USING THE RULES OF EVIDENCE TO CONTROL CRIMINAL CONFESSIONS

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I. INTRODUCTION

The biggest problem with confessions in criminal law, long seen as "the strongest evidence[ ] of imputed guilt," is that they are so powerful.[1] Confessions persuade police, prosecutors, jurors, and the public.[2] They even persuade courts.[3] The second biggest problem with confessions is that sometimes they are false.[4]

The strength of confessions in judicial and investigative settings can encourage police authorities to push suspects to make statements.[5] It has long been known that a false confession can be coerced from an innocent person.[6]

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1. Commonwealth v. Dillon, 4 Dall. 116, 118 (Pa. 1792). The old European view was that confession was the *regina probationum* (the queen of evidence). *See* James Williams, *Torture*, 27 ENCYCLOPÆDIA BRITANNICA 72, 72–79 (1911). This led to the view that where confession was not voluntary, it had to be extorted. *id.*

2. *See* Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. CRIM. L. & CRIMINOLOGY 71, 88–89 (2019).

3. As Yale Law Professor Edmund Morgan noted a century ago, "Formal judicial admissions dispense with the necessity of evidence. They take the matter out of the domain of proof, so that neither court nor jury need make any finding with respect to them from the evidence." Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 355 (1920–21).

4. *See generally* Destiny Howell, *Guarding Against False Confessions*, 54 AM. CRIM. L. REV. ONLINE 65, 65–66 (2017).

5. *See generally* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 921 (2004).

6. St. Augustine wrote of it in the fifth century. *See* St. Augustine of Hippo, *The City of God*, DOCUMENTA CATHOLICA OMNIA 1159 (May 31, 2006, 8:14 PM), https://www.documentacatholicaomnia

As time has passed, however, the legal system has come to realize that less coercive conduct, perhaps even the mere human frailties of a fully competent suspect, can lead to a false confession.[7]

Judges have worked very hard to control the prosecution's use of statements that have been obtained through undue pressure.[8] They have used their supervisory authority, constitutional provisions that were not intended to cover such matters, and alternative theories to restrict the prosecution's use of statements made by the defendant.[9] This has led to a situation in the American legal system that seems to please no one. Perhaps a different approach would be more successful.

When officers obtain a confession, admission, or other statement that the prosecution later wants to use in its case against the defendant, that statement meets the classic definition of hearsay: an out-of-court statement offered to prove the truth of the matter asserted.[10] Evidentiary issues should be resolved with evidentiary rules, and the hearsay rule should be employed in cases where the prosecution seeks to make substantive use of a criminal defendant's out-of-court statements.[11] This approach would result in fewer instances of false confessions being admitted, less direct involvement of the

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.eu/03d/03540430,_Augustinus,_De_Civitate_Dei_Contra_Paganos,_EN.pdf (noting than an accused but innocent person might "declare[ ] that he has committed the crime which in fact he has not committed."); *see also* Ronald J. Rychlak, *Interrogating Terrorists: From* Miranda *Warnings to "Enhanced Interrogation Techniques,"* 44 SAN DIEGO L. REV. 451, 463 n.64 (2007) (quoting a letter written by Pope St. Nicholas I in 866 that referred to physical abuse to extract a confession as "totally unacceptable under both divine and human law").

Both England and the United States decided early on that "acceptance of a false confession was likely to result in the grave injustice of an unwarranted conviction; confessions were thus to be carefully scrutinized before being admitted." *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 954 (1966).

7. The *Miranda* opinion briefly notes both the history of the "third degree" in America and the danger of false confessions. *Miranda v. Arizona*, 384 U.S. 436, 447–48 (1966). It describes the modern interrogation process as "psychologically rather than physically oriented." *Id.* at 448. According to the Innocence Project, many of the wrongful convictions overturned by DNA evidence involved some form of a false confession. *False Confessions & Recording of Custodial Interrogations*, THE INNOCENCE PROJECT, https://innocenceproject.org/false-confessions-recording-interrogations/ (last visited Aug. 31, 2021). The reasons set forth for false confessions include:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education. Young people who do not understand their rights and are taught to please authority figures are particularly vulnerable.
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

Id.

8. *See generally* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 19–26 (2008).

9. *See generally id.* at 19–47.

10. *See* FED. R. EVID. 801(c).

11. FED. R. EVID. 801 advisory committee's note to 2014 amendment.

judiciary in the development of police procedures, and a more coherent legal approach to the laws related to confessions.

II. TESTIMONY BY CRIMINAL DEFENDANTS

While prosecuting authorities may consider confessions persuasive if not conclusive proof of guilt,[12] suspects do not typically confess without being persuaded.[13] Far less aggressive actions by police authorities, however, can also lead to unreliable responses from suspects.

Custodial interrogation by itself places "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[14] Looking back to the days of the Star Chamber,[15] it has been noted that guilty criminal defendants had to incriminate themselves, face charges of perjury, or risk being held in contempt of court if they gave no answer.[16] Concern, not only over physical abuse, but also over pressure from this "cruel trilemma," gradually resulted in the development of the right to remain silent.[17] In fact, because of the pressure that was being applied to compel confessions, Great Britain developed evidentiary rules that deemed all parties incompetent to testify as witnesses at their own trials.[18] Accordingly, a person on trial for a

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12. Ronald J. Rychlak, *Baseball, Hotdogs, Apple Pie, and* Miranda *Warnings*, 50 TEX. TECH L. REV. 15, 16 (2017).

13. The *Miranda* opinion noted both the history of the "third degree" and the danger of false confessions. *Miranda v. Arizona*, 384 U.S. 436, 445–48 (1966). It described the modern interrogation process as "psychologically rather than physically oriented." *Id*.

14. *Id.* at 467.

15. The Star Chamber, an English court that sat at the royal Palace of Westminster from the late fifteenth century to the mid-seventeenth century, was at first regarded as one of the most just and efficient courts of the Tudor era. Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 745 (1913). Sir Edward Coke described it as "the most honourable court (Our Parliament excepted) that is in the Christian world, both in respect of the Judges in the Court and its honourable proceeding." *Id*. It long remained an avenue for appeals by the common people against the excesses of the nobility. *Id*. Some historians date the beginning of the concept of a privilege against self-incrimination to a Star Chamber case, the 1637 trial of John Lilburn. E. M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 9 (1949); *see Miranda*, 384 U.S. at 459 (identifying *Lilburn* as a critical historical event in development of privilege). Parliament abolished the Star Chamber after this trial. *Miranda*, 384 U.S. at 459.

16. *See* Nathan Dorn, *John Lilburne Oaths and the Cruel Trilemma*, LIBR. OF CONG. (Apr. 25, 2013), https://blogs.loc.gov/law/2013/04/john-lilburne-oaths-and-the-cruel-trilemma/.

17. *See* GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 42–43 (Stevens and Sons., 3d ed. 1963) (describing 1568 Court of Common Pleas' release of defendant imprisoned for not answering judge's questions)*; see also* Pennsylvania v. Muniz, 496 U.S. 582, 583 (1990). The ancient maxim of the common law, *nemo tenetur se ipsum prodere* (that no person shall be compelled in any criminal case to be a witness against himself), is imbedded in the Bill of Rights. *See Ex parte Senior*, 19 So. 52, 652–53 (Fla. 1896).

18. Thus, under the common law of England (until 1898), a defendant was deemed incompetent to be a witness in his own case. *See* Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 485–90 (1939). The Supreme Court of the United States has noted that "firm establishment for criminal defendants" came somewhat later because in the sixteenth century an accused had to conduct his own

felony was not permitted to take the witness stand to testify even on their own behalf.[19]

This was also the law in the United States in 1791 when the Fifth Amendment's provision that "no person . . . shall be compelled in any criminal case to be a witness against himself" was adopted.[20] As the Supreme Court has explained:

> The disqualification of parties as witnesses characterized the common law for centuries. Wigmore traces its remote origins to the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law . . . . Under those old forms, the oath itself was a means of decision . . . . Jury trial replaced decision by oath with decision of the jurors based on the evidence of witnesses; with this change '[T]he party was naturally deemed incapable of being such a witness.'[21]

This remained the prevailing rule in the United States until roughly the time of the Civil War.[22] When change did come, it was significantly influenced by Judge John Appleton of the Maine Supreme Court.[23] His book,

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defense since he was not permitted to call witnesses and not granted the assistance of counsel. Ferguson v. Georgia, 365 U.S. 570, 573–74 (1961).

19. Parties were disqualified because they were seen as untrustworthy. 2 LEON F. SCULLY, JR., THE COUNTERFEIT CONSTITUTION: HOW VOLUNTARY CONFESSIONS BECAME INADMISSIBLE EVIDENCE 25–26 (2017).

20. *Id.* "The maxim, *nemo debet esse testis in propria causa*—'no man should be a witness in his own case'—was the rule of law that prevailed." *Id.* at 26; *see also* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 423 (1968). Moreover, other societies have had similar rules. *See Confession*, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/confession (last visited Aug. 31, 2021). For instance, under traditional Jewish law, neither confessions nor admissions of fact from which criminal responsibility might be inferred were admissible as evidence in criminal or quasi-criminal proceedings. *See id*. There are several arguments about the basis of this law. *Id*. One stems from the teaching that "no man may call himself a wrongdoer." *Id.*

21. *Ferguson*, 365 U.S. at 573 (citations omitted).

22. *See* McGautha v. California, 402 U.S. 183, 214 (1971) ("[A]t the time of framing of the Fifth Amendment and for many years thereafter the accused in criminal cases was not allowed to testify in his own behalf . . . ."). Change to the rule regarding incompetency of parties came even later in Britain with the passage of the *Criminal Evidence Act of 1898*. *See* WILLIAMS, *supra* note 17, at 45–48 (noting that the Act was developed to counteract unmerited acquittals resulting from defendants not testifying). Under the Act, criminal defendants were permitted to testify, but they also had the right not to testify. *See* Criminal Evidence Act 1898, 61 & 62 Vict. ch. 36, § 1(a) (U.K.) https://www.legislation.gov.uk/ukpga/Vict/61-62/36/1991-02-01 (stating that a charged person "shall be a competent witness," but "shall [only] be called . . . upon his own application"). At that time, however, judges could comment on a defendant's failure to testify. *Id.* In addition, once a defendant elected to testify, the procedures compelled him to face cross-examination. *Id.*

23. Appleton drew upon the work of English philosopher Jeremy Bentham, who had lobbied for more permissive rules of evidence. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 229–41 (Fred B. Rothman & Co. 1995) (1827) (criticizing exclusion of self-incriminating evidence because the innocent would want to speak, and therefore the privilege would only protect the guilty); *Ferguson*, 365 U.S. at 775 ("Bentham led the movement for reform in England, contending always for rules that would not exclude but would let in the truth"); *see also* Xiaobo Zhai, *Bentham's Exposition of Common Law*, 36 L. & PHIL. 525, 525–27 (2017) (discussing Bentham's ideas on the origination of common law). Others

The Rules of Evidence, argued that "[t]he present law benefits the criminal, by exempting him from the dangers of detection, and injures the innocent by depriving him of the benefits arising from an inquiry into his conduct."[24]

Maine enacted the first statute making defendants competent witnesses in prosecutions for some crimes in 1859.[25] "This was followed in Maine in 1864 by the enactment of a general competency statute for criminal defendants, the first such statute in the English-speaking world."[26] A similar federal statute was adopted in 1878[27] and, before the turn of the century, every state other than Georgia had abolished the disqualification,[28] though not without debate.[29]

While criminal defendants were not required to testify, American courts followed the British practice of permitting judges to comment on a witness's choice to remain silent.[30] Courts saw this as a matter of logic. In fact, at the 1931 American Bar Association Convention, the following resolution was put up for a vote: "[t]hat by law it should be permitted to the prosecution to comment to the jury on the fact that a defendant did not take the stand as a

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argued for the admissibility of testimony by parties because "all evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals." LORD MACAULAY'S LEGISLATIVE MINUTES 214 (Oxford Univ. Press 1946) (1835).

24. SCULLY, *supra* note 19, at 29 (quoting JOHN APPLETON, THE RULES OF EVIDENCE STATED AND DISCUSSED 134 (Philadelphia: T. & J.W. Johnson & Co., 1860)). Appleton argued that the rule of party incompetence worked to the advantage of a guilty defendant:

> The accused innocent, he would rejoice at such a rule. To dissipate the clouds which encircle and surround him; to expose, detect and refute the false and calumnious charges, which have been made against him, would be to him a source of pride. Innocent, he would rejoice at an opportunity of stating, under the most solemn sanctions, the several exculpatory facts by which such innocence would be proved. To him interrogation brings no terrors. To the guilty alone is it a source of dread.

APPLETON, supra note 24, at 127 (Philadelphia: T. & J.W. Johnson & Co., 1860). Clearly, a confession or admission was relevant, so it met that standard. "[T]he admission of a criminal defendant is relevant and material if it tends to incriminate the defendant, to connect the defendant to a crime, or to manifest the defendant's consciousness of guilt." State v. Brummall, 51 S.W.3d 113, 119 (Mo. Ct. App. 2001) (quoting State v. Isa, 850 S.W.2d 876, 894 (Mo. 1993)). "The defendant need not expressly acknowledge his or her guilt for the statement to qualify as an admission." *Id*. (quoting State v. Bannister, 680 S.W.2d 141, 148 (Mo. 1993)).

25. *Ferguson*, 365 U.S. at 577.

26. *Id.*

27. The federal law provided that in all federal criminal trials: "the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." 18 U.S.C. § 3481 (originally at 20 Stat. 30, section rewritten without a change of substance).

28. *Ferguson*, 365 U.S. at 577. Thus, except in Georgia, a criminal defendant in any criminal trial could take the stand and testify on his own behalf if he so desired. *See* SCULLY, *supra* note 19, at 29. If, however, a criminal defendant chose to testify, he was subject to full cross-examination. *Id.*

29. Commenting on his state's statute in 1867, Massachusetts Supreme Court Justice Seth Ames argued that allowing defendants to testify would destroy the presumption of innocence. *See* Seth Ames, *Testimony of Persons Accused of Crime*, 1 AM. L. REV. 443, 444 (1867). Due to jurors' inevitable negative reaction to those who chose silence, defendants would have "practically no option at all" and would be compelled to testify. *Id.*

30. *See* SCULLY, *supra* note 19, at 34–35.

witness; and to the jury to draw the reasonable inferences."[31] It passed 242 to 115.[32] Such commentary, and the inferences that were drawn, certainly applied pressure on defendants to testify at trial.[33]

Witnesses were competent to testify, and a negative inference could be drawn from silence. Moreover, courts admitted confessions even if law enforcement officials abridged the rights of those being interrogated.[34] The key issue was whether the confession was reliable.[35] This, of course, led to a situation ripe for the introduction of forcibly extracted confessions that suspects gave solely to stop the interrogation.

III. TWENTIETH CENTURY EFFORTS TO REGULATE TESTIMONY

In 1936, the Supreme Court of the United States held in *Brown v. Mississippi* that confessions extracted through the use of physical brutality violated due process and were therefore inadmissible under the Fourteenth Amendment to the Constitution.[36] The State argued that the Court's 1908

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31. *Id.* at 34.

32. *Id.* Following this resolution "and a study by the American Law Institute, California amended its constitution to permit comments to be made and inferences to be drawn upon a defendant's silence." *Id.*

33. Former President William H. Taft, addressing the New York State Bar Association in Buffalo on January 22, 1915, said, "The prosecution of criminals ought not to be a game. The rights of society ought to be recognized. If a man is entitled to testify, as he now may in a criminal case, and does not testify, the natural and the just inference is that he is afraid to testify. Why shouldn't the State have the benefit of that inference?" William H. Taft, *The New York State Bar Association: The Annual Address*, (Jan. 22, 1915), *reprinted in Government of Monroe County, N.Y. (Including Town Government): Description of Organization and Functions* (1915) https://www.google.com/books/edition/New_York_State/3HQ0AQAAMAAJ?hl=en&gbpv=1&dq=why+criminals+do+not+testify&pg=RA5-PA17&printsec=frontcover (last visited Aug. 31, 2021).

34. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 294 (2d ed. Hornbook Series 1992).

35. *See id.* ("[T]he question was put in terms of whether the defendant's confession had been induced by a promise of benefit or threat of harm, while on other occasions the inquiry was more directly put in terms of whether the circumstances under which the defendant had spoken impaired the reliability of the confession.").

36. Brown v. Mississippi, 297 U.S. 278, 286 (1936). In this case, three black tenant farmers had been convicted and sentenced to death for the murder of a white planter. *Id.* The only evidence was in the form of confessions that had been extracted by force. *Id.* As the Court explained:

> [D]efendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.
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> Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a

holding in *Twining v. New Jersey*, that the "exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution,"[37] meant that it was free to coerce confessions and use them in evidence against those from whom they had been extorted. The *Brown* Court noted that "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[38] The unanimous rulings in *Brown v. Mississippi* and *Chambers v. Florida* established that no statement obtained under threat of violence or intimidation would be considered voluntary or admissible.[39]

In the 1944 case, *Ashcraft v. Tennessee*, the Supreme Court addressed interrogation methods known as the "third degree."[40] These techniques did not involve brute force but rather things like powerful lights, persistent questioning over numerous hours, and sleep deprivation.[41] The Court held that where the manner of interrogation was inherently coercive, the confession would be inadmissible regardless of reliability.[42] Moreover, if impermissible methods were used, a confession would be inadmissible regardless of the impact that those methods had on obtaining the confession.[43] This became the "voluntariness test," which excluded any statements by defendants that were not a product of their own free will.[44]

Critics have argued that this voluntariness test permits too much pressure to be applied on suspects, as it only prohibits prosecutors from using

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modern civilization which aspires to an enlightened constitutional government.

Id. at 286 (quoting J. Griffith's dissent)*; see also* Ward v. Texas, 316 U.S. 547, 555 (1942) (setting aside a conviction based on a confession extorted by coercion and duress).

37. Twining v. New Jersey, 211 U.S. 78, 114 (1908).

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

39. *See generally* Chambers v. Florida, 309 U.S. 227 (1940) (defendants not arraigned for a week; they were held without access to legal counsel and subjected to questioning alone in a room with up to ten police officers and other members of the community without being informed of their right to remain silent; after a week of questioning, and despite previous denials, they confessed and were convicted and sentenced to death for capital murder; the state supreme court affirmed the convictions, but the Supreme Court of the United States overturned).

40. Ashcraft v. Tennessee, 322 U.S. 143, 150 n.5 (1944).

41. *Id.* at 150 n.6. The Court found Ashcraft's confession involuntary, compelled, and thus, inadmissible because it resulted from a continual relay-style interrogation over a period of thirty-six hours without rest. *Id.* at 153. In dissent, Justice Jackson wrote, "Questioning is an indispensable instrumentality of justice." *Id.* at 160 (Jackson, J., dissenting).

42. Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949) (finding that if circumstances indicate that the confession was not given by the free will of the defendant, it will not be deemed voluntary and therefore will be inadmissible, even though the statement itself may be reliable).

43. The Court has held, however, that the characteristics of a particular defendant might subject him or her to particular peril. *See* Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("[M]ental condition is surely relevant to an individual's susceptibility to police coercion . . . .").

44. *Watts*, 338 U.S. at 53 (confessions must be "the expression of free choice" and the suspect must not be "overborne"); Spano v. New York, 360 U.S. 315, 323 (1959) (accused's "will was overborne by official pressure, fatigue[,] and sympathy falsely aroused").

evidence obtained by "interrogation methods that would exert so much pressure that the suspect would admit to facts regardless of whether she believed in the truth of the facts admitted."[45] Nevertheless, the voluntariness rule still exists though it is often overshadowed by *Miranda* with which it works in conjunction.[46]

In the 1950s, the Supreme Court used its supervisory powers to establish the so-called *McNabb-Mallory* rule.[47] Based on a federal statute, this rule provided that, in a federal case, a criminal defendant had to be arraigned without unnecessary delay and any confession obtained during such a delay could be excluded from evidence in any subsequent prosecution.[48] The rule was never constitutionally required (thus never binding on state courts), and it was eventually supplanted.[49]

In the 1960s, the Warren Court reshaped the way states dealt with criminal suspects.[50] Prior to that time, protections afforded defendants in state criminal proceedings, where most criminal cases are tried, were limited.[51] The Bill of Rights applied only to the federal government,[52] and the Fourteenth Amendment, which did apply to the states, was understood only

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45. *See, e.g.*, Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2012 (1998).

46. In *Connelly*, a man heard voices that commanded him to make a confession. *Id.* at 174–75 (Brennan, J., dissenting). Lower courts, based on testimony from psychologists, concluded that this was not voluntary and therefore was inadmissible. *Id.* at 162. The Court reversed, holding that before a confession could be deemed involuntary, there must be "coercive police activity." *Id.* at 167. Because there was none in this case, the confession was not involuntary. *Id.* at 166–67.

47. *See* McNabb v. United States, 318 U.S. 332, 341–42, 345 (1943); Mallory v. United States, 354 U.S. 449, 453 (1957).

48. The statute, 18 U.S.C. § 595 (current version at FED. R. CRIM. P. 5), said: "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial."

49. It was also controversial. *See generally* Peter A. Dammann, *Recent Federal Court Decisions on the Admissibility of Confessions*, 38 J. CRIM. L. & CRIMINOLOGY 627 (1948). Legislation was passed three times in the 80th Congress (1947–49) which would have overturned *McNabb*, but it failed in the Senate. *See generally* Peter A. Dammann, *Admissibility of Confessions in the Federal Courts and the Hobbs Bill*, 38 J. CRIM. L. & CRIMINOLOGY 136 (1947). In 1958, a similar bill passed both the House and the Senate, but it was blocked by a parliamentary maneuver by Senator John Carroll of Colorado. *See* OTIS H. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 82–87 (1984).

50. *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004); *see generally* BUREAU OF NAT'L AFFS., THE CRIMINAL LAW REVOLUTION 1960–1968 (Crim. L. Rep. ed., 1968); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. J. 1 (1995); Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 1 (2005).

51. "Ninety-five percent of all the felonies committed in this country come under the jurisdiction of the states, and with respect to violent crime the figure is more like 99 percent." SCULLY, *supra* note 19, at 256.

52. *See* Spies v. Illinois, 123 U.S. 131, 166 (1887) (the first ten amendments do not limit the powers of the state governments but only operate on the national government).

to give criminal defendants those fundamental rights that were deemed implicit in the concept of ordered liberty.[53]

In the 1960s, instead of looking for fundamental rights implicit in the concept of ordered liberty, the Court moved to "selective incorporation" of provisions contained in the Bill of Rights.[54] In doing that, the Court provided all of the following rights to state criminal defendants over the course of a single decade: the freedom from unreasonable searches and seizures and the exclusionary rule,[55] the prohibition against cruel and unusual punishment,[56] the right to assistance of counsel in felony cases,[57] the privilege against self-incrimination,[58] the right to confront opposing witnesses,[59] the right to a speedy trial,[60] the right to compel defense witnesses to appear at trial,[61] the right to a jury trial,[62] and protection against double jeopardy.[63] In 1972, the death penalty was declared unconstitutional as it was then applied[64] and, in 1973, states were prohibited from outlawing abortions in the early stages of pregnancy.[65]

The key for the matter at the heart of this Article, of course, is *Miranda.* The right to remain silent and to have an attorney present for questioning are the most important rules affecting confession law today.[66] *Miranda* and its progeny set forth the parameters of police interrogation.[67]

The Court's journey to the Fifth Amendment-based *Miranda* rule was not direct. It first adopted a rule based upon the Sixth Amendment. *Massiah*

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53. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969). For an interesting review of the Fourteenth Amendment, see Victor Li, *The 14th: A Civil War-Era Amendment has become a Mini-Constitution for Modern Times*, A.B.A. J. (May 1, 2017, 12:10 AM), https://www.abajournal.com/magazine/article/14th_amendment_constitution_important_today.

54. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961).

55. *Id.*

56. Robinson v. California, 370 U.S. 660, 666–67 (1962).

57. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

58. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

59. Pointer v. Texas, 380 U.S. 400, 407–08 (1965).

60. Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967).

61. Washington v. Texas, 388 U.S. 14, 23 (1967).

62. Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

63. Benton v. Maryland, 395 U.S. 784, 795–96 (1969).

64. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); *see generally* Ronald J. Rychlak, *Defense Counsel and the Death Penalty: An Obligation to Oppose the Theory Behind the Punishment?*, 42 BRANDEIS L. J. 371, 373–74 (2004).

65. Roe v. Wade, 410 U.S. 113, 164 (1973)*; see also* Ronald J. Rychlak, *Abortion, Thinking Americans, and Judicial Politics*, 14 U. FAC. FOR LIFE: LIFE & LEARNING CONF. PROC. 77, 85–86 (2004) (discussing the moral dilemma of abortions in early pregnancy).

66. In *Griffin v. California*, by a vote of five-to-three, the Court struck down a California statute that permitted comment by the trial judge or prosecutor on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 612–14 (1965).

67. *Miranda*'s progeny includes, *inter alia*: New York v. Quarles, 467 U.S. 649, 654 (1984) (the public safety exception); Illinois v. Perkins, 496 U.S. 292, 300 (1990) (the jailhouse informant exception); Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990) (routine booking questions); and Missouri v. Seibert, 542 U.S. 600, 617 (2004) (statements made by the suspect both prior to and following the warnings were inadmissible).

v. United States prohibited the police from "deliberately elicit[ing]" statements from an individual after the initiation of judicial proceedings—indictment, information, arraignment, or preliminary hearing—without an attorney present.[68] The following month, in *Escobedo v. Illinois*, the Court created the "focus" test, applying the right to counsel at the point when an investigation focuses on the accused with the purpose of eliciting a confession.[69] These protections were based on the Sixth Amendment, which by 1964 had already been incorporated and made binding on the states.[70] In 1966, the Court incorporated the Fifth Amendment, changed its analysis, and set forth the now-familiar *Miranda* rules.[71]

Miranda was the Warren Court's "most controversial criminal procedure decision hands down."[72] Justice Harlan issued a strong dissent from the decision where he argued that the "social costs of crime are too great to call the new rules anything but a hazardous experimentation."[73] In 1968, presidential candidate Richard Nixon took aim at *Miranda* in a position paper on crime entitled *Toward Freedom from Fear*.[74] He urged Congress to pass a bill overturning *Miranda* and restoring the voluntariness.[75] He wrote, "[t]he *Miranda* and *Escobedo* decisions of the high court have had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces . . . [t]he balance must be shifted back"[76]

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68. Massiah v. United States, 377 U.S. 201, 206 (1964). This test remains valid even after *Miranda*. *See, e.g.*, Fellers v. United States, 540 U.S. 519, 523–24 (2004).

69. Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

70. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 342 (1964); *Massiah*, 377 U.S. at 206; *Escobedo*, 378 U.S. at 492.

71. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966)*; see generally* Ronald J. Rychlak, *The Right to Remain Silent in Light of the War on Terror*, 10 CHAP. L. REV. 663 (2007).

72. Paul G. Ulrich, *What Happened to Miranda? A Decision and Its Consequences*, 72 J. MO. B. 204 (2016) (quoting LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 394 (2000)).

73. *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting). Justice White, joined by Harlan and Stewart, made this prediction:

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Id. at 542 (White, J., dissenting).

74. Richard Nixon*,* Toward Freedom from Fear (1968), *in* 114 CONG. REC. 10, 12937 (1968).

75. *See id.*

76. *Id.* Congress accepted the challenge and enacted 18 U.S.C. § 3501 with overwhelming majorities in both houses. 18 U.S.C. § 3501. *See* Legislative History of the Omnibus Crime Control and Safe Streets Act of 1968 Pub. L. 90-351, 82 Stat. 197 (1968). The statute provided that, while the trial court is deciding whether a confession is voluntary, it should take into account all the surrounding circumstances, including whether *Miranda* type warnings were given; *see* 18 U.S.C. § 3501. The absence of such warnings, however, would not preclude admissibility of an otherwise voluntary confession. *Id.* In other words, the statute effectively overruled *Miranda*. *Id.*

Over the years, scholars have attempted to obtain empirical evidence regarding confessions and the impact of *Miranda*, but the difficulty of gathering and evaluating evidence has led to inconclusive results.[77] Many commentators argue that the cost of *Miranda* is minimal, and the significant benefits include protection of the innocent and respect for all citizens.[78]

Others argue that its costs, in terms of suppressed confessions and lost convictions, are too great to justify the limited benefits *Miranda* supplies.[79] They report that thousands of violent criminals escape justice each year as a direct result of *Miranda*.[80] Some have even suggested that the warnings

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President Johnson signed § 3501 into law before he departed office. Maw Frankel, *President Signs Broad Crime Bill with Objections*, N.Y. TIMES, June 20, 1968, at 1. For thirty years, however, the Attorneys General refused to enforce § 3501, believing that it was unconstitutional. United States v. Dickerson, 166 F.3d 667, 682 n.16 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000) (quoting letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division Section Chiefs (Nov. 6, 1997)) (noting the Department of Justice took the position that "unless the Supreme Court overrules *Miranda*, 'the United States is not free to urge the lower courts' to rely on Section 3501"; also noting that "'[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*'") (alteration in original). Finally in 2000, a case made its way to the Supreme Court. *See Dickerson*, 530 U.S. at 428. In a 7–2 opinion delivered by Chief Justice Rehnquist, the Court held that *Miranda* governs the admissibility of statements made during custodial interrogation in both state and federal courts. *Id.* "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," wrote Rehnquist. *Id.* at 430 (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999)). "*Miranda* announced a constitutional rule that Congress may not supersede legislatively. . . . [W]e decline to overrule *Miranda* ourselves." *Id.* at 444. The case brought forth a strong dissent from Justice Scalia in which he argued that the majority opinion gave needless protection to "foolish ([but not] compelled) confessions . . . ." *Id.* at 449.

77. LAFAVE & ISRAEL, *supra* note 34, at 291*; see also* Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J. L. & PUB. POL'Y 327 (1997); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment,* 90 NW. U. L. REV. 387, 417, 438 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 871 (1996); Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh-A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) (all arguing that *Miranda* is injurious to law enforcement).

78. *See* Miller v. Fenton, 474 U.S. 104, 109 (1985) (coerced confessions are "offensive to a civilized system of justice")*; see also* SUSAN M. EASTON, THE RIGHT TO SILENCE 60–62 (1991) (arguing that the innocent is protected by the right to silence).

79. The events of September 11, 2001, and the subsequent War on Terror renewed interest in (and controversy over) the issue of interrogation and confessions. *See* Rychlak, *supra* note 71; Rychlak, *supra* note 6; Ronald J. Rychlak, *Is There a Right to Remain Silent? Coercive Interrogation and the Fifth Amendment After 9/11*, 12 NEW CRIM. L. REV. 335 (2009) (book review). "[C]laims of violations of human-rights law or the Constitution must be evaluated in the context of the realities created by Sept. 11." John C. Yoo, *Perspectives on the Rules of War: Sept. 11 Has Changed the Rules*, S.F. CHRON., June 15, 2004, at B9. *See also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (proposing a "foreign interrogation" exception to *Miranda*).

80. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1126 (1998). As one noted critic of *Miranda* has argued:

> Evidence of *Miranda*'s harmful effects is mounting. For example, along with various co-authors, I have developed empirical evidence of *Miranda*'s substantial harm to law enforcement. In my most recent articles, I have analyzed the precipitous drop in crime clearance rates that followed immediately on the heels of *Miranda* and concluded that *Miranda*

themselves, used properly, are helpful in obtaining statements from suspects.[81] The argument is that police have learned to "work around" *Miranda*, if not absolutely exploit it, to help extract statements from suspects.[82]

IV. THE HEARSAY RULE

The evolution of law surrounding confessions, admissions, and other statements by criminal suspects makes it clear that *Miranda* exists as the principle means of dealing with these issues not because it works well, but because the courts have not found a better way to protect the rights of citizens.[83] At its core, one should acknowledge that *Miranda* is a constitutional remedy to an evidentiary problem, and the constitutional provision in question was not intended to deal with evidentiary issues. Yet, there is a well-established evidence rule that could fit the bill.

When offered in court by the prosecution, a confession, admission, or any other statement by the defendant that leads to incriminating evidence is an out-of-court statement offered to prove the truth of the matter asserted.[84] That, of course, is the textbook definition of hearsay, which is typically inadmissible.[85] Prior to enactment of the *Federal Rules of Evidence*,

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severely hampered police effectiveness.

Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL'Y 523, 531 (1999) (citations omitted).

> [T]he innocent are at risk not only from false confessions, but also from "lost" confessions—that is, confessions that police fail to obtain from guilty criminals that might help innocent persons who would otherwise come under suspicion for committing a crime [or become a victim of the criminals who did not confess]. . . .
>
> . . . [T]here is good reason to believe that the Supreme Court's decision in *Miranda* has exacerbated the risks to the innocent. The *Miranda* decision has reduced the number of truthful confessions, while at the same time doing nothing about, and probably even worsening, the false confession problem by diverting the focus of courts away from the substantive truth of confessions to procedural issues about how they were obtained.

Id. at 525–27 (citation omitted).

81. In a brilliant passage based on interrogations conducted by Baltimore detectives, author David Simon walks the reader through the use of *Miranda* warnings—both verbal and written—to bring forth a confession from a suspect. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 193–94 (1991); *see also* JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM (2016).

82. SIMON, *supra* note 81, at 199.

83. In fact, *Miranda* does not accomplish its mission unaided. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966). Each year, I instruct my criminal procedure students to apply *Miranda*, *Massiah*, and the voluntariness test to each confession or admission issue they encounter. *See generally id.*; Massiah v. United States, 377 U.S. 201 (1964).

84. *See* Morgan, *supra* note 3, at 355–56.

85. As Professor Morgan explained:

> [A]dmissions are not received as substitutes for evidence, nor as evidence merely of a waiver of proof, nor as circumstantial evidence from which by a double inference a conclusion of the truth of the matter admitted may be deduced, nor solely as impeaching or destructive evidence; they are received as evidence of the truth of the matter asserted in them. Prima facie they fall

statements of party-opponents (also called admissions) were recognized as hearsay, but they were deemed admissible.[86] When the Supreme Court adopted the *Federal Rules of Evidence*, statements of party-opponents were defined as non-hearsay.[87] The label was different, but the logic, and the final outcome, was the same. Statements that would normally be inadmissible hearsay were admitted.

In criminal cases, this exception allowed the state to offer the defendant's own statement, be it oral, written, or in some form of nonverbal communication, into evidence by introducing it through the testimony of a witness who heard or observed it, such as the investigating detective who took the defendant's confession during a custodial interview, the officer who made the arrest, or a witness who overheard the defendant talking about the crime.[88]

The typical reason that hearsay is barred from evidence is that the party against whom it is entered cannot cross-examine the person who made the statement because that person is not in court.[89] The witness testifying in court, or the document that is being read, is simply repeating what someone else said outside of the courtroom, and that out-of-court declarant is not present and available for cross-examination.[90]

In the past, when parties were deemed incompetent to testify, they could not be cross-examined (or otherwise testify about the out-of-court

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squarely within the prohibition of the rule against hearsay.

Id. at 358. Morgan goes on to note that such statements "lack the essentials" of the "declaration against interest" exception to the hearsay rule. *Id.* at 359.

86. *Id.* at 360 ("[T]he conclusion is inevitable that [such statements] are received as an exception to the rule against hearsay, and not that they are received on any theory that they are not hearsay.").

87. FED. R. EVID. 801 advisory committee note to Rule 801(d)(2). The following definitions apply under this article:

> (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion . . .
>
> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: . . . (2) An Opposing Party's Statement. The statement is offered against an opposing party and:
>
> (A) was made by the party in an individual or representative capacity

FED. R. EVID. 801.

88. *See, e.g.*, State v. Graham, 733 S.E.2d 100, 106 (2012) ("[d]efendant's [admission] that he touched five to ten other boys is an admission under Rule 801(d)(A)"); State v. Laney, 631 S.E.2d 522, 526 (2006) ("defendant's statement that he would 'be guilty' was admissible under the hearsay exception N.C. GEN. STAT. § 8C–1, Rule 801(d)(A)").

This exception applies only when a statement is offered against a party. *See* FED. R. EVID. 801(d)(A). Thus, it does not allow a non-testifying defendant to offer his own self-serving statements into evidence through another witness who heard the statement. *See* State v. Portillo, 787 S.E.2d 822, 834 (2016) (no error in excluding "inadmissible self-serving hearsay of the defendant who has not testified"); State v. Wiggins, 584 S.E.2d 303, 311 (2003) (non-testifying defendant's statements properly excluded where they were self-serving and offered for the truth of the matter asserted, not the defendant's state of mind).

89. *See generally Hearsay Evidence: The Basics*, STIMMEL L., https://www.stimmel -law.com/en/articles/hearsay-evidence-basics (last visited Aug. 31, 2021).

90. *Id.*

assertion).[91] Today, however, general competency of parties is no longer a concern.[92] Criminal defendants can take the stand, but they rarely do.[93] Moreover, it is generally accepted that having a defendant testify is a bad idea.[94] As such, the conditions in most cases are similar to the conditions that justify employment of the hearsay rule.[95]

In 1966, the *Harvard Law Review* noted that "there are several exceptions to the 'hearsay' rule, one of the most important of which permits the prosecution to introduce in a criminal trial any relevant out-of-court statement made by the defendant. The theoretical bases that have been advanced in support of admitting such statements are not entirely satisfactory."[96] Professor Morgan even went so far as to say "[e]very danger that cross-examination tends to guard against is positively shown to be present in full force" in the case of an opposing-party admission.[97]

Opposing-party admissions do not rely on the traditional ground for hearsay exceptions—reliability.[98] In fact, they have been deemed admissible even when guarantees of trustworthiness that underlie other hearsay exceptions are lacking.[99] There was significant debate over the proper justification for this exception to the hearsay rule.[100] Eventually, however, scholars seemed to settle on the theory of fairness; it is "fair to permit a party

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91. *See supra* notes 10–22 and accompanying text (discussing the history of competency and the impact on testimony).

92. *See supra* note 22 (inferring that competency is no longer a concern).

93. Jeffrey Bellin, *Improving the Reliability of Criminal Trials through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 852 (2007–08) (discussing criminal defendants testifying).

94. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 407 (2018).

95. *See supra* notes 87–89 and accompanying text (comparing the rule for hearsay with confessions).

96. *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 952 (1966).

97. Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. 181, 183 (1937).

98. [T]he veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. Lilly v. Virginia, 527 U.S. 116, 124–25 (1999) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). Of course, if admissions or confessions are admissible, despite being hearsay, solely because a person would not admit anything adverse to his or her case unless it were true, why is the exception limited to parties?

99. *See* John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 573 (1937).

100. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1239 (E.D. Pa. 1980), *aff'd in part, rev'd in part sub nom. In re* Japanese Elect. Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.*, 475 U.S. 574 (1986). *See* Strahorn, *supra* note 99, at 569–79 (discussing various theories advanced to support admitting party admissions); Richard D. Geiger, *Vicarious Admissions by Agents of the Government: Defining the Scope of Admissibility in Criminal Cases*, 59 B.U. L. REV. 400, 402 (1979); *see also* Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269, 271 (1986) ("Vicarious admissions are admitted against the party-opponent on the theory that, given the party's close relationship with the third party, it is fair to impute the statement to the party-opponent.").

to introduce, against its adversary, words attributable to that adversary."[101] As Professor Morgan explained:

> The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was made furnish the [court or jury] means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under the sanction of an oath.[102]

Professor McCormick argued that a party's admission had special evidentiary value when offered against that party because the party "is discredited (like a witness impeached by contradictory statements) by his statements inconsistent with his present claim asserted in his pleadings and in the testimony on which he relies."[103]

V. THE OPPOSING-PARTY EXCEPTION TO HEARSAY NO LONGER WORKS

Whether defined as non-hearsay or an exception to the hearsay rule, the justification for admitting the out-of-court statements of criminal defendants as proof of the matter being asserted, without applying a true hearsay analysis, is no longer persuasive. Confessions or other out-of-court statements that end up being incriminating should be treated as hearsay. In other words, a general presumption of inadmissibility should apply to the kind of statements that are now at the heart of so many *Miranda* issues.[104]

There was a time when uncoerced confessions were deemed reliable and that was a justification for admitting statements of party opponents.[105] Today, we know that false confessions have far too frequently led to wrongful convictions.[106] We know that police authorities have strong incentives to find ways to encourage suspects to make incriminating statements and we know

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101. Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 410 (2002).

102. EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1963); *see also* State v. Tilley, 232 S.E.2d 433, 438 (1977) (stating a party's own admissions are admissible as a hearsay exception because "the declarant or actor cannot be heard to complain about not having a right to cross-examine himself").

103. C. MCCORMICK, EVIDENCE § 262 at 774–75 (E. Cleary 3rd ed. 1984) (citing 4 J. WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972)). That, however, is justification for a non-substantive use of such statement. As such, it would fall outside of the definition of hearsay.

104. *See* Andrew L.-T. Choo, *The Hearsay Rule and Confessions Relied upon by the Defence: R v Myers*, 1 INT'L J. EVIDENCE & PROOF 158 (1997).

105. *Id.* at 159.

106. "Since 1989, there have been 367 post-conviction DNA exonerations in the United States, and 28% of these involved false confessions." Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. CRIM. L. & CRIMINOLOGY 43 (2020). *See generally* TRUE STORIES OF FALSE CONFESSIONS (Rob Warden & Steven A. Drizin, eds., 2009) (providing accounts of numerous suspects who made false confessions). Complicating matters, false confessions can taint other evidence. *See* Saul M. Kassin et al., *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files*, 23 Psych. Sci. 41 (2012).

that they can accomplish this without beating suspects.[107] That will not change in the near future. As such, reliability is not a valid basis for ignoring the hearsay rule.

A perhaps stronger justification for this particular exception is the general fairness of holding someone to something that they have said.[108] Yet, when a suspect at the scene of a crime or in a police stationhouse is confronted by officers trained to obtain statements, and highly motivated to do so, it is not the same situation as when a party to a civil lawsuit makes an unprompted statement in a less stressful situation.[109] Moreover, the suspect is often under stress and perhaps afraid. As such, those statements are perhaps particularly unfair to hold as binding.[110]

Professor Morgan set forth the following argument in favor of the fairness justification for the party-opponent statement exception to the hearsay rule:

> [I]t is too obvious for comment that the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or of lack of opportunity for cross-examination. It seems quite as clear that he ought not to be heard to complain that he was not under oath. All the substantial reasons for excluding hearsay are therefore wanting.[111]

Moreover, Morgan concluded, "the admission is always offered against the declarant, and he cannot object to its being received as *prima facie* trustworthy, particularly when he is given every opportunity to qualify and explain it."[112]

Morgan's fairness argument rests upon two observations about human behavior and the judicial system. First, is the assumption that the initial statement is trustworthy—he argues that it is more trustworthy than any statement likely to be made during judicial proceedings.[113] Second, he says that the criminal defendant is free to take the stand and testify.[114] Both of those matters are subject to question.

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107. Miranda v. Arizona, 384 U.S. 436, 448 (1966) (explaining psychological practices employed by police to elicit confessions).

108. This Article has limited discussion to statements made by a criminal defendant himself or herself. Federal Rule of Evidence 801 has a much wider reach. *See* FED R. EVID 801.

109. It is worth noting that evidence law does sometimes work differently in criminal and civil actions. This is true for the impact of taking judicial notice, *see* FED. R. EVID. 201; impeachment of witnesses, FED. R. EVID. 404; sex offender cases, FED. R. EVID. 412; and more*; see, e.g.*, FED. R. EVID. 803(10)(b), 803(22), 804(b)(3).

110. *E.g.*, Lackey, *supra* note 106, at 46.

111. Morgan, *supra* note 3, at 361.

112. *Id.*

113. *Id.* ("Ordinarily there is quite as little likelihood of securing from the declarant in court testimony as trustworthy and free from bias as his extra-judicial admissions . . . .").

114. *Id.*

The first part of Morgan's justification is essentially reliability which has already been addressed.[115] His passage brings to mind a freely issued statement by the defendant without any prompting by police authorities.[116] That, however, is almost never how these statements are obtained.[117] As one author put it: "[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked[,] and manipulated from a suspect by a detective who has been trained in a genuinely deceitful art."[118] Thus, this element of Morgan's justification is weak at best.

The second part of the justification, that the defendant can take the stand to correct and clarify, is also insufficient. Hearsay is indeed based upon the need to cross-examine the out-of-court declarant and criminal defendants are virtually without exception in the courtroom.[119] Comparatively few of them testify, however.[120] There are too many risks associated with it, including opening the door to the use of impeachment evidence that would not otherwise be admissible.[121] The risk is significant enough that about forty

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115. *See supra* notes 106–108 and accompanying text (discussing Morgan's theory of reliability).

116. *See* Morgan, *supra* note 3, at 361.

117. *See* ED HAGAN, A DETECTIVE'S GUIDE TO INTERROGATION LAW (2020). According to promotional materials from the Amazon webpage, readers can:

> Use it to solve real world problems like this: •Compelling suspects to unlock computer and cell phone passcodes •The difference between Garrity and Kalkines warnings, and how to use them while questioning public employees •Admissibility of admissions made by prisoners, probationers, or parolees as part of a treatment or rehabilitation program •The admissibility of a defendant's silence when accused of a crime •Things an officer can say and do to avoid a finding of Miranda custody •Questioning prison and jail inmates without Miranda warnings •The application of the Miranda rule to questioning at borders or airports •Obtaining Miranda waivers from uncooperative suspects •How to lawfully question suspects who have invoked their Miranda rights •What officers should do when defendants change their minds about invoking Miranda rights •Questioning suspects who have been formally charged or who have attorneys •How to manage jailhouse informants •How to work with prosecutors on investigations without creating ethical problems for them •Tactics for addressing insanity and diminished intent issues •Your obligation to advise foreign nationals of their consular notification rights •Working with foreign police officers in foreign countries

A Detective's Guide to Interrogation Law, AMAZON, https://www.amazon.com/Detectives-Guide-Interrogation-Law/dp/B08GFPMFRM/ref=asc_df_B08GFPMFRM/?tag=hyprod-20&linkCode=df0&hvadid=459770433743&hvpos=&hvnetw=g&hvrand=18289011429701875773&hvpone=&hvptwo=&hvqmt=&hvdev=c&hvdvcmdl=&hvlocint=&hvlocphy=9058342&hvtargid=pla-971529985678&psc=1 (last visited Aug. 31, 2021).

118. SIMON, *supra* note 81, at 199. On the other hand, studies suggest that about 20% of the confessions obtained by the police would have been made even if there had been no interrogation. Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions while Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 56 (2006).

119. Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

120. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 836 (2016).

121. *See* United States v. Richardson, 515 F.3d 74, 79 (1st Cir. 2008) (trial court's instruction to "only consider these prior convictions for purposes of assessing [the defendant's] credibility"); United States v. Stanley, 94 F. App'x 984, 986 (4th Cir. 2004); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L.

percent of the defendants later exonerated by DNA evidence declined to testify at their trials.[122]

In addition to the deficiencies in each of the grounds for the fairness justification for the opposing party exception to the hearsay rule, the exception itself is not very fair, at least in terms of reciprocity. Because the state's witnesses are normally not a party to the criminal case, the exception does not authorize the introduction of hearsay statements that they may have made.[123] So, because the exception fails to operate as intended, out-of-court statements made by criminal defendants should be treated like the hearsay that they are.

VI. CONCLUSION

Applying hearsay law to criminal confessions will not resolve all the issues surrounding the admission of criminal confessions. It will, however, have the advantage of using a rule of evidence to address an evidentiary problem.[124] At first blush, it seems likely that this approach would exclude more confessions and admissions than does the current practice.[125] If all out-of-court statements made by the defendant are hearsay, there would be a starting assumption that they are inadmissible.[126] Of course, as Justice Frankfurter wrote: "Ours is the accusatorial as opposed to the inquisitorial system . . . . [S]ociety carries the burden of proving its charge against the accused not out of his own mouth . . . but by evidence independently secured through skillful investigation."[127] Moreover, there are other ways around the hearsay rule, and the applicability of those exceptions would need to be considered.[128]

REV. 289, 330 (2008) (tracing doctrinal developments that led state and federal courts to "routinely permit prior conviction impeachment of criminal defendants").

122. *See* Bellin, *supra* note 94, at 397.

123. *See* State v. Shoemaker, 341 S.E.2d 603, 607 (N.C. App. 1986) ("An adverse witness, even the complaining witness in a criminal trial, is not a party to the action. Thus, the witness was properly prohibited from testifying about a hearsay statement.").

124. *See generally* Roberta C. Sinapole, *Admissibility of an Out-of-Court Confession: Inability to Make an In-Court Identification of the Defendant as the Out-of-Court Confessor, Despite Exactness of Names and Other Circumstantial Evidence of Identity, Goes to the Admissibility Rather Than to the Weight of the Confession*, 22 U. BALT. L. REV. 395 (1993) (hearsay evidence is used to prove preliminary facts).

125. *See id.*

126. *See id.*

127. Watts v. Indiana, 338 U.S. 49, 54 (1949).

128. The rule that comes immediately to mind is the exception for statements against interest. *See* FED. R. EVID. 804(b)(3). Unlike an admission, which is limited to a statement made by a party to the lawsuit or one of the party's agents, a declaration against interest must have been against the declarant's interest when it was made, and it is only applicable when the declarant is unavailable. *See* FED. R. EVID. 804(b)(3).

Interrogation practices might also shift. Hearsay is an evidentiary rule, not a rule designed to regulate police conduct like *Miranda*.[129] As such, authorities may well still use interrogations to seek information for further investigation, well aware that the statements will be inadmissible but hopeful that the information will help resolve the crime and lead to admissible evidence. That may create problems that need to be addressed with rules designed to control police conduct, but that is an improvement over using constitutional provisions that are forced into areas that they are not intended to cover.

129. *See* United States v. Nelson, 725 F.3d 615, 620 (6th Cir. 2013).