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Where the Constitution Falls Short: Confession Admissibility and Police Regulation

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ABSTRACT

A confession presented at trial is one of the most damning pieces of evidence against a criminal defendant, which means that the rules governing its admissibility are critical. At the outset of confession admissibility in the United States, the judiciary focused on a confession's truthfulness. Culminating in the landmark case *Miranda v. Arizona*, judicial concern with the reliability of confessions shifted away from whether a confession was true and towards curtailing unconstitutional police misconduct. Post-hoc constitutionality review, however, is arguably inappropriate. Such review is inappropriate largely because the reviewing court must find that the confession was voluntary only by a preponderance of the evidence, and post-conviction challenges to admissibility are subject only to harmless error review.

The United States is not the only country that must wrestle with confession admissibility and police misconduct. In 1984, the United Kingdom's Parliament determined that leaving police practices unregulated was no longer acceptable and passed the Police and Criminal Evidence Act (PACE). PACE and its accompanying Codes of Practice set out regulations for most police conduct. The regulations established clear procedure for police to follow and the accused to anticipate.

This Comment first examines the history of confession admissibility law as created by the Supreme Court of the United States. Next, this Comment considers the British model of confession admissibility. The British couch confession admissibility in broader legislation regulating nearly all police practices in de-

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tail. After consideration of the systems of admissibility in both the United States and Britain, this Comment argues that post-hoc constitutionality review of police interrogations is inadequate to regulate police practices. Finally, this Comment argues that American legislative bodies should generate statutory regulation of police and use the British Police Codes of Practice as a model for American police regulation.

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I. INTRODUCTION

A confession from a criminal suspect is like striking gold for police investigators; the police get to close the case, hand it over to the prosecutor, and return to an overwhelming caseload. Prosecutors also appreciate a confession from a criminal suspect.[1] Confessions usually mean reaching a plea agreement, or if the accused chooses to go to trial, confessions are extremely weighty in the courtroom with jurors.[2] Even when a defendant recants the confession, statistics show that juries remain fixated on the original confession and choose to convict, regardless of how scant the other evidence against the defendant is or how strong the evidence in the defendant's favor is.[3] In fact, the Innocence Project reports that over 25 percent of DNA exonerations occur in cases involving a confession or incriminating statement made by the defendant.[4] While the truth about the power of confessions at trial is known,[5] the judicially created standards for confession admissibility at criminal trials are minimal.[6]

This Comment attempts to expose the inadequacy of the current Supreme Court precedents to regulate confession admissibility at criminal trials. A discussion of relevant Supreme Court holdings, centering on the seminal *Miranda v. Arizona*[7] decision, demonstrates that after-the-fact constitutionality review of police interrogation methodologies is an insufficient tool to address the harms of police misconduct and the highly prejudicial nature of a wrongly admitted confession. Further, this Comment suggests that legislatively generated policing regulation would be a useful measuring stick for police conduct, especially when obtaining incriminating statements, and for the prosecution in determining when to offer such statements at trial. Recognizing that generating police regulations is a herculean task, this Comment briefly analyzes British law that regulates police and proposes using it as a model for American police regulations. This Comment does not intend to argue that the

1. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221 (1997) [hereinafter Kassin, *Confession Evidence*].

2. Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 434 (2012) [hereinafter Kassin, *Innocence*].

3. *Id.*

4. *False Confessions or Admissions*, INNOCENCE PROJECT, https://bit.ly/2wVm4Ci [https://perma.cc/2DW4-72MX].

5. Kelsy S. Henderson & Lora M. Levett, *Can Expert Testimony Sensitize Jurors to Variations in Confession Evidence?*, 40 LAW & HUM. BEHAV. 638, 638 (2016) (citing several psychological studies on the effects of confession evidence at criminal trials).

6. *See infra* Part II.A.3.b.

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

United States should adopt a word-for-word or policy-for-policy regulation of police from Britain. This Comment does, however, argue that the British model provides an example of how a quasi-common-law, quasi-statutory system of criminal justice can in fact regulate police in a way that helps to eliminate secrecy and protect civil liberties.

II. BACKGROUND

A criminal defendant's[8] confession is arguably the most powerful piece of evidence that the prosecution can offer at trial against a defendant.[9] Both judges and juries tend to attribute more evidentiary weight to a defendant's confession than any other combination of evidence.[10] Even when juries learn that the defendant recanted the confession,[11] or the confession was the product of coercion,[12] or the defendant has a mental illness,[13] or that a police informant with incentives to falsely implicate the accused is the vehicle for the defendant's confession,[14] juries tend to remain fixated on the original confession.[15] The many wrongful conviction cases that include a false confession demonstrate that false confessions will result in

8. Significant research and scholarship exposes the racial hierarchy embedded in the American criminal legal system; unfortunately, examination of the intersection between race, policing, and confession prejudice is beyond the scope of this Comment. For more on these topics, see MICHELLE ALEXANDER, THE NEW JIM CROW (2010); Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697 (2017); Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157 (2013).

9. Kassin, *Confession Evidence*, *supra* note 1, at 221 ("In criminal law, confession evidence is a prosecutor's most potent weapon—so potent that, in the words of one legal scholar, 'the introduction of a confession makes the other aspects of a trial in court superfluous.'" (quoting CHARLES TILFORD MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972)).

10. Kassin, *Innocence*, *supra* note 2, at 434.

11. *Id.* at 433.

12. *Id.* at 434 (citing Allison D. Redlich et al., *Perceptions of Children During a Police Interview: A Comparison of Alleged Victims and Suspects*, 38 J. APPLIED SOC. PSYCHOL. 705 (2008); Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the Harmless Error Rule*, 21 LAW & HUM. BEHAV. 27 (1997); Saul M. Kassin & Lawrence S. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133 (1980)).

13. *Id.* (citing Linda A. Henkel, *Jurors' Reactions to Recanted Confessions: Do the Defendant's Personal and Dispositional Characteristics Play a Role?*, 14 PSYCHOL. CRIME & L. 565, 565–78 (2008)).

14. *Id.* (citing Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137 (2008)).

15. *Id.*; *see also* Kassin, *Confession Evidence*, *supra* note 1, at 229 (observing in a discussion on the ability of juries to discount coerced confessions that the presence of "confessions raised the conviction rate more than do eyewitness identi-

conviction, regardless of how scant the other evidence is against the defendant or how strong the evidence is in the defendant's favor.[16] As one confession psychologist observed, "confession evidence is so inherently prejudicial that people do not fully discount the information even when it is logically and legally appropriate to do so."[17]

One might assume, given the highly prejudicial nature of confessions at trial, that confession admissibility standards are high and that interrogation practices by law enforcement are subject to strict regulation. However, the judicial system determines admissibility of a confession only through post-interrogation constitutionality standards,[18] and very little is known about police interrogation practices.[19] Legislatures and executive agencies have not provided policing best-practices or regulations.[20] The absence of guidelines leaves policing practices, such as interrogations, outside the scope of democratic governance.[21] No one outside the police department typically reviews police policies and actions regarding interrogations until a defendant challenges the admissibility of a confession, which prompts a constitutionality review in court.[22] Under a constitutionality analysis, judicial review of police practices is more concerned with police misconduct than the reliability of any evidence proffered—or actually finding the truth.[23]

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fications and character testimony—two other common and potent forms of evidence").

16. Kassin, *Innocence*, *supra* note 2, at 436.

17. Kassin, *Confession Evidence*, *supra* note 1, at 229.

18. In pertinent part, the Fifth Amendment to the United States Constitution states, "[No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. *See also* Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court recognized the long-held legal standard that confessions must be made "voluntarily" and only if constitutional rights are made known and the suspect makes an informed waiver of those rights. *See infra* Part II.A.

19. A handful of police departments, such as the Chicago, Seattle, and Los Angeles police agencies, have published policing manuals. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1848 n.95 (2015).

20. *Id.* at 1843.

21. *See generally id.* (examining the lack of democratic process in regulating policing practices in the United States).

22. *Id.* at 1847, 1865; Mark Berger, *The Exclusionary Rule and Confession Evidence: Some Perspectives on Evolving Practices and Policies in the United States and England and Wales*, 20 ANGLO-AM. L. REV. 63, 79 (1991) [hereinafter Berger, *Exclusionary Rule*]; Friedman & Ponomarenko, *supra* note 19, at 1865.

23. *See* Mapp v. Ohio, 367 U.S. 643, 680 (1961) (reasoning that the explicit purpose of the evidence exclusionary rule is deterring police misconduct); *see also* United States v. Leon, 468 U.S. 897, 906 (1984) (citing United States v. Calandra, 414 U.S. 338, 360 (1974)) (reasoning that exclusionary rules are a "'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect'"); Lego v. Twomey, 404 U.S. 477, 489 (1972) (refusing to raise the

In the event that the prosecution offers an involuntarily given confession at trial, judges face a difficult dilemma. They may choose to either refuse the confession's admission, thus depriving the jury of potentially highly probative information, or admit it and possibly condone police misconduct.[24]

The United States is not the only country that must overcome problems associated with confession admissibility. Through reforms made by Parliament over the last half-century, Britain's system is "generally regarded as meticulous in safeguarding the rights of the accused."[25] Analyzing the British system to inform the American system is proper because both systems are accusatorial[26] and both give the accused a similar right to remain silent.[27] Given that the colonies based the early American system of justice on the British system, comparing how the two systems have developed over time is appropriate and valuable.[28]

As a preliminary matter, it is important to note the differences between the American and British systems of law creation and judicial enforcement. The American judicial system centers on the premise that the Constitution is the highest law of the land, and laws generated by legislatures are always subject to constitutionality review.[29] On the other hand, British courts do not have a constitution

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standard of proof for the voluntariness of confessions to beyond a reasonable doubt, in part because "the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof . . . would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries"); *cf.* Arizona v. Fulminante, 499 U.S. 279, 311 (1991) (explaining why applying the harmless error standard to erroneously admitted confessions does not offend an interest in curbing police misconduct).

24. Berger, *Exclusionary Rule*, *supra* note 22, at 64.

25. Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 7 (1986). *But see id.* at 7 n.19 (acknowledging other scholars in disagreement with this proposition).

26. "[A]n accusatorial process [is one] in which the parties, rather than the judge, have the primary responsibility for marshaling and presenting the evidence, and in which the fact-finder is an all-lay jury." *Id.* at 7.

27. *Id.* There are important differences, however. *See infra* Part II.B.

28. *Cf.* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 314–20 (1998) (discussing early origins of modern confession law). The Supreme Court is known to cite to and compare American criminal justice practices to Great Britain's practices as well. *See* Chambers v. Florida, 309 U.S. 227, 240 n.15 (1940).

29. Gibbons v. Ogden, 22 U.S. 1 (1824). The Supreme Court entertained and ultimately rejected the argument that a law governing steam boat licensing in New York, which conflicted with a law passed by Congress, was nonetheless valid for the state of New York. *Id.* at 189–92. The Court reasoned that there are no words in the Constitution limiting Congress's authority "to make all laws which shall be

to interpret as the country's highest order of law.[30] Britain operates under a parliamentary system where Parliament legislates with sovereignty and the courts must follow that legislation.[31]

This section offers an examination of the American and British confession admissibility standards. First, the section presents a historical review of the United States' confession admissibility standards set by the Supreme Court. Next, the section discusses the British model of statutory confession admissibility standards embedded in larger sets of Codes of Practice regulating police conduct.

A. The American Legal Standard for the Admissibility of Confessions

The evolution of confession admissibility in America has been complicated and slow.[32] At colonial inception, the British Crown bestowed judicial power in America on governors of colonies.[33] The Crown quickly left the colonies to their own devices to construct a system of justice.[34] The colonists had few other examples and thus modeled their courts after the British court system.[35] Procedures in both England and colonial America required questioning of the accused before trial,[36] and confessions were admissible regardless of how the state obtained them.[37] The first British[38]

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necessary and proper" in the execution of their enumerated powers. *Id.* at 188. Adopting the principle that the framers used words in the construction of the Constitution intentionally, the Court held that the powers expressly conferred to Congress by the Constitution have supremacy over state legislation conflicting with those powers. *Id.* at 189–92.

30. Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243, 246 (2000) [hereinafter Berger, *Reforming Confession Law*].

31. *Id.*

32. Penney, *supra* note 28, at 310.

33. Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 253 (1967).

34. *Id.* For example, Governor Thomas Olive of West Jersey "was in the habit of dispensing justice sitting on a stump in his meadow." *Id.* at 258.

35. *Id.* at 254. Although the courts were modeled after the British system, historians have exposed that colonial courts left much to be desired and often failed at rendering justice in a meaningful way. *Id.* at 255. Complaints about the inadequacy of the court system were rampant, and around the year 1700, several colonies sent requests to the British government for chief justices to be sent from England; however, it appears the Crown never took these ideas seriously. *Id.* at 259–60.

36. Penney, *supra* note 28, at 318.

37. *Id.* at 320.

38. The first American Supreme Court decision addressing confession admissibility did not occur until over 120 years later. *See* Bram v. United States, 168 U.S. 532 (1897).

cases addressing confession admissibility are *King v. Rudd*[39] and *King v. Warickshall*.[40] In *Rudd*, the court observed that when the accused gives a confession after threats or promises, "such examinations and confessions have not been made use of against them on their trial."[41] Eight years later, the *Warickshall* court affirmed *Rudd* into solidified law:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not [e]ntitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[42]

The *Warickshall* court was the first court to clearly reject a confession's admission based on how the government obtained it.[43] *Warickshall* is the foundation upon which American jurisprudence built the voluntariness standard of confession admissibility.[44]

*1. Confession Admissibility Pre-*Miranda*: Voluntariness Standard*

Police forces had little power and virtually no responsibility for gathering evidence against the accused until the mid- to late-1800s.[45] Instead of police, a justice of the peace interrogated the accused, and whatever the accused said to the justice of the peace was admissible against the accused.[46] The Framers of the United States Constitution did not believe adding the Fifth Amendment to the Constitution would create tension between the Bill of Rights and the criminal procedure that was in place.[47] Nothing required

39. King v. Rudd (1775) 168 Eng. Rep. 160; 1 Leach 115; *see* Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J.L. REFORM 1, 8 (1990) [hereinafter Berger, *Legislating Confession Law*] (identifying *Rudd* and *Warickshall* as the first English cases that address confession admissibility).

40. King v. Warickshall (1783) 168 Eng. Rep. 234; 1 Leach 262. However, the rule espoused in *Warickshall* and *Rudd* did not appear in a vacuum; the idea of voluntariness has origins dating as far back as Medieval romano-canon and civil law. Penney, *supra* note 28, at 320 n.58.

41. *Rudd*, 168 Eng. Rep. at 161.

42. *Warickshall*, 168 Eng. Rep. at 234–35 (footnote omitted).

43. Penney, *supra* note 28, at 321.

44. Berger, *Legislating Confession Law*, *supra* note 39, at 8.

45. Penney, *supra* note 28, at 322.

46. *Id.* at 318.

47. *Id.* at 319.

interrogators at the time to inform defendants of any rights they had, nor were there any limitations on confession admissibility at trial.[48] Rather, the prevailing understanding of the privilege against self-incrimination was that it prohibited a tyrannical government from using a confession in court obtained through torture or other coercive interrogation practices involving threats and promises.[49]

As defense attorneys became more common in the criminal process in the 1800s, they began asserting the right to silence for their clients that the accused may assert today.[50] Around the same time, American cities were following the example of a London magistrate who employed a group of police officers to act as guards and assist in investigations.[51] As defendants began asserting a right to remain silent in court, police forces began obtaining confessions as part of their investigations.[52] Courts entered uncharted legal territory when defendants challenged the admissibility of confessions obtained by police.[53]

a. Voluntariness: The Confession's Evidentiary Reliability

The first Supreme Court decision in America that held a confession obtained by police inadmissible through the Fifth Amendment right against self-incrimination was *Bram v. United States*.[54] The Court in *Bram* relied on the circumstances around the confession to determine its voluntariness, reasoning that an admissible confession cannot be "'obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'"[55] While the *Bram* Court did not provide a definition for "improper influence," the majority opinion introduced a two-factor test for voluntariness: (1) whether the accused may have feared the consequences of remaining silent, and (2) whether the atmosphere of the questioning was coercive.[56]

In *Harrold v. Oklahoma*,[57] the Eighth Circuit stipulated that confessions of guilt or facts lending to guilt obtained through compulsion, promise, or other inducement are "incompetent evidence

48. *Id.* at 318.
49. *Id.* at 319.
50. *Id.*
51. *Id.* at 323.
52. *Id.* at 322.
53. *Id.* at 324.
54. Bram v. United States, 168 U.S. 532 (1897).
55. *Id.* at 542–43 (quoting 3 RUSSEL ON CRIMES 478 (6th ed. 1850).
56. Penney, *supra* note 28, at 328.
57. Harrold v. Oklahoma, 169 F. 47 (8th Cir. 1909).

against [the defendant] because it is not worthy of belief,"[58] and that "no one person 'shall be compelled in any criminal case to be a witness against himself.'"[59] The court reasoned that confessions obtained through "promises of favor or threats of injury, are excluded as incompetent . . . not because any wrong is done to the accused in using them," but because the statements may not actually be true and do not have a "legitimate tendency to prove the facts admitted."[60] Enforcing a rule excluding involuntary confessions was "in the interest of safe and reliable evidence," not because the method in which the police obtained the confession was unconstitutional.[61] The court stated that the improperly acquired confession was incompetent evidence, so admitting the confession as impeachment was a violation of evidence laws and contravened the very purpose of evidence rules.[62]

In *Ziang Sung Wan v. United States*,[63] the Supreme Court found a confession inadmissible because the circumstances of the confession rendered it involuntary and unreliable.[64] The defendant in *Wan*, a 24- or 25-year-old Chinese immigrant, was bedridden with the Spanish influenza when the police took him for questioning about the death of three other Chinese immigrants.[65] After 12 days of incessant questioning without counsel or communication with anyone other than police and detectives, a very ill and emaciated Wan signed a confession that the court allowed the state to

58. *Id.* at 48 (citing 1 WIGMORE ON EVIDENCE § 822 (1st ed. 1904)).

59. *Id.* (quoting U.S. CONST. amend. V).

60. *Id.* at 49 (quoting Commonwealth v. Morey, 67 Mass. (1 Gray) 461, 463 (Mass. 1854)).

61. *Id.* (quoting State v. Novak, 79 N.W. 465, 469 (Iowa 1899)).

62. *Id.* at 51 ("Involuntary confessions of accused persons are inadmissible to impeach them as witnesses on the same ground that hearsay and all other incompetent evidence is inadmissible to impeach other witnesses, because they are unworthy of belief.").

63. Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

64. *Id.* at 14–15, 17.

65. *Id.* at 9–10. When the police officers requested that Wan come with them for questioning, Wan told them that he was too ill. *Id.* Once Wan learned that he and his friend were suspected of murder, he agreed to go with the police. *Id.*

enter against him at trial.[66] Wan was sentenced to death by hanging.[67]

In reaching its decision to overturn Wan's conviction, the Court relied heavily on the jail's chief medical examiner's testimony.[68] The chief medical examiner, who examined Wan on Wan's 13th day of detainment, testified that Wan was in such a state at the time that someone in his condition would have likely done "anything to have the torture stopped."[69] The Supreme Court, unlike the lower courts, did not find such circumstances around a confession sufficient to ensure that the confession was voluntary and reliable.[70] *Wan* solidified the suggestion in *Bram* that "circumstances of detention and interrogation can in themselves create an atmosphere of compulsion, even in the absence of a specific inducement to confess."[71]

b. Transitioning to Judicial Concern Over Police Misconduct

Forty years after *Bram*, the Supreme Court confronted confessions obtained through physical torture in *Brown v. Mississippi*.[72] There was no dispute concerning the violent and racially charged facts[73] surrounding the confessions.[74] An angry mob of white men and police beat, repeatedly noosed, and whipped the three black defendants until the defendants confessed to the exact details that

66. *Id.* at 10–13. The facts of Wan's detention and interrogation were undisputed and based on the testimony of the police and chief medical examiner of the jail. *Id.* at 9. The police held Wan incommunicado for the 12 days of questioning without formal arrest; moreover, a police officer or detective always accompanied him and "subjected [Wan] to persistent, lengthy and repeated cross-examination." *Id.* at 11. In the evening of the eighth day, Wan was taken to the location of the murders and "continuously for ten hours, this sick man was led from floor to floor minutely to examine and reexamine the scene of the triple murder and every object connected with it, to give explanations, and to answer questions." *Id.*

67. *Id.* at 9.

68. *See id.* at 13–14.

69. *Id.* at 14.

70. *Id.*

71. Penney, *supra* note 28, at 329.

72. Brown v. Mississippi, 297 U.S. 278 (1936).

73. The three defendants, whom the lower court characterized as "ignorant negroes," were accused of murdering a presumably, given the facts, white man. *Id.* at 281. The sheriff took one of the defendants, whose name was Ellington, from his home at night to the home of the victim, where a crowd of white men accused Ellington of murdering the victim. *Id.*

74. *Id.* at 281, 284–85. The deputy even testified in reference to the severity of the whipping he did to Ellington: "'Not too much for a negro; not as much as I would have done if it were left to me.'" *Id.* at 284. No one who testified denied the beatings. *Id.* at 285.

their accusers demanded.[75] The court allowed the confessions into trial as the only evidence against the defendants.[76] Five days later, a jury found all three defendants guilty of murder, the markings of the beatings that extracted the confessions still evident on the defendants' bodies while they sat in court.[77] The Mississippi Supreme Court upheld the convictions.[78]

The undisputed facts of the case clearly indicated that the confessions were inadmissible under *Bram* and *Wan*.[79] However, since *Brown* was a state case, the Court could not rely on federal common law to find the confessions inadmissible.[80] It also could not rely on the Fifth Amendment because the Court at this time had not found the Fourteenth Amendment to apply the Bill of Rights to the states.[81] Instead, the Court held that confessions obtained through physical torture are inadmissible under the Due Process Clause of the Fourteenth Amendment.[82]

Confessions obtained through physical torture are inadmissible because "the due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[83] While the Court did not define or give examples of what state actions "consistent with the fun-

75. *Id.* at 281–82. When Ellington denied responsibility for the murder, the group of white men, with the help of the deputy, tied a noose around his neck, repeatedly hung him from a tree, and tied him to the tree and whipped him as he maintained his innocence. *Id.* at 281. When these tactics failed to provoke the confession they sought, the men allowed Ellington to go home for the night. *Id.* A day or two later, the deputy arrested Ellington at his home and, on the way to the jail, "severely whipped the defendant, declaring that he would continue the whipping until he confessed." *Id.* at 281–82. Ellington finally promised to confess to whatever the deputy wanted and made the confession official once they arrived at the jail. *Brown*, 297 U.S. at 282.

The same deputy arrested the other two defendants, Brown and Shields, and brought them to the same jail that housed Ellington. *Id.* A mob consisting of the deputy, another officer, the jailer, and other white men came to the jail and forced Brown and Shields to strip and lay over chairs. *Id.* The mob of white men then "cut [Brown and Shields' backs] to pieces with a leather strap with buckles on it," and informed the prisoners that the beatings would not stop until they "confessed in every matter of detail as demanded by those present." *Id.* The beatings continued and repeated until Brown and Shields adjusted their confessions to match the demands of the mob. *Id.*

76. *Id.* at 284.

77. *Id.* at 284.

78. *Id.* at 280.

79. Penney, *supra* note 28, at 333.

80. *Id.*

81. *Id.*

82. *Brown*, 297 U.S. at 286.

83. *Id.* (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

damental principles of liberty and justice"[84] are, the *Brown* decision marks a shift away from an interest in a confession's reliability towards a concern with the process of obtaining confessions.[85]

Four years after *Brown*, the Supreme Court took up *Chambers v. Florida*.[86] Following the robbery and murder of an elderly white man, the police arrested, without warrant, and jailed some 25 to 40 black men.[87] Among those arrested and questioned were the four black men who appealed the state's use of their confessions to convict them.[88] At the end of a week of questioning, the police questioned the defendants again from afternoon until sunrise, and the men finally confessed to facts satisfactory to the state attorney.[89] The Court recounted a significant amount of facts and testimony to show that the circumstances surrounding the confessions may not have included physical coercion, but had psychological elements of coercion.[90]

The Supreme Court refused to approve of the psychological coercion employed in the *Chambers* facts, even without the physical brutality that the facts in *Brown* presented.[91] In reaching its decision, the Court could have easily reinforced the importance of evidentiary reliability and truthfulness that the Court emphasized in *Bram* and *Wan*, but the Court instead focused on the constitutionality of police conduct.[92] The Court reasoned that the Framers in-

84. *Id.* The Court did not take the opportunity to define what the "fundamental principles of liberty and justice" are in either *Herbert* or *Brown*. *See generally* Brown v. Mississippi, 297 U.S. 278 (1936); Hebert v. Louisiana, 272 U.S. 312 (1926).

85. Penney, *supra* note 28, at 334 n.134 (citing Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1832 (1987)).

86. Chambers v. Florida, 309 U.S. 227 (1940).

87. *Id.* at 229.

88. *Id.*

89. *Id.* at 235.

90. *See id.* at 229–35 n.7. Each man was questioned individually "surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community." *Id.* at 231. One of the officers testified to having "'broke'" the defendants when referring to finally obtaining the satisfactory confessions, suggesting a level of coercion. *Id.* at 231–32. Further, "from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody[,] and control of those whose persistent pressure brought about the sunrise confessions." *Id.* at 235.

91. *Id.* at 239 ("Just as our decision in *Brown v. Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'The undisputed facts showed that compulsion was applied.'" (quoting Ziang Sung Wan v. United States, 266 U.S. 1, 16 (1924))).

92. Penney, *supra* note 28, at 337.

tended the Due Process Clause of the Fourteenth Amendment "to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."[93] The Court found that "[t]o permit human lives to be forfeited upon confessions [which are] obtained [through coercion] would make of the constitutional requirement of due process of law a meaningless symbol."[94] The Court made no mention of whether the confessions were reliable, but focused its attention on the conduct of interrogating police officers.[95]

Around 20 years later in *Payne v. Arkansas*[96] and *Blackburn v. Alabama*,[97] the Supreme Court reversed the respective defendants' convictions after finding that the police psychologically coerced the confessions admitted at trial.[98] Both opinions are rife with language condemning the use of psychologically coerced confessions to obtain convictions.[99] In *Blackburn*, the Court stated that "coercion can be mental as well as physical, and that the blood of the accused

93. *Chambers*, 309 U.S. at 236.

94. *Id.* at 240.

95. *See id.* at 240 (rejecting "the argument that law enforcement methods such as those under review are necessary to uphold our laws"); *see also id.* at 240 n.15 (observing that "police practices here examined are to some degree widespread throughout our country").

96. Payne v. Arkansas, 356 U.S. 560 (1958).

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

98. *Payne*, 356 U.S. at 568; *Blackburn*, 361 U.S. at 211. In *Payne*, the interrogating officer said that he would not protect the defendant, whom the court termed "a 19-year-old Negro with a fifth-grade education" who was "mentally dull and 'slow to learn,'" from an angry mob if the defendant refused to confess. *Payne*, 356 U.S. at 562, 562 n.4. In *Blackburn*, the defendant, Jesse Blackburn, was "a 24-year-old Negro, [who] had suffered a lengthy siege of mental illness." *Blackburn*, 361 U.S. at 200. Before confessing, Blackburn was interrogated in a closely confined room by as many as three officers at a time for eight or nine hours. *Id.* at 204.

99. *See, e.g.*, *Payne*, 356 U.S. at 561 ("The use in a state criminal trial of a defendants confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."); *Blackburn*, 361 U.S. at 206–07 ("[I]n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."). In *Payne*, the Court stated:

> It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice,' and that its use before the jury, over petitioner's objection, deprived him of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

Payne, 356 U.S. at 567 (quoting Watts v. Indiana, 338 U.S. 49, 53 (1949); Lisenba v. California, 314 U.S. 219, 237, 240 (1941)) (citations omitted).

is not the only hallmark of an unconstitutional inquisition."[100] In *Payne*, the Court recognized that whether "petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for 'there is torture of mind as well as body; the will is as much affected by fear as by force.'"[101] The Court added in *Blackburn* that "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'"[102] Significantly, however, the Court made no mention in either *Payne* or *Blackburn* about the importance of truthful and factual evidence.[103] Instead, the focus centered on police behavior.[104]

Both *Payne* and *Blackburn* require, under the Fourteenth Amendment, reversal of convictions where the state used a psychologically coerced confession to obtain the conviction—regardless of how overwhelming the rest of the evidence against the accused.[105] The Court explained in *Payne* that "[t]he use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."[106] The Court's refusal to permit a conviction to stand even if there is enough evidence to otherwise convict further supports the observation that the Court became preoccupied with police conduct over confession reliability.[107]

To summarize, the evolution of confession admissibility before the seminal case *Miranda v. Arizona*[108] culminated in whether the

100. *Blackburn*, 361 U.S. at 206.

101. *Payne*, 356 U.S. at 566 (quoting Watts v. Indiana, 338 U.S. 49, 52–53 (1949)).

102. *Blackburn*, 361 U.S. at 206.

103. *See generally* Blackburn v. Alabama, 361 U.S. 199 (1960); Payne v. Arkansas, 356 U.S. 560 (1958).

104. *Payne*, 356 U.S. at 567 ("It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice' . . . ."); *Blackburn*, 361 U.S. at 206–07 ("Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.").

105. *Blackburn*, 361 U.S. at 206 ("[W]e have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession.") (citing Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948)).

106. *Payne*, 356 U.S. at 561.

107. Penney, *supra* note 28, at 341–46; *see also* Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

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

accused voluntarily gave the confession.[109] A confession could not have been voluntary if the state coerced, either physically[110] or psychologically,[111] the accused into giving the confession. Whether the confession was involuntary because of either physical or psychological coercion requires the presiding court[112] to base its determination on the totality of the circumstances surrounding the confession.[113] The Supreme Court required the exclusion of coerced confessions from trial and the reversal of convictions based in whole or in part on involuntary confessions.[114] However, criticism of the voluntariness standard as "vague, contradictory, and politically malleable" grew over time.[115]

2. *The New American Standard: Confession Admissibility and* Miranda

The Supreme Court again took up the issue of confession admissibility in the landmark case *Miranda v. Arizona*.[116] The Court, focused still on police conduct, took the opportunity to provide an in-depth analysis of the available knowledge about police interrogation practices.[117] At the outset of the examination of the police practices, the Court recognized that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[118]

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109. Ziang Sung Wan v. United States, 266 U.S. 1 (1924); Bram v. United States, 168 U.S. 532 (1897).

110. Brown v. Mississippi, 297 U.S. 278 (1936).

111. Blackburn v. Alabama, 361 U.S. 199 (1960); *Payne*, 356 U.S. 560.

112. Jackson v. Denno, 378 U.S. 368 (1964). In *Jackson*, the Court held that New York's procedure for determining whether the police coerced a confession was unconstitutional. *Id.* at 391. The New York rule required that the presiding judge make a preliminary determination as to whether "in no circumstances could the confession be deemed voluntary." *Id.* at 377. If there was any uncertainty of the confession's voluntariness, the law required the judge to let the jury make a determination as to its voluntariness as part of the jury's ultimate determination of guilt or innocence. *Id.* The Court found this practice to be a violation of the accused's Fourteenth Amendment due process rights, because when the jury determines whether the confession was coerced, the accused is denied "a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Id.* at 391.

113. Haynes v. Washington, 373 U.S. 503 (1963).

114. *Jackson*, 378 U.S. at 376.

115. Penney, *supra* note 28, at 361.

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

117. *See id.* at 448–65.

118. *Id.* at 448.

The Court, relying heavily on interrogation manuals,[119] paints the picture of what we expect most modern interrogations to look like.[120] The interrogators separate the accused from family or anyone familiar so that the interrogators can have as much advantage over the suspect as possible.[121] The interrogating police officers employ tactics "designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty."[122] The police are even encouraged to "resort to deceptive stratagems," such as giving false legal advice.[123] Additionally, the police can fabricate evidence alleged against the accused, such as an eyewitness or DNA evidence that would put the accused at the scene of the crime.[124] The manuals even provided police with strategies to overcome a suspect asserting a right to remain silent or right to counsel, suggesting that the officers play the part of a concerned friend who simply wants to help the suspect before anything is official.[125]

Against the backdrop described in the interrogation manuals, the Court asserted that these techniques carry their "own badge of intimidation . . . . not physical intimidation, but it is equally destructive of human dignity."[126] With no available remedy outside the Constitution and case precedent,[127] the Court moves into a discussion of what an acceptable confession looks like under available

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119. CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (Thomas Springfield, III., ed. 1956); FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (Williams & Wilkin, Co. 1962).

120. *Miranda*, 384 U.S. at 449–55. *But see Miranda*, 384 U.S. at 499 (Clark, J., dissenting) ("The materials [the majority] refers to as 'police manuals' are . . . merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection.").

121. *Miranda*, 384 U.S. at 450.

122. *Id.*

123. *Id.* at 455.

124. *Id.* at 453.

125. *Id.* at 453–55 (citing O'HARA and INBAU & REID, *supra* note 119). Since the *Miranda* decision came down, these manuals published new editions to comply with *Miranda*. *See, e.g.*, CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (7th ed. 2003); FRED. E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS (5th ed. 2013).

126. *Miranda*, 384 U.S. at 457.

127. *See id.* at 459. The Court reasoned, immediately after the multipage discussion of the police interrogation practices, that

> [t]hose who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."

Id. (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

law.[128] Amidst a review of the Self-Incrimination Clause of the Fifth Amendment and the voluntariness standard,[129] as well as some of the practices in other countries,[130] the Court held that certain information must be given to individuals in police custody, or "otherwise deprived of [their] freedom by the authorities in any significant way,"[131] before the state may use anything they say against them in court.[132]

The information that police must give to a suspect before questioning is what people today refer to as a person's "Miranda Rights." Under *Miranda*, the police must inform the suspect that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning."[133] The accused may waive these rights, but the prosecution bears the burden of proving that the accused made "a knowing and intelligent waiver" of these rights.[134] Otherwise, the state cannot use any statement made as a result of interrogation against him.[135]

The dissenting justices in *Miranda* had significant concerns about the impact that the majority holding would have on law enforcement.[136] The dissenters argued that the new warnings required by the court would all but kill police ability to conduct investigations.[137] They advocated for maintenance of the standard requiring "continuing re-evaluation on the facts of each case of *how much* pressure on the suspect was permissible."[138]

*3. Confession Admissibility Post-*Miranda

The "Miranda warning" was the Court's attempt at simplifying the voluntariness standard. Miranda warnings replaced the volun-

128. *See generally id.* (citing extensive case law interpreting the Constitution).
129. *Miranda*, 384 U.S. at 461–67.
130. *Id.* at 478–90. Significantly, one of the countries that the Supreme Court analyzes in its discussion of confession admissibility internationally is England. *Id.* at 487.
131. *Id.* at 478. What exactly constitutes "in police custody," while interesting, is beyond the scope of this Comment. For opinions regarding what constitutes "in custody," see Yarborough v. Alvarado, 541 U.S. 652 (2004); Berkemer v. McCarty, 468 U.S. 420 (1984); Rhode Island v. Innis, 446 U.S. 291 (1980); Beckwith v. United States, 425 U.S. 341 (1976).
132. *Miranda*, 384 U.S. at 479.
133. *Id.*
134. *Id.* at 498–99.
135. *Id.* at 479.
136. *Id.* at 500–45 (dissenting opinions).
137. *Id.* at 500 (Clark, J., dissenting).
138. *Id.* at 507 (Harlan, J., dissenting).

tariness standard with a bright-line guide for police practices and for courts to determine admissibility.[139] Unfortunately, the new requirement that the suspect make a "knowing and intelligent" waiver of their constitutional rights proved to be just as amorphous as the voluntariness standard.[140] Supreme Court decisions following *Miranda* do not meet the powerful and demanding spirit of *Miranda*.[141] Instead, subsequent Supreme Court decisions on confession admissibility apply rules that are a combination of requisite warnings, waivers, and voluntariness, as shown by a totality of the circumstances.[142]

a. The First Step Away: Partial Right Notifications and Voluntariness by a Preponderance of the Evidence

Frazier v. Cupp[143] was one of the first Supreme Court confession admissibility decisions after *Miranda.*[144] The Supreme Court found in *Frazier* that a partial notification of the suspect's constitutional rights was adequate if the police questioning that led to a confession was brief.[145] As shown in the approximately one hour and forty-five minute tape-recorded interrogation, the petitioner was questioned for a time before he was given "a somewhat abbreviated description of his constitutional rights."[146] The police informed him that he could have an attorney and that anything he said could be used against him at trial.[147] Once the police gave him that partial notification of his rights, the questioning became a little more intense.[148] The police told the petitioner that someone the petitioner said he had been with had already confessed to the crime—a statement that was not true.[149] Once the police lied and

139. Penney, *supra* note 28, at 366.

140. *Id.*

141. *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 10–23 (2015) (discussing pre-*Miranda*, *Miranda*, and post-*Miranda*).

142. *Id.* at 22. *But see* Berger, *Reforming Confession Law*, *supra* note 30, at 245 (suggesting "the core of the Fifth Amendment jurisprudence has remained largely intact" since *Miranda*).

143. Frazier v. Cupp, 394 U.S. 731 (1969).

144. The first relevant case decided after *Miranda* was *Johnson v. New Jersey*, 384 U.S. 719 (1966). In *Johnson*, the Court held that both *Escobedo* and *Miranda* were applicable only to cases with trials that began after each of those decisions were made. *Johnson*, 384 U.S. at 721.

145. *Frazier*, 394 U.S. at 739. The police arrested the petitioner at about 4:15 PM, took him to headquarters, and questioned him from about 5:00 PM until he signed a confession at about 6:45 PM. *Id.* at 737.

146. *Id.* at 737.

147. *Id.*

148. *Id.*

149. *Id.*

gave suggestions to the defendant about the crime, the defendant spilled out a story about the crime and requested an attorney.[150] The police, however, stopped the questioning and responded, "you can't be in any more trouble than you are in now," before obtaining the full written confession.[151]

The petitioner argued that the court should not have admitted his confession because it was involuntary.[152] In addressing the claim that the confession was involuntary, the *Frazier* Court revived the pre-*Miranda* "totality of the circumstances" standard to determine voluntariness.[153] The Court reasoned that since "he received partial warnings of his constitutional rights" and the duration of questioning before the confession was short, the confession the petitioner gave must have been voluntary.[154] The Court permitted the confession's admission, notwithstanding the recognition that the police intentionally lied to him about evidence it did not have in its possession—namely that the person who the petitioner said he had been with at the time of the crime had already confessed.[155]

Even though *Miranda*'s confession admissibility standards did not apply to this petitioner's trial because his trial took place before the *Miranda* decision,[156] *Frazier* served to weaken the strong expectations rendered in *Miranda*. While the Court attempts to make clear that the *Frazier* decision falls under the "totality of the circumstances" voluntariness rule that existed before *Miranda*,[157] the language from *Miranda* creeps into the *Frazier* holding.[158] For example, the *Frazier* Court reasoned that the defendant "was told that he could have an attorney if he wanted one and that anything he said could be used against him at trial. . . . [Thus,] he received

150. *Id.* at 738.

151. *Id.*

152. *Id.* The petitioner in *Frazier* also argued that his confession was inadmissible under *Escobedo* and *Miranda*; however, since the Court reasoned that *Escobedo* did not apply to his facts and that *Miranda* was decided after the date of his trial, this argument failed. *Id.*; *see also supra*, note 144.

153. *Frazier*, 394 U.S. at 739.

154. *Id.*

155. *Id.* ("The fact that the police misrepresented the statements that [the codefendant] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible.").

156. *Id.* at 738; *see also* Johnson v. New Jersey, 384 U.S. 719 (1966) (holding that states could apply *Miranda* to cases tried before the *Miranda* decision if they wanted to, but they were not required to do so).

157. *Frazier*, 394 U.S. at 739.

158. *Compare Miranda*, 384 U.S. at 479 (detailing the warnings police must give to the accused before questioning), *with Frazier*, 394 U.S. at 739 ("Before petitioner made any incriminating statements, he received partial warnings of his constitutional rights; this of course, a circumstance quite relevant to a finding of voluntariness.").

partial warnings of his constitutional rights."[159] That reasoning is remarkably similar to the requirement generated in *Miranda* that the defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, [and] that he has the right to the presence of an attorney."[160] The muddied conflation of the totality of the circumstances standard with the Miranda warnings weakened *Miranda*'s potential power to protect the accused.

The Supreme Court continued to chip away at the protections afforded to the accused when it held in *Lego v. Twomey*[161] that "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary."[162] In *Lego*, the petitioner argued that his confession was involuntary because the police beat him in the head and neck with the butt of a gun during the interrogation.[163] The trial court admitted his confession despite a photo he presented of the injuries.[164] Relying on the principles and reasoning in landmark cases like *Jackson v. Denno*,[165] *Brown v. Mississippi*,[166] and *Miranda*, the petitioner argued that the prosecution must prove the voluntariness of a confession beyond a reasonable doubt.[167] The arguments left the majority unpersuaded, and the Court reasoned, "we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt."[168]

b. Where's *Miranda* Now? The Supreme Court Finds Coerced Confessions Can Be Harmless

Arguably, the Supreme Court took the largest step away from the spirit of *Miranda* by its decision in *Arizona v. Fulminante*.[169] A severely divided court[170] found that an erroneous admission of an

159. *Frazier*, 394 U.S. at 737, 739.
160. *Miranda*, 384 U.S. at 479.
161. Lego v. Twomey, 404 U.S. 477 (1972).
162. *Id.* at 489.
163. *Id.* at 480.
164. *Id.* The trial court reasoned that the defendant obtained the injuries in the photo from a scuffle involved in carrying out the robbery at issue. *Id.*
165. *See* Jackson v. Denno, 378 U.S. 368 (1964); *see also supra* note 112.
166. *See* Brown v. Mississippi, 297 U.S. 278 (1936).
167. *Lego*, 404 U.S. at 487–88.
168. *Id.* at 488. *But see id.* at 490 (Brennan, J., dissenting).
169. Arizona v. Fulminante, 499 U.S. 279 (1991).
170. Justice White wrote for the five-four majority in Parts I, II, and IV of his opinion, and Chief Justice Rehnquist wrote for the five-four majority in Part II of his opinion. *Id.* Each of the Parts has a different combination of justices joining

involuntary confession does not automatically overturn a conviction; instead, the violation of the constitutional protection is merely subject to a harmless-error analysis.[171] The Court characterized admission of a coerced confession as a "classic 'trial error,'" which it determined is not a constitutional violation that amounts to the right to a new trial.[172] Subjecting the admission of a coerced confession at trial to a harmless-error analysis means that the appellate court "simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."[173] In other words, if the reviewing court finds that the state could have obtained the conviction without the confession, considering all other evidence admitted at trial, the conviction is constitutional.

In *Fulminante*, the Court not only violated the sanctity of protecting against involuntarily given confessions embedded in *Miranda*,[174] but it demonstrated a complete about-face on its abhorrence of unconstitutional police conduct that characterized *Chambers*[175] and *Blackburn*.[176] The *Blackburn* Court, for example, cited several decisions supporting its statement that "we have rejected the argument that introduction of an involuntary confession is immaterial where other evidence establishes guilt or corroborates the confession."[177] The *Fulminante* decision is a full-throated rejection of the idea that admission of a police-coerced confession—regardless of whether physically or psychologically coerced—is so vile

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them to provide majority. Contained in each opinion are dissents, and Justice Kennedy filed an additional opinion. *Id.*

171. *Id.* at 310.

172. *Id.* at 309.

173. *Id.* at 310.

174. *See* Penney, *supra* note 28, at 371.

175. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 236–37 (1940). The Court stated:

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal *free of prejudice, passion, excitement, and tyrannical power*. . . . [T]he forfeiture of the lives, liberties[,] or property of people accused of crime *can only follow if procedural safeguards of due process have been obeyed*.

Id. (emphasis added).

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

177. *Id.* at 206 (citing Spano v. New York, 360 U.S. 315, 324 (1959); Payne v. Arkansas, 356 U.S. 560, 567–68 (1958); Watts v. Indiana, 338 U.S. 49, 50 (1949); Haley v. Ohio, 332 U.S. 596, 599 (1948)).

to the rights in our Constitution that it affords the defendant a new trial.[178]

The case law prior and subsequent to *Miranda* leaves confession admissibility in a complicated stratagem of checking for the requisite warning and notification of rights, proof of knowing and intelligent waiver, and voluntariness.[179] Further, concern about a confession's reliability and truthfulness seems to have completely disappeared from the analysis of whether a confession was voluntary or admissible.[180] The evolution of confession law has produced a "voluntariness doctrine [that] remains as hazy and unfocused as ever, . . . almost always arriving at the conclusion that what the police did was, all things considered, acceptable."[181] The case law, as it stands, leaves it unclear if there is any hope that a defendant's coerced confession has any way of staying out of the earshot of the jury.[182]

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178. *Fulminante*, 499 U.S. at 288 (White, J., dissenting). Justice White pointed out the Court's shift, stating,

> The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction."

Id. (citations omitted) (quoting Jackson v. Denno, 378 U.S. 368, 376 (1964)).

179. *See infra* Part II.A.3; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."); Dassey v. Dittmann, 877 F.3d 297, 303 (7th Cir. 2017) ("The Supreme Court's many cases applying the voluntariness test have not distilled the doctrine into a comprehensive set of hard rules, though prohibitions on physical coercion are absolute."), *cert denied*, 86 U.S. 3640 (2018).

180. Primus, *supra* note 141, at 9; Van Kessel, *supra* note 25, at 26.

181. Primus, *supra* note 141, at 3; *see also* Van Kessel, *supra* note 25, at 27 ("[The Supreme Court] has failed to articulate clear and predictable voluntariness standards and often has avoided supervising lower courts in their review of claims that threats or promises were used to procure confessions.").

182. While involuntary and coerced confessions are inadmissible in the prosecution's case-in-chief, the Supreme Court held in *Harris v. New York* that a defendant's coerced confession may be used to impeach him. 401 U.S. 222 (1971). Considering the documentation about a jury's inability to disregard a coerced confession once it has heard the confession, concern exists over whether a jury can differentiate between purposes for which a confession is offered in the courtroom. Kassin, *Innocence*, *supra* note 2, at 434.

B. The British Legal Standard for the Admissibility of Confessions

As noted above, the British and American confession admissibility standards began in the same place.[183] Similar to the American standard of admissibility, the British standard requires that the court find that the accused voluntarily made the confession before the court can allow the prosecution to enter it into evidence.[184] However, after a finding by the 1981 Royal Commission on Criminal Procedure that the "voluntariness" standard was too difficult to manage in practice, Parliament enacted the Police and Criminal Evidence Act of 1984 (PACE).[185] PACE and its accompanying codes have arguably made policing in England more democratic and confessions that make it into court more reliable.[186] But with the legislation has come an evolution of British law that shrinks a constitutional right Americans hold dear: the right to remain silent.[187]

1. The Police and Criminal Evidence Act of 1984 and the Interrogation Code

While the United States has left police interrogation practices and confession admissibility entirely up to police departments themselves and reviewable only under constitutionality standards,[188] the United Kingdom has addressed confession admissibility by codifying police interrogation practices and admission exclusion rules.[189] PACE and the accompanying Codes of Practice began a comprehensive centralization of control over police con-

183. *See, e.g.*, King v. Rudd (1775) 168 Eng. Rep. 160; 1 Leach 115; King v. Warickshall (1783) 168 Eng. Rep. 234; 1 Leach 262 (cited in Bram v. United States, 168 U.S. 532, 547 (1897)); *see also supra* Part II.A. (discussing the beginning of American courts).

184. Van Kessel, *supra* note 25, at 15.

185. *Id.* at 20; *see* Police and Criminal Evidence Act (PACE) 1984, c. 60, (UK).

186. Berger, *Legislating Confession Law*, *supra* note 39, at 78.

187. Berger, *Reforming Confession Law, supra* note 30, at 243 ("The principle that a suspect in a criminal case should not be subjected to compelled self-incrimination is widely accepted."). Additionally, the United Nations International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms support the right against self-incrimination. *Id.* at 244.

188. *See supra* Part II.A.3.b. "Most United States Supreme Court cases suppressing confessions as involuntary have involved rather extreme factual situations such as police brutality, unconscionable trickery, or a particularly vulnerable suspect." Van Kessel, *supra* note 25, at 24–25.

189. Berger, *Legislating Confession Law*, *supra* note 39, at 5.

duct, with Parliament producing additional codes over time.[190] PACE and the accompanying Interrogation Code[191] provide police officers with thorough and detailed instructions on how to conduct questioning and when a confession is admissible in court.[192] Now, the most important differences between the American and the British confession admissibility standards are the mandatory and discretionary exclusion rules and the comprehensive detailed codification of the entire interrogation process.[193]

Under PACE, judges can exclude confessions from court through either mandatory exclusion or discretionary exclusion.[194] The first mandatory exclusion in PACE applies to any statements obtained through "oppression" and to any statements that are likely to be unreliable under the circumstances.[195] Section 76(8) defines "oppression" as including "torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."[196]

Section 76(2)(b) requires the exclusion of confessions that were or "may have been obtained . . . in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof."[197] The language in section 76(2)(b) that excludes any confession considered "unreliable" under the circumstances is arguably broad enough for a barrister to successfully argue for exclusion of a confession obtained in a questionable manner that does not fit into the section 76(8) "oppression" category.[198]

The Interrogation Code provides many of the constitutional interrogation rights established in the United States. The code provides for the right to counsel,[199] right to silence,[200] record of waiver if the accused waives any rights,[201] rest periods in questioning,[202]

190. *See* PACE, c. 60, (UK).

191. Police and Criminal Evidence Act 1984, Code C Revised: Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers (2018) [hereinafter PACE, Code C].

192. Berger, *Legislating Confession Law*, *supra* note 39, at 5.

193. *Id.* at 6.

194. *See* PACE, c. 60, §§ 76(2)(a)–(b), 76(3), 76(8), (UK).

195. *See id.* § 76(2)(a).

196. *Id.* § 76(8).

197. *Id.* § 76(2)(b).

198. *Id.* §§ 76(2)(a)–(b), 76(3), 76(8); *see* Berger, *Legislating Confession Law*, *supra* note 39, at 16.

199. PACE, Code C, § 6 (right to legal advice).

200. *Id.* § 3.2(a)(iv).

201. *Id.* § 6.5.

202. *Id.* § 9.

meals,[203] and others rights.[204] However, the details of how the United Kingdom observes these rights are occasionally different than the United States.

2. The Criminal Justice and Public Order Act of 1994

Up until the 1970s, the United States and Great Britain observed the right to remain silent and the right against self-incrimination similarly.[205] The two systems were similar in practice when protecting the right to remain silent while in police custody and in determining confession admissibility on the voluntariness standard.[206] In 1972, however, a group of researchers proposed changes to British law that protected the right to remain silent without the jury's opportunity to draw adverse inferences from that silence.[207] Parliament refused to act on the report and its suggested changes to evidence law amidst overwhelming public disapproval of the proposal.[208] The British started the conversation about limiting the right to silence, however. The conversation crept into the political forefront in 1987 when the Home Secretary gave a speech to the Police Foundation that questioned whether the good of observing the right outweighed its harm.[209]

In 1988, Parliament enacted legislation exclusively applicable to Northern Irish criminal cases to address ongoing violence in the region.[210] Known as the Criminal Evidence Order, the law permitted finders of fact to draw inferences of guilt from a defendant's silence.[211] The Order sought to address the sense that suspects seemed to be exploiting their right to remain silent, and pointing

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203. *Id.* § 8.6.

204. *See, e.g.*, *id.* § 10(d) (additional rights to children and the mentally disabled); *id.* § 5 (right not to be held incommunicado); *id.* § 9.5 (access to medical attention).

205. Berger, *Reforming Confession Law*, *supra* note 30, at 248. Results in application were certainly not always the same; however, "viewed in perspective, the similarities between American and British self-incrimination doctrine were far more significant than their differences." *Id.* at 249.

206. Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms with an Eye Toward Reforming the American Criminal Justice System*, 44 KAN. L. REV. 929, 930 (1996).

207. Berger, *Reforming Confession Law*, *supra* note 30, at 246, 250.

208. *Id.*

209. *Id.* at 253.

210. *Id.* at 254.

211. *Id.* at 254–66 (discussing the Northern Ireland Order and subsequent British adoption of the Criminal Justice and Public Order Act); *see* Criminal Evidence (Northern Ireland) Order 1988 (UK).

out the silence to the jury seemed an appropriate way to resolve it.[212]

The British subsequently adopted a similar statute after appointing a committee to generate a report on reforming the right to silence.[213] The Criminal Justice and Public Act of 1994 ("Act") extended curtailment of the right to remain silent in Northern Ireland to England and Wales.[214] The Act permitted judges and juries, at the behest of the prosecution, to draw adverse inferences based on a person's choice to remain silent, even to the point of determining guilt or innocence.[215] Factfinders may draw only "proper" inferences,[216] yet no legislative instruction exposes what would be a proper versus improper inference.[217] The Act, by purpose and design, transfers a heavy weight onto the accused to forgo the right to silence.[218] Regardless of whether the accused chooses to answer police questions or testify, the choice is never free of risk.[219]

While the idea might surprise most Americans who hold the right to remain silent nearly and dearly,[220] many British people saw the restriction on the right to remain silent as necessary in a setting that they perceived to strongly disadvantage prosecutors.[221] In the 1970s, there was a growing concern that "experienced criminals" wielded the right to silence, without the risk of an inference of guilt, against police and prosecutors.[222] In this way, the British system

212. Berger, *Reforming Confession Law*, *supra* note 30, at 254. The Order did not permit the accused to be compelled by subpoena to testify and failing to testify was not a criminal act. *Id.* at 255.

213. *See id.* at 257–59.

214. *Id.* at 263. "One of the central objectives of the Act was to ease the burden of proving the defendant's membership in a proscribed terrorist organization." *Id.* at 247 n.21. It is important to note that the United States similarly wrestled with terrorist-defendant rights following the 2001 terrorist attacks, but this issue is beyond the scope of this Comment. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662 (2009).

215. Chase, *supra* note 206, at 930.

216. Berger, *Reforming Confession Law*, *supra* note 30, at 262 n.81. The accused is protected from this curtailment of the right to remain silent only if the accused is under 14 years of age or suffers a physical or mental condition to render the accused "undesirable" to testify. *Id.* at 262. The judge may refuse to allow adverse inferences for "good cause." *Id.*

217. *Id.*

218. *Id.* at 265.

219. *Id.*

220. Chase, *supra* note 206, at 929 ("One of the rights fundamental to the American criminal justice system is the defendant's Fifth Amendment privilege against self-incrimination."); Berger, *Reforming Confession Law*, *supra* note 30, at 243 ("The principle that a suspect in a criminal case should not be subjected to compelled self-incrimination is widely accepted.").

221. Berger, *Reforming Confession Law*, *supra* note 30, at 259.

222. *Id.* at 246 n.18; Chase, *supra* note 206, at 938.

addressed the perception that the right to remain silent and avoid self-incrimination protected the guilty more than the innocent and deprived the factfinder from probative information.[223]

There are some protections built into the rule. For example, the prosecution may only suggest inferences of guilt when the accused exercised their right to remain silent *and* the accused had access to counsel.[224] Counsel may also advise the defendant to remain silent and ask that the court restrict the jury's adverse inferences based on that silence because counsel instructed the defendant as such.[225] However, the judge may inquire why counsel advised silence and deny the request to restrict adverse inferences based on whether counsel divulges his reasoning for silence.[226] The process of advising silence can drive a wedge of distrust between counsel and defendant because such a process could compromise privilege between the counselor and defendant.[227] Occasions where a British court restricts a jury's adverse inferences from a defendant's silence are rare.[228]

III. ANALYSIS

A. The Reality that the Court Is Inadequate at Regulating Confession Law and Police Conduct

As described above, the malleable and police-friendly voluntariness rule governs American law regarding confession admissibility. To meet the voluntariness rule, the prosecution must show that the confession was voluntary only by the totality of the circumstances, by a preponderance of the evidence, subject only to harmless error review.[229] Without legislation,[230] the only way that the courts can have any oversight over police conduct is through after-the-fact constitutionality review.[231] The judicial system has largely failed to protect the accused from coerced confessions at the hands

223. Berger, *Reforming Confession Law*, *supra* note 30, at 253.
224. *Id.* at 264; *see also* PACE, Code C, *supra* note 191, Annex C.
225. Berger, *Reforming Confession Law*, *supra* note 30, at 287.
226. *Id.*
227. *Id.*
228. *Id.* at 288.
229. Primus, *supra* note 141, at 3.
230. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079 (1993) ("[L]egislatures have done little by way of limiting the discretion of police and prosecutors, or requiring the criminal courts to observe procedural safeguards against unjust conviction. By default, the judiciary has become the principal guardian of the rights of the accused.").
231. Friedman & Ponomarenko, *supra* note 19, at 1865.

of police[232] or from prosecutors presenting recanted confessions to the jury.[233]

The first issue unresolved by judicial oversight of confession admissibility is that it has, by all indicators, failed to reign in police misconduct.[234] *Miranda* was a remarkably ambitious decision, with an apparent goal of curbing police misconduct.[235] However, the accused waive their *Miranda* rights more than three-quarters of the time and render "*Miranda*'s formalities . . . no more than a preliminary ritual to the methods the court deplored."[236] Even though confession rates may have dipped following *Miranda*, they recovered to pre-*Miranda* rates quickly.[237] After a long analysis, one scholar succinctly laid out the simple deductive reasoning one must use to arrive at the conclusion that *Miranda* and its progeny have failed to protect the rights of the accused or change police conduct:

> If the police obtained confessions unfairly before *Miranda* and if *Miranda* reduced the frequency of their unfair practices, one would expect a reduction in the number of confessions and probably in the number of convictions. It seems unlikely that suspects who formerly confessed only after being subjected to unfair questioning responded to *Miranda* by providing an equal number of confessions out of the goodness of their hearts.[238]

The second issue unresolved by judicial oversight of confession admissibility is a coerced confession's influence over the jury and the ultimate revelation of truth. The exclusionary rule is largely not working to exclude recanted and potentially coerced confessions.[239] Further, appellate review of whether a confession's entry into the courtroom was appropriate rarely results in a new trial.[240] The Supreme Court's decisions on confession admissibility described

232. Albert W. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 880 (2017).

233. *See supra* note 182.

234. Alschuler, *supra* note 232, at 889–90.

235. *See supra* Part II.A.2.

236. Alschuler, *supra* note 232, at 856.

237. Berger, *Legislating Confession Law*, *supra* note 39, at 1. For an overview of the entertainment and disproval of scholarly literature claiming that *Miranda* significantly negatively impacted police in obtaining confessions, see Alschuler, *supra* note 232, at 881–90.

238. Alschuler, *supra* note 232, at 889–90.

239. Even though the Court stated in *Miranda* that the prosecution had a "heavy burden" in proving adequate waiver of rights, the Court found in *Colorado v. Connelly*, 479 U.S. 157 (1986), that the prosecution must only show waiver by a preponderance of the evidence—a much lower standard than either a "clear and convincing" or "beyond a reasonable doubt" standard. Berger, *Legislating Confession Law*, *supra* note 39, at 1 n.3.

240. *See supra* notes 169–77 and accompanying text.

above show that the prosecution is likely to have the accused's confession admitted at trial in one way or another,[241] highly prejudicing the accused.[242] Once that is done, a court is still unlikely to grant a new trial under the harmless-error doctrine, even if the confession was involuntary.[243]

Miranda and the voluntariness doctrine are exemplary of how the courts are "simply incapable of making the sorts of tradeoffs that are necessary to evaluate the reasonableness of a deterrence-based regime."[244] The current legal structure both does nothing to prevent police misconduct and leaves most victims of police misconduct without remedy,[245] often convicted and incarcerated. The reality is that "[c]onstitutional regulation of police interrogation is in a state of collapse."[246]

B. Ending Police Exceptionalism: A Democratic Process for Police Regulation

While the Supreme Court has moved away from the seminal decision's spirit, *Miranda* seemed to recognize that an after-the-fact constitutionality review of police misconduct may not adequately address the problems that arise in interrogation. The majority in *Miranda* invited the legislative branch to address the issue, stating:

> Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.[247]

Legislators have largely failed to do this.[248] To the contrary, in 1968, Congress attempted to legislate over *Miranda*.[249]

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241. *See supra* note 182 and accompanying text.
242. *See supra* notes 9–17 and accompanying text.
243. Arizona v. Fulminante, 499 U.S. 279 (1991).
244. Friedman & Ponomarenko, *supra* note 19, at 1875.
245. *Id.* at 1865.
246. Primus, *supra* note 141, at 2.
247. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
248. Friedman & Ponomarenko, *supra* note 19, at 1831 ("Compared to the sprawling administrative codes that detail every aspect of agency practice, laws governing the police are notably sparse—if they exist at all.").
249. *See* 18 U.S.C. § 3501(a)–(b) (2018), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000). Subsections (a) and (b) re-enacted the voluntariness standard as demonstrated by the totality of the circumstances as the only requirement for confession admissibility, effectively nullifying the necessity of Miranda warnings. *Id.*

There are many possible reasons why the police continue to be the "distinct outlier" when it comes to government agency regulation.[250] Discussing the many reasons why the police go unregulated is beyond the scope of this Comment,[251] but noting the legislative slumber around police practices is necessary here.

While legislatures have authority to regulate police practices so long as regulations do not infringe on constitutional rights,[252] legislators are loathe to legislate changes to police practices and face criticism for an "easy on crime" stance.[253] Additionally, strong interest groups willing to pay for legislation with votes, volunteer time, or campaign contributions seem to be one of the primary motivations for legislators.[254] In the area of police regulation, one "interest group" consists of the poor, uneducated, and people of color, while the opposing group consists of police and prosecutors.[255] One need not contemplate long to deduce which of those interest groups possesses more political currency—and economic currency.[256] Not only is it much easier for legislatures to do nothing about regulating police, it has historically been in their political and financial interests to resist such regulation.[257] Nonetheless, developing regulations for police conduct is necessary, timely, and congruent with American values.[258]

One way to accomplish the goal of regulating police under democratic review is through a judiciary-led push for legislatures to

250. Friedman & Ponomarenko, *supra* note 19, at 1831 ("Of all the agencies of [the] executive government, those that 'police'—*i.e.*, that engage in surveillance and employ force—are the most threatening to the liberties of the American people. Yet, from the standpoint of democratic governance, they are the least regulated.").

251. For an extensive discussion about why police exceptionalism exists and persists, see Friedman & Ponomarenko, *supra* note 19. *See also* Dripps, *supra* note 230 (identifying and discussing public choice theory as why legislatures don't "give a damn about the rights of the accused").

252. *Miranda*, 384 U.S. at 467; *see also* Berger, *Legislating Confession Law*, *supra* note 39, at 4 n.16.

253. Friedman & Ponomarenko, *supra* note 19, at 1863–64.

254. *Id.* at 1863.

255. *Id.*

256. Dripps, *supra* note 230, at 1089.

257. *Id.* at 1090. Additionally, legislators likely identify more with victims of crime than suspects, so where legislation exists, it naturally favors a "tough on crime" structure. *Id.* at 1089.

258. Friedman & Ponomarenko, *supra* note 19, at 1837 ("Accountability is primal to American democracy."); *id.* at 1843 ("Because the usual requisites of democratic authorization are lacking with policing, we can have little confidence that policing at present is efficacious, cost-effective, or consistent with popular will.").

generate regulations over police.[259] Under this theory, the courts should require proof of authorization when adjudicating challenges to police conduct.[260] Requiring prior authorization in the context of confessions, for example, would mean that the police would have to defend their reasons for and methods of interrogation based on either a court order to do so or a regulatory procedure.[261] If the police are unable to demonstrate authorization for the interrogation, the courts would exclude the communication. Conversely, if police could demonstrate prior authorization for the communication with the accused, the courts would give deference to police.[262] An approach such as this would likely moot the voluntariness doctrine.

Regardless of the method employed to spur legislative action, the United Kingdom's experience with police regulation is a significant resource for the United States.[263] While any American regulation over police would inevitably employ different rules,[264] the British experience demonstrates that a statutory approach to police regulation is possible and effective.[265]

One of the notes America could take from the British model is a focus on clear criminal procedure, as opposed to relying on a post hoc review based on a constitutional floor.[266] PACE and the accompanying Codes, such as Code C on Interrogations, scrutinize and delineate police activity as clearly as possible.[267]

A second note that the United States could take from the British model is the accessibility and transparency of police practices and procedures. PACE and all accompanying Codes of Practice are readily accessible online and easily navigable.[268] The ease of access

259. *Id.* at 1889–1907. Friedman and Ponomarenko suggest this strategy for three main reasons: (1) "Many of the extant statutes that do regulate police are on the books in response to judicial decisions;" (2) judicial focus on procedural failures would permit denial of deference to police actions that do not have sufficient democratic authorization; and (3) existing constitutional doctrines provide room for "courts to motivate democratically accountable policing." *Id.* at 1836.

260. Friedman & Ponomarenko, *supra* note 19, at 1835.

261. *Cf. id.* at 1835 (advocating for courts to exclude confessions if police are unable to provide authority for obtaining a confession).

262. *Cf. id.*

263. Berger, *Legislating Confession Law*, *supra* note 39, at 5.

264. It is unlikely and probably unwise, for example, for Americans to give up their right to be free from negative inferences based on asserting a right to silence. Chase, *supra* note 206, at 944.

265. Berger, *Legislating Confession Law*, *supra* note 39, at 6.

266. *Id.* at 5.

267. *Id.* at 6.

268. *See* Police and Criminal Evidence Act 1984, c. 60, (UK), https://bit.ly/2Fw9T12 [https://perma.cc/C2UG-A4AL].

presumably means a more informed public, who can anticipate what contact with police looks like, or should look like.[269] As policing stands in the United States today, mystery envelopes police practices, and police regularly deny access to their policies, application methods, and corresponding data.[270] Arguably, focusing on, and easing access to, police procedure would generate a measuring stick for lawful police conduct and a more balanced dialogue about how Americans experience policing.

Of course, the United States should not ascribe to the British model identically. There are substantial differences between the countries that would make such an action imprudent. Significantly, parliamentary supremacy is the basis of British law, whereas constitutional supremacy is the basis of American law.[271] As a constitutional issue, policing is traditionally a state function.[272] Thus, unlike Britain, America has the logistical and constitutional issue that police are and historically have been primarily decentralized, small, and local operations.[273] The United Kingdom's parliamentary process means that facilitating regulations in a centralized manner is appropriate.[274] The United States, on the other hand, would need to consider a method permitting the states to develop regulations individually,[275] subject to judicial review for constitutionality.

Additionally, while it seems an elementary statement, it is worth noting that the United States should not blanket adopt the language of the British legislation. Americans should not blindly apply legislation possibly contrary to deeply held values, such as the right to remain silent.[276] Instead, the states should use the British legislation as a framework that raises and addresses policing issues.[277] The United States should regulate police through policies

269. *Cf.* Friedman & Ponomarenko, *supra* note 19, at 1878 (discussing how PACE and Codes of Practice were adopted after significant review and public comment).

270. *Id.* at 1848–49.

271. Berger, *Legislating Confession Law*, *supra* note 39, at 58.

272. Jacobson v. Massachusetts, 197 U.S. 11 (1905); McCulloch v. Maryland, 17 U.S. 316 (1819); Marbury v. Madison, 5 U.S. 137 (1803).

273. Friedman & Ponomarenko, *supra* note 19, at 1886 (noting that the median number of full-time sworn officers in local police departments in America is only eight).

274. Berger, *Legislating Confession Law*, *supra* note 39, at 5.

275. *Cf.* Friedman & Ponomarenko, *supra* note 19, at 1886–89 (describing scaling options for obtaining public comment on proposed regulations).

276. *Cf.* Chase, *supra* note 206, at 944. Professor Chase analyzed whether the United States should permit judges and juries to draw adverse inferences from the accused's invocation of the right to remain silent and found that it should. *Id.* at 949.

277. Berger, *Legislating Confession Law*, *supra* note 39, at 59.

and procedures subject to American public comment and judicial review.[278]

IV. CONCLUSION

Assessing issues of confession admissibility and police misconduct in the larger context of the American criminal justice system exposes how they are contributing pieces to a broken system. Once a crime occurs, police and prosecutors largely prioritize conviction of *someone* over conviction of the *right* someone.[279] The courts themselves show a practice of prioritizing process over integrous convictions.[280]

In *Miranda v. Arizona*, the Supreme Court acknowledged that "the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."[281] Policing issues have been particularly prevalent in recent years.[282] Legal scholars have already mapped how legislatures can make a bipartisan call for police regulation while minimizing concerns of political heavyweights such as police departments.[283] As police and civilian interaction continues to make headlines and draw attention to policing issues, legal professionals should use their positions of leader-

278. Friedman & Ponomarenko, *supra* note 19, at 1858. Even though regulatory agencies are not required to be open to public input, policing methods "unequivocally have huge consequences for people, and thus should, as a normative matter, be subject to . . . public notice and room for public participation." *Id.*

279. *See* Kassin, *Innocence*, *supra* note 2, at 433 (discussing the way police will close off an investigation after a confession, regardless of internal inconsistencies to the confession, and the way prosecutors trust and defend their police investigators and defendant statements over DNA evidence).

280. Van Kessel, *supra* note 25, at 20. Van Kessel concludes:

> Consequently, the sole issue is whether the confession was coerced. An inquiry into whether it was true or false is irrelevant and forbidden: "[T]he judge . . . is . . . duty-bound to ignore implications of reliability in facts relevant to coercion and to shut from his mind any internal evidence of authenticity that a confession itself may bear."

Id. (quoting *Lego v. Twomey*, 404 U.S. 477, 484–85 n.12 (1972)); *see also* Malloy v. Hogan, 378 U.S. 1, 7 (1964); Bram v. United States, 168 U.S. 532, 542–43 (1897).

281. Miranda v. Arizona, 384 U.S. 436, 480 (1966) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

282. Friedman & Ponomarenko, *supra* note 19, at 1832; *see, e.g.*, Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018), https://wapo.st/2QLsTDq [https://perma.cc/C3KM-3RWL]; *Chicago Police Misconduct Settlements Reach $45 Mln in 2018*, DAILY HERALD (July 25, 2018), https://bit.ly/2AbD5KV [https://perma.cc/6HQP-XWZN]; John Eligon, *In St. Louis, Protests Over Police Violence Disrupt Economy, and Win Attention*, N.Y. TIMES (Oct. 20, 2017), https://nyti.ms/2yCxpt9 [https://perma.cc/YYG7-RR5L].

283. Albeit the scholars in this area are few and far between. Friedman & Ponomarenko, *supra* note 19, at 1834 n.31.

ship to shape conversations and action by developing democratic policing regulations.

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