evidence are warranted.").

160. *See, e.g.*, FED. R. EVID. 403 (establishing that unduly prejudicial or time-consuming evidence, though relevant, may be excluded); FED. R. EVID. 404(a) (placing strict limits on the admission of character evidence).

161. This is a concern in child witness out-of-court statement cases. *See, e.g.*, Tome v. United States, 513 U.S. 150 (1995) (discussing the necessity of assessing the trustworthiness of a child's out-of-court statement before admitting it); White v. Illinois, 502 U.S. 346 (1992) (same); Idaho v. Wright, 497 U.S. 805 (1990) (same); United States v. Barrett, 8 F.3d 1296, 1299–1300 (8th Cir. 1993) (discussing some of the factors that a trial court can consider when determining whether to find a child's out-of-court statement trustworthy enough to be admitted). *See also* MUELLER & KIRKPATRICK, *supra* note 113, § 8.83 at 963 ("On the central question whether [child] hearsay is trustworthy, the broad notion that children do not make up stories . . . or seriously err in describing [facts] has not been accepted (and is sharply disputed). . . . Instead of a rule that children are to be trusted, a vast body of modern case law has appeared, largely in the state systems, and the cases have developed criteria that bear on trustworthiness.").

162. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 597 (1993).

children's interviewers rather than emanating from their own recollections of actual events.[163]

In the confession context, social scientists who have studied false confessions counsel extreme caution before exposing lay jurors to disavowed confessions of guilt. Confessions are widely considered to be "the most powerful, persuasive, and damning evidence of guilt that the state can bring against an accused,"[164] and a false confession may be "more prejudicial than any other potential source of evidence."[165] Indeed, studies of false confessions suggest that once a jury is exposed to a false confession, the chance that the jury will convict on the basis of that confession is substantial.[166] As put by one scholar who has studied the question, "[j]uries are often so unwilling to believe that anyone would confess to a crime that he did not commit that they are likely to convict on the basis of the confession alone, even if no significant or credible evidence confirms the confession and considerable evidence disconfirms it."[167]

C. Are Judges Superior Assessors of Truth?

Some will surely question whether judges will be any more adept than lay jurors at determining the reliability of a confession claimed to be false.[168] Even

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163. *See White*, 502 U.S. 346. Social scientists concur that young children are more suggestible than adults and may accept and incorporate untrue information into their statements and even beliefs, particularly when interacting with an authoritative adult. *See, e.g.*, STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995); Maggie Bruck, Stephen J. Ceci, & Helene Hembrooke, *Reliability and Credibility of Young Children's Reports*, 53 AM. PSYCHOLOGIST 136 (1998) (reviewing research on child suggestibility); Stephen J. Ceci & Michele D. Leichtman, *"I Know That You Know That I Know That You Broke the Toy": A Brief Report of Recursive Awareness Among 3-Year-Olds, in* COGNITIVE AND SOCIAL FACTORS IN EARLY DECEPTION 1 (Stephen J.Ceci, Michelle DeSimone Leichtman & Maribeth Putnick eds. 1992). *See also* Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL., PUB. POL'Y & L. 485, 488 (1999) ("How the child's statement was elicited, the exchange between the child and the adult, is clearly essential for an assessment of the reliability of the child's account.").

164. Leo, *False Confessions*, *supra* note 153, at 45.

165. *Id.*

166. WHITE, *supra* note 4, at 185. The Supreme Court has considered this danger and the question of whether a judge is better than the jury at deciding questions relating to an accused's confession in a slightly different context. In *Jackson v. Denno*, the Court held that due process voluntariness inquiries had to be resolved by trial judges rather than the trial juries in order to minimize the risk that once a jury heard that a defendant had confessed, it would be unable to put that fact aside to consider dispassionately the question of whether that confession was voluntary or coerced. 378 U.S. 368, 395 (1964). The same concern exists when the question is the reliability of a confession alleged to be false.

167. Leo, *False Confessions*, *supra* note 153, at 46. *See also* Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27 (1997) [hereinafter Kassin & Sukel, *Coerced Confessions*].

168. Others might be concerned about whether judges would have sufficient guidance if they took on this additional gatekeeping role. *See* Nance, *supra* note 158, at 197 (arguing that in the scientific gatekeeping context the tendency to think of expert evidence reliability decisions in "binary" terms—either the expert evidence is reliable or it is not—is inadequate, but it is explained by the lack of "some reasonably determinate algorithm based on appropriate legal norms that

if in the abstract the answer to this question is that they are probably not, it is reasonable to believe that trial judges will with sufficient training become superior assessors of the truth or falsity of confessions.[169] I am persuaded that this is true for at least three reasons. First, unlike jurors, judges regularly attend judicial conferences which provide special opportunities for educating them about the realities of false confessions. These conference sessions could expose judges to social science findings about the heightened dangers of false confessions in certain types of cases, the special vulnerability of certain classes of suspects (such as juveniles and the mentally ill), and the red flags that can help them separate problematic confessions from unproblematic ones. Although juries also could be educated through the introduction of expert testimony about the reality of false confessions, that "training" would inevitably be far less comprehensive and effective when delivered in the context of a single prosecution.

Second, as repeat players in the court system, judges possess a frame of reference as to confession evidence that jurors necessarily lack, which better positions them to assess the significance of the red flags associated with suspect confessions. Judges know experientially that, in the vast majority of cases, confessions offered into evidence at criminal trials *are* accompanied by corroborating evidence and *do not* present the kind of internal and external inconsistencies present in the Central Park jogger case confessions. Thus, when a prosecutor's case lacks these trappings or includes such inconsistencies, judges are better able to understand the significance of these failures of proof.

Third, empirical studies show that jurors routinely fail to appreciate the serious possibility that voluntary confessions can in fact be false, and are thus staggeringly susceptible to the persuasive effect of confessions.[170] Judicial

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would specify what degree of reliability is 'sufficient'"). Scholars have addressed this very question in the expert testimony context. The concern there, as here, is that judges asked to determine the scientific or other reliability of a particular expert's testimony are left unguided as to how reliable the evidence must be before it may be admitted and considered by the finder of fact. How good is good enough? One thoughtful answer supplied by Professor Michael Graham is that reliability determinations should be made in the expert evidence context by asking whether there are "*sufficient assurances*" that the expert's theory produces an accurate result, rather than whether the expert's theory *does or does not* "produce a correct, accurate, truthful, valid" result. Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho, *and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U.MIAMI L. REV. 317, 339 (2000) (emphasis added). This formulation may be helpful to judges performing a gatekeeping role in the context of confession evidence as well.

169. *Cf.* Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 75 (1998) (arguing that in the expert evidence context, with proper training, judges can distinguish valid from invalid scientific evidence).

170. Leo & Ofshe, *Consequences of False Confessions*, *supra* note 75, at 481 (finding that "[e]ven an unsupported and disconfirmed confession is often sufficient to lead a trier of fact to judge the defendant guilty beyond a reasonable doubt"). *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (analyzing "125 recent cases of proven interrogation-induced false confessions"); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the*

gatekeepers would add a measure of protection against this understandable lay tendency to fall prey to the lures of confessions of guilt.

V.
CONCLUSION

The disturbing facts of the Central Park jogger case point to the need for additional checks in the trial process to help ensure that criminal convictions are not based on false confessions. In this article, I have proposed that trial judges who are asked to admit disavowed confessions perform the same type of gatekeeping role they currently perform when screening witness testimony or expert evidence. This proposal dovetails with existing evidentiary rules, has historical support, and is consistent with Supreme Court precedent that has identified evidentiary law as the proper vehicle for addressing reliability concerns.

To avoid proposing a change that would do more harm than good, I recommend that reform be directed at the courtroom rather than the interrogation room. Reform directed at the courtroom acts more like a scalpel than a scythe, and thus this choice will help to minimize unintended consequences. By contrast, there is good reason to believe that reform proposals that have sought changes to interrogation methods (that is, by restricting the tactics commonly employed by interrogators or specifying the circumstances in which questioning is allowed to proceed) would, if adopted, reduce far more truthful confessions than false confessions. This problem is averted by reform proposals targeted at the courtroom—the point at which a decision is made as to the confession's admissibility—rather than the interrogation room.

Inevitably, a reform in courtroom admission procedure will also influence the way in which the police and prosecutors conduct interrogations and post-interrogation investigations in the future. These indirect effects on interrogation and investigation processes are salutary, as they will improve accuracy while simultaneously permitting the police to continue to use time-tested interrogation techniques that secure vastly more true confessions than false. If law enforcement officials know that confessions will be examined for their reliability, they will learn to examine the fruits of the interrogation process more critically and to conduct more thorough searches for corroborating evidence. Such reform might even finally convince law enforcement authorities of the wisdom of videotaping the entire interrogation process (rather than just the confession portion of it), given that the prosecutor will bear the burden of convincing the court not only about what the accused said during interrogation, but that those statements could fairly be attributed to the accused's own "personal knowledge."

Fundamental Difference Hypothesis, 21 LAW & HUM. BEHAV. 469 (1997) (examining the impact of confessions on juries, as compared to other types of evidence); Kassin & Sukel, *Coerced Confessions*, *supra* note 167 (examining whether an erroneously admitted coerced confession can be considered "harmless error").

The Central Park jogger case shows that once a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence. It is reasonable to believe that as repeat players in the system, judges can be trained to see the warning signs of a false confession in a way that jurors cannot. Admittedly, this proposal would place a heavy responsibility on the shoulders of trial judges. Some are sure to worry that judges will shy away from the role, preferring to leave to the jury the question of a confession's credibility. Others, no doubt, will fear the opposite—that judges will be too aggressive in policing confessions, keeping too many probative facts from the jury's consideration. To skeptics in the first group, mandatory performance of the gatekeeping role might be particularly important. Moreover, the proposal offers judges a way to navigate their new role by having them ask a litany of precise questions designed to probe the accuracy of a disavowed confession. To those concerned with overzealous gatekeeping, it should be evident that in the vast majority of cases these very questions will quickly establish the truthfulness of the challenged confession. It is the rare case in which the prosecution will be unable to corroborate statements made during interrogation with other evidence. When corroborating evidence is unavailable, however (or worse, when other evidence undercuts or contradicts the statements given during interrogation), there is real reason for concern. In such cases it is right for the courts to proceed with caution. If the Central Park jogger case can teach us anything, it is that, to our own disbelief, it is indeed possible to persuade innocents to confess guilt.