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CONFESSION CORROBORATION IN NEW YORK: A REPLACEMENT FOR THE CORPUS DELICTI RULE

I. INTRODUCTION

There is a long-standing rule in almost all American jurisdictions that a defendant may not be convicted of a crime solely on the basis of a confession. The foundation for this rule lies historically in the convergence of three policy factors: "first, the shock which resulted from those rare but widely reported cases in which the 'victim' returned alive after his supposed murderer had been convicted . . .; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed . . ., involuntarily made . . ., mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual . . ." and, thirdly, "the realization that sound law enforcement requires police investigations which extend beyond the words of the accused."3

The New York version of the confession corroboration rule, which is similar to the rule followed by a majority of jurisdictions, provides: "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed."4 This brief statute and its predecessor have spawned a


The confession corroboration requirement is often called the "corpus delicti rule" and has been referred to as such in the title of this Note for ease of reference. However, the term "corpus delicti rule" has also been used to refer to a rule of evidence in the law of homicide which has no relation to confession corroboration. See notes 25 & 43 infra. Also, there are other methods of confession corroboration which do not follow the "corpus delicti" format. To avoid confusion, the term "corpus delicti version" will be used throughout this Note to refer to that standard of corroboration that incorporates the "corpus delicti" concept.


4. N.Y. Crim. Proc. Law § 60.50 (McKinney 1971). The recent Criminal Procedure Law, ch. 996, 1970 N.Y. Laws 3117 (effective 1971), completely revised the old Code of Criminal Procedure, ch. 442, 1881 N.Y. Laws 601. As to confession corroboration, only minimal changes were made in the old rule, which had stated that a defendant's confession "is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." Id. § 395; see Denzer, Practice Commentary, N.Y. Crim. Proc. Law § 60.50 (McKinney 1971). The differences between the old and new rules are discussed in notes 52 & 80 infra. Except where such differences are specifically discussed, all references to the New York rule or the current rule embrace both versions.

This Note deals solely with corroboration of statements of the defendant. New York law also
rather long and complex decisional history. The New York Court of Appeals has promulgated several rules of construction, often strained or logically inconsistent, directed at answering the following questions: (1) Which offense must be corroborated? (2) Which elements of the offense must the additional proof corroborate? (3) How much corroboration is required to satisfy the demands of the rule? In *People v. Murray*, a case which reflects the confusion engendered by the New York rule, the court of appeals failed to reach a majority opinion on the issue of whether a conviction for felony murder can stand when there is no proof, besides the defendant's confession, of the underlying felony. The *Murray* opinions, and indeed the entire line of cases on which they rely, indicate a need for a reassessment of the current rule, and perhaps for legislative revision of the rule.

This Note will attempt such a reassessment. First, the history and policy of corroboration and its relationship to other confession doctrines will be discussed. Then the two major formulations of the corroboration rule in American criminal law will be examined: the corpus delicti version, followed in New York and the majority of states, and the trustworthiness version, followed in the federal courts and in an increasing number of states. Next, the decisional history interpreting the current New York rule will be analyzed, culminating in the conclusion that the rule is outmoded, vague, and unworkable. The final section of this Note reviews other confession doctrines

requires corroboration of the victim's testimony where certain crimes are charged, N.Y. Penal Law §§ 115.15 (criminal facilitation), 130.16 (certain sex offenses), 165.65 (criminal possession of stolen property), 210.50 (perjury and related offenses), 230.15 (promoting prostitution), 255.30 (adultery and incest), 260.11 (endangering the welfare of a child) (McKinney Cum. Supp. 1977-1978). Corroboration is also required where a conviction is based on unsworn testimony of a child less than 12 years old, N.Y. Crim. Proc. Law § 60.20(3) (McKinney 1971 & Cum. Supp. 1977-1978), or on accomplice testimony, *id.* § 60.22. In the 1970 Criminal Procedure Law recodification, the legislature retained the latter provision despite recommendations that the federal accomplice rule be substituted. Denzer, *Practice Commentary*, N.Y. Crim. Proc. Law § 60.22 (McKinney 1971). No such suggestion was made, or probably even considered, regarding the confession corroboration rule.

5. *See* pt. III *infra*.
7. *Id.* at 329-35, 353 N.E.2d at 606-11, 386 N.Y.S.2d at 693-97 (Gabrielli, J.; *id.* at 335, 353 N.E.2d at 611, 386 N.Y.S.2d at 697 (Wachtler, J., concurring); *id.* at 335-45, 353 N.E.2d at 611-17, 386 N.Y.S.2d at 697-703 (Jasen, J., dissenting). See notes 158-75 *infra* and accompanying text for a complete discussion.
9. *See* pt. II(A) *infra*.
10. *See* pt. II(B) *infra*.
11. *See* pt. II(C) *infra*.
currently in force and suggests a statutory replacement for the current rule.

II. HISTORY AND POLICY OF CONFESSION CORROBORATION

A. Rationale of the Rule

The requirement of corroboration when a conviction is based upon an extrajudicial confession is one of the oldest confession doctrines. In New York, one of the first American jurisdictions to adopt the requirement, the avowed purpose of corroboration is to avert the danger that a person may confess to an offense when no such offense has in fact been committed by anyone. In other words, the rule seeks to prevent convictions based on a confession to a nonexistent, rather than an actual, crime. Three major policies can be distinguished as supporting the corroboration requirement. First, the impact of a confession may be so great upon the jury that extreme care must be taken to insure its reliability. There are numerous reasons why a confession may be untrue, either in whole or in part. Although other rules of evidence exclude unreliable testimony, the corroboration requirement

13. See pt. IV(A) infra.
14. See pt. IV(B) infra.
15. For historical development, see 7 J. Wigmore, supra note 1, §§ 2010-71; Proof of the Corpus Delicti, supra note 1, at 638-42; Comment, California's Corpus Delicti Rule: The Case for Review and Clarification, 20 U.C.L.A. L. Rev. 1055, 1058-65 (1973) [hereinafter cited as California's Corpus Delicti Rule].
16. The rule was adopted as common law in 1836. See notes 92-106 infra and accompanying text.
18. People v. Rooks, 40 Misc. 2d 359, 368, 243 N.Y.S.2d 301, 311 (Sup. Ct. 1963). The problem of confessions to actual crimes by persons not guilty of them is not an objective of the New York corroboration requirement. Justice Sobel comments that such confessions are more frequent than those covered by the New York rule. Id. Although the corpus delicti version of corroboration, the New York rule, is not directed at preventing a conviction based on such an unreliable confession, other versions of corroboration, including the version proposed herein, would prevent such a conviction.
20. See Proof of the Corpus Delicti, supra note 1 at 642-45. Unreliable statements may be induced by physical or psychological coercion, or by improper suggestion or deceptive police practices. In addition, a misunderstanding of the law may lead to a false confession, such as where the accused "creates" facts for the purposes of exculpating himself, and it is those facts which are used in his conviction. A statement may report conclusions or opinions which were not facts within the personal knowledge of the accused, yet can be used as evidence against him at trial. Finally, mental disease or defect, intoxication, hallucinations, or other causes, may influence the content of the statement so as to make it unreliable. Exculpatory statements, i.e., those made by the accused in an effort to excuse or clear himself, "are often made under conditions involving strong pressures for unreliability." C. McCormick, supra note 1, § 145, at 312.
21. For example, the basis of the voluntariness doctrine, see note 27 infra, was the unreliability of confessions. Also, general doctrines excluding testimony by incompetent witnesses lead to
provides an additional safeguard in situations where a criminal prosecution hinges on the extrajudicial words of the accused. It must be noted, however, that many authorities consider confessions highly reliable. In practice, the circumstances of the case will dictate the extent to which the confession appears reliable, and the corroboration rule provides a formalized vehicle for adjudging the reliability of certain facts proved through the confession.

A second rationale for the rule is the prevention of the kind of embarrassment that resulted in cases where the "murdered" victim returned alive after his supposed murderer's conviction. If the state were required to produce corroborative proof of death, in theory the possibility of such shocking events would be greatly reduced, or eliminated. However, this rationale has as its roots a general distrust of circumstantial evidence, and is therefore not strictly applicable to confessions. A third objective of the corroboration rule is to insure that the police engage in non-coercive and extensive investigative work and that the prosecution present the best and most thorough case possible. Simply put, if the prosecution could show that the crime took place solely by exclusion of unreliable confessions. As to the relationship to the hearsay doctrine and its exceptions, as well as other aspects of the theory of admissibility of confessions, see generally C. McCormick, supra note 1, § 145; 3 J. Wigmore, supra note 1, § 816.

22. Smith v. United States, 348 U.S. 147, 153 (1954); C. McCormick, supra note 1, § 158, at 349.

23. See, e.g., 3 J. Wigmore, supra note 1, § 820(b),(c). Essentially, if a confession is truly voluntary, that is, the product of a free intellect and rational choice, it certainly has a higher degree of reliability than most other extrajudicial statements, since rational people do not confess to crimes of which they know they are innocent. The voluntariness doctrine, discussed in note 27 infra, thus raises the level of reliability of admissible confessions by excluding those that are not voluntary. Massachusetts, the only state which does not recognize the corroboration requirement, points to the voluntariness safeguards as sufficient protection against unreliability. Commonwealth v. Killion, 194 Mass. 153, 155, 80 N.E. 222, 223 (1907).

24. See Proof of the Corpus Delicti, supra note 1, at 643-44. This rationale will be referred to as the "reappearing victim" rationale.

25. A great deal of confusion has been generated by the use of the concept of corpus delicti in two separate doctrines, one the confession corroboration rule and the other an evidentiary rule historically associated with the law of homicide. The reappearing victim rationale was the entire basis of the latter rule, which required that proof of death or criminal agency must be direct, that is, through real evidence or eyewitness testimony. 7 J. Wigmore, supra note 1, § 2081. This rule insured that a homicide conviction could not be based solely on circumstantial evidence, thus strengthening the probability that the victim was indeed dead. Note that a confession is direct eyewitness testimony, not circumstantial evidence, and thus fulfills without corroboration the corpus delicti homicide rule. If the accused confesses that he shot the victim and threw him overboard at sea, the homicide rule is satisfied, but, absent corroboration, the confession corroboration rule is not. Thus, the confession corroboration rule must be heavily grounded in the difference between a confession and other eyewitness testimony, differences such as greater unreliability or possible involuntariness, not in the reappearing victim rationale. Wigmore supports this conclusion. Id. § 2070, at 393-94 n.3. Difficulties arise where the case law in a jurisdiction following the corpus delicti corroboration rule borrows case law interpretations of corpus delicti used for the homicide rule. The result is not necessarily appropriate to the rationale underlying confession corroboration. See note 43 infra.
putting a defendant's extrajudicial confession before a jury, there would be too great a likelihood that over-reliance on confessions would result. 26

This last rationale, together with the problem of unreliability, has also served as the justification for the common law "voluntariness" doctrine 27 and the federal constitutional constraints, particularly as implemented in the Miranda doctrine. 28 In fact, the corroboration rule has been called a "first

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26. See notes 97-99 infra and accompanying text.

27. See generally McCormick, supra note 1, § 147; Developments, supra note 19, at 954-61. Based on the premise that a confession made under a threat or promise of benefit is likely to be false, the voluntariness doctrine renders it inadmissible. See 3 J. Wigmore, supra note 1, § 822 n.1. Until recently, most American jurisdictions interpreted this rule rather strictly. For example, they required that the promise of benefit must be offered by a person in authority and must be related to the criminal charge. See Dix, Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions, 1975 Wash. U.L.Q. 275, 283. In New York, a quirk in the development of the law produced the highly stringent requirement that the only promise of benefit rendering a confession inadmissible would be one made by the district attorney not to prosecute. The first part of § 395 of the 1881 Code of Criminal Procedure, ch.442, § 395, 1881 N.Y. Laws, was enacted to make confessions admissible in response to a case which had held a confession under oath before a coroner's inquest inadmissible at the later criminal trial of the confessor. People v. Mondon, 103 N.Y. 211, 220, 8 N.E. 496, 499-500 (1886). Section 395 declared the confession admissible "unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that [the defendant] shall not be prosecuted." The courts interpreted this literally to limit the voluntariness doctrine to the precise circumstances described in the statute. Denzer, Practice Commentary, N.Y. Crim. Proc. Law § 60.45, at 261 (McKinney 1971). Under such conditions, it is probable that in New York many convictions were obtained through the use of unreliable confessions.

28. The voluntariness doctrine expanded as the United States Supreme Court began to review state criminal decisions based on coerced confessions and overturned them as violative of due process. E.g., Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936). Restraint of coercive police practices became an equal, if not more important goal, than reliability. Rogers v. Richmond, 365 U.S. 534 (1961); see Kamisar, What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions, 17 Rutgers L. Rev. 728, 753-59 (1963). The Court developed the "totality of the circumstances" test for voluntariness, asking whether "the confession [is] the product of an essentially free and unconstrained choice by its maker?" Culombe v. Connecticut, 367 U.S. 568, 602 (1961). However, the state courts were slow to adopt this test, and the Supreme Court soon found that the due process review of state criminal cases, requiring careful weighing of facts and circumstances, was too cumbersome. Dix, supra note 27, at 305-08. In 1964, the Court attempted to short-circuit this problem by requiring, in Escobedo v. Illinois, 378 U.S. 478 (1964), the automatic exclusion of statements obtained in violation of the defendant's sixth amendment right to counsel. In the same term, the fifth amendment privilege against self-incrimination was held applicable to the states. Malloy v. Hogan, 378 U.S. 1 (1964). Two years later, Miranda v. Arizona, 384 U.S. 436 (1966), was decided. By establishing procedural safeguards in the form of warnings detailing defendant's rights to be given to him prior to "custodial interrogation," the Court hoped to objectify the notion of voluntariness. Id. at 478-79. If the defendant were aware of his rights, then his confession would be a product of free choice. One difficulty, however, is that a defendant who makes a statement after being apprised of his rights to remain silent and to counsel is not necessarily making a knowing and voluntary waiver of those rights. This raises many of the voluntariness issues once again. See generally C. McCormick, supra note 1, § 154(d). Another difficulty with Miranda is that its applicability depends on the changing definitions of "custodial
Thus, the importance of the corroboration rule has varied in accordance with the viability of the voluntariness doctrine and its constitutional counterparts. As the other doctrines have become more effective in excluding confessions from evidence, the need for corroboration has dwindled.

Whereas the other doctrines have constitutional underpinnings, the corroboration requirement has never attained that stature, and therefore might be considered relatively expendable. Recently, several commentators have called for the elimination of the corroboration rule, particularly in light of the increased protection guaranteed to defendants under Miranda and similar cases. However, a principle of two centuries' duration which remains alive though somewhat inactive in the federal courts and forty-nine states, should be carefully scrutinized before it is entirely abolished.

Since the corroboration requirement seeks to achieve its objectives by demanding additional evidence, in most jurisdictions the requirement is not implemented as an "exclusionary rule," as are, for example, the voluntariness doctrine and the Miranda doctrine, but as an added requirement of evidenc-
The two major versions of the rule differ as to the type of corroborative evidence which best serves its rationales. The corpus delicti version requires that the corroborative evidence tend to show the commission of the crime; the trustworthiness version requires that the corroborative evidence tend to show the truthfulness of the confession. Clearly, there can be a great deal of overlap, since facts showing that the crime took place will tend to corroborate the truthfulness of the confession. However, some facts may tend to establish the trustworthiness of the confession, yet be wholly collateral to the crime, and fail to meet the corpus delicti standard. Thus, the corpus delicti version is generally considered the stricter rule.

B. The Corpus Delicti Version

The corpus delicti version of corroboration requires that the corroborative evidence tend to prove the corpus delicti, the "body of the crime." To understand the functioning of the corroboration rule, it is necessary to understand this underlying concept. In proving the commission of a crime, the prosecution must show beyond a reasonable doubt that (1) the basic injury or result occurred; (2) such injury was the result of criminal rather than natural

34. Although in some jurisdictions the sufficiency of corroboration may be left to the jury, the better rule is that the decision be left to the trial judge, since the nature of the corroboration requirement is technical and requires reasoning similar to that involved in the consideration of preliminary questions of fact where admissibility is at issue. One of the purposes of corroboration is to enable the judge to dismiss the charge in the face of a confession to which the jury may give too much weight, rather than ask the jury to ignore a convincing piece of evidence and apply a technical and little understood rule. See Comment, Pennsylvania's Corpus Delicti Rule in Criminal Confession Cases, 77 Dick. L. Rev. 297, 309-12 (1972-73). But cf. People v. Cuozzo, 292 N.Y. 85, 95, 54 N.E.2d 20, 25-26 (1944) (instruction to jury that it could not convict solely on the basis of a confession without corroboration). The status of the operation of the rule in New York in this respect appears to be unclear, especially after the Murray case, discussed in the text accompanying notes 158-75 infra.

35. "Corroborative evidence" is evidence "supplementary to that already given and tending to strengthen or confirm it." Black's Law Dictionary 414 (4th ed. 1968). This definition applies only to the trustworthiness version; corpus delicti corroboration is not really "corroboration" in the sense of confirming other evidence. The New York rule appears to avoid this semantic difficulty by its use of the term "additional proof." N.Y. Crim. Proc. Law § 60.50 (McKinney 1971).

36. See note 72 infra for an example.

37. See 7 J. Wigmore, supra note 1, § 2071, at 397.

38. By requiring only a minimal weight of evidence and using other rules of construction some jurisdictions have made the corpus delicti version quite weak. See notes 53-71 infra and accompanying text. Even the three judges who joined the Murray dissenting opinion, which favored a strong rule, had to admit "the confession corroboration requirement is one of the weakest in our law." 40 N.Y.2d 327, 339, 353 N.E.2d 605, 613, 386 N.Y.S.2d 691, 699 (1976), (Jasen, J., dissenting), cert. denied, 430 U.S. 948 (1977). The New Jersey Supreme Court felt that the protection of the trustworthiness version was broader. State v. Lucas, 30 N.J. 37, 57, 152 A.2d 50, 60 (1959); see notes 85-87 infra and accompanying text.
or accidental cause; and (3) defendant was the criminal agent. Generally, the corpus delicti is defined as the first two of these elements. The identification of the defendant, the third element, has only rarely been considered to be part of the corpus delicti, and may usually be proved solely through the defendant's confession. Although the corpus delicti concept normally isolates proof of the identity of the defendant from the other elements of the crime, there is no requirement that this proof of identity be independent from the proof that the crime was committed. All elements may thus rest on the same foundation of circumstantial evidence, and evidence tending to establish the corpus delicti may often be intertwined with evidence tending to establish defendant's identity. Viewed in this fashion, the barrier interposed by the corpus delicti concept is often artificial. With the exception of its use in confession corroboration, the concept of corpus delicti is rarely used in modern criminal law.

39. 7 J. Wigmore, supra note 1, § 2072, at 401.
40. Id. at 401-02. Note that Wigmore would define corpus delicti "in its orthodox sense to signify merely the first of these elements, namely, the fact of the specific loss or injury sustained." Id. at 401 (footnote omitted). He appears to rely heavily in this regard on the "reappearing victim" rationale; that is, so long as the injury is shown, the protection of the rule is no longer required. However, in almost all jurisdictions, including New York, the term "corpus delicti" includes both elements. People v. Bennett 49 N.Y. 137, 143 (1872).
41. To include the identity of the defendant would make the corpus delicti synonymous with the crime itself. Wigmore calls such an inclusion "absurd." 7 J. Wigmore, supra note 1, § 2072, at 402. Few jurisdictions include identity in the definition of corpus delicti. Until recently, Texas had required all three elements to be corroborated. This requirement was expressly overturned in Self v. State, 513 S.W.2d 832, 837 (Tex. Crim. App. 1974). In New York, a proposed 1969 legislative modification to expand the New York rule to include the identity element was never adopted. See Committee on Criminal Courts, Law and Procedure, The Association of the Bar of the City of New York, 1969 Legislative Bull. No. 11.
42. In fact, some crimes are definable only in terms of an identifiable defendant. The defendant's identity is not at issue in a perjury, bribe receiving, or income tax fraud case. Corroboration of the corpus delicti of these charges would thus include corroboration of identity. See Veldorale, The Principle of Corpus Delicti and the Evidence Pertaining Thereto, 39 Temp. L.Q. 1, 49 (1965).
43. The only other doctrine incorporating the corpus delicti concept is the evidentiary rule in homicide law, discussed at note 25 supra, that requires proof of death or criminal agency to be direct, that is, through real evidence or eyewitness testimony. 7 J. Wigmore supra note 1, § 2081. In New York, this rule was first set forth in Ruloff v. People, 18 N.Y. 179, 184 (1858), which stated that the law of homicide required direct proof of death or the act which produced death. Codified in the 1881 Penal Code, the requirement was that "[n]o person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt." Act of June 30, 1882, ch. 384, § 181, 1882 N.Y. Laws §40 (codified as Penal Law § 1041, N.Y. Cons. L. (1909) (repealed 1966) (emphasis added). This section was omitted in the recent revision of the Penal Law, ch. 1030, 1965 N.Y. Laws 2343, 2503 (effective 1967). Thus, it is now possible for a homicide conviction to depend entirely on circumstantial evidence, without the finding of a body or eyewitness testimony of the homicidal act. New York has joined the great majority of jurisdictions in relying on the adequacy of circumstantial evidence. See 7 J. Wigmore, supra note 1, § 2081, 422 n.8.
With respect to corroboration of confessions, the corpus delicti version was adopted in several early American cases, and the majority of jurisdictions followed Simon Greenleaf's treatise which declared: "In the United States, the prisoner's confession, when the corpus delicti is not otherwise proved, has been held insufficient for his conviction; and this opinion best accords with the humanity of the criminal code, and with the great deal of caution applied in receiving and weighing cases . . . ." Jurisdictions differ considerably about many aspects of this rule, to the extent that, in practice, there is no real "majority rule." The issues subject to a wide variance of interpretation are: (1) which elements of the offense must be corroborated, and (2) what amount of corroboration is necessary. Many jurisdictions, including New York, have made the rule quite malleable by stretching one of these requirements, often at the expense of the other, to achieve a particular result in a given case.

Perhaps the first question posed by the corpus delicti version of corroboration is whether the corroborative evidence must tend to confirm all of the material elements of a crime. For example, a conviction for second degree arson in New York requires the prosecutor to prove the actor (1) started a fire (conduct); (2) intentionally (mens rea); (3) causing damage to a building (result); and (4) another person was present in the building at the time (attendant circumstance); and (5) the actor knew or should have known this (attendant circumstance). Which of these five elements must be corroborated? Since the definition of corpus delicti itself requires that the result be produced by criminal, not natural or accidental, means, it is clear that the corroboration must tend to establish at least the result element of the offense, such as a dead body in a homicide, missing property in a larceny, and a burned building in an arson. Direct corroborative evidence of the result by itself is fully sufficient to satisfy the "reappearing victim" rationale. How-

44. 1 S. Greenleaf, Evidence § 217, at 278-80 (12th ed. 1866).
46. See, e.g., Jones v. State, 253 Ind. 235, 252 N.E.2d 572 (1969). The majority held that in a felony murder charge the underlying felony need not be corroborated. The dissent declared this a clear break with precedent, warning, "we are here substituting expediency and hysteria for deliberation and judgment." Id. at 253, 252 N.E.2d at 581 (Jackson, J., dissenting). The techniques used by the Pennsylvania courts to vary that state's strict requirements are discussed in Comment, Pennsylvania's Corpus Delicti Rule in Criminal Confession Cases, 77 Dick. L. Rev. 297, 305 (1972-73). The New York rule is analyzed in pt. III infra.
47. A "material element" is defined, e.g., as "an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct." Model Penal Code § 1.13 (10) (Proposed Official Draft 1962). New York does not directly define such elements, but uses the term "material element" in the same fashion as does the Model Penal Code. See, e.g., N.Y. Penal Law § 15.10 (McKinney 1975).
49. This appears to be Wigmore's basis for limiting the definition of corpus delicti to the specific injury or loss. Circumstantial corroboration, however, does not provide complete assurance that the victim will not reappear, yet may be used to satisfy the requirement in all
ever it is equally clear that where an offense contains no result element, such as is true of conspiracies or attempts for example,\textsuperscript{50} neither the corpus delicti concept, nor the reappearing victim rationale is at all relevant since the burning of the building, or similar result, is not even alleged.\textsuperscript{51} Despite this, the requirement of corpus delicti corroboration has been extended in most jurisdictions to offenses without result elements.\textsuperscript{52}

Because corpus delicti as it is usually defined incorporates a requirement of criminality, it would appear that the corroboration should extend beyond the result to the required level of culpability (mens rea); for example, \textit{intent} to burn a building; \textit{knowing} possession of a dangerous weapon; \textit{reckless} creation of a risk of serious physical harm to another; or \textit{negligent} causation of another's death. Although negligence and recklessness are to a great extent objective standards, most crimes involve higher levels of culpability, such as knowledge and intent, which are subjective and therefore inextricably linked to the identity of the accused.\textsuperscript{53} Since a high level of "criminality" is thus always inseparable from the actor's identity, which is not part of the corpus delicti, most jurisdictions do not require the corroboration of this degree of culpability.\textsuperscript{54} Instead, these jurisdictions follow a rule which holds corroboration of criminality in the lowest degree sufficient to corroborate any degree of the crime.\textsuperscript{55} Thus, for example, if the circumstances surrounding a death

jurisdictions. In those jurisdictions where the weight of circumstantial corroboration may be slight, the reappearing victim rationale is essentially undercut. \textit{See California's Corpus Delicti Rule, supra note 15, at 1088 & n.162.} 

\textsuperscript{50} "Attempt" requires "conduct which tends to effect the commission of [a] crime." N.Y. Penal Law § 110.00 (McKinney 1975). A defendant may be charged with conspiracy if, with the requisite mental culpability, he "agrees with one or more persons to engage in or cause [conduct constituting a crime]." \textit{Id.} § 105.00. In neither case is there a requirement that the predicate crime actually take place.

\textsuperscript{51} This problem is discussed in Veldorale, \textit{supra} note 42, at 4. The author suggests using "criminal occurrence" as the corpus delicti for those crimes not involving a specific loss or injury. Rather than illuminating the deficiencies of the corpus delicti concept, this approach appears cosmetic at best.

\textsuperscript{52} \textit{Proof of the Corpus Delicti, supra} note 1, at 673-74. In New York, the rule was almost always raised in felony cases. The 1971 Criminal Procedure Law extends the coverage of the rule by making it applicable to all "offenses," rather than "crimes." N.Y. Crim. Proc. Law § 60.50 (McKinney 1971). "Offense" includes violations, whereas "crime" does not. N.Y. Penal Law § 10.00(1),(3),(6) (McKinney 1975).

\textsuperscript{53} Criminal negligence is the gross deviation from an objective standard of behavior. N.Y. Penal Law § 15.05(4) (McKinney 1975). Recklessness goes beyond criminal negligence in requiring that the actor is "aware of and consciously disregards" a risk. \textit{Id.} § 15.05(3). This aspect of recklessness, as well as the existence of intent or knowledge on the part of the actor, \textit{id.} § 15.05(1)-(2), may be corroborated only by circumstantial evidence or a judicial admission.

\textsuperscript{54} \textit{See} Veldorale, \textit{supra} note 42, at 22 (concluding that intent is unique to the defendant and thus not part of the corpus delicti).

\textsuperscript{55} Many modern criminal codes structure penalties so that they correspond in degree with levels of increased culpability and aggravating attendant circumstances. One of the five "general purposes" of the Penal Law in New York is "[t]o differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor." N.Y. Penal Law § 1.05(4) (McKinney 1975).
indicate at least criminal negligence, a defendant may be convicted of any degree of homicide for which criminally negligent homicide is a lesser included offense, including intentional murder. Once the corroboration of "criminality" is established, the defendant's confession may supply the sole proof as to any greater degree of culpability.\textsuperscript{56}

By the same reasoning, corroboration of attendant circumstances contained within the statutory definition of an offense is not required. In New York, for example, heavier penalties are imposed for certain crimes if it is proved that the conduct took place at night,\textsuperscript{57} or was accomplished by means of a dangerous instrument,\textsuperscript{58} or in concert with another person present.\textsuperscript{59} If the defendant's confession contains facts regarding such aggravating circumstances, most jurisdictions would not require such facts to be corroborated in order to convict the defendant of the higher degree offense.\textsuperscript{60} This is so even if the defendant could show that the facts were highly unreliable.\textsuperscript{61}

In a word, the corpus delicti version of corroboration is satisfied by proof of result where applicable and the lowest levels of culpability and circumstances associated with the crime charged. This is nothing more than a compromise between a very strict rule, usable by defendants as a technical loophole to avoid conviction,\textsuperscript{62} and no rule at all. A requirement that the prosecution corroborate every element and its corresponding culpability\textsuperscript{63} would be a great


\textsuperscript{57} Compare burglary in the second degree, N.Y. Penal Law § 140.25(2) (McKinney 1975), with burglary in the third degree, \textit{id.} § 140.20.

\textsuperscript{58} Compare assault in the second degree, \textit{id.} § 120.05(2), with assault in the third degree, \textit{id.} § 120.00(1).

\textsuperscript{59} Compare robbery in the second degree, \textit{id.} § 160.10(1), with robbery in the third degree, \textit{id.} § 160.05.


\textsuperscript{61} Thus, for example, a defendant may be charged with robbery in the second degree rather than robbery in the third degree because of his statement attempting to place most of the blame on an imaginary accomplice. In most jurisdictions the presence of the accomplice may be proved solely by defendant's statement, indeed despite evidence of the complaining witness that his assailant acted alone.

\textsuperscript{62} Wigmore railed that "this rule . . . [is] today constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge . . . [making] it often a positive obstruction to the course of justice." J. Wigmore, supra note 1, § 2070, at 395. The possibility that the rule would be so used is a major policy factor in the development of judicial rules of construction tending to weaken the utility of the rule, such as the "confession is the key" rule devised in New York. See pt. III(C) \textit{infra}.

\textsuperscript{63} The logical consistency of such an approach has appealed to the New York courts from time to time, but it has never been adopted by the court of appeals. See notes 144-49 \textit{infra} and accompanying text.
burden, especially for those elements which are within the control of the defendant. The prosecution must still prove its case beyond a reasonable doubt. Corroboration of the lowest degree of the crime shows there was a crime committed and it shows that defendant's confession is reliable in at least some important details. Moreover, the jury need not give all the facts in the confession equal weight, and will disregard those which are patently unreliable. The foregoing reasons mitigate against a strict rule and the need for a compromise is evident.

A second type of compromise centers on the weight of corroborated evidence required. Jurisdictions vary significantly in the amount of evidence required, ranging from "slight" to "prima facie" to "substantial". Within these stated boundaries, however, the concept of weight gives considerable discretion to the trial judge, so that in jurisdictions requiring only slight weight, such as New York, a trial judge (or an appellate judge on review) may virtually ignore the corroboration requirement. The resulting decisional law is very difficult to rationalize. It should be noted that even those authorities who recommend abolition of the rule remark that if it is to be retained, some significant weight of corroboration should be required.

Although the corpus delicti rule appears flexible, it is periodically misapplied, and its emphasis on the elements of the crime charged as opposed to the reliability of the confession has caused several courts and commentators to question the extent to which the corpus delicti version serves its original purposes, and to prefer the alternative trustworthiness version.

64. For example, defendant's statement as to his own state of mind is the best evidence of intent. That the prosecution be required to corroborate this has been called a "second-best" evidence rule. See People v. Murray, 40 N.Y.2d 327, 335, 353 N.E.2d 605, 610-11, 386 N.Y.S.2d 691, 697 (1976), cert. denied, 430 U.S. 948 (1977); Proof of the Corpus Delicti, supra note 1, at 647, 654.

65. That the rule intrudes into the jury's province as factfinder is considered a major drawback. A very strict rule would be too great an intrusion. Smith v. United States, 348 U.S. 147, 153 (1954).

66. The corpus delicti formulation, however, is not the only compromise possible. The rule proposed in pt. IV infra uses the technique of shifting the burden of going forward to the defendant as a means to accomplish the same result. See notes 207-13 infra and accompanying text.


68. See, e.g., Shuler v. State, 132 So.2d 7, 8 (Fla. 1960); State v. Lutes, 38 Wash. 2d 475, 483, 230 P.2d 786, 790 (1951).


70. "Once the decision to retain the corpus delicti rule has been made, then the amount of independent evidence required should be truly significant, perhaps even amounting to a preponderance." Developments, supra note 19, at 1077.

C. The Trustworthiness Version

The trustworthiness version of corroboration, which emphasizes the inherent unreliability of some confessions, requires the prosecution to produce evidence corroboration of the confession’s reliability. This evidence need not directly tend to prove the corpus delicti; it is often said that it may in fact be wholly collateral to the crime itself. The corroboration, however, directly relates to the trustworthiness of the important facts contained in the defendant's statement, whereas the corpus delicti version is more concerned with the elements of the offense. In the federal courts, the rule had its genesis in Daeech v. United States, a 1918 conspiracy case involving a federal anti-sabotage statute. Judge Learned Hand, after first invoking the corpus delicti rule, ambiguously went on to state “any corroborating circumstance will serve in which in the judge's opinion go to fortify the truth of the confession.” Later cases followed this latter emphasis on trustworthiness, although at least one circuit court strongly supported the corpus delicti version. The United States Supreme Court adopted the trustworthiness version as the “best rule” in two companion cases decided in 1954, Opper v. United States and Smith v. United States. In Opper, the Court rejected see, e.g., State v. Johnson, 31 N.J. 489, 503-04, 158 A.2d 11, 19 (1960), cert. denied, 368 U.S. 933 (1961). One defendant stated in his confession that he had cut his hand during the attempted robbery of a store and the murder of its owner. This was corroborated by witness testimony that he had a bandage on his hand the next day. Another defendant's confession alluded to a gun (not the murder weapon) he had borrowed; this was corroborated by the owner of the gun. This plus other corroboration, for example the body and blood on the floor, led the court to find the confessions sufficiently reliable to allow the felony murder charge to stand. “The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed . . . .” Id. at 571. Note the use of the word “touch,” which underscores many of the issues raised about the corpus delicti version in pt. II(B) supra. The court does not indicate whether every element must be “touched” and what weight of evidence the word “touch” connotes. The ambiguity derives from the question whether Judge Hand was discussing merely the weight of corroboration within the corpus delicti framework, or whether he was instead attempting to restate the entire rule in terms of trustworthiness. The former interpretation is more likely, since he cites People v. Badgley, 16 Wend. 53 (N.Y. Sup. Ct. 1836), the earliest New York corpus delicti case as support for his argument. Still, the emphasis on trustworthiness was followed by other courts. Forte v. United States, 94 F.2d 236, 243 (D.C. Cir. 1937) (conviction for transporting stolen motor vehicles in interstate commerce reversed for lack of corroboration of defendant's knowledge that the car was stolen). 77. 348 U.S. 84 (1954); see Comment, Corroboration of Extrajudicial Statements, 7 Stan. L. Rev. 378 (1955). 78. 348 U.S. 147 (1954). While Opper states the federal corroboration rule as primarily a question of trustworthiness, 348 U.S. at 93, Smith focuses more closely on the unfairness of the Government's use of uncorroborated admissions when they are “extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.” 348 U.S. at 153. Smith was cited as authority in Malloy v. Hogan, 378 U.S. 1, 7 (1964), which first held the right against
corpus delicti version, holding that "[i]t is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." The opinion stressed unreliability, indicating that an admission, confession, and exculpatory statement all have significant possibilities for error. The case involved an admission, which by definition did not involve every element of the offense charged. In requiring the Government to introduce "substantial independent evidence," the Court relied on this evidence to serve a "dual function . . . make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense."

The essence of the Opper rule is that a conviction cannot stand where any element of the crime charged has been proved only by a defendant's statement, and no other evidence in the case corroborates the reliability of the essential facts admitted in the statement. This rule allows corroboration by facts which tend to prove the corpus delicti; that is, if the Government makes a sufficient showing of an element of the offense charged by using additional

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79. 348 U.S. at 93. Thus, it would appear that the corroborating evidence must independently convince a reasonable juror that the facts are reliable. The Court required that there be substantial evidence to support this inference of reliability Id. Thus the element of weight of corroboration remains in the trustworthiness standard. Judges will still disagree, sometimes vehemently, over whether sufficient corroboration has been produced. See, e.g., State ex rel J.P.B., 143 N.J. Super. 96, 112, 362 A.2d 1183, 1192 (App. Div. 1976). In J.P.B., the majority held a confession by a juvenile to murder subject to a high degree of corroboration because of the susceptibility of a juvenile to suggestion by the police. Id. The dissent found "more than sufficient corroborating evidence tending to establish that the juvenile was telling the truth," id. at 119, 362 A.2d at 1195 (Carton, P.J., dissenting), citing inconsistent details and the "unmistakable ring of truth" in the confession, id. at 118, 362 A.2d at 1195. At least, however, the disagreement centered around the reliability of the statement rather than the arcane question of whether some element was part of the corpus delicti.

80. There are several definitions for the terms "confession," "admission," and "exculpatory statement." See generally 3 J. Wigmore, supra note 1, § 821; Developments, supra note 1, at 1031-32. In New York a confession is a direct acknowledgment by the defendant that he committed the crime charged. People v. Bretagna, 298 N.Y. 323, 326, 83 N.E.2d 537, 538, cert. denied, 336 U.S. 919 (1949). An "admission," however, is an acknowledgment by the accused of a fact which tends to prove guilt only when considered with other proven facts; it leaves out some facts that are necessary for sufficiency of proof of one or more elements of the crime charged. Thus, a "properly proved and corroborated confession is sufficient for conviction; an admission is merely circumstantial evidence and needs other proof . . . ." Both are different from an exculpatory statement, with which the accused attempts to show that he did not or could not have committed the crime." People v. Utley, 77 Misc. 2d 86. 92, 353 N.Y.S.2d 301, 311 (Nassau County Ct. 1974) (citations omitted). The recent revision of the New York corroboration rule explicitly extends the rule to admissions. Under the old rule, the need to corroborate admissions was unclear. See Slough, Confessions and Admissions, 28 Fordham L. Rev. 96, 106-09 (1959).

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evidence, the rule never bars the defendant's statement from consideration by the jury. In many cases, in fact, trustworthiness corroboration and corpus delicti corroboration lead to identical results. The former's advantage lies in its simplicity and its direct bearing on the reliability of facts stated in the confession or admission.

Since the Supreme Court's adoption of the trustworthiness version, five jurisdictions have discarded or refused to adopt the corpus delicti version. Typically, this has been done as a matter of judicial decision, since the corroboration rule is rarely codified. The leading case is State v. Lucas, in which the New Jersey Supreme Court questioned the premise of corpus delicti corroboration, noting that "[t]here seems to be little difference in kind between convicting the innocent where no crime has been committed and convicting the innocent where a crime has been committed, but not by the accused." For example, where the defendant confesses to an actual crime and the confession is falsely made because of duress or mental disease, the corpus delicti version gives no protection, whereas the trustworthiness version does. The rule set out in Lucas requires corroboration "that when the defendant confessed he was telling the truth, plus independent proof of the loss or injury." This latter requirement is a vestige of the corpus delicti version—no longer does "someone's criminality" need corroboration, but corroboration of the "result" is still required to insure that the victim does not reappear.

Five years later, in 1964, the Connecticut Supreme Court reexamined its corpus delicti requirement and found that "the application of our definition of corpus delicti creates complications . . . [which] tend to produce unjust results because of the greater hazard that mistakes will be made by the court or jury." By redefining corpus delicti to exclude "someone's criminality," the court thus appeared to be following New Jersey, although the emphasis on trustworthiness as a replacement was unclear. There thus appeared to be a trend away from the corpus delicti version to simpler variations of corroboration.

85. 30 N.J. 37, 152 A.2d 50 (1959).
86. Id. at 57, 152 A.2d at 60.
87. Id.
88. Id. at 58, 152 A.2d at 61.
90. "Actually, there was a considerable amount of corroboration indicating the trustworthiness of the confessions." Id. at 21, 202 A.2d at 497.
tion. New York declined the opportunity to revise its rule when the new Criminal Procedure Law was adopted in 1970.91

III. THE NEW YORK RULE
A. History and Development

New York's rule, first adopted as common law in 1836,92 then codified in 1881 and again in 1971,93 embodies the corpus delicti version.94 Since the original codification, the rule was applied in more than 100 reported cases. A review thereof reveals a confused patchwork of justifications for the conviction or acquittal of particular defendants.95 The first two New York cases,96 both decided in 1836, illustrate the multiple policies used to support the rule. People v. Hennessey97 involved a civil servant who had been convicted, solely on the basis of his confession, of embezzling tax monies. Citing the fact that the confession was the only evidence produced in the case, although proof of payment of the taxes to the accused could have been shown through witnesses, the court adopted the corpus delicti rule as justification for overturning the conviction.98 Hennessey emphasized the importance of requiring the prosecution to produce something more than an extrajudicial plea of guilty.99

In a companion case, People v. Badgley,100 the court limited the scope of the rule. The defendant had forged the signature of a merchant named Clark to a note, and then had given it as security to prevent execution of other judgments. Defendant later admitted that he, not Clark, had drawn the note.

91. Corroboration of confessions was a minor issue in the context of the sweeping revisions encompassed in the 1970 Criminal Procedure Law, ch. 996, 1970 N.Y. Laws 3117. One court has noted that the New York Legislature did not adopt the "more liberal" trustworthiness rule, although the courts of its neighboring states had so recently shifted to it. People v. Jennings, 40 App. Div. 2d 357, 361 n.3, 340 N.Y.S.2d 25, 29 n.3, aff'd, 33 N.Y.2d 880, 307 N.E.2d 561, 352 N.Y.S.2d 533 (1973). However, it is quite probable that the legislature's act did not constitute a ratification of the corpus delicti concept so much as a reluctance to change a rule that had apparently been serviceable in the past.

92. People v. Badgley, 16 Wend. 53, 57, 59 (N.Y. Sup. Ct. 1836). Although the opinion itself is somewhat unclear as to whether the corpus delicti version is being invoked, later cases often referenced the headnote which set forth the rule more directly. See id. at 53.

93. See note 4 supra for the legislative history of the New York rule.

94. Note that the codified versions do not mention corpus delicti expressly as did People v. Badgley, 16 Wend. 53 (N.Y. Sup. Ct. 1836). Yet clearly the New York rule has always been categorized as requiring corpus delicti corroboration. See, e.g., People v. Deacons, 109 N.Y. 374, 378, 16 N.E. 676, 678 (1888); 7 J. Wigmore, supra note 1, § 2071, at 397, 399 n.4.

95. See, e.g., text accompanying notes 124-26 & 151-52 infra.


97. 15 Wend. 147 (N.Y. Sup. Ct. 1836).

98. Id. at 155.

99. To allow the prosecutor thus to obtain the equivalent of a guilty plea would encourage reliance on inquisitorial methods, leading to abuse of power. See, e.g., Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964).

100. 16 Wend. 53 (N.Y. Sup. Ct. 1836).
After posting bond, he regained possession of the note and immediately burned it, thus destroying any direct evidence of the forgery. The proof of criminality thus depended completely on defendant's statement. In upholding the conviction, the court stated that the corroborative evidence may be circumstantial and need not be so great as to establish independently a prima facie case. Defendant's own act of destroying the note had provided sufficient corroboration of the admission—"[w]hy destroy a note against a responsible maker, if it was genuine?" In addition, although Clark had died before the trial, the prosecutor had called Clark's son, an active member in his father's firm, as a witness, and he disclaimed any knowledge of the note or the underlying transaction. This contrasted with Hennessy in that the "highest and best evidence in the power of the prosecutor was produced." Finally, the court noted the defendant's failure to produce any evidence tending to show his admission to be false, even though "he knew . . . the maker, and . . . could at least have given some proof of the transaction out of which the note arose." The court simply was not willing to allow the corroboration rule to be used as a technical loophole.

With the two extremes already delineated, the rule became available for application to the many confession cases which occupied the middle ground. While few prosecutors subsequently followed the Hennessy approach to law enforcement, and few defense attorneys were inclined to imitate Badgley's counsel, there were a number of cases which necessitated narrower rulings on the scope of the rule. Although one would imagine that the basic issue in these cases was whether in fact there was a crime at all (the supposed purpose for corpus delicti corroboration), in reality the key issues were the reliability of the confession and the police practices accompanying it. Because the New

101. Id. at 57-58. Note that the defendant claimed he fabricated the fact that the note was a forgery in order to regain possession of it. This raised a genuine question as to the reliability of the fact admitted. The court balanced this assertion against the fact that when defendant did regain possession he destroyed the note. The analysis of the court clearly relates to reliability, and much less clearly to corpus delicti.

102. Id. at 59.

103. Id. at 58.

104. Id. at 59; see text accompanying notes 98-99 supra.

105. 16 Wend. at 58.

106. Badgley pointed to many cases in which "slight corroborating facts were held sufficient." Id. at 59 (emphasis added). Thus, New York became a jurisdiction using a minimal weight standard.

107. E.g., People v. Cuozzo, 292 N.Y. 85, 54 N.E.2d 20 (1944) (mentally retarded defendant confessed to authorities while under custodial interrogation three years after the event); People v. Joyce, 233 N.Y. 61, 134 N.E. 836 (1922) (mentally retarded defendant confessed to felony murder under circumstances indicating he was deceived by police into falsely incriminating himself); People v. Ramos, No. 2109/72, slip op. at 19-20 (N.Y. Sup. Ct. Oct. 23, 1975) (mentally retarded defendant's confession to fire marshall investigating possible arson showed substantial indicia of unreliability); People v. Rooks, 40 Misc. 2d 359, 243 N.Y.S.2d 301 (Sup. Ct. 1963) (juvenile defendant, after nine hours of police questioning, confessed to attempted rape and possible killing of 9-year old girl); People v. Shanks, 201 Misc. 511, 108 N.Y.S.2d 504 (Kings County Ct. 1951),
York voluntariness doctrine was until recently highly circumscribed and did not offer defendants much protection against police practices that tended to elicit unreliable confessions. Courts occasionally used the corroboration rule to protect defendants' rights. Although the corpus delicti formulation was not easily manipulated, it was used to protect the defendant in circumstances where there was ambiguity as to whether a criminal act had occurred.

Thus, where the crime charged has obviously taken place, the corpus delicti formulation offers no protection. For example, if the victim is found dead of a bullet wound not obviously self-inflicted, an internally inconsistent confession made during a twenty-four hour interrogation three years after the event by a mentally retarded defendant, unacquainted with the victim, can be sufficient evidence for conviction. Subject to the general admissibility criterion of competence, the reliability of the confession need never be corroborated.

For purposes of analysis, the New York decisional law can be classified in three categories: (1) cases involving unreliable confessions and an ambiguous event; (2) cases involving reliable confessions and an ambiguous event; and (3) cases involving unreliable confessions and a clearly criminal event. Blackletter rules were developed so that the proper result would be reached for cases in each category. A strict corpus delicti formulation has been used where the confession is unreliable and the event ambiguous. The so-called "confession is the key" rule has been devised for cases in which the confession is reliable and the event ambiguous. Finally, attempts have been made to require the "each and every element" rule where the event was clearly criminal, but the confession unreliable. These rules purport to stress various nuances of the corpus delicti construction; however, they only tangen-


108. See note 27 supra.

109. In a homicide, if the cause of death is stabbing or shooting, a presumption of criminality is invariably made; that is, the cause of death itself is sufficient corroboration of a criminal act. However, if the cause of death is drowning, falling, or is not discernable, there is a reasonable probability that the victim may have accidentally perished—no presumption of criminality is made and more corroborating evidence is required. See Perkins, The Corpus Delicti of Murder, 48 Va. L. Rev. 173, 192-95 (1962). The effect of this rule, which is a direct consequence of the criminality aspect of corpus delicti, is that the availability of corroboration is often totally unrelated to the rationales underlying the corroboration requirement. For example, defendant X confesses to deliberately pushing the victim to his death from a crowded subway platform, while defendant Y admits accidentally shooting the victim while showing him his gun. Assuming that the victim's body is found in both cases, that both statements are made under similar conditions of police interrogation and have the same degree of reliability, the corpus delicti version could lead to the acquittal of X for lack of corroboration, whereas the jury would get the opportunity of convicting Y.

110. If the confession is clearly reliable and the event is clearly criminal, the corpus delicti rule does not apply, nor is the court overly concerned with defendant's rights.

111. See notes 115-25 infra and accompanying text.

112. See notes 126-41 infra and accompanying text.

113. See notes 142-57 infra and accompanying text.
tially relate to the issue of reliability, and generally ignore the question whether the prosecution has presented the best available evidence of the crime charged.\textsuperscript{114} As will be shown, these latter policies, rather than technical nuances, in fact form the basis of the selection of the rule to be applied in a particular case.

\textbf{B. The Cuozzo Rule: Unreliable Confession and Ambiguous Event}

In \textit{People v. Cuozzo},\textsuperscript{115} defendant, twenty-five years old and a "mid-grade moron," confessed that he had raped a nineteen-year-old girl, struck her over the head and left her on the railroad tracks, where her body was mutilated by a freight train. Eleven confessions were made in all, with varying levels of inconsistency with each other and with known extrinsic facts.\textsuperscript{116} All confessions were made to the police during what today would be considered custodial interrogation.\textsuperscript{117} Finally, the confessions were made three and one-half years after the event; and although the police had investigated the incident at the time it occurred, no "important information" had been uncovered.\textsuperscript{118}

The majority opinion extensively reviewed the above matters of reliability. Then, implicitly admitting that the admissibility of the confession was probably within the trial court's discretion,\textsuperscript{119} the opinion proceeded to consider corpus delicti corroboration as a rule wholly unrelated to the truthfulness of the confession.\textsuperscript{120} Construing prior corpus delicti case law, the majority concluded that the rule must be strictly applied; the additional evidence, direct or circumstantial, must tend to show "the crime was in fact committed by someone."\textsuperscript{121} In this case, the majority found that the victim's body did

\textsuperscript{114} See notes 19-23, \textit{supra} and accompanying text.
\textsuperscript{115} 292 N.Y. 85, 54 N.E.2d 20 (1944).
\textsuperscript{116} Defendant did not at first say he raped the victim. He also changed the place where he said he had first seen her, his original statement being inconsistent with the testimony of other witnesses. Several other inconsistencies were noted by the majority opinion. \textit{Id.} at 89-91, 54 N.E.2d at 22-23.
\textsuperscript{117} The police had arrested defendant on another charge, and when he asked whether they "had ever found out who killed" the victim, they took him to a barn and questioned him at length. \textit{Id.} at 88, 54 N.E.2d at 22.
\textsuperscript{118} \textit{Id}.
\textsuperscript{119} Defendant had raised on appeal the issue of involuntariness due to insanity. \textit{Id.} at 95, 54 N.E.2d at 26. But there was medical evidence indicating he "had the capacity to make a valid confession." \textit{Id.} at 99, 54 N.E.2d at 27-28 (Conway, J., dissenting). By ruling on the corpus delicti issue, the majority deftly avoided the entire subject of competence.
\textsuperscript{120} "Having examined those confessions with an eye to trustworthiness, we pass to a consideration of an entirely different question . . . ." \textit{Id.} at 91, 54 N.E.2d at 23 (emphasis supplied). Thus, the \textit{Cuozzo} court purportedly disclaimed trustworthiness entirely as a supporting rationale for corroboration. One may well ask, then, why a three-page review of trustworthiness was at all necessary. \textit{See also} \textit{People v. Deacons}, 109 N.Y. 374, 382, 16 N.E. 676, 680 (1888) (conclusion of sufficient corpus delicti corroboration justified by showing confession was trustworthy).
\textsuperscript{121} 292 N.Y. at 92, 54 N.E.2d at 24.
not bear the marks of murder, nor was there a sufficient degree of other circumstantial evidence tending to show "someone's criminality." Consequently, the corpus delicti was not corroborated, and the conviction was overturned.

The majority did not discuss evidence introduced at trial of the victim's healthy state of mind or the timing of events, evidence which tended to eliminate the possibilities of suicide and accident. As presented by the dissent, these facts would appear to support the corroboration of criminality if a minimal amount of weight is sufficient. The majority opinion did note the principle that the corroborative evidence may be "of whatever weight" and need not be "full, direct and positive evidence of the corpus delicti," but the opinion ignored evidence of a type which had been held in other cases to be sufficient corroboration.

Thus, despite the majority's invocation of a strict corpus delicti rule, the underlying reason for overturning the conviction was the distrust of the reliability of the defendant's confessions. Unable to find lack of competence or voluntariness, the majority used the corpus delicti rule as a ground for overturning the conviction. The use of the rule, though, depended completely on the lack of a presumption of criminality where the victim is hit by a train; had the body shown any signs of human violence, the conviction apparently would have stood, despite the conclusions as to the unreliability of the confession. In this regard, the Cuozzo rule exemplifies the manner in which

122. "The jury could well find that the deceased had not committed suicide for the testimony showed that she was . . . a strong, robust, athletic, happy young girl . . . ." Id. at 100, 54 N.E.2d at 28 (Conway, J., dissenting). As to the possibility of accident, the dissent argued that based on the time the victim was last seen, a jury could reasonably have concluded that if she had fallen, an earlier train would have hit her. Id. at 100-01, 54 N.E.2d at 28. For a recent decision which follows the dissent's reasoning, see People v. Jennings, 40 App. Div. 2d 357, 340 N.Y.S.2d 25, aff'd, 33 N.Y.2d 880, 307 N.E.2d 561, 352 N.Y.S.2d 444 (1973), discussed note 154 infra.

123. 292 N.Y. at 92, 54 N.E.2d at 24 (quoting People v. Conroy, 287 N.Y. 201, 202 (1941)).

124. The corroborative evidence, reviewed by the majority, tended to prove the truth of some facts in the confession, and would apparently have been sufficient under the federal trustworthiness standard. For example, the defendant accurately described the victim's underclothing, about which the majority makes this remarkable statement: "Nothing in the record gives us any clue as to how defendant found that out unless he was the killer. But that one mysterious and unexplained piece of special knowledge on his part, significant though it may be and important as it surely would be on the question of the weight to be given the confession, is not proof of a homicidal killing . . . ." Id. at 94-95, 54 N.E.2d at 25. Compare Self v. State, 513 S.W.2d 832 (Tex. Crim. App. 1974). In Self, defendant confessed to killing two girls and placing their bodies partially submerged in a bayou. Police were then led to the site where the bodies were uncovered, but in too decomposed a state to discern cause of death. Rather than hold that the "mysterious" knowledge of defendant related only to the question of weight, the court, stressing the reliability of the confession, found sufficient corroboration. Id. at 837. The Self court, unlike the Cuozzo majority, found evidence about the victim's excellent health corroborative of death by criminal means. Id. It is highly questionable whether a New York court presented with the facts of Self would follow Cuozzo.

125. See note 109 supra and accompanying text.
the corpus delicti version can be so strictly construed as to be ostensibly divorced from all its original rationales.

C. The "Confession is the Key" Rule: Reliable Confession and Ambiguous Event

There are many cases in which the event is ambiguous, yet the confession has such indicia of reliability that the corroboration rule appears, as in Badgley, to be merely a technical loophole. To prevent the possibility of letting an obviously guilty defendant go free, the court has devised the "confession is the key" rule.

This rule allows the corroborative evidence to be proof of circumstances which, although innocent in themselves, are "nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key." In effect, weightless evidence is bolstered by the confession itself to yield sufficient corroboration. In one case, the defendant had confessed to starting a fire in his room because of "an urge" and was convicted of arson despite the lack of extrinsic evidence as to the criminal origin of the fire. Sufficient corroboration had been found in a fire marshall's testimony that the fire had started in defendant's closet, which lacked wiring or heating fixtures, and defendant's immediate disappearance after the event and subsequent reappearance with dyed hair. Another case resulted in the conviction of a husband for drowning his wife, despite the lack of "signs of human violence" on the body. The corroboration consisted of evidence that the defendant was seen with his wife near the location at which he confessed that he had drowned her, and that he was involved with another woman whom he had promised to marry and with whom he ran off after his wife's disappearance. In neither of these cases did the court have adequate proof, under the Cuozzo rule, of "someone's criminality." The courts instead weighed evidence of motive or appearance of guilt, and found such evidence, "when interpreted in the light of the confession . . . , strongly corroborative of its truth." Thus, by looking at the confession itself a court can turn a highly

126. "It would shock common sense to say in the light of the confession that all of [the evidence produced does] not in any degree tend to prove a crime . . . , and that the defendant should be discharged because some other impossible evidence has not been produced." People v. Brasch, 193 N.Y. 46, 60-61, 85 N.E. 809, 814 (1908).


128. It is universally agreed that the corroborative evidence must be independently admissible—that is, competent, not hearsay, and relevant. Proof of the Corpus Delicti, supra note 1, at 659. Often the corroborative evidence is relevant only if the confession is taken as true. In this way, the actual degree of relevance of the external evidence to the crime considered independently may be infinitesimal; yet with its weight bolstered by the facts in the confession, a sufficient degree of corroboration is achieved. See cases cited in Annot., 45 A.L.R.2d 1316, 1333 (1965).


130. Id. at 46, 191 N.E.2d at 893, 241 N.Y.S.2d at 832.


132. Id. at 59-60, 85 N.E. at 814.

133. People v. Jaehne, 103 N.Y. 182, 199, 8 N.E. 374, 381 (1886).
ambiguous, or even innocent, fact into one "calculated to suggest" a crime.

The innocent fact corroborates the reliability of the confession, and the confession itself then tends to establish the essential elements of the corpus delicti. This rule appears to operate exactly like the trustworthiness concept of Opper.135 To avoid this appearance, the Cuozzo majority limited the "confession is the key" rule to situations where there is a compelling link between the defendant and the crime.136 In essence, the "confession is the key" rule allows a minimal corroboration requirement for those cases in which the defendant is so linked with the crime that proof of "someone's criminality" can be shown by his "presence at the scene, proof of motive, [or] evidence of flight and other conduct indicating a consciousness of guilt."137 This is a recognition that proof of a crime may rest on a single foundation—and that in such cases, given the strong evidence against an identified defendant, strict application of the corpus delicti rule would operate as a loophole.138 Yet it is in these cases particularly that some greater degree of corroboration of reliability should be demanded, because a person closely linked to a loss would seem more likely to fabricate a confession because of a mental delusion, misplaced guilt, or mistake. Typical examples of such confessions include the husband who says he pushed his wife off the balcony when she may have jumped in his presence;139 and the wife who confesses to forcing an overdose of pills on her husband when he had already taken an overdose himself.140 The weakening of the protection of the corroboration rule in the very cases where it makes the most sense to require it is merely one more shortcoming of the corpus delicti standard. Of course, the "confession is the key" rule is not consistently applied; in practice, if the "innocent fact" is insufficient to convince the court of the confession's reliability, the Cuozzo rule will be applied instead.141 It is this type of rule selection based on an implicit reliability determination which

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134. Id.
135. 348 U.S. 84 (1954); see notes 79-82 supra and accompanying text. Jaehne and Oppor are both based on bribery charges, and in both cases the corroborating evidence was found to be sufficient. The United States Supreme Court used the opportunity to depart from the corpus delicti standard. Unfortunately, the New York Court of Appeals, interpreting a statute rather than operating under common law, was not able to change in such an open manner.
136. See 292 N.Y. at 92, 54 N.E.2d at 24.
138. See notes 41-42, 126 supra and accompanying text.
140. See Batterbee v. State, 537 S.W.2d 12 (Tex. 1976).
141. For example, in People v. Shanks, 201 Misc. 511, 108 N.Y.S.2d 504 (Kings County Ct. 1951), aff'd, 279 App. Div. 1082, 113 N.Y.S.2d 447 (1952), defendant confessed to murdering his roommate nine years earlier by asphyxiation. Finding the medical examiner's corroboration of the cause of death and the fact that the defendant and the victim were living together insufficient proof of criminality, the court dismissed the indictment. Cuozzo itself is also a good example: defendant's corroborated description of the victim's underwear was dubbed a "mysterious and unexplained piece of special knowledge." 292 N.Y. at 95, 54 N.E.2d at 25. This evidence appears to be a great deal stronger than an "innocent fact," but was not found sufficient because the court doubted the overall reliability of the confession.
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 IDisposable CONFESSION CORROBORATION typifies the approach of the courts under the New York rule. It may be noted that a trustworthiness standard, which goes directly to reliability, would most likely not result in a different holding, but would require the court to decide the central issue of reliability openly, rather than sub rosa.

D. The "Each and Every Element" Rule: Attempts To Extend Protection Beyond Ambiguous Events

As mentioned above, a difficulty with the corpus delicti version lies in determining which elements of the offense charged must be corroborated. The strictest interpretation is one that would require the corroboration to touch each and every element of the offense. Under this interpretation, a conviction could not be had for an offense unless every element of that offense except defendant's identity were corroborated. Moreover, the judge could not charge a greater degree of the offense than the degree which was corroborated. New York courts have occasionally relied on an "each and every element" reasoning as a means of broadening the protection of the rule. An early example of this can be seen in Judge Crane's concurring opinion in People v. Joyce. On the basis of a confession judged to be voluntary by the jury, the defendant was convicted of felony murder of a storekeeper. The record was replete with circumstances pointing to the conclusion that defendant's will had been overborne by the police. The court of appeals overturned the conviction, reasoning that the exclusion of evidence of defendant's mental retardation was reversible error. Judge Crane offered the corroboration rule as another ground for reversal, arguing that a felony murder conviction must contain evidence sufficient to convict for the underlying felony. Although the confession indicated an attempted robbery, there was no corroboration of this element. Crane was searching for consistency in the corroboration requirement—recognizing that the essential element of criminality in a felony murder is the felony itself. However, Crane's reasoning was rejected by the court in a later case, People v. Lytton, in which Judge Cardozo found that a body killed by gunshot wounds was sufficient corroboration of any degree of homicide, including felony murder.

142. See notes 48-66 supra and accompanying text.
143. See Forte v. United States, 94 F.2d 236, 243 (D.C. Cir. 1937).
144. 233 N.Y. 61, 72-75, 134 N.E. 836, 840-41 (1922) (Crane, J., concurring).
145. Id. at 70-71, 134 N.E. at 840.
146. Id. at 74, 134 N.E. at 841 (Crane, J., concurring).
149. Id. at 314-16, 178 N.E. at 292. In this case, defendant had admitted that his gun accidentally went off while he was attempting to rob the victim. This is a confession to felony murder, which does not require any degree of culpability in the killing, but rests on the theory that the intent to commit the felony makes the felon culpable for any deaths caused by him in furtherance of the crime, even when those deaths are accidental. At the time Cardozo wrote the
People v. Rooks,\textsuperscript{150} a 1963 pre-Miranda case in which the indictment was initially overturned because of lack of corroboration, presents another example of an attempt to apply the "each and every element" rule as a safeguard of defendant's rights. A fifteen-year-old defendant had made an essentially reliable statement to police that he had attempted to rape a nine-year-old girl and that while he was trying to intimidate her into not telling anyone, had accidentally "dropped" her off a roof to her death. The corroborative evidence consisted of the girl's nude body with recognizable signs of attempted sexual assault. Justice Sobel, the trial judge, perhaps influenced by the police tactics of holding a minor for nine hours and questioning him for three without benefit of a lawyer or his parents,\textsuperscript{151} found insufficient corroboration of intentional murder, using Cuozzo as support.\textsuperscript{152} His holding seems to involve an obvious misapplication of the corroboration rule, since the corroborative evidence did tend to show "someone's criminality" within the usual corpus delicti parameters. Although the cause of death was a fall, the circumstances clearly indicated the criminal involvement of another person. The opinion should have distinguished situations in which the victim accidentally causes his own death from those in which he is accidentally killed by another;\textsuperscript{153} whereas Cuozzo typifies the former category, Rooks typifies the latter. There is no doubt that in Rooks a criminal homicide occurred, and this would appear to satisfy the demands of Lytton's "any degree" rule.\textsuperscript{154}

Lytton opinion, felony murder did not have to be specifically alleged in a first degree murder indictment. \textit{Id.} at 315, 178 N.E. at 292. Under the common law indictment then in use, the jury had to find the element of malice in order to convict for first degree murder. They could infer malice from evidence of premeditation and deliberation, or from evidence of felony. Thus, if six jurors felt that the act was accidental, but committed during a felony, and six felt it was intentional, but not committed during a felony, a conviction could result. Under the new Criminal Procedure Law, this form of indictment has been done away with. \textit{See} N.Y. Crim. Proc. Law § 200.30 (McKinney 1971). Cardozo used the common law form of indictment to support his argument that felony murder is not so different from intent murder to require different corroboration. The dissenting opinion in People v. Murray refers to the change in indictments as undercutting this argument and requiring a reversal of Lytton. People v. Murray, 40 N.Y.2d 327, 341-42, 353 N.E.2d 605, 615, 386 N.Y.S.2d 691, 701 (1976) (Jasen, J., dissenting), cert. denied, 430 U.S. 948 (1977). For a discussion of whether felony murder and intent murder should be interpreted as the same offense under the new law, see note 170 infra.

\textsuperscript{150} 40 Misc. 2d 359, 243 N.Y.S.2d 301 (Sup. Ct. 1963).

\textsuperscript{151} \textit{Id.} at 361, 243 N.Y.S.2d at 305.

\textsuperscript{152} \textit{Id.} at 361, 243 N.Y.S.2d at 319.

\textsuperscript{153} Perkins, supra note 109, at 193.

\textsuperscript{154} Violence of distinctly human origin occurring in proximity to the victim's body has been held to supply sufficient circumstantial corroboration of homicide. In People v. Jennings, 40 App. Div. 2d 357, 340 N.Y.S.2d 25, aff'd, 33 N.Y.2d 880, 307 N.E.2d 561, 352 N.Y.S.2d 444 (1973), the body of a 14-year-old girl was found in a state of decomposition, which prevented establishment of cause of death by laboratory analysis. The court found that the victim's good health at the time of her disappearance, the position of the body when found in the woods (nude and lying on a coat), and indications of probable sexual assault, collectively constituted sufficient corroboration of defendant's confession to rape and strangulation. \textit{Id.} at 362, 340 N.Y.S.2d at 29-30. There is little doubt that the above evidence corroborates rape and felony murder based on...
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concern Justice Sobel was the notion that a juvenile (who at the time could not be convicted of felony murder) should be convicted of intentional murder without corroboration of such intent. Of course, in this case the confession did not even admit intent, so the question went beyond the sufficiency of corroboration to the sufficiency of the overall evidence. Had a witness seen the defendant drop the girl, there is little doubt that a prima facie case of intent murder would have been established.

Despite the handling it received in Rooks, the “each and every element” rule is perhaps the only logically consistent version of corpus delicti corroboration. Other opinions have been written which impliedly or expressly approved this interpretation of the corroboration rule. The recent court of appeals ruling in People v. Murray leaves the viability of this interpretation unresolved.

E. People v. Murray: A Benchmark of Confusion

In People v. Murray, defendant Murray had confessed to police officers to having stabbed the victim during a struggle while he was attempting to rob him. At trial, the confession was repudiated, the defendant testifying that the victim was in fact his drug supplier to whom he owed money and whom he stabbed in self-defense during an argument. Of several counts in the indictment, those of attempted robbery and attempted larceny were dismissed by the trial court on the ground that there was insufficient corroboration under the confession corroboration rule; but an intentional and a felony murder count went to the jury. The jury found the defendant guilty of manslaughter in the first degree, a lesser included offense of intentional murder, and guilty of felony murder.

On appeal of the felony murder charge, the defendant contended that the dismissal of the underlying felony for lack of corroboration required dismissal of the felony murder charge on the ground that the culpability underlying the murder was insufficiently proved. The People, on appeal, relied on several corpus delicti blackletter rules. One of these, the Lytton rule, formed the basis

rape. However, defendant was convicted of intentional murder, not felony murder. The rationale for the result is that under the Lytton rule, see note 149 supra, the corroborative evidence tended to show at least criminal negligence associated with the death, thus corroborating any degree of homicide, including intentional murder.

155. See, e.g., People v. Ruckdeschel, 51 App. Div. 2d 861, 380 N.Y.S.2d 161 (1976). Defendant was convicted of manslaughter and robbery, after the victim had been found stabbed and with his pants pockets pulled out and torn. The robbery conviction was overturned since there was no outside proof that anything had been taken. The judge could have charged, of course, the lesser included offense of attempted robbery.


158. Id. at 330, 353 N.E.2d at 607, 386 N.Y.S.2d at 694.

159. Id. at 334, 353 N.E.2d at 610, 386 N.Y.S.2d at 696.
of an opinion sustaining conviction written by Judge Gabrielli, and concurred in by two other judges.\textsuperscript{160} \textit{Lytton} and cases following it provided that a dead body with signs of human-inflicted violence is sufficient corroboration of any degree and any method of criminal homicide, including felony murder.\textsuperscript{161} Judge Gabrielli, finding "[n]o reason . . . to now depart from these sound, established precedents,"\textsuperscript{162} held that no corroboration of the underlying felony was necessary,\textsuperscript{163} and that the evidence that the victim's death was caused by a nonaccidental knife wound satisfied the corroboration requirement.\textsuperscript{164} The opinion proceeded to bolster the available corroborating evidence by considering defendant's in-court statements regarding his presence at the scene, drug addiction, and flight from the scene as circumstantial corroboration of the commission of a crime.\textsuperscript{165} This argument creates at least two difficulties. First, it is an extension of the "confession is the key" rule to situations in which the defendant is not "compellingly linked" to the crime.\textsuperscript{166} Second, evidence of guilt in general does not tend to corroborate the reliability of the essential facts regarding the underlying felony.

As an alternative to the \textit{Lytton} rule, the Gabrielli opinion stated that "some of us hold that even if [corroboration of the felony were required] . . . [t]here was sufficient evidence of the predicate felony to satisfy the meager requirements of [the New York rule]."\textsuperscript{167} The evidence of a struggle and the victim's temporarily missing wallet constituted this "meager" measure. Judge Wachtler concurred in this finding solely because he found sufficient corroboration of the predicate felony.\textsuperscript{168}

Three judges voted to reverse. In an opinion by Judge Jasen, they took issue with every argument put forth by the others. Beginning with the question of weight, Judge Jasen condemned the "corroborative evidence" found by the others as nothing more than appellate court speculation.\textsuperscript{169} As to the requirement of corroborating the underlying felony, the dissent strongly supported reversing \textit{Lytton}, pointing to changes in the method of indictment,\textsuperscript{170} but basically taking issue with the underlying rationale of the rule.

\textsuperscript{160} Id. at 332, 353 N.E.2d at 608, 386 N.Y.S.2d at 695.

\textsuperscript{161} See notes 148-49 supra and accompanying text.

\textsuperscript{162} 40 N.Y.2d at 334, 353 N.E.2d at 610, 386 N.Y.S.2d at 696.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 332-33, 353 N.E.2d at 609, 386 N.Y.S.2d at 695.

\textsuperscript{165} Id. at 333, 353 N.E.2d at 609, 386 N.Y.S.2d at 695. Notice that while a defendant's subsequent \textit{extrajudicial} statements cannot be used to corroborate, subsequent \textit{in-court} statements can be used as corroboration. But to corroborate defendant's extrajudicial admission of attempted robbery by using his in-court testimony denying that admission seems to lack any degree of logic. Certainly, one statement can be used to \textit{impeach} the reliability of the other, but to allow one to corroborate the other puts the defendant in the unfortunate position of having his in-court testimony corroborate his confession, which in turn impeaches his in-court testimony.

\textsuperscript{166} See notes 134-36 supra and accompanying text.

\textsuperscript{167} 40 N.Y.2d at 335, 353 N.E.2d at 611, 386 N.Y.S.2d at 697.

\textsuperscript{168} Id. (Wachtler, J., concurring). There is no mention that the trial judge is being reversed, in effect, on his decision to dismiss the underlying felonies.

\textsuperscript{169} Id. at 339, 353 N.E.2d at 613, 386 N.Y.S.2d at 699. (Jasen, J., dissenting).

\textsuperscript{170} Id. at 341-42, 353 N.E.2d at 614-15, 386 N.Y.S.2d at 700-01 (Jasen, J., dissenting); see
The two three-judge opinions indicate a basic split regarding the policy and purpose of corroboration. The Gabrielli opinion stressed that the offense charged (in this case murder in the second degree) was shown to have occurred through other evidence, that is, the body. There will be no "reappearing victim" or conviction based on a non-existent crime. The basic policies behind the corroboration requirement are thus satisfied, and "the truth of the confession . . . is for the jury."171 The opinion by Judge Jasen, on the other hand, stressed the inconsistency of dismissing a felony charge for want of corroboration, but allowing a felony murder charge to stand. The opinion seemed to apply the "each and every element" rule,172 holding that felony murder (not murder in the second degree) is the "offense charged" and that to corroborate this offense, the People must corroborate the underlying felony. The policy behind the Jasen opinion is that facts contained in a

note 149 supra. A major problem is whether the corroboration must tend to prove "felony murder," "murder in the second degree," or "homicide." Under the old common law indictment, such distinctions were not important, according to Lytton. Yet the legislative intent behind the new Criminal Procedure Law was clearly to abandon common law indictments. Denzer, Practice Commentary, N.Y. Crim. Proc. Law § 200.30, at 215-16 (McKinney 1971). Section 200.30 requires the prosecution to charge only one offense per count, and defines "offense" in a manner different from its meaning elsewhere in New York criminal law. Normally, "offense" is defined as "conduct for which a sentence to a term of imprisonment or to a fine is provided," N.Y. Penal Law § 10.00(1) (McKinney 1975), a definition applicable to the Criminal Procedure Law, see N.Y. Crim. Proc. Law § 1.20 (McKinney 1971). Generally, the term refers to captioned offenses under the Penal Law punishable by a specific prison term, e.g., "murder in the second degree," N.Y. Penal Law § 125.25 (McKinney 1975) (class A-I felony); "manslaughter in the first degree," id. § 125.20 (class B felony); see id. § 70.00. Section 200.30 indicates that if a Penal Law provision "defines the offense named in the title thereof by providing, in different subdivisions or paragraphs, different ways in which such named offense may be committed," each method must be charged in a different count. N.Y. Crim. Proc. Law § 200.30 (McKinney 1971). Subsequent sections use the term "offense charged" to refer to an offense contained within a count of the indictment. See, e.g., id. § 300.10(3). Under this nomenclature, "felony murder," N.Y. Penal Law § 125.25(3) (McKinney 1975), is a different "offense charged" from "intent murder," id. § 125.25(1), even though they are the same "offense," i.e., "murder in the second degree." The affirmers in Murray were not impressed by such "technical formalities." They found no evidence in the legislative history that the "offense charged" which must be corroborated under the rule meant anything other than what it has always meant. 40 N.Y.2d at 334, 353 N.E.2d at 610, 386 N.Y.S.2d at 696. The dissenters, however, pointed to the new system of pleading and proof, which incorporates the corroboration rule, as an indication of legislative intent. Id. at 341-43, 353 N.E.2d at 615-16, 386 N.Y.S.2d at 701-02. Under the new Criminal Procedure Law, when a murder charge is presented to the jury under two theories, such as intent and felony murder, the judge has complete discretion to submit either or both. See N.Y. Crim. Proc. Law §§ 300.40(3)(a), 300.30(3) (McKinney 1971); N.Y. Penal Law § 70.25(5) (McKinney 1975). Any count submitted, however, must be supported by legally sufficient evidence, N.Y. Crim. Proc. Law § 300.30(1) (McKinney 1971), which means that all corroboration requirements have been met, id. § 70.10. This is a structure which insures that the proof of a crime clearly supports one type of conduct which constitutes that crime. The structure requires a count-by-count analysis, and the corroboration rule should be interpreted within the spirit of this structure.

171. 40 N.Y.2d at 335, 353 N.E.2d at 611, 386 N.Y.S.2d at 697.
172. See notes 142-49 supra and accompanying text.
confession are inherently untrustworthy, that police should be required to find corroborating evidence where possible,\textsuperscript{173} and that it is basically unfair to turn a manslaughterer into a murderer on the basis of his own uncorroborated admission of a felony.\textsuperscript{174} Note that, far from letting defendant go free on a legal technicality, the rule as applied by the dissenters would upset only the felony murder conviction, and not the manslaughter conviction. The fears of using the rule as a loophole are thus not justified in this particular case.

Reliability as a policy factor was apparently ignored by both sides in Murray. It is perhaps because there is no clear difference of opinion on reliability that so much emphasis can be placed on the "technical" functioning of the corroboration rule. The reliability issue, however, is the most viable factor supporting a corroboration rule. Had the defendant's statement had a greater degree of reliability, the dissent would not have been shocked at his conviction. For example, if instead of being made to police, his admission had been made to a friend immediately after the event, it would have the kind of reliability which forms the basis of the res gestae exception to the hearsay rule,\textsuperscript{175} and it would be difficult to justify a corroboration requirement for such an admission. On the other hand, if defendant's statement had a greater degree of untrustworthiness, such as inconsistency with other facts (for example, if reliable proof was offered at trial that the victim was indeed the defendant's drug supplier), the conviction for felony murder would appear to nullify completely the utility of the corroboration rule as protective of the defendant's rights. Under such circumstances one wonders whether the confirming judges would follow Lytton so rigidly. Perhaps because the present

\textsuperscript{173} The policy of this State is that no person can be convicted solely upon his own admission. Given this policy, it is, as a matter of logic, impossible to conclude that a felony of which there is legally insufficient proof may yet form the basis of a felony murder conviction. Our conclusion is basic: without sufficient proof of the felony, there cannot be sufficient proof of a felony murder."  40 N.Y.2d at 342, 353 N.E.2d at 616, 386 N.Y.S.2d at 702 (Jasen, J., dissenting) (emphasis added). Note the logical case built by considering defendant's statement an admission of the underlying felony, rather than as a confession to felony murder. The "admission" focuses the argument on a particular element, on the reliability of the essential facts admitted which result in conviction. Consider, however, the difficulty of trying to corroborate an underlying felony such as attempted robbery when the victim, often the only witness, has been killed. Generally, the method used by the courts has been to accept very insubstantial evidence as corroboration, a method which, apparently, four members of this court found acceptable.


\textsuperscript{175} People v. McKinney, 65 Mich. App. 131, 237 N.W.2d 215 (1975). Defendant was convicted of felony murder in a state which requires corroboration of the underlying felony. Deceased was found in his own home, hands and feet tied, death caused by a gunshot wound in his chest. Defendant was followed by a witness after leaving the scene, and told him "[I] only got a little bit." Although other evidence was found insufficient to corroborate the felony, the court found that the admission was sufficient in that, as with the res gestae exception to hearsay, the circumstances of spontaneous utterances carry "sufficient indication of the truth to overcome any reluctance to convict on the basis" of the admission. Id. at 139, 237 N.W.2d at 219 (quoting People v. Randall, 42 Mich. App. 187, 192, 201 N.W.2d 292, 295 (1972)); cf. Smith v. United States, 348 U.S. 147, 155 (1954) (not all admissions require corroboration).
rule does not make the corroboration relate to trustworthiness, the record was devoid of enough information to enable the judges to exercise the kind of appellate review typical of the history of this rule. In any case, the clear message of Murray is that the current rule—the corpus delicti version—no longer supports its original rationales. It is time for New York to restructure its rule, putting reliability back into the equation, and making the rule capable of rational application.

IV. REPLACING THE NEW YORK RULE

The confusion resulting from the corpus delicti version lies in the tangle of policy rationales behind the corroboration requirement. In searching for an alternative to the current rule, it is important to examine whether these policy rationales are now served adequately by recent developments in the law of confessions. If so, perhaps the corroboration requirement can be entirely eliminated, as has been suggested by several commentators. If, however, there is a gap in the law which a corroboration rule can close, a workable rule must be fabricated specifically for that purpose.

A. Current New York Confession Law

As noted earlier, the major doctrine in American confession law is the voluntariness doctrine and its constitutional variants. The voluntariness doctrine is premised upon the same concerns which resulted in the development of the corroboration rule—that involuntary confessions are inherently unreliable and yet carry a great deal of weight with the ordinary juror. In New York, the definition of “involuntary” was so narrow that the rule rarely prevented unreliable confessions from reaching the jury. Thus the corroboration rule was sometimes used instead to prevent convictions where the prosecution used an unreliable confession as a major part of its case. This usage may now be unnecessary since, in 1970, the legislature freed the New York voluntariness rule from its historical fetters by expanding the circumstances under which a confession would be found to be “involuntarily made”. The new law excludes a statement from evidence as involuntarily made if it was extracted by duress, coercion, or undue pressure (essentially a question of due process corresponding to pre-Miranda notions of voluntariness), or if it was obtained:

(b) by a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

(i) by means of any promise or statement of fact, which . . . creates a substantial risk that the defendant might falsely incriminate himself; or

176. See notes 17-26 supra and accompanying text.
177. See notes 32-33 supra and accompanying text.
178. See notes 27-28 supra and accompanying text.
179. See note 27 supra.
180. See notes 124-25 supra and accompanying text.
182. Id. § 60.45(2)(a).
(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.  

The exclusion of statements obtained by methods which create a substantial risk of falsity represents the first time in New York confession law that a reliability standard is used as an express standard of admissibility. Thus, under the old standard a police practice using trickery or deception would rarely result in the exclusion of the resulting confession, whereas under the new standard, if the practice raised a substantial risk of falsity, the confession would be inadmissible.

The protection offered by this new standard is strengthened by relatively recent procedural developments regarding the motion to suppress involuntary confessions. Under prior law, a suppression hearing could be held in front of the jury, which often was required to decide the voluntariness issue. Since 1965, however, the hearing must be held out of the jury's presence, and the judge must suppress the confession if not convinced beyond a reasonable doubt of its voluntariness. Even if the judge finds the confession voluntary, the defendant, by raising the issue again at trial, is entitled to have the jury instructed to disregard the confession upon their finding it was involuntarily made. These developments provide substantial new protection to defendants against the use of statements obtained by coercive police practices.

183. Id. § 60.45(2)(b).
184. The exclusion of statements obtained by methods creating a substantial risk of falsity "works some change in the New York law of this area, although precisely what the law has been is far from clear." Denzer, Practice Commentary, N.Y. Crim. Proc. Law § 60.45, at 261 (McKinney 1971).
185. Id.
186. A suppression hearing was properly held before a jury. People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909). If the evidence established that the confession was involuntary as a matter of law, or if a finding of voluntariness would be against the weight of the evidence, the trial judge excluded it. People v. Leyra, 302 N.Y. 353, 362, 98 N.E.2d 553, 558 (1951). When, however, a question of fact as to voluntariness was presented, the confession was admitted and the jury was instructed to disregard it if not convinced beyond a reasonable doubt of its voluntariness. See People v. Doran, 246 N.Y. 409, 416-17, 159 N.E. 379, 381-82 (1927).
187. The prior New York procedure for determining voluntariness was found to violate due process in Jackson v. Denno, 378 U.S. 368 (1964), because the jury could not be expected to ignore the appearance of reliability of a confession in determining whether it was voluntary. New York complied with this decision by structuring a new procedure, which requires the judge to make an initial determination of voluntariness. People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). The pretrial suppression hearing is called a "Huntley hearing" in New York and is provided for in N.Y. Crim. Proc. Law art. 710 (McKinney 1971 & Supp. 1977).
188. The standard in New York is higher than the preponderance standard mandated under the U.S. Constitution, see Lego v. Twomey, 404 U.S. 477 (1972), arguably making the need for corroboration less supportable.
189. N.Y. Crim. Proc. Law § 710.70(3) (McKinney 1971). This is the so-called "Massachusetts procedure." See Jackson v. Denno, 378 U.S. 368, 378 n.8 (1963). Massachusetts, the only state which refused to adopt a corroboration rule, appeared to rely on the above procedure as a better functional alternative for reducing the impact of involuntary confessions that were unreliable.
Furthermore, the protection of *Miranda, Escobedo*, 190 and various New York state constitutional doctrines191 go beyond the reliability issue to confront directly the question of “unfairness” without regard to reliability.

The corroboration rule is apparently duplicative of the above doctrines, and cannot be supported on the ground that it will prevent excessive use by the police of involuntary confessions.192 Since the “reappearing victim” rationale is inapplicable to the corroboration of many crimes, and in any case has been severely undercut by the acceptance of circumstantial corroboration of minimal weight,193 there remains only one possible rationale for corroboration: the possible conviction of a defendant on the basis of a statement which is unreliable, not because it was induced by official promises or tricks, but because it was the product of a mental defect, delusion, mistake of law or fact, or a poorly conceived attempt by the defendant to exculpate himself.

A case which illustrates the current approach of the New York courts to the above situations is *People v. Brown*, 194 where the defendant sought to exclude several inculpatory statements made to police and others on the ground that the statements were not the product of “a rational intellect and a free will,”195 but were caused by a delusional belief that she and her children were in danger.196 The court held a suppression hearing and, using expert psychiatric testimony introduced at a prior competency hearing, held the statements admissible. The court based its conclusion on evidence that at the time defendant made the statements she had testimonial capacity, appeared alert and responsive to others, and that the statements themselves were logical, coherent, and sufficiently detailed to indicate an origin in memory.197 The court thus adopted a minimal standard for admissibility—the accused must be competent at the time of confessing; that is, possess at that time the ability to perceive, recall, and relate.198 The “rational intellect”, the court decided, is

190. See note 28 supra.
191. Such doctrines include the Donovan-Arthur rule, which renders inadmissible certain statements made by defendants in police custody when they are denied access to an attorney, see *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), or when an attorney demands and is denied access to the defendant, see *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968). See J. Prince, Richardson on Evidence, §§ 547-49 (10th ed. 1973).
192. See notes 27-33 supra and accompanying text; *California's Corpus Delicti Rule*, supra note 15, at 1089-90.
193. See note 49 supra.
196. 86 Misc. 2d at 344, 380 N.Y.S.2d at 482. Defendant argued that the statements she had made to police and reporters were involuntary under N.Y. Crim. Proc. Law § 60.45(2)(a) (McKinney 1971). However, it is questionable whether that section applies to confessions made in response to some internal, rather than external, stimulus, since it requires “threatened use of physical force . . . or . . . any other improper conduct or undue pressure”. Id.
197. 86 Misc. 2d at 352, 380 N.Y.S.2d at 489.
really no more than a mere "modicum of intelligence." This standard fails to recognize a confession as any more inherently unreliable than any in-court testimony. It further appears to bootstrap the conclusion of reliability on the statement's internal appearance of logic, coherence, and detail.

It therefore appears that the existing law, considered apart from any corroboration rule, does not fully safeguard the defendant from the introduction into evidence of an unreliable confession. The corroboration rule is supposed to provide some additional safeguard against the defendant's conviction on the basis of such a confession alone. The greatest danger of this type of conviction arises when the confession appears reliable with respect to most of the facts within it, but contains a key fact, necessary for the establishment of a material element of the offense, which the defendant can show is unreliable. Under such circumstances the jury may convict on the basis that the fact is proved by the defendant's own words, letting the reliability of the rest of the statement infuse the questionable fact with credibility. A rule is needed which will allow the trial judge in this situation to determine whether the material element, and consequently the offense, is sufficiently proved.

B. The Proposed Rule

The present New York corpus delicti version corroboration rule should be repealed and replaced by a rule that is specifically directed toward the prevention of convictions on the sole basis of unreliable facts contained in a confession or admission of the accused. It is suggested that the following rule will achieve such an objective:

Statements of facts contained in a confession or in admissions of the defendant may be used in determining legal sufficiency unless defendant shows, on grounds other than those in § 60.45(2)(b)(i), that such facts are untrustworthy and the people fail to prove such facts true by a preponderance of the evidence.

199. The court compared the standard to that for capacity to stand trial. 86 Misc. 2d at 350, 380 N.Y.S.2d at 487. It further argued that it would be difficult, if not inappropriate, for a judge to determine whether a confession is a product of "free will" according to any less objective a standard, since confessions are often prompted by complex emotional, moral, and ethical urgings. Id. at 349-51, 380 N.Y.S.2d at 487-88. Other courts, however, have attempted to apply a less mechanical rule. See, e.g., United States v. Robinson, 459 F.2d 1164 (D.C. Cir. 1972); Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), cert. denied, 406 U.S. 950 (1972); People v. MacPherson, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970).


201. In fact, the Brown opinion cites the current corroboration rule as an indication that the use of a minimal test for admissibility will not result in a breach of fairness towards the defendant. 86 Misc. 2d at 348, 380 N.Y.S.2d at 486. Most confession doctrines deal with the admissibility of the confession in its entirety. Although it is possible to expunge matter from a confession on grounds of possible prejudice, this is not generally done on grounds of untrustworthiness. See J. Prince, Richardson on Evidence § 552 (10th ed. 1973).

202. This rule would replace the current rule as § 60.50 of the Criminal Procedure Law. A companion rule, set out in note 217 infra, specifies the procedural interrelationship of the proposed rule to the other sections of the law.
This rule rejects the corpus delicti construction in favor of a direct probing of reliability. The rule's basic premise is that any fact in a confession or admission which is used to establish any element of the offense charged may be highly unreliable but may not fall within the criteria established by other doctrines for exclusion from evidence. Where an element of the offense is proved primarily through such stated facts, and where the other evidence independently fails to rise to prima facie proof, the proposed rule allows the trial judge an opportunity to delve further into the reliability of such facts. Thus, the rule provides what one commentator has suggested may be the only purpose for corroboration, a "more thorough review of the evidence to determine whether, in view of any factors that might tend to show the unreliability of the statements, the evidence as a whole is sufficient to sustain the verdict." By focusing on reliability, the rule will insure that the trial record fully and accurately reflects the primary concern of the corroboration rule; an appellate court will then be in a position to analyze the judgment below. By discarding the corpus delicti framework, the rule adopts the simplicity and logical consistency of the trustworthiness version—for example, since any fact may conceivably be shown to be unreliable, the rule demands that each and every element of the offense be proved by either extensive external evidence or by reliable facts in a confession.

The major innovation of the proposed rule is its shift to the defendant of the burden of going forward. It will be remembered that the corroboration requirement traditionally has been construed weakly; the logical "each and every element" rule has been rejected by almost all jurisdictions as too

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203. Thus, such elements of crimes as the felony in felony murder, intent in intentional murder, and time of day in second degree burglary may all require corroboration if they are proved substantially through the defendant's statement and the defendant can raise a reasonable doubt as to the reliability of the facts as he has stated them. Even the defendant's identity should come within the ambit of the rule, for it is no less amenable to untrustworthiness than any other aspect of the prosecution's case. For example, if defendant testifies at trial that he confessed to prevent his mother, who really committed the crime, from going to jail, there is no reason not to test the reliability of the identity.

204. C. McCormick, supra note 1, § 158, at 349.

205. The appellate court will not have to resort to arcane rules as has been necessary under the current rule. See text accompanying notes 110-13 supra.

206. A benefit of the proposed rule is that it should encourage careful police investigative work because the accused may put any part of his confession to the test. The result is that conclusory and undetailed confessions will prove difficult to use as a basis for conviction. For example, suppose that the police secure a confession which reads in its entirety, "I killed V last night. I shot him with my gun," and that this is the only evidence which the prosecution intends to present on a charge of intentional murder. If defendant can show that he accidentally fired his gun, saw V fall, and ran, he can challenge the prosecution's evidence with respect to two material elements, intent and death. The prosecution will have to prove by a preponderance as a threshold to get to the jury that V is dead or that V's death was reasonably within defendant's knowledge, and that V's death was intentionally caused. It is apparent that such proof cannot be successful without significant external evidence. The proposed rule thus still protects against the wholesale proof of a case by an extrajudicial confession, an objective of the corroboration rule since its adoption. See note 99 supra and accompanying text.
burdensome for the prosecutor.\textsuperscript{207} The prosecutor already has substantial burdens with respect to custodial statements and statements claimed by the defendant to be otherwise involuntary.\textsuperscript{208} The proposed rule effects a compromise, and does so in a more rational way than does the corpus delicti version.\textsuperscript{209} The rule simply requires the defendant to come forward with facts to support his contention of untrustworthiness.\textsuperscript{210} Unless the defendant does so, once the confession is admitted its entire contents are presumed sufficiently reliable for the jury's consideration.\textsuperscript{211} Thus, the prosecutor need not produce impossible-to-find corroboration. The defendant must first make a reasonable showing that the contested facts are untrue.\textsuperscript{212} Upon this showing, the burden shifts to the prosecutor, who may establish the facts as reliable by offering circumstantial or direct evidence of the facts at issue, or by attacking the credibility of the defendant's claim. The burden of proof is placed upon the prosecutor; he must convince the judge by a preponderance of the evidence, or else the admitted facts may not be used to determine whether a prima facie case exists. The preponderance standard is another compromise—less than that used to determine voluntariness, but greater than the slight weight used under the existing corroboration rule.\textsuperscript{213}

People v. Murray provides a situation which illustrates the rule's functioning.\textsuperscript{214} Assume the defendant, in trying to suppress the confession, had not attacked it on grounds that the police methods used tended to induce a false confession. The defendant thus would have the opportunity to raise independently the issue of the reliability of the admission of attempted robbery contained in the confession. Defendant would testify that he fabricated his confession to the attempted robbery because he felt at the time that this confession would be less harmful than a statement that the man he killed was

\textsuperscript{207} See notes 63-65 supra and accompanying text.
\textsuperscript{208} See notes 187-88 supra and accompanying text.
\textsuperscript{209} See notes 62-66 supra and accompanying text.
\textsuperscript{210} This approach follows the lines recommended by Professor Dix in his analysis of problems of mistake or ignorance of the defendant when he waives his rights to remain silent and to the presence of counsel. As an "accommodation" to the burdened prosecutor, he suggests the defendant can challenge a waiver only by meeting an initial burden of production. Dix, supra, note 27, at 346-51. Likewise, with respect to questions of reliability, the defendant is in a better position than the prosecutor to produce evidence as to why his statement is untrustworthy.
\textsuperscript{211} If the defendant has challenged the admissibility of the confession, he may have raised the issue of reliability by claiming that his statement was induced by methods which created a substantial risk of falsity. N.Y. Crim. Proc. Law § 60.45(2)(b)(i) (McKinney 1971). The admission of the statement consequently establishes it as free from a substantial risk of unreliability. With the exception of the defendant's subsequent discovery of new evidence, see id. § 710.40(4), there is no reason to let the issue be relitigated. A new procedural statute is suggested in note 217 infra detailing how duplicative hearings may be avoided.

\textsuperscript{212} The rule avoids "corroboration" per se. The only corroboration in the traditional corpus delicti sense is that the rule does not come into issue if the prosecution introduces legally sufficient evidence, see N.Y. Crim. Proc. Law § 70.10(1) (McKinney 1971), independent of the confession.
\textsuperscript{213} See notes 167-69 supra and accompanying text.
\textsuperscript{214} 40 N.Y.2d 327, 353 N.E.2d 605, 386 N.Y.S.2d 691 (1976), cert. denied, 430 U.S. 948 (1977); see notes 158-75 supra and accompanying text.
his drug supplier. Perhaps defendant could find other witnesses who could attest to his drug use. In any event, if the defendant makes a credible showing that the facts were fabricated, the presumption of reliability is rebutted and the burden falls on the prosecution to prove them true. The prosecution can rebut the defendant in several ways: it can show that the victim was not a drug pusher, or that the defendant did not know the victim, or that the defendant was not an addict, or that the defendant was aware when he confessed that the police knew he was an addict, or even that the circumstances surrounding the event made the defendant's new story more questionable than his first story. Before charging the jury, the judge would rule on the sufficiency of the evidence and would not charge felony murder unless the prosecution had met its burden of proof. The appellate courts would receive a record which delineated the grounds upon which the decision was made. No mention would be made of the esoteric issue of whether the corroboration of felony murder must include corroboration of the underlying felony.

As another example, consider cases such as People v. Brown,\(^{215}\) where a defendant claims his out-of-court statement is unreliable because it was made while he was under a severe state of stress or some other diminished mental condition. Under the proposed rule, the defendant could meet his burden of production by introducing expert psychiatric testimony, and the prosecutor no doubt would counter with the same. The rule has advantages over the current admissibility hearing in at least two respects. First, since the rule looks to sufficiency rather than admissibility, the judge will have the entire record before him in reaching his decision. Second, because the rule clearly applies a reliability, rather than a voluntariness, standard it avoids the implications of the less objective standard rejected by the Brown court.\(^{216}\) The rule does not require the judge to analyze the defendant's motivation in confessing to determine whether it was in accordance with the concept of "free will." The judge must merely rule on reliability.

An important aspect of the proposed rule is the procedural context into which it must fit. Since the rule relates closely to other confession doctrines, but involves sufficiency rather than admissibility, and is reasonably complicated in that it sets forth burdens of producing evidence, a procedural statute, an example of which is set forth in the margin,\(^{217}\) would be helpful to

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215. 86 Misc. 2d 339, 380 N.Y.S.2d 476 (Nassau County Ct. 1975); see notes 194-201 supra and accompanying text.

216. See note 199 supra.

217. Procedure for raising and determining sufficiency of proof under § 60.50.

1. If the people notify defendant of intention to offer evidence of a statement made by defendant, pursuant to § 710.30(1)(a), and if defendant moves to suppress such evidence before trial, pursuant to § 710.40, defendant waives any further defense as to legal insufficiency under § 60.50 [the proposed rule] unless he raises, in his motion papers or at a hearing on the motion to suppress, the evidence required of him under § 60.50, or unless circumstances set forth in § 710.40(4) subsequently develop.

2. If the defendant is not notified according to subd. 1, he may at any time prior to the charging of the jury move for a hearing to determine the sufficiency of proof under § 60.50.
eliminate foreseeable complications. The first criterion must be to conserve court resources within the spirit of the rule. Since most defendants will seek to suppress a confession in a hearing, they should be required to raise the reliability issue at the same time.\textsuperscript{218} Besides avoiding multiple hearings, this affords the prosecution a chance to gather evidence to rebut the defendant's claim. If the defendant does not contest the admissibility of the admission or confession (possibly because he need not be given notice that certain of his statements will be used),\textsuperscript{219} he will first raise the issue when presented with the statement at trial. Defendant must be given a chance to make his showing at trial or at a hearing during trial, at the close of the people's case.\textsuperscript{220} Such a hearing should be held out of the jury's presence, if the defendant chooses.\textsuperscript{221} Thus, the defendant should be given an opportunity to decide whether to make the issue a part of his defense since it is recognized that under some circumstances the collateral proof may be prejudicial, involving as in the Murray case, admissions of criminal activities. This rule also allows the defendant to challenge the reliability of facts contained within his extrajudicial statement without having to forego his right not to testify at his trial. In sum, the new corroboration rule should be introduced within the context of existing New York procedural law in such a way as to avoid compromising the policy objectives on which it is based.

V. Conclusion

The confession corroboration requirement is one of the oldest evidentiary rules in New York criminal law. Although the stated reason for the rule is the prevention of convictions for crimes which have not been committed, an analysis of the case law shows that the rule has historically been used to prevent convictions based largely on unreliable confessions. However, the rule is not well suited to this purpose because of limitations inherent in the concept of corpus delicti on which it is based. Three problems have resulted: there has been a promulgation of confusing rules of construction that have questionable links to the issue of reliability; cases which reach reasonable

\begin{itemize}
  \item If either the people or the defendant have evidence to introduce with respect to the issue of sufficiency under § 60.50, the court must hold a hearing prior to charging the jury. The hearing must be held out of the jury's presence at the defendant's discretion. The court may use all evidence presented at the hearing and at the trial in reaching its determination. The court must set down its findings and the reasons therefor.
  \item Under current law, the prosecutor must notify the defendant if he intends to use in evidence a statement made by the defendant to a public servant. N.Y. Crim. Proc. Law § 710.30(1) (McKinney 1971). The defendant may then file a motion to suppress. See id. § 710.40.
  \item Admissions made to private parties, for example, may be used without notice to defendant. He still has a chance under the new procedure to contest the reliability of the admission at any time prior to the judge's charge.
\end{itemize}
results must do so through circuitous logic; and there are some cases in which the rule cannot be used to test the reliability of the confession. The corroboration rule originated in a complex of policy rationales. Because of the many recent developments in confession law the only remaining rationale is the prevention of convictions based on unreliable facts contained within an otherwise voluntary extra-judicial statement. The trustworthiness version of corroboration, used in the federal courts and an increasing number of states, directly relates to this rationale. New York should adopt this rule, tailoring it to the context of existing evidentiary and procedural law. A suggested draft of such a rule has been presented which, it is submitted, represents a workable and rational approach to confession corroboration in a post-Miranda era.

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