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Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct

Katherine Sheridan

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**EXCLUDING COERCED WITNESS TESTIMONY
TO PROTECT A CRIMINAL DEFENDANT’S
RIGHT TO DUE PROCESS OF LAW AND
ADEQUATELY DETER POLICE MISCONDUCT**

*Katherine Sheridan**

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INTRODUCTION

Colin Warner served twenty years in jail for a murder he did not commit—his conviction based entirely on the testimony of a scared fourteen-

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year-old boy who was coerced by police to implicate Warner.¹ Mario Hamilton was shot and killed in April of 1980 in broad daylight near the Erasmus Hall High School in Flatbush, Brooklyn.² Thomas Charlemagne stated that he had seen what happened, though in fact he had not.³ Charlemagne was the only witness or lead that the police had on the killer, so they immediately brought him and the victim's fifteen-year-old brother Martell (who was with Charlemagne) down to the station for questioning.⁴

Detectives presented Charlemagne with mug shots, including one of Colin Warner,⁵ demanded an identification of the shooter, and grilled him for answers.⁶ At one point Charlemagne stated he had not seen the gun, but the police hung on his initial words—"I saw what happened"—and yelled back that there must have been a gun.⁷ Nearly fourteen hours after the start of the interrogation, Charlemagne ended the questioning the only way he knew how and pointed—at random—to Warner's picture.⁸ He went on to elaborate on the lie, claiming the killer had spoken to him, and provided the details that the police fed him—that it was a drive-by and that there was passenger in the car.⁹ Meanwhile, Martell, still grieving over the news of his older brother's murder, sat listening to the relentless interrogation and was released only after Charlemagne cooperated.¹⁰

1. *This American Life* 282: *DIY*, Chicago Public Radio (Feb. 11, 2005) [hereinafter *This American Life*], available at <http://www.thisamericanlife.org/radio-archives/episode/282diy>; see also Diane Carwell, *Man Says He Was Real Killer In 21-Year-Old Murder Case*, N.Y. TIMES, Jan. 25, 2001, available at <http://www.nytimes.com/2001/01/25/nyregion/man-says-he-was-real-killer-in-21-year-old-murder-case.html> (explaining how the witness was coerced to provide perjured testimony at Warner's trial.); Andy Newman, *Murder Conviction Overturned for Man Behind Bars 20 Years*, N.Y. TIMES, Feb. 1, 2001, available at <http://www.nytimes.com/2001/02/01/nyregion/murder-conviction-overturned-for-man-behind-bars-20-years.html>.

2. *This American Life*, *supra* note 1; Carwell, *supra* note 1.

3. Martell postured that Charlemagne was "perhaps trying to make me feel better or trying to be helpful." *This American Life*, *supra* note 1.

4. The State never recovered a murder weapon nor found forensic evidence supporting Warner's guilt. *Id.* Moreover, the autopsy report of the victim revealed that the bullet had a downward trajectory, which was incompatible and physically impossible under the State's theory of the case, provided by Charlemagne's testimony that the murder occurred in a drive-by shooting. *Id.*

5. Warner had been previously arrested, charged, and sentenced to three years probation for gun possession after a stop-and-frisk in which a .38 caliber pistol without a trigger was found on his person. Curtis Harris, *The Courage Of His Conviction*, CITY LIMITS, Jan. 1, 2002, at 2, available at <http://www.citylimits.org/news/articles/2116/the-courage-of-his-conviction/2>.

6. *This American Life*, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

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The next day, police visited Martell at his home, presented him with four photos, and asked if he recognized any of the men.¹¹ Martell said no over and over again, until the officer pushed one photo above the others, and asked specifically about Warner.¹² Martell stated that “maybe he recognized him,” which was enough to satisfy police that they had the right person—despite lacking any other evidence.¹³ Based on Charlemagne’s testimony¹⁴ and Martell’s corroboration, the State successfully convicted Colin Warner of second-degree murder, resulting in a sentence of fifteen years to life.¹⁵

The wrongful conviction of Colin Warner adeptly illustrates the problems caused by police coercion that will be subsequently explored in this Note. Such coercive practices manufacture inherently unreliable evidence and are revolting to the sense of justice that Americans expect and demand from the United States’ legal system.

In many criminal cases there is a lack of physical evidence despite the most sophisticated criminal forensic sciences, and the prosecution must build a case on statements made by the defendant or a witness.¹⁶ Predictably, criminal offenders and their cohorts do not ordinarily admit to wrongdoing or divulge incriminating information.¹⁷ In turn, police interrogations are designed to persuade individuals to share information about the crime.¹⁸

11. *Id.*

12. *Id.*

13. *Id.*

14. Charlemagne agreed to testify in court after he was arrested for armed robbery, and his testimony was likely a condition of a plea bargain. *Id.*

15. Warner actually served twenty-one years in jail, and was then released—not on parole—but subsequent to a court announcing his innocence. *Id.* Although Warner was eligible for parole after fifteen years, Warner refused to admit his guilt and show remorse for the murder he was convicted of—a consideration of release on parole—because accepting responsibility would have required him to lie, something he was not willing to do. *Id.*; see also *In re Silmon v. Travis*, 741 N.E.2d 501, 505 (N.Y. 2000) (holding that it was proper for the parole board to consider the remorse and insight of the prisoner).

16. Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16, 17-19 (1961); see also *Culombe v. Connecticut*, 367 U.S. 568, 571 (1961) (“Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.”).

17. Inbau, *supra* note 16, at 17 (“Self-condemnation and self-destruction not being normal behavior characteristics, human beings ordinarily do not utter unsolicited, spontaneous confessions. They must be first be questioned regarding the offense.”); see also WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 603 (5th ed. 2009).

18. See Inbau, *supra* note 16, at 16; see also LAFAVE, *supra* note 17.

Indeed, police interrogations resulting in admissible statements promote the government's strong interest in investigating and prosecuting crimes.¹⁹ As John Henry Wigmore noted, confessions are usually "the highest sort of evidence."²⁰ That is only true, however, where the confession is reliable as "trustworthy evidence of guilt."²¹

The government's ability to pursue its interest in law enforcement is checked by the right of an individual not to be compelled to testify against himself²² or to be persuaded to confess after enduring physical or extreme psychological pressure.²³ The United States criminal justice system rests on the underlying principle that "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused."²⁴ Thus, the Supreme Court demands that police refrain from using coercive interrogation techniques to elicit involuntary confessions from a criminal defendant.²⁵ As a result of this rule, a defendant in a criminal case has a right to contest the voluntariness of a statement he has given to the police, and such statements are excluded if involuntary.²⁶

Whether this right extends to allow defendants to object to the admission of an involuntary statement coerced from a witness is debated by judges across the country and remains unresolved by the Supreme Court.²⁷ Such a right would have allowed Colin Warner to suppress Thomas Charlemagne's statements at his trial, and avoid a wrongful conviction.²⁸ Today, several courts recognize this expansion, finding that where a coerced witness's statement is entered into evidence against the defendant, there is a violation of the defendant's right to due process of law, and thus exclu-

19. *See generally* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT (1973).

20. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 866 (2d ed. 1923).

21. THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 14 (Richard A. Leo & George C. Thomas, III eds., 1998).

22. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

23. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; *see also* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (finding that the Fourteenth Amendment imposes a minimum standard of fairness on the states, and requires state criminal trials to provide defendants with protections "implicit in the concept of ordered liberty").

24. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

25. *See infra* note 68 and accompanying text.

26. *See infra* note 69 and accompanying text.

27. *See infra* note 186.

28. *See supra* notes 1-15 and accompanying text.

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sion is the warranted remedy.²⁹ Other courts, however, explicitly reject this notion, finding that it is an evidentiary matter, rather than a constitutional concern, and therefore hold that defendants have no standing to contest the alleged violations of the witness's rights.³⁰ In the absence of a Supreme Court ruling on the issue, courts have no binding authority to draw from and, as a result, the due process rights of a criminal defendant depend on the jurisdiction in which he is prosecuted.

In early cases, the Supreme Court required exclusion of involuntary confessions primarily on the grounds that they were not reliable, and therefore could not serve as the basis for a criminal conviction requiring proof of guilt beyond a reasonable doubt.³¹ Over time, however, courts became more concerned with unfair police interrogation practices, even where they produced reliable statements.³² The purpose of exclusion thus became deterring the police from using coercive interrogation techniques that are abhorrent to an individual's constitutional rights.³³ Achieving this goal requires excluding coerced statements made by both defendants and third parties.

Nevertheless, some scholars and judges argue that exclusion is falling out of favor, and should be abolished rather than expanded.³⁴ While the exclusionary rule is riddled with exceptions as it relates to both unreasonable search and seizure and self-incrimination violations, the same is not true as it applies to due process violations. Thus, these arguments against the exclusionary rule do not withstand scrutiny when made in reference to the extension of the principle to the inadmissibility of coerced witness statements. The exclusionary rule establishes an absolute bar on the admissibility of coerced statements made by the defendant, suggesting that the judiciary finds these due process violations most troubling. It stands to reason that all coercive statements pose a similarly severe threat to due process rights. Nevertheless, the Court has not yet addressed whether the Due Process Clause also protects defendants from the admission of an involuntary statement made by a witness—this Note argues that it must.

Part I considers the historical background of the use of involuntary statements under the Due Process Clause, following the development of ju-

29. *See infra* notes 225-256 and accompanying text.

30. *See infra* notes 217-224 and accompanying text.

31. *See infra* notes 38-39 and accompanying text.

32. *See infra* notes 63-71 and accompanying text.

33. *See infra* notes 63-71 and accompanying text.

34. For arguments about the value of the exclusionary rule, see William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997). *See generally* Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743 (2010).

jurisprudence in this area to present day. Specifically, this section addresses the evolution of the Court's underlying justifications for the exclusion of coerced confessions as an analytical basis for the arguments made in Part III. Part II lays out the approach taken by various state, district, and circuit courts that have addressed this matter, and details how those courts employ different Due Process Clause analyses to reach divergent conclusions. Finally, Part III explains why involuntary witness statements should be excluded under the Due Process Clause in criminal trials.

I. POLICE COERCION AND DUE PROCESS

Because the Supreme Court has yet to address the constitutionality of government use of coerced witness testimony against a criminal defendant, it is necessary to consider established legal principles upon which courts rely when faced with this unsettled issue. Thus, the following topics will be examined: the origins of confession jurisprudence; the modern conception of confession jurisprudence; and the exclusionary rule and standing as they relate to due process, self-incrimination, and search and seizure violations.

A. Origins of Confession Jurisprudence

The early common law rule that governed the admissibility of confessions was simple: confessions were admissible at trial without any restriction, even if the statement was obtained by torture.³⁵ Over time, restrictions were put into place to limit this rule as courts aimed to regulate the reliability of evidence entered into a criminal trial to prove the defendant's guilt.³⁶

The common law rule of evidence, deriving from both English and U.S. jurisprudence, deems involuntary confessions to be "inherently unreliable"—a term to express the idea that when a defendant is coerced, his contemporaneous statements are not a product of his free choice, but rather, a reaction to the coercion itself: the defendant confesses to escape an aversive interrogation, secure a promised benefit, or avoid a threatened harm.³⁷ Because these statements are inherently unreliable, they are of insufficient

35. LAFAYE, *supra* note 17, at 343.

36. *See infra* notes 38-41 and accompanying text.

37. *See* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 98-100 (1989); *see also* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 320-22 (1998).

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quality to be admissible into evidence against a criminal defendant.³⁸ The reliability of a confession is the paramount concern at common law, as reliable evidence is required to ensure a fair trial, uphold the integrity of the evidentiary system by requiring the admitted evidence be trustworthy, and avoid the harsh consequences of falsity—*inter alia*, the conviction of an innocent man.³⁹

Under the common law, the reliability of an out-of-court statement turns on whether the statement was voluntary.⁴⁰ In framing reliability around the speaker's ability to act on his own free will, the common law assumes that innocent men under normal circumstances do not voluntarily confess to crimes they did not commit. Thus, courts look at the circumstances surrounding the confession to determine if the out-of-court statement is a reliable admission of guilt.⁴¹

An example of how police coercion can overwhelm the free will of a suspect is the Central Park Jogger case, where innocent boys confessed to a crime they did not commit and subsequently served eight to ten years in jail.⁴² In this case, five teenage boys between the ages of fourteen and six-

38. *See, e.g.*, *Hopt v. People of Territory of Utah*, 110 U.S. 574, 585 (1884) (“But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.”); *King v. Rudd*, 1 Leach 115, 117-18, 122-23 (K.B. 1783) (Lord Mansfield C.J.) (stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263-64 (K.B. 1783) (“[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it.”).

39. *See Developments in the Law: Confessions*, 79 HARV. L. REV. 954, 962 (1966).

40. *Hopt*, 110 U.S. at 585 (stating that when police conduct is coercive in nature, the state will “deprive [the accused] of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law”) (alteration in original).

41. *Id.* at 583 (“The admissibility of such evidence [confessions] so largely depends upon the special circumstances connected with the confession . . .”) (alteration in original).

42. Yusef Salaam, Antron McCray, Raymond Santana, Kevin Richardson, and Kharey Wise,

were arrested, tried and convicted for a number of serious crimes. The charges against them included the rape, assault and attempted murder of Patricia Meili, a woman brutally attacked on April 19, 1989 while jogging in Central Park. The local and national press covered their prosecution, and the cases against them generated significant media attention. The matter became known as the “Central Park Jogger” case.

McCray v. City of New York, 03 Civ. 9685, 9974 & 10080, 2007 U.S. Dist. LEXIS 90875, at *13 (S.D.N.Y. Dec. 11, 2007) (internal citations omitted). The convictions were over-

teen made inculpatory statements after having been detained for twenty-eight hours and lied to by police.⁴³ Based on the oral statements made during the detainment, the five men were prosecuted and convicted for various crimes arising from the beating, rape, and robbery of a twenty-eight year old jogger.⁴⁴ The young men subsequently served between eight to ten years in jail.⁴⁵ Fifteen years later, in January 2002, a man named Matias Reyes confessed to being the sole attacker in the case, and DNA testing confirmed his guilt.⁴⁶

When the court vacated the convictions in 2002,⁴⁷ the court did not go so far as to say that the original confessions were involuntary.⁴⁸ However,

turned eighteen years later. *See* *People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002) [hereinafter *Wise II*].

43. District Attorney Morgenthau summarized the boys statement as follows:

[E]ach of the statements cast the speaker in a relatively minor role, and none of the defendants admitted that he personally raped her. Kevin Richardson stated that he grabbed at the jogger, but equivocated about it and, at least on video, stopped short of saying that he did so to assist in an assault or rape. Antron McCray said that he kicked the jogger and lay on top of her, but did not penetrate her. Raymond Santana finally stated that he “felt her tits.” And Kharey Wise eventually said that he held and fondled her leg. Yusef Salaam, in his unrecorded statement, went furthest in ascribing culpability to himself, by saying that he struck the jogger with a pipe at the inception of the incident.

Affirmation in Response to Motion to Vacate Judgment of Conviction at 44, *Wise II*, 752 N.Y.S.2d 837 (No. 4762/89). *See* the related proceedings at *People v. Wise*, 204 A.D.2d 133 (N.Y. App. Div. 1994); *People v. Richardson*, 202 A.D.2d 227 (N.Y. App. Div. 1994); *People v. McCray*, 198 A.D.2d 200 (N.Y. App. Div. 1993); *People v. Salaam*, 187 A.D.2d 363, 363 (N.Y. App. Div. 1992). Defendant-Santana, who was tried jointly with Salaam and McCray, did not perfect an appeal until 2002. *See Wise II*, 752 N.Y.S.2d at 483.

44. *Wise*, 204 A.D.2d at 133 (Defendant-Wise was convicted by jury of assault in the first-degree, sexual abuse in the first-degree, and riot in the first-degree); *Richardson*, 202 A.D.2d at 227 (Defendant-Richardson was convicted by jury of attempted murder in the second-degree, rape in the first-degree, sodomy in the first-degree and robbery in the first-degree); *McCray*, 198 A.D.2d at 200 (Defendant-McCray was convicted by jury of rape in the first-degree and robbery in the first-degree); *Salaam*, 187 A.D.2d at 363 (Defendant-Salaam was convicted by jury of rape in the first-degree and robbery in the first-degree).

45. *Wise*, 204 A.D.2d at 133 (Defendant-Wise was sentenced to concurrent terms of five to fifteen years, one and one-third to seven years, and one to three years); *Richardson*, 202 A.D.2d at 227 (Defendant-Richardson was sentenced to an aggregate term of five to ten years); *McCray*, 198 A.D.2d at 200 (Defendant-McCray was sentenced to consecutive terms of three and one-third to ten years); *Salaam*, 187 A.D.2d at 363 (Defendant-Salaam was sentenced to consecutive terms of three and one-third to ten years).

46. *Wise II*, 752 N.Y.S.2d at 842 (“It is uncontested that in January 2002, Matias Reyes, for the first time, informed law enforcement officials that he, alone, committed the rape and other crimes concerning the female jogger, for which several defendants were convicted, and that DNA testing confirms his participation in the rape.”).

47. *Id.* at 850 (“Based on the foregoing, this court concludes that if the statement and the forensic evidence, related to Matias Reyes, were available at the time of trial, there exists a reasonable probability that the verdicts in the defendants’ trials would have been more favorable to defendants. Accordingly, defendants’ motion to vacate judgment and order a

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even District Attorney Morgenthau publically questioned the strength of the 1993 confessions that led to the convictions.⁴⁹ The exact details of what happened during the interrogations leading up to the confessions was disputed at trial, but the boys and their parents claimed that the interrogations were highly coercive, and specifically alleged that the officers slapped the boys.⁵⁰ What is known is that the boys were detained for twenty-eight hours, played against each other, shown pictures of the crime scene, and given the explicit promise that if they confessed, they would be treated as witnesses, not suspects.⁵¹

The Central Park Jogger case clearly illustrates that false confessions do not simply occur, but are reactions to external pressures or promises.⁵² Coerced statements, even where corroborated must not always be taken at face value.⁵³ Importantly, the common law rule seeks to protect the integrity of the judicial system by requiring that evidence admitted in a criminal trial be a reliable representation of fact.⁵⁴

The common law rule of evidence is doctrinally important in confession jurisprudence because the Supreme Court has adopted its “voluntariness” standard in constitutional confession jurisprudence. The Supreme Court recognizes two constitutional grounds on which involuntary statements by a criminal defendant are inadmissible—the Fifth Amendment⁵⁵ right against self-incrimination and the Due Process Clause of the Fourteenth

new trial, based on newly discovered evidence, must be granted as to all of the remaining convictions.”).

48. *Id.* at 846. Even in 2002, the court failed to address the circumstances surrounding the various “incriminating statements linking them [the defendants] to the crime scene” that were made after the boys were apprehended.

49. Affirmation in Response to Motion to Vacate Judgment of Conviction at 44, *Wise II*, 752 N.Y.S.2d. 837 (No. 4762/89) (“Perhaps the most persuasive fact about the defendants’ confessions is that they exist at all. While all of the defendants began by denying knowledge of the attack, each ultimately made himself an accomplice in a terrible crime.”). See generally Phil Hirschhorn, *Prosecutor: Drop All Convictions in Central Park Jogger Case*, CNN.COM (Dec. 10, 2002), <http://www.cnn.com/2002/LAW/12/05/central.park.jogger/>.

50. TIMOTHY SULLIVAN, *UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS* 80, 280-81 (1992) (documenting that Kharey Wise claimed he was slapped by a detective in the head four times).

51. *Id.* at 80, 182-87, 280-81 (Defendant-Wise and the parents of Defendant-McCray testified at trial that detectives promised that the boys could go home if they confessed); see generally *DA Wants Central Park Convictions Tossed*, ABC NEWS (Dec. 4, 2002), www.abcnews.go.com/us/story?id=91009&page=1.

52. *E.g.*, *supra* notes 42-51; see also Nadia Soree, Comment, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 193-95 (2005).

53. See *supra* note 43 and accompanying text; see also Soree, *supra* note 52.

54. See *supra* note 39 and accompanying text.

55. “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

Amendment.⁵⁶ The law concerning these two constitutional guarantees, in the context of police coercion, will be discussed below.

B. Due Process Protection

In 1884, *Hopt v. Utah* explicitly recognized the common law voluntary confession rule prohibiting the use of confessions obtained by inducements, promises, or threats.⁵⁷ The rule was based on the premise that confessions resulting from promises or threats are unreliable and therefore could not be admitted into evidence.⁵⁸ However in 1897, just thirteen years after *Hopt*, the Supreme Court expanded the purview of confession jurisprudence by expressing a concern for police overreaching.⁵⁹ Thus, in *Bram v. United States*, the Supreme Court held that the use of involuntary confessions violated the constitutional bar on compelled incrimination.⁶⁰ The *Bram* Court created a bright line rule, excluding any confession extracted by threat, violence, or promises “however slight.”⁶¹

In 1936, confession jurisprudence again changed directions: *Brown v. Mississippi* analyzed the admissibility of an involuntary confession under the Fourteenth Amendment⁶² and focused on the underlying police mis-

56. “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (finding that the Fourteenth Amendment imposes a minimum standard of fairness on the states, and requires state criminal trials to provide defendants with protections “implicit in the concept of ordered liberty”).

57. 110 U.S. 574, 585 (1884) (“[W]hen the confession appears to have been made either in consequence of inducements . . . or because of a threat or promise by or in the presence of such person, which . . . deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.”).

58. *Id.* (“[T]he presumption upon which weight is given to such evidence [voluntary confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made” involuntarily).

59. See *infra* note 60 and accompanying text.

60. 168 U.S. 532, 542 (1897) (“In criminal trials, in the courts of the United States, whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’”) (citation omitted).

61. *Id.* at 543. The Court reasoned that “the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.” *Id.* at 565 (internal quotations omitted) (citation omitted).

62. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”). The Fifth Amendment is applicable to federal actors, and the Fourteenth Amendment is applicable to state actors. See *Malloy v. Hogan*, 378 U.S. 1 (1964).

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conduct.⁶³ In *Brown*, several African-American tenant farmers accused of murdering a white farmer were whipped, pummeled, and tortured until they provided detailed confessions of the crime.⁶⁴ The Supreme Court reversed the convictions, holding that the Due Process clause requires that state action be “consistent with the fundamental principles and liberties which lie at the base of all our civil and political institutions.”⁶⁵ *Brown* explicitly incorporated the voluntary confession rule—which was first pronounced under the common law to ensure reliability of evidence—as a constitutional guarantee to due process of law.⁶⁶

In modern due process jurisprudence, it is unequivocal that the Fourteenth Amendment⁶⁷ regulates state conduct by prohibiting police from coercing a criminal defendant.⁶⁸ Thus, the Supreme Court has explicitly required a confession to be “voluntary” to provide sufficient due process of law.⁶⁹ Over the years, cases in this area have brought to light that the voluntariness requirement reflects two important policies: (1) determination of coerced confessions as unreliable because of the practices used to obtain them,⁷⁰ and (2) deterrence of offensive police practices through exclusion

63. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (finding that due process of law forbids the admission of a confession if obtained by state infliction of torture on the suspect).

64. *Id.* at 282. The *Brown* defendants,

not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

Id.

65. *Id.* at 286 (citation omitted).

66. *Id.* (reversing a criminal conviction under the Due Process Clause of the Fourteenth Amendment because it was based on a confession obtained by physical coercion and was thus involuntary); *Bram v. United States*, 168 U.S. 532, 542 (1897) (stating that the voluntariness test “is controlled by that portion of the Fifth Amendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”).

67. U.S. CONST. amend. XIV, § 1. *See also supra* note 62.

68. The Due Process Clause requires that “state action . . . be consistent with the fundamental principles of liberty and justice.” *Brown*, 297 U.S. at 286.

69. *Ashcraft v. Tennessee*, 322 U.S. 143, 146 n.1 (1944) (admissibility of a confession is “largely a question of fact as to whether or not a confession is voluntary”) (internal quotations omitted).

70. *Brown*, 297 U.S. at 285 (finding that the confessions of the farmers were of doubtful reliability because they had been tortured by state agents until they confessed); *see also* LAFAVE, *supra* note 17, at 344 (stating that *Brown* can be read as announcing a “due process test for excluding confessions obtained under circumstances presenting a fair risk that the statements are false. . . . [This] led many state courts to the conclusion that unfairness in violation of due process exists when a confession is obtained under circumstances affecting its

of this evidence, even where the reliability of a confession is not in question (i.e., where there is strong corroborating evidence).⁷¹

Since *Brown* the “voluntariness” requirement has evolved to reflect a “complex of values” that underlie “the stricture against use by the state of confessions.”⁷² The “voluntary” status of a confession is determined by the totality of the circumstances surrounding the statements.⁷³ The crux of this inquiry is the nature of the police conduct and its effect on the specific defendant.⁷⁴ Some police conduct is considered to be “inherently coercive” and requires no further inquiry.⁷⁵ Examples include torture,⁷⁶ physical violence,⁷⁷ the threat of mob violence,⁷⁸ being forced to sit naked in jail,⁷⁹

testimonial trustworthiness”). *But see* *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (rejecting, in dicta, that the unreliability of a confession is a concern of due process analysis). In the facts of *Connelly*, however, no police overreaching was at play. *See also infra* note 88.

71. *Lisenba v. California*, 314 U.S. 219, 236 (1941) (“[T]he aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence, whether true or false.”); *see also, e.g., Rogers v. Richmond*, 365 U.S. 534, 541 (1961). In *Rogers*, the Court found that a confession made by the defendant after the police pretended to order his ailing wife to be arrested for questioning was involuntary, and was excluded to deter oppressive and unfair police interrogation methods. *Id.*

72. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (“Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.”).

73. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.”); *Blackburn*, 361 U.S. at 207 (“complex of values”); *Developments in the Law: Confessions, supra* note 39, at 962.

74. The Supreme Court has explained that coerced confessions must be overturned “not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . .” *Rogers*, 365 U.S. at 540-41.

75. *Stein v. New York*, 346 U.S. 156, 182 (1953) (finding that when outrageous police conduct has occurred, “there is no need to weigh or measure its effects on the will of the individual victim”).

76. *Brown v. Mississippi*, 297 U.S. 278, 281 (1936). In *Brown*, one defendant was found to be tortured where, after he denied his involvement in the accused crime, the officers “hanged the defendant by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped.” *See also supra* notes 64-65 and accompanying text.

77. *Brown*, 297 U.S. at 281.

78. *Stein*, 346 U.S. at 156 (interrogating officer threatened defendant that unless he confessed, the officer would leave him to an angry mob waiting outside the jailhouse door).

79. *Malinski v. New York*, 324 U.S. 401 (1945) (confession determined involuntary when defendant was taken to a hotel room by police and stripped before questioning).

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and holding defendant incommunicado for thirty-six hours without food, water, or sleep.⁸⁰

Where the police conduct is not inherently coercive, the circumstances surrounding the confession are taken into consideration.⁸¹ Relevant circumstances include, credible threats of violence,⁸² explicit promises that are untrue,⁸³ manufactured false evidence,⁸⁴ whether the defendant was subject to lengthy and uninterrupted periods of interrogation,⁸⁵ and whether the police induced a credible fear that the defendant would not see his child,⁸⁶ or be able to support that child if incarcerated.⁸⁷ State misconduct is a prerequisite to due process violations, thus, if no indicia of coercive conduct are found to have occurred at the time of the confession, the voluntariness inquiry will end.⁸⁸

80. *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (confession is involuntary when the defendant was held incommunicado for thirty-six hours without sleep or rest and was interrogated by relays of officers and investigators).

81. *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (“In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. . . . And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances.”).

82. *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) (confession is involuntary when defendant was promised protection by a fellow inmate if he told the truth about what had occurred from violence of other inmates if they found out that defendant killed his daughter).

83. *United States v. Walton*, 10 F.3d 1024, 1027 (3d Cir. 1993) (confession is involuntary where the officer, a longtime friend of the defendant, promises to keep a conversation “off the record” and then does not do so).

84. *State v. Cayward*, 552 So. 2d 971, 972 (Fla. Dist. App. Ct. 1989) (confession is involuntary when police fabricated a scientific report for use as a ploy in interrogating the defendant).

85. *Leyra v. Denno*, 347 U.S. 556, 561 (1954) (confession is involuntary where defendant was subjected to many hours of day-and-night questioning by police officers as a murder suspect).

86. *United States v. Tingle*, 658 F.2d 1332, 1334 (9th Cir. 1981) (confession involuntary where induced by police that told defendant she would not see her child for “a while”).

87. *Lynnum v. Illinois*, 372 U.S. 528, 534 (1963) (confession is involuntary where defendant confessed “only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not ‘cooperate’”).

88. The mere presence of a state actor when the defendant confesses, is not enough to raise due process concerns. *Connelly v. Colorado*, 479 U.S. 157, 164 (1986). For example, in *Connelly*, the defendant approached a police officer and stated that he had murdered someone. *Id.* at 160. He later claimed that he was following “the voice of god” in confession. *Id.* at 161. The Court found that the statements were voluntary because no “police overreaching” had taken place. *Id.* at 167.

If there is any evidence that coercive conduct took place,⁸⁹ the court will continue the “voluntary” inquiry by focusing on the individual characteristics of the defendant in order to determine if that particular defendant’s statement was made voluntarily.⁹⁰ The factors taken into account include the youth of the accused,⁹¹ his lack of education or low intelligence,⁹² and whether he is foreign-born or a native American.⁹³ No one factor will be conclusive, but rather all the circumstances will be considered together to paint an overall picture of whether the confession was voluntary.⁹⁴

In *Rogers v. Richmond*, the “voluntary” inquiry of the due process analysis was expressed as whether the interrogation exerted sufficient pressure on an individual to overbear his independent free will or capacity for autonomous choice.⁹⁵ This formulation of the test persists in modern due process analysis.⁹⁶

However, the voluntariness test of due process jurisprudence undertakes a fact-specific analysis and leaves police with little guidance.⁹⁷ Typically,

89. Importantly, in *Connelly*, the Court made clear that police coercion was a prerequisite to finding that the will of the accused had been overborne, and rejected the notion that reliability of the statement was alone, enough to be “involuntary.” *Id.* at 167. *See also supra* note 88.

90. *Connelly*, 479 U.S. at 163 (“[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.”) (internal quotations omitted); LAFAVE, *supra* note 17, at 348 (“Especially in an otherwise close case, it is appropriate also to take into account the particular characteristics of the person subject to interrogation, in order to judge the extent of his ability to resist the external pressures brought to bear upon him.”).

91. *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948) (relevant that the defendant was fifteen-years-old, and refused the aid of family, friends, or counsel during interrogation).

92. *Payne v. Arkansas*, 356 U.S. 560, 562-63 (1958) (relevant that the defendant was nineteen-years-old, but had only a fifth grade education).

93. *Spano v. New York*, 360 U.S. 315, 321-22 (1959) (relevant that the defendant was foreign-born).

94. *Connelly*, 479 U.S. at 164 (“But this fact does not justify a conclusion that a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional ‘voluntariness.’”).

95. *Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (finding that the voluntary standard under due process analysis ultimately asked whether the police pressures were such “as to overbear the petitioner’s will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth”).

96. *Id.*; *see also Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (“That there was a credible threat of physical violence, we agree with . . . [the lower court’s] conclusion that Fulminante’s will was overborne in such a way as to render his confession the product of coercion.”).

97. LAFAVE, *supra* note 17, at 349 (“One major defect in the due process ‘voluntariness’ test is that it leaves police without needed guidance. This is attributable to the fact that the term itself is imprecise. Virtually all incriminating statements—even those made under brutal treatment—are ‘voluntary’ in the sense of representing a choice of alternatives, yet

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the evidence of involuntariness rests on the conflicting testimony of the defendant and police officers, making it impossible for the courts to determine the “facts” of what happened.⁹⁸ Needless to say, without video coverage of the interrogation, the “he-said, she-said” due process test tilts in the government’s favor.⁹⁹

From the start, the administration of the due process voluntariness test was problematic and prompted courts to regulate confessions under the rubric of other constitutional guarantees:¹⁰⁰ the right of prompt appearance, the right to counsel, and the privilege from self-incrimination.¹⁰¹ While these guarantees further protect a criminal defendant in the pre-trial stages of his case, they do nothing to clarify the voluntariness requirement in due process analysis when it is required. The privilege of self-incrimination does, however, narrow the instances where due process analysis is needed. The Supreme Court created a bright line rule that police compulsion (as opposed to police coercion)¹⁰² inherent to a custodial interrogation renders a suspect’s statements involuntary unless the police have informed the suspect of certain constitutional rights that he holds,¹⁰³ and the suspect has voluntarily waived those rights.¹⁰⁴ The next section explores the privilege of self-incrimination, and its treatment of “involuntary” confessions.

very few are ‘voluntary’ in the sense that they would have been given absent official pressure of some kind.”).

98. *Id.* at 350 (stating that a swearing contest over what happened behind closed doors makes it difficult for the court to determine what really occurred).

99. *Id.* (the totality of the circumstances approach facilitates pro-police rulings at the suppression hearings).

100. *Id.*

101. *Id.* The right to prompt appearance and right to counsel are outside the scope of this Note and will not be further discussed. For more information on how these constitutional guarantees protect a defendant, see *id.* at 350-66.

102. In the context of confession jurisprudence, there is an important difference between police compulsion and coercion. The test for “compulsion” is objective, and is satisfied by the mere presence of atmospheric pressure inherent in custodial interrogations. See *infra* notes 105-119 and accompanying text. The presumption of compulsion is rebutted when *Miranda* warnings are given to the defendant, and he knowingly and voluntarily waives his rights before speaking. See *infra* notes 112-115 and accompanying text. Police coercion on the other hand eludes a concrete definition, and is determined by the court’s examination of the totality of the circumstances. See *supra* notes 73-88 and accompanying text. Any police activity that goes beyond merely questioning the defendant in a custodial interrogation will be at risk of being found coercive, as the police conduct is looked at in light of the individual characteristics of the defendant. See *supra* notes 90-94 and accompanying text.

103. See *infra* note 106.

104. See *infra* notes 106-113 and accompanying text.

C. Custodial Interrogations and Police Compulsion

In *Miranda v. Arizona*, the Supreme Court found that the pressures inherent in a custodial interrogation undercut the suspect's ability to make voluntary statements—even absent physical or psychological coercion—and thus held that a suspect's statements made in this situation are presumed involuntary¹⁰⁵ unless specific safeguards were taken by the police, namely that the suspect was notified of certain constitutional rights,¹⁰⁶ and waived them before speaking.¹⁰⁷ A custodial interrogation is simply a situation where police initiate questioning of the suspect while he is in-custody,¹⁰⁸ or is “deprived of his freedom of action in any significant way.”¹⁰⁹ Since *Miranda*, it is unequivocal that the Fifth Amendment¹¹⁰ privilege from self-incrimination regulates government conduct by prohibiting police compulsion, and requires that a suspect's confession be voluntary to be admissible at his trial.¹¹¹

Law enforcement officials are able to dispel the inherent atmospheric pressure of custodial interrogations and rebut the presumption that the statements are involuntary by deploying sufficient safeguards, famously

105. *Miranda v. Arizona*, 384 U.S. 436, 467 (1967) (“[T]he process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.”).

106. These rights include: (1) the right to remain silent, with the knowledge that any statements he does make will be used as evidence against him; and, (2) the right to an attorney, either retained or appointed. *Miranda*, 384 U.S. at 444.

107. *Id.* (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

108. Whether one is in “custody” is determined by satisfaction of the *Mendenhall*, “free to leave,” two-pronged test. *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). First, the police conduct must communicate to a reasonable person that the person was not free to decline the officers' request or otherwise terminate the encounter; and second, the individual must actually submit to the officers' authority. *Id.* at 554-55. In *Mendenhall*, the Court determined that the defendant was not in custody when she was stopped in the airport by Drug Enforcement Administration (DEA) personnel, who identified themselves as agents, but were not in uniform. *Id.* at 555. The DEA agents had merely requested to see the defendant's identification and tickets in a public concourse. *Id.*

109. *Miranda*, 384 U.S. at 444 (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).

110. “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

111. *Miranda*, 384 U.S. at 465 n.33 (“[T]he defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession.”) (citations omitted).

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known as the *Miranda* warnings.¹¹² Adequate *Miranda* warnings make the suspect aware of certain constitutional rights.¹¹³

Miranda procedures are intended to protect the suspect by giving him the information necessary to make rational decisions during the interrogation.¹¹⁴ Additionally, *Miranda* warnings protect the fairness of the trial itself by excluding presumptively false statements made as a consequence of police compulsion.¹¹⁵

These warnings are limited in scope—they cover only those confessions made during a custodial interrogation, and importantly, only protect individuals from police compulsion.¹¹⁶ Failure to administer *Miranda* warnings to the defendant results in the exclusion of statements at his trial, regardless of the statements reliability.¹¹⁷ *Miranda*, however, has become customary procedure, and the greater issue arises when *Miranda* rights are

112. *Id.* at 467 (“In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”).

113. *Id.* Although the exact warnings may vary, in general the police will state: “[Y]ou have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed to you. Do you understand these rights as they have been read to you?” Stephan J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishing Small Costs*, 90 NW. U. L. REV. 500 (1996).

114. *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964) (*Miranda* reflects “many of our fundamental values and most noble aspirations . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates ‘a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load’; our respect for the inviolability of the human personality and of the right of each individual ‘to a private enclave where he may lead a private life’; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent’”) (citations omitted).

115. *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (“Nor does the Fifth Amendment ‘trial right’ protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt.”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973) (the *Miranda* Court “made it clear that the basis for decision was the need to protect the fairness of the trial itself”); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (finding that *Miranda* warnings protect against “the possibility of unreliable statements in every instance of incustody [sic] interrogation,” and serves to guard against “the use of unreliable statements at trial”); *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) (“[A] system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses” than a system relying on independent investigation).

116. *See supra* note 102.

117. Statements made before *Miranda* warnings are given are often called “*Miranda*-defective.” After *Miranda* warnings are issued, the defendant is sometimes called “*Mirandized*.” *Schulhofer, supra* note 113, at 500. *But see supra* note 115 (for cases that recognized the effect that *Miranda* rights have on ensuring reliable evidence).

waived. Approximately four-out-of-five suspects waive their *Miranda* rights—which leaves the Due Process Clause as their only protection.¹¹⁸ Once again, a criminal defendant's constitutional protection from police pressure is limited to the Due Process Clause.¹¹⁹

D. The Exclusionary Rule and Standing

During the 1960s, the Supreme Court handed down a series of decisions that significantly expanded the procedural guarantees in a criminal proceeding.¹²⁰ These added protections aim to prevent police misconduct—and in part, were a direct response to the inadequacy of the “voluntariness” requirement of the Due Process Clause.¹²¹

Violations of a criminal defendant's constitutional protections are remedied in two ways: (1) allowing the defendant to bring a civil action against the violating officer under 42 U.S.C. § 1983,¹²² and (2) excluding the unconstitutionally obtained evidence at the victim's trial.¹²³

The first remedy, allowing the victim to bring a civil action, is unfavorable because of two major obstacles that these suits present: (1) criminal defendants are likely to be unsympathetic plaintiffs, which makes winning a

118. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 860 tbl.3 (1996) (83.7% waiver rate); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl.3 (1996) (78% waiver rate).

119. See *supra* note 118 and accompanying text.

120. The Bill of Rights was extended to state criminal proceedings to give defendants the right to a jury trial, the right to a speedy trial, the right to confront witnesses, the right to assistance of counsel, the protection against unreasonable searches or seizures, and the privilege against self-incrimination. See *Argersinger v. Hamilton*, 407 U.S. 25 (1972) (right to counsel for petty offenses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (right to speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront witnesses); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony trial); *Mapp v. Ohio*, 367 U.S. 643 (1961) (protection against unreasonable search and seizure).

121. LAFAVE, *supra* note 17, at 350; *Police Coercion of Witnesses*, 1973 WASH. U. L.Q. 865, 865 (“An important policy objective of this expanded application of constitutional guarantees to criminal procedures is to deter the police from engaging in illegal methods of law enforcement.”).

122. 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

123. *Mapp*, 367 U.S. at 655-56 (finding that when a constitutional privilege is denied, the defendant is entitled to “the exclusion of the [resulting] evidence”).

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case more difficult;¹²⁴ and (2) collecting on a favorable judgment is often futile because the offending officer is unable to pay.¹²⁵ Moreover, police officers exercising discretion are entitled to qualified immunity, so that even if they violated the Constitution, the victim does not recover unless the law was clearly established at the time of the conduct.¹²⁶

The second remedy, excluding the unconstitutionally obtained evidence at the victim's trial, is constitutionally required and provides immediate relief to the victim.¹²⁷ The main purpose of this remedy, referred to as "the exclusionary rule," is to deter police from violating the constitutional rights of individuals.¹²⁸ This policy is derived from a "deep-rooted feeling that the police must obey the law while enforcing the law."¹²⁹ The rationale is that by excluding illegally obtained evidence from trial, a police officer will be hesitant to resort to illegal and offensive interrogation techniques in the future because he knows that the fruits of his efforts will be disregarded by the court.

124. *Samuel v. Frank*, 525 F.3d 566, 567 (7th Cir. 2008) ("A criminal is not a very appealing tort plaintiff . . .").

125. See STEPHEN A. SALTZBURG, *AMERICAN CRIMINAL PROCEDURE INVESTIGATIVE* 596 (8th ed. 2007).

126. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known.").

127. *Weeks v. United States*, 232 U.S. 382 (1914) (holding that evidence obtained in violation of the Constitution must be excluded from presentation in federal courts); see also *Mapp*, 367 U.S. at 648 (expanding exclusion of illegally obtained evidence to state courts and stating that the exclusionary rule is a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard" from state misconduct). To benefit from the exclusionary rule, the defendant may file a motion to suppress evidence on the grounds that the evidence was obtained in violation of the Constitution. LAFAYETTE, *supra* note 17, at 513. At the request of the defense, a trial judge must conduct a pretrial hearing outside the presence of the jury to determine voluntariness before the government may introduce testimonial evidence obtained from the defendant. See *Sims v. Georgia*, 385 U.S. 538, 543-44 (1967) ("[A] jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given."); see also *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964) (finding that the defendant has a right to "a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession").

128. *United States v. Leon*, 468 U.S. 897, 906 (1984) (finding that the main purpose of the exclusionary rule is to deter violations of the Constitution); *Mapp*, 367 U.S. at 656 ("[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'") (internal citations omitted).

129. *Spano v. New York*, 360 U.S. 315, 320-21 (1959) (stating that the exclusionary rule is based on the idea that "in the end life and liberty can be as much endangered from illegal methods used to convict thought to be criminals as from the actual criminals themselves").

The exclusionary rule also serves to protect the credibility and dignity of the judiciary.¹³⁰ Courts sometimes refer to the rule as “the imperative of judicial integrity,” which must be followed so that courts will not become “accomplices in the willful disobedience of a Constitution they are sworn to uphold.”¹³¹ Furthermore, the exclusionary rule serves to uphold public trust in the judicial system, by ensuring the public that police officers will not profit from their misconduct.¹³²

For a defendant to be entitled to exclusion of evidence he must have standing—meaning that he must be a proper party to assert the claim of illegality and seek the remedy of exclusion.¹³³ To establish standing, the party seeking exclusion must demonstrate a “personal stake in the outcome of the controversy.”¹³⁴ A criminal defendant clearly has such a stake in the outcome of his own trial.¹³⁵ A criminal defendant, however, does not automatically have standing to raise all constitutional issues bearing on his trial.¹³⁶ This limitation will depend on the constitutional violation in question.¹³⁷

Moreover, even where a defendant has standing to object to the prosecution’s use of unconstitutionally obtained evidence, the exclusionary rule does not automatically bar the evidence.¹³⁸ Suppression of evidence is costly—it may result in the freeing of guilty and dangerous criminals, and the waste of government resources (both police officer time and state funds).¹³⁹ Therefore, the Supreme Court requires that suppression of evi-

130. *Mapp*, 367 U.S. at 659.

131. *Elkins v. United States*, 364 U.S. 206, 222-23 (1960).

132. *United States v. Calandra*, 414 U.S. 338, 354 (1974) (finding that the exclusionary rule serves the purpose “of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government”).

133. *LAFAVE*, *supra* note 17, at 513.

134. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (“Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”).

135. *LAFAVE*, *supra* note 17, at 513.

136. Criminal defendants do not have automatic standing to contest violations of third-party constitutional rights. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 131 (1978) (finding that the defendants did not have standing because they “were not persons aggrieved by the unlawful search and seizure”) (internal quotations omitted).

137. *See infra* notes 153-79 and accompanying text.

138. *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (“We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.”).

139. *Id.* (“The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free . . . the rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.”).

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dence be justified by deterrent benefits and will not suppress tainted evidence where the benefits are unclear.¹⁴⁰ In other words, “the benefits of deterrence must outweigh the costs.”¹⁴¹ As the Supreme Court stated in *Herring*: “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”¹⁴²

The remainder of this section will detail the various exceptions to the exclusionary rule and will reveal a great disparity in the strength of the rule in its application to due process violations as compared with applications in self-incrimination and search and seizure violations. The exclusionary rule’s application to due process violations is simple: there are no exceptions.¹⁴³ If the court finds that the police have coerced a suspect to involuntarily confess, these statements will be barred from use at the defendant’s trial.¹⁴⁴ In comparison, the exclusionary rule’s application to self-incrimination and reasonable search and seizure violations has various exceptions where the Supreme Court has allowed the prosecution’s use of tainted evidence in the defendant’s trial.¹⁴⁵ This comparison is doctrinally important, as I argue in Part III that the difference in the application of the exclusionary rule reveals that the Supreme Court believes coercive police conduct (i.e., due process violations) to be more problematic, and more worthy of protection than other constitutional guarantees; the Court also believes that the benefit of deterring police misconduct (via suppression of a confession) unequivocally outweighs the costs of due process violations (a defendant being coerced). Moreover, if due process rights require special protection, as the current state of the exclusionary rule suggests, it follows that the Supreme Court should extend the exclusionary rule of due process to ban the use of coerced witness testimony, regardless of its reliability, to further accomplish its goal of deterring police coercion.¹⁴⁶

140. *Id.* at 700 (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’”) (citations omitted).

141. *Id.*

142. *Id.* at 702.

143. *See infra* notes 148-149 and accompanying text.

144. *See infra* notes 148-150 and accompanying text.

145. *See infra* notes 153-179 and accompanying text.

146. *See infra* Part III.C.

1. *The Due Process Exclusionary Rule*

A criminal defendant has standing to object to the introduction of his own involuntary out-of-court statement.¹⁴⁷ The exclusionary rule forbids the prosecution's use of involuntary confessions in the trial.¹⁴⁸ There are no exceptions to this rule.¹⁴⁹ Failure to exclude tainted evidence requires reversal.¹⁵⁰

Nevertheless, the law is unsettled as to whether a criminal defendant has standing to object to the introduction of a coerced, out-of-court statement made by a third-party.¹⁵¹ In jurisdictions that allow the use of coerced third party statements, the police can improperly induce a third party witness to incriminate the defendant and later avoid constitutional challenges to the introduction of that evidence in-court.¹⁵²

2. *The Self-Incrimination Exclusionary Rule*

When the Fifth Amendment right of an individual to be free from government compulsion is violated, the exclusionary rule limits the admissibility of the resulting statements at trial.¹⁵³ Like due process, the privilege of self-incrimination is a personal right, and standing therefore is limited to the individual whose Fifth Amendment rights were violated.¹⁵⁴ However, unlike the due process exclusionary rule, statements made after a Fifth Amendment violation are not absolutely barred from use against the defendant in his trial. Rather, there are several exceptions.¹⁵⁵

147. *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (“[E]ven though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.”).

148. *Id.*

149. *Mincey v. Arizona*, 437 U.S. 385, 402 (1978) (“Due process of law requires that [involuntary] statements obtained as these were [coercively] cannot be used *in any way* against a defendant at his trial.”) (emphasis added). In *Mincey*, the statements made by the defendant while he was in the hospital, seriously injured, “encumbered by tubes, needles, and breathing apparatus,” were involuntary and inadmissible in his trial for any reason, but specifically not for impeachment purposes. *Id.* at 399.

150. *Id.*; *Payne*, 356 U.S. at 561 (finding that the error of admitting a coerced confession into a defendant's trial requires reversal). In *Payne*, the Court reversed a conviction where the trial court wrongfully admitted an involuntary confession into evidence.

151. *See infra* note 186.

152. *See infra* note 224 and accompanying text.

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

154. *Rogers v. United States*, 340 U.S. 367, 371 (1951) (“[T]he privilege against self-incrimination ‘is solely for the benefit of the witness,’ and ‘is purely a personal privilege of the witness.’”) (citations omitted).

155. *See infra* notes 156-162 and accompanying text.

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First, the illegally obtained confession may be used to impeach the defendant if he takes the stand and testifies inconsistently with the previous confession.¹⁵⁶ Moreover, the use of pre-arrest silence is allowed to impeach a defendant claiming self-defense.¹⁵⁷ Second, a confession that violates the Fifth Amendment may be used against a defendant for any purpose where police questioning is reasonably prompted by a concern for public safety.¹⁵⁸

Some fruits of *Miranda*-defective confessions are similarly admissible in the defendant's trial, even though the confession itself is not. Admissible "fruits" include: (1) the testimony of a witness who was identified in the *Miranda*-deficient confession;¹⁵⁹ (2) the physical fruits of a *Miranda*-deficient confession;¹⁶⁰ and (3) a second confession (that is voluntary) resulting from a *Miranda*-defective confession.¹⁶¹

156. *Harris v. New York*, 401 U.S. 222, 226 (1971). In *Harris*, the defendant was charged with selling heroin to an undercover police officer, and he took the stand in his own defense. *Id.* at 223. On cross-examination, he was asked if he had made statements to the police immediately after his arrest that partially contradicted his direct testimony. *Id.* The statements were not admissible as substantive evidence because they were *Miranda* defective, but the Court held that they could be admitted for purposes of impeaching his credibility. *Id.* at 225-26.

157. *Jenkins v. Anderson*, 447 U.S. 231, 232 (1980). In *Jenkins*, Defendant stabbed and killed a man, and at his trial for murder he contended that the killing was in self-defense. *Id.* Defendant turned himself in two weeks after the killing. *Id.* On cross-examination, and in closing arguments, the prosecutor was allowed to bring up the defendant's two week waiting period as inconsistent with his self-defense claim. *Id.* at 235-40.

158. *New York v. Quarles*, 467 U.S. 649, 651 (1984) (finding that a *Miranda*-deficient statement was admissible at trial because the officer's failure to issue *Miranda* warnings was justified with "overriding considerations of public safety"—namely, the officers knew that the suspect had a gun on his person, and it was immediately necessary to ascertain the whereabouts of the gun).

159. *Michigan v. Tucker*, 417 U.S. 433 (1974) (suppressing the defendant's confession when, prior to receiving *Miranda* warnings, the defendant confessed to committing rape and indicated that he was with his friend at the time of the crime, but finding that the friend's testimony was not suppressed because there was "no reason to believe that [the friend's] testimony [was] untrustworthy simply because [defendant] was not" *Mirandized*).

160. *United States v. Patane*, 542 U.S. 630 (2004). In *Patane*, one police officer arrested the defendant for allegedly violating a restraining order, while a second police officer attempted to inform the defendant of his *Miranda* rights. *Id.* at 634-35. Before the officer was able to complete the *Miranda* warnings, the defendant interrupted, asserting that he knew his rights. *Id.* at 635. Neither officer attempted to complete the *Miranda* warnings, and eventually the defendant, a convicted felon, in response to the questioning of one of the officers, revealed the location of a pistol. *Id.* The Court held that "[i]ntroduction of the non-testimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements, however defined, will be used against him at a criminal trial." *Id.* at 643.

161. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). In *Elstad*, the defendant confessed to burglary, prior to receiving *Miranda* warnings. *Id.* at 301. Later, after *Miranda* warnings

Moreover, the Fifth Amendment right against self-incrimination can be waived where the speaker does so with full awareness of the right being abandoned and the consequences of the decision to abandon that right.¹⁶²

Thus, the privilege against compelled self-incrimination is not absolute and the Supreme Court has found many instances where the cost of suppressing *Miranda*-deficient evidence—the loss of reliable evidence—outweighed the benefit of deterring potential police overreaching in the future. Next and last will be a discussion of the reasonable search and seizure exclusionary rule. While a discussion of the reasonable search and seizure exclusionary rule may seem removed from that of confession jurisprudence, it is helpful to see how the Fourth Amendment constitutional protection, in comparison to the due process protection, is riddled with exceptions.

3. *The Reasonable Search and Seizure Exclusionary Rule*

The Fourth Amendment right to be free from unreasonable searches and seizures is a personal right,¹⁶³ and when violated, the exclusionary rule limits the admissibility of the evidence at the defendant's trial.¹⁶⁴ The standing requirements for a Fourth Amendment claim are: (1) the person challenging the search must demonstrate a subjective expectation of privacy in the place searched or a possessory interest in the thing seized; and, (2) the person must demonstrate that this subjective expectation is one that society accepts as reasonable.¹⁶⁵

were properly administered, the defendant again confessed to the crime in writing. *Id.* at 302. The Supreme Court found that it was correct to suppress the first confession, but not the second written confession. *Id.* at 314. There were no “deliberately coercive or improper tactics” accompanying the initial *Miranda* violation, and thus a subsequent administration of the warnings was held to “cure” any lingering compulsion from the first interrogation. *Id.* at 310-11, 314. There are two circumstances in which a second confession must be excluded even though the officers properly gave *Miranda* warnings before the second confession: (1) where the first confession is actually involuntary; or, (2) where the second confession is itself involuntary as this would violate the Due Process Clause of the Fourteenth Amendment. *See supra* notes 147-152 and accompanying text.

162. *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (“*Miranda* holds that ‘[the] defendant may waive effectuation’ of the rights conveyed in the warnings ‘provided the waiver is made voluntarily, knowingly and intelligently.’”) (citations omitted); *see also supra* notes 118-119 and accompanying text.

163. *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”) (quoting *Alderman v. United States*, 394 U.S. 165 (1969)).

164. *Id.* at 134 (“[T]he exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment.”).

165. *Id.* at 143 n.12.

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The standing requirement allows a defendant to object to the use of evidence obtained in the course of an illegal search of or seizure from a third-party in three instances. The defendant has standing if: (1) he is the owner of a car illegally searched or seized, even if he is not present at the time of the search and seizure;¹⁶⁶ (2) he had permission from the owner to use the property illegally searched or seized;¹⁶⁷ or, (3) he is an overnight guest in the premises illegally searched or seized.¹⁶⁸ A defendant has standing in these situations because of a held expectation of privacy in the areas searched and seized—either based on ownership, or permission from the owner.¹⁶⁹ Aside from these three exceptions, a defendant does not have standing. Thus, if the police violate a third-party's Fourth Amendment rights, the resulting evidence can be used in the prosecution of the defendant.¹⁷⁰ In fact, in *United States v. Payner*, the Supreme Court made clear that if the standing requirement is not met, courts may not use their supervisory power to exclude evidence, even in the face of blatant and intentional Fourth Amendment violations.¹⁷¹

Once the defendant has successfully established standing, the exclusion of the evidence obtained in violation of his Fourth Amendment rights is

166. *United States v. Jenkins*, 92 F.3d 430, 435 (6th Cir. 1996) (finding that an absentee owner had a reasonable expectation of privacy in his truck even when the truck was being driven by an employee). In *Jenkins*, the owner of the truck was found to have standing to object to the use of evidence obtained during an illegal search of the truck that was conducted when the owner was not present. *Id.* at 435.

167. *United States v. Rubio-Rivera*, 917 F.2d 1271, 1273-75 (10th Cir. 1990). In *Rubio-Rivera*, the defendant was directed to a secondary checkpoint after his initial border stop, where he consented to a vehicle search. *Id.* at 1273-74. Defendant was not the owner of the vehicle searched, but he had obtained the car from someone in Mexico who had given him permission to drive the car and was in possession of the registration papers. *Id.* at 1274-75. The court found that the defendant offered sufficient evidence that he had permission of the owner to use the vehicle, and thus, plainly had "a reasonable expectation of privacy in the vehicle and standing to challenge the search of the vehicle." *Id.* at 1275.

168. *Minnesota v. Olsen*, 495 U.S. 91, 96-97 (1990) (holding that a person's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable."). In *Olsen*, the Court affirmed the reversal of defendant's conviction on the grounds that he was arrested without a warrant, in violation of the Warrant Clause of the Fourth Amendment, in a home in which he was an overnight guest. *Id.* at 96-97, 100.

169. See *supra* notes 166-168 and accompanying text.

170. *United States v. Payner*, 447 U.S. 727, 731 (1980) ("[A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights.") (citing *Rakas v. Illinois*, 439 U.S. 128, 138 (1978)).

171. *Id.* at 733. In *Payner*, IRS agents investigating the defendant, Payner, stole the briefcase of another person and photocopied hundreds of documents that were entered into evidence against Payner. *Id.* at 729-30. The Court found that Payner did not have standing to challenge the illegal search and seizure. *Id.* at 732.

warranted in the prosecution's case-in-chief.¹⁷² Nevertheless, the Supreme Court has created several exceptions whereby the prosecution may use such evidence for "collateral use": (1) for impeachment;¹⁷³ (2) in habeas corpus proceedings;¹⁷⁴ (3) in grand jury proceedings;¹⁷⁵ (4) in sentencing hearings;¹⁷⁶ (5) in forfeiture proceedings;¹⁷⁷ (6) in deportation proceedings;¹⁷⁸ (7) in civil tax proceedings;¹⁷⁹ and, (8) in parole revocation hearings.¹⁸⁰ Because the Fourth Amendment violation occurs at the time of the intrusion and not when the resulting evidence is admitted at trial, the Supreme Court views the exclusion of reliable evidence as a cost that outweighs the deterrence benefits of the exclusionary rule.

The Fourth Amendment also includes additional exceptions for the fruits of illegal searches where the evidence obtained is too attenuated from the original violation, where the evidence is obtained from an independent source, or where discovery of the evidence illegally found would have inevitably occurred by legal means.¹⁸¹

In short, the Fourth Amendment right to be free from unreasonable search and seizure is qualified by many exceptions where the state can use unconstitutionally obtained evidence against a defendant at trial.¹⁸² This has led the Supreme Court to state that "[s]uppression of evidence . . . has always been our last resort, not our first impulse."¹⁸³ This is certainly accurate in the context of Fourth Amendment violations, as the cases developing the search and seizure exclusionary rule reveal that the Supreme Court does not view violations of the Fourth Amendment as "sufficiently deliberate" or "sufficiently culpable" to warrant the cost of losing valuable evidence.¹⁸⁴ In comparison, the cases surrounding the due process exclu-

172. *See* *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (exclusionary rule applies in state courts); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (exclusionary rule applies in federal courts).

173. *Walder v. United States*, 347 U.S. 62, 64 (1954).

174. *Stone v. Powell*, 428 U.S. 465, 485 (1976).

175. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

176. *United States v. Tejada*, 956 F.2d 1256, 1261 (2d Cir. 1992).

177. *United States v. \$277,000.00 U.S. Currency*, 941 F.2d 898, 899 (9th Cir. 1991).

178. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

179. *United States v. Janis*, 428 U.S. 433, 447 (1976).

180. *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362-63 (1998).

181. *Murray v. United States*, 487 U.S. 533 (1988) (independent source); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (inevitable discovery); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (attenuation).

182. *See supra* notes 163-179 and accompanying text.

183. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *see, e.g., Colorado v. Connelly*, 479 U.S. 157, 166-67 (1986) (finding that the exclusionary rule does not apply when a person's involuntary statement was not the product of police coercion).

184. *See supra* note 142 and accompanying text.

sionary rule provide no exceptions where the prosecution may benefit from police misconduct—revealing the Supreme Court’s intolerance for police coercion.¹⁸⁵ This Note will argue that the elevated concern for police coercion demands the conclusion that coerced witness statements must also be submitted to an equally strict exclusionary standard in a criminal defendant’s trial on grounds that it would violate his due process rights. As the Supreme Court has yet to rule on this important issue, state, district, and circuit courts have come to different results.¹⁸⁶ The next section will discuss cases bearing on the issue of coerced witness testimony and look at how these courts have justified their position.¹⁸⁷ Some courts have found that the use of coerced witness testimony in a defendant’s trial is completely an evidentiary matter,¹⁸⁸ while others hold that it is a constitutional issue.¹⁸⁹

II. THE DUE PROCESS DEBATE ON COERCED WITNESS TESTIMONY

In 2008, the Seventh Circuit held in *Samuel v. Frank* that a defendant may not benefit from the exclusionary rule if a witness’s coerced out-of-court statement is admitted into evidence because his constitutional rights are not violated.¹⁹⁰ On the other hand, other courts that have considered the same issue, find the exact opposite: the use of coerced witness testimony in the defendant’s trial indeed violates that defendant’s constitutional rights and thus must be excluded.¹⁹¹

In *Samuel v. Frank*, police coerced Tisha Leyh, a sixteen-year-old mother, into incriminating the defendant by threatening her with losing custody of her two-day-old infant.¹⁹² In 1996, Tisha was kicked out of her mother’s home¹⁹³ and subsequently left Wisconsin with Stanley Samuel, the forty-seven year old defendant.¹⁹⁴ The pair was tracked down thirteen months later in Illinois, where Samuel was arrested and extradited to Wisconsin,

185. *See supra* notes 147-149 and accompanying text.

186. *Samuel v. Frank*, 525 F.3d 566, 569 (7th Cir. 2008) [hereinafter *Samuel II*] (“The Supreme Court has not decided whether the admission of a coerced third-party statement is unconstitutional . . .”).

187. *See infra* notes 190-256 and accompanying text.

188. *See infra* note 217 and accompanying text.

189. *See infra* note 227 and accompanying text.

190. *Samuel II*, 525 F.3d at 566; *see also infra* notes 192-206 for a complete discussion of the facts in *Samuel II*.

191. *See infra* notes 226-256 and accompanying text.

192. *Samuel II*, 525 F.3d at 566, 567-68; *Samuel v. Frank*, No. 03-C-1279, 2006 U.S. Dist. LEXIS 91796, at *5-6 (E.D. Wis. Dec. 19, 2006) [hereinafter *Samuel I*].

193. Brief of Petitioner-Appellant at 3, *Samuel II*, 525 F.3d 566 (7th Cir. 2008) (No. 03-C-1279).

194. *Samuel II*, 525 F.3d at 567.

while Tisha's father picked her up.¹⁹⁵ Just one day after their return, on March 10, 1997, Tisha gave birth.¹⁹⁶ The State pressed charges against Samuel for sexual assault, and "critical to the charge . . . was whether the pair had sex in Wisconsin before they left the state"¹⁹⁷ The State lacked sufficient physical evidence, and thus needed the cooperation of either Samuel or Tisha.¹⁹⁸

On March 12, 1997, just two days after giving birth, social workers and police officers held a conference with Tisha and her father to determine custody of the baby.¹⁹⁹ Despite their stated purpose of determining custody of the child, police asked Tisha questions about her sex life with Samuel, and her whereabouts over the past year.²⁰⁰ Tisha, her father, and her lawyer later testified that during the conference it was indicated that the infant would be removed from Tisha's custody unless she cooperated by giving statements to the police.²⁰¹ Tisha did not incriminate the defendant, and it was decided at the end of the conference to immediately place the child into foster care.²⁰² The following day, Tisha went to the police station and made several statements that were later used in the prosecution of defendant.²⁰³ On March 14, 1997, Tisha's baby was taken from foster care, and placed in Tisha's custody.²⁰⁴

At a pretrial suppression hearing, and again at trial, Tisha recanted her statements implicating the defendant, and asserted that she made them out of fear of losing custody of her newborn child.²⁰⁵ Nevertheless, these statements were admitted into evidence against Samuel.²⁰⁶

195. *Samuel I*, 2006 U.S. Dist. LEXIS 91796, at *2.

196. *Id.*

197. *Samuel II*, 525 F.3d at 567.

198. *See id.*

199. *Id.*

200. Brief of Petitioner-Appellant, *supra* note 193, at 4.

201. *Samuel II*, 525 F.3d at 568 ("Tisha testified that at the first conference she had been told that if she didn't cooperate she wouldn't get her baby back, and that she understood this to mean that she had to give statements to the police. Her father testified that at that conference the police officers had gotten angry with Tisha because she refused to tell them where she'd been with the defendant or give them the addresses of the people they had stayed with. Her lawyer testified that the impression created at the conference was that unless Tisha gave a full statement concerning the defendant's conduct, she would not get the baby back.").

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Samuel was convicted by a jury of second-degree sexual assault of a child, interference with child custody, and abduction, and sentenced to thirty-eight years in prison, followed by sixteen years on probation. *Id.* at 567-68. Samuel exhausted his state appeals. *See State v. Samuel*, 643 N.W.2d 423 (Wis. 2002). Samuel also petitioned for federal habeas corpus relief, lost, and appealed. *See Samuel II*, 525 F.3d at 567.

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The *Samuel* court first looked at the egregiousness of the police conduct, acknowledging that the officers at the initial conference indeed created an impression that Tisha had to cooperate in the investigation of Samuel or suffer the consequence of losing custody of her child.²⁰⁷ Nevertheless, the court declined to find that this behavior equated to a finding that Tisha's statements were in fact coerced.²⁰⁸ Rather, the police conduct during the initial conference with Tisha was found to be legitimate, even though police and social workers "would be forcing her to choose between losing the baby and incriminating" Samuel.²⁰⁹ The court reasoned that Tisha's failure to cooperate with police could be a valid reason to doubt her competency as a mother.²¹⁰ The court suggested that non-cooperation with police would be one factor among others that would be evaluated in determining the competency of a mother.²¹¹ That said, the day after Tisha cooperated with the police investigation of Samuel, she was given custody of her child.²¹² The court explicitly distinguished the facts of *Samuel* from a situation where the police threatened a mother "with denial of custody of the baby because she refused to incriminate the father."²¹³ That situation, the court announced, would render Tisha's statements inadmissible,²¹⁴ because "taking away a person's child . . . [is] not considered [a] proper method . . . of obtaining evidence against criminals."²¹⁵ The police conduct complained of was not, in fact, found to be coercive.

After evaluating the police conduct and concluding that Tisha's constitutional rights had not been violated, the court nevertheless went on to discuss the appropriate treatment of coerced statements of non-defendants un-

207. *Samuel II*, 525 F.3d at 568 ("The officers may have created the impression that unless she [Tisha] cooperated in their investigation of the defendant they would make sure she did not get her baby back.").

208. *Id.* ("A failure to cooperate with police *could* be a proper reason for doubting a runaway teenage single mother's competence to be given custody of her child . . .").

209. *Id.*

210. *Id.* ("Had the child-welfare authorities believed that her failure to answer questions about her pregnancy during her months on the run counted against giving her custody of her baby, they could tell her that."). The court suggested that non-cooperation with police would be one factor among others that would be evaluated in determining the competency of a mother. *Id.* ("Tisha had not sought prenatal care or given other signs of taking responsibilities of motherhood seriously."). That said, the day after Tisha cooperated with the police investigation of Samuel, she was given custody of her child. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (emphasis added).

214. *Id.* That situation, the court noted, was akin to "threatening a person with torture if he refused to 'fess up.'" *Id.*

215. *Id.*

der the Constitution, as it related to the defendant.²¹⁶ The court considered the applicability of the exclusionary rule to coerced statements in general, and pronounced that the Seventh Circuit “do[es] not think that there is an exclusionary rule . . . applicable to third-party statements.”²¹⁷ Nevertheless, the court limited its evaluation of the exclusionary rule to Fifth Amendment self-incrimination violations and did not consider its applicability to due process violations.²¹⁸

The court also rejected the argument that the coerced third-party statement be constitutionally excluded on the ground that it was unreliable because “[n]ot all evidence routinely allowed in trials is particularly reliable,”²¹⁹ and found such evidence to be reliable enough, especially where corroborated.²²⁰ To support this, the court cites to several cases where corroboration cured the unconstitutionally obtained evidence; however, in so doing, the court refers to cases in which the police had either not violated a constitutional right of the defendant, or where a constitutional right other than due process was at issue.²²¹

After refusing to exclude Tisha’s statements on constitutional grounds, the court stated in dicta that evidentiary concerns would require that it “reverse a conviction if it rested entirely on a coerced statement that was completely unreliable.”²²² Ultimately, the court pointed to corroborating evidence that supported Tisha’s coerced statements and did not reverse.²²³ Thus by targeting Tisha rather than the defendant, the prosecution was able to benefit from the use of coercive techniques to abstract the information

216. *Id.* at 569.

217. *Id.* Moreover, the court noted that there is “no rule or principle that evidence obtained by improper means may not be used in a legal proceeding.” *Id.* at 570.

218. *Id.* at 570 (“[T]he concern with coerced statements is a concern with confessions or other self-incriminating statements, rather than with the coercion itself.”) (citation omitted).

219. *Id.*

220. *Id.* at 570-71 (“[T]he reliability of a single item of evidence often depends on other evidence, rather than being assessable in isolation. This is true of coerced statements. Not all are unreliable; their reliability may be established by corroboration . . .”).

221. *Id.* at 571 (finding no constitutional violation of the defendant, thus the exclusionary rule was inapplicable (citing *Colorado v. Connelly*, 479 U.S. 157 (1986); *New York v. Quarles*, 467 U.S. 649 (1984) (finding a Fifth Amendment violation of the defendant, thus remanding the case with direction to invoke the exclusionary rule to exclude illegally obtained evidence); *Brewer v. Williams*, 430 U.S. 387 (1977) (finding a Sixth Amendment violation of the defendant, thus remanding the case with direction to invoke the exclusionary rule to exclude illegally obtained evidence)).

222. *Id.* at 569 (“For in such a case no reasonable judge or jury could find that the defendant’s guilt had been proved beyond a reasonable doubt, and hence the conviction would have deprived him of liberty without due process of law.”).

223. *Id.* at 571.

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needed for the defendant's conviction, without having to face what would otherwise be constitutionally-mandated suppression.²²⁴

In 1999, the Tenth Circuit faced a similar situation to *Samuel* when it decided *United States v. Gonzales*.²²⁵ In *Gonzales*, police allegedly coerced a key witness and the resulting information was used against the defendants at trial.²²⁶ Despite the similarities of the cases, the court set a starkly different precedent from the Seventh Circuit, holding that a defendant's due process rights are violated when the government coerces a witness to make false statements and uses those statements at trial.²²⁷ In justifying this approach the court relied on the framework set out in *Clanton v. Cooper*, which addressed a similar issue of whether a defendant's right to due process of law was violated by the use of coerced witness testimony in an arrest warrant.²²⁸ In *Clanton*, Carolyn Clanton was arrested and detained for arson pursuant to an arrest warrant.²²⁹ The arrest warrant was based largely on the uncorroborated statements of Clanton's nephew, Michael Eaves, made in the course of his own confession.²³⁰ Eaves later recanted his statements, asserting that the confession was false and the police coerced him into making the statement by falsely telling him that they had physical evidence linking Eaves to the crime, threatening to send him to jail for twenty-five years unless he confessed, and suggesting that Eaves would "get off lightly" if he confessed.²³¹ The court found that a promise of leniency, coupled with lies about incriminating evidence, indeed made the

224. *Id.*

225. 164 F.3d 1285 (10th Cir. 1999).

226. *Id.* at 1289. In *Gonzales*, an arrest warrant was issued for an individual (the "Witness") who was allegedly a key witness to a murder that defendants were charged with, and further, the Witness was acquainted with the structure and organization of the Sureno 13 gang, to which the defendants belonged. *Id.* at 1287. The arrest warrant contained an "escape clause" that asserted the Witness would be arrested and held in detention unless she "cooperates fully, and truthfully and accurately and completely reveals" to the government her information and involvement in the crimes. *Id.* The district court found that the Witness's subsequent testimony was involuntary because the warrant "was blatantly tailored to obtain information and testimony" from the Witness because she "could escape arrest [only] if she divulged everything she knew about the Garcia homicide." *Id.* at 1289 (internal citation omitted). However, on appeal the court disagreed, and found the subsequent statements voluntary. *Id.* at 1291. Relevant here, is that the court addressed the proper treatment of coerced witness testimony. *Id.*

227. *Id.* at 1289 ("[D]efendants' due process rights would be implicated if the subject witness was coerced into making *false* statements and those statements were admitted against defendants at trial.").

228. *Id.* at 1289-91 (citing *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997)).

229. *Clanton*, 129 F.3d at 1151.

230. *Id.* at 1157.

231. *Id.* at 1152, 1157. Subsequently, Eaves signed a *Miranda* waiver form and gave a tape-recorded oral statement in which he confessed to the arson and implicated Clanton. *Id.*

Eaves confession involuntary under the totality of circumstances.²³² Thus, Clanton argued that her constitutional right to due process of law had been violated when the police coerced statements from Eaves, and used them against her.²³³

The court agreed with Clanton, reasoning that she had standing to object to the use of Eaves' coerced testimony based on a violation of her own constitutional right to due process of law.²³⁴ The court stated that the exclusionary rule protects the legitimacy of the Constitution itself, and exclusion is needed because of the danger of unreliable evidence, and because of a sense of fundamental unfairness best expressed as the "deep-rooted feeling that the police must obey the law while enforcing the law."²³⁵ Clanton thus had standing because Eaves' confession was found to be involuntary.²³⁶ Importantly, the court found that the concerns justifying the exclusion of coerced defendant statements are of similar importance when a witness is coerced: offensive police measures are no less offensive when exerted against a witness, rather than a defendant, and the resulting evidence is no less unreliable when spoken by a coerced witness than a coerced defendant.²³⁷ The court emphasized that the government's treatment of Eaves was at odds with the principles of the Constitution, and would not be ignored so that the government could bolster its case against Clanton.²³⁸ While *Clanton*'s holding was limited to the defendant's right to

232. *Id.* at 1159 ("[T]he totality of the circumstances surrounding Eaves' interrogation gives rise to an atmosphere which to this Court's conclusion that any statements arising from these circumstances cannot be said to be 'freely self-determined' or of 'free will.'") (internal citations omitted).

233. *Id.* at 1157.

234. *Id.* at 1158 ("Clanton may contest the voluntariness of Eaves's confession not based on any violation of his constitutional rights, but rather as a violation of her own Fourteenth Amendment right to due process.") (formatting omitted).

235. *Id.* at 1157 (exclusion of illegally obtained evidence is warranted because of: "[T]he strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will . . . that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." (citing *Jackson v. Denno*, 378 U.S. 368 (1964)) (internal citations omitted).

236. *Id.* at 1157-58 ("Clanton has standing to contest the voluntariness of Eaves's [sic] confession.").

237. *Id.* at 1158 ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause. . . . Further, it is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case. . . . Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.") (internal quotations omitted).

238. *Id.*

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object to the use of coerced witness testimony in an arrest warrant,²³⁹ *Gonzales* represents its expansion to a defendant's trial.²⁴⁰

The *Gonzales-Clanton* approach has been adopted in various state and federal courts, and grants a defendant standing to object to the use of coerced witness testimony on the basis of a violation of the defendant's personal due process rights.²⁴¹ Standing has, on occasion, even been expanded to allow defendants to object to the use of coerced statements for impeachment purposes,²⁴² and to the admission of an involuntary confession of a co-defendant.²⁴³ These courts exclude coerced witness testimony,

239. *Id. But see* *United States v. Webster*, 960 F.2d 1301, 1306 n.2 (5th Cir. 1992) (holding that evidence may be excluded if it was obtained in violation of a non-defendant's Fifth Amendment right, but does not extend to cover allegations of violations of a non-defendant's Fourth Amendment rights); *United States v. Fortna*, 796 F.2d 724 (5th Cir. 1986) (finding that statements made by a witness to the government are not "involuntary" and thus excludable on grounds of due process merely because the government violated the attorney-client privilege in talking to the witness).

240. *United States v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999).

241. *See, e.g., Valdez v. McKune*, 266 Fed. App'x 735, 739 (10th Cir. 2008) (stating that "a defendant may assert that his right to a fair trial has been violated by the use of testimony that has been unlawfully compelled from government witnesses" but declining to find a due process violation because the facts did not support that the witness was improperly coerced); *United States v. Dowell*, 430 F.3d 1100, 1107 (10th Cir. 2005) (citations omitted) (acknowledging that defendant had standing to contest the use of coerced testimony, but the court denied that the witness statements were involuntary where "federal agents contacted [the witness] 'continuously' and told him if he did not cooperate 'he would be facing 25 to 40 years in jail . . . but that they would go easy on him if he 'cooperated'"); *LaFrance v. Bohlinger*, 499 F.2d 29, 35 (1st Cir. 1974) (finding that the Due Process Clause "protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part," including situations where the government coerces a third-party); *Bradford v. Johnson*, 354 F. Supp. 1331, 1336-38 (E.D. Mich. 1972) (defendant had standing to object to the use of coerced witness testimony on due process grounds). In *Bradford*, the witness had been tortured by law enforcement officials to obtain his own confession and coerce him to name the defendant as his accomplice. *Bradford*, 354 F. Supp. at 1332-34. The witness had attempted to recant but had again been tortured. *Id.* at 1337. He was still in the custody of the abusive officers at the time that he testified in court against petitioner. *Id.* The court held that the use of testimony obtained by torture of a witness violated defendant's right to due process. *Id.* at 1338; *see also* *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000) (citations omitted) ("[T]he subsequent use of her testimony against [defendant], if coerced, would violate [defendant's] due process."); *People v. Douglas*, 50 Cal. 3d 468, 500 (1990) ("[T]he exclusion is based on the idea that coerced testimony is inherently unreliable, and that its admission therefore violates defendant's right to a fair trial.").

242. *See Valdez*, 266 Fed. App'x at 739 (forbidding the use of coerced testimony as evidence against the criminal defendant); *LaFrance*, 499 F.2d at 39 (forbidding the use of coerced testimony against the criminal defendant for impeachment purposes).

243. *United States v. Miller*, 250 F.R.D. 588, 597 (D. Kan. 2008) (holding that co-defendants had standing to challenge the voluntariness of co-defendant-Ross's confession, not based on a violation of Ross's constitutional rights, but on the basis of a violation of their own right to due process).

much like coerced defendant testimony, because of the unreliability of the coerced testimony, and because the underlying police misconduct offends society's sense of fairness.²⁴⁴

Some courts adhering to a *Gonzales-Clanton*-like approach hold that the defendant's due process rights are violated *only if* the coerced testimony is unreliable or false, and will not exclude coerced testimony if it is strongly corroborated, or if the coerced testimony is on the basis of police misconduct alone.²⁴⁵ In these courts, the police coercion will be inconsequential if, for instance, a witness is coerced by police to implicate the defendant but later voluntarily testifies at trial.²⁴⁶ To find that in-court testimony is not tainted by the prior coercion, the court looks at several factors including how much time elapsed between the illegal interrogation and the trial testimony,²⁴⁷ whether any intervening circumstances insulated the testimony from the effect of the prior coercion,²⁴⁸ whether the coerced statements and in-court testimony were substantially consistent,²⁴⁹ whether the statements

244. *Valdez*, 266 Fed. App'x at 739; *LaFrance*, 499 F.2d at 35; *Raphael*, 994 P.2d at 1008.

245. *United States v. Hodges*, No. 99-3083, 2000 U.S. App. LEXIS 5030, at *3-4 (10th Cir. Mar. 24, 2000) (holding that the defendant had standing to object to the coerced testimony of the government's witness). In *Hodges*, the witness testified at trial that once she and the defendant realized they were being pulled over, the defendant passed drugs to her to hide on her person. *Id.* at *2-3. Defendant argued that the officers coerced this testimony from the witness. *Id.* at *3. The court held that, even if the witness's testimony was coerced, any unreliability was overcome by the officers' corroboration. *Id.* at *4; *see also Gonzales*, 164 F.3d at 1287 ("[D]efendants' due process rights would be implicated if the subject witness was coerced into making *false* statements and those statements were admitted against defendants at trial."); *United States v. McCuiston*, No. 06-40071-01-SAC, 2007 U.S. Dist. LEXIS 11038, at *4 (D. Kan. Feb. 14, 2007) ("A defendant's right to due process is implicated when a witness is coerced into making a false statement and the false statement is admitted at trial.")

246. *See Williams v. Woodford*, 384 F.3d 567, 594 (9th Cir. 2002) ("By the time of trial, the psychologically coercive atmosphere of that interrogation must surely have dissipated. There [was] no indication that [the witness] was told at any time by anyone what he should say on the witness stand. We also noted that the witness was subject to cross-examination, through which the appellant brought out the facts of the interrogation and the inducement to testify, and that the jury was free to observe the witness's demeanor and gauge his credibility. Because the alleged facts of coercive interrogation and inducement to testify did not support a conclusion that the witness's trial testimony was involuntary, we denied the appellant's due process claim.") (quoting *United States v. Mattison*, 437 F.2d 84 (9th Cir. 1970)).

247. *See id.* at 595 (finding that two years was sufficient to cure atmosphere of coercion).

248. *See id.* (finding that the coerced witness testimony was cured when he testified at trial because two years had passed, and by the time of trial, the witness was represented by counsel).

249. *See United States v. Merkt*, 764 F.2d 266, 274 (5th Cir. 1985) ("Although there appear to be some factual inconsistencies between the [witnesses'] out-of-court statements . . . and the [witnesses'] subsequent in-court testimony, Merkt points to no substantial contradictions between the two recitations.")

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are unreliable or untrue, and whether the witnesses would have testified on the defendant's behalf had their statements not been adduced by the prosecution's case.²⁵⁰ The fact that in-court testimony is subject to cross-examination, allowing juries to make a credibility determinations, is also a factor that courts weigh deciding whether to admit coerced witness statements.²⁵¹

Other courts, following a *Gonzales-Clanton* approach, frame this issue as whether the government's investigation methods resulted in a fundamentally unfair trial, so as to violate the defendant's right to due process.²⁵² In substance, however, the analysis does not differ: courts look at the police misconduct, and the veracity of the coerced statements.²⁵³ If the coerced statements are corroborated with in-court testimony, the right to due process of law—specifically, the right to a fair trial—is not violated.²⁵⁴ In *Merkt*, for example, the court held that while the defendant's due process rights had been violated by the admission of coerced witness statements, this violation was cured by subsequent in-court testimony that was consistent with those statements, thus finding the defendant had been granted a fair trial.²⁵⁵ Moreover, a deprivation of a fair trial requires that the coerced testimony actually be admitted into evidence, or that the witness's in-court testimony has been tainted by the prior coercion.²⁵⁶

250. *Id.* (finding it relevant to the issue of a fundamentally fair trial that the defendant did not claim that the witnesses would have testified on her behalf had they not been coerced by the government).

251. *Williams*, 384 F.3d at 594.

252. *Douglas v. Woodford*, 316 F.3d 1079, 1092-93 (9th Cir. 2003) (finding that the defendant was not deprived of a fundamentally fair trial because while one of the State's witnesses was coerced to implicate the defendant through repeated physical beatings, none of the resulting statements were actually admitted into evidence against him); *Merkt*, 764 F.2d at 274 (finding that the defendant was not deprived of a fundamentally fair trial because the coerced witnesses' in-court testimony was voluntary, and substantially consistent with the statements made under coercion); *United States v. Chivola*, 744 F.2d 1271 (7th Cir. 1984) (finding that the government's investigation methods did not result in a fundamentally unfair trial because the co-conspirator was not coerced by police to implicate the defendant, but rather, the co-conspirator was merely instructed to call a certain phone number which the defendant picked up).

253. *Merkt*, 764 F.2d at 274.

254. *Id.*

255. *Id.*

256. *Douglas*, 316 F.3d at 1093 (finding no taint of coercion in witness's in-court testimony where witness himself admitted that the coercive nature of the interrogation had changed and he was simply told to tell the truth on the witness stand).

III. WITNESS COERCION IN A CRIMINAL TRIAL—A CONSTITUTIONAL WRONG

This Note has detailed the history of confession jurisprudence in the United States and highlighted an issue not yet addressed by the Supreme Court—whether the use of a coerced witness statement in a criminal trial violates the defendant's right to due process. A vast discrepancy exists among circuit, district, and state courts in how to handle this important issue.²⁵⁷

Some courts follow the *Samuel v. Frank* approach, which held that a criminal defendant has no constitutional right to contest the use of involuntary witness statements at his trial.²⁵⁸ Other courts follow an approach more akin to that of *Gonzales-Clanton*, providing that a criminal defendant indeed has standing to object to the use of unreliable, coerced witness statements as evidence, on the grounds that if admitted, the defendant's constitutional right to due process of law would be violated.²⁵⁹ There is no national consensus, however, as to what the Constitution demands. Certainly, the adoption of either approach by the Supreme Court would cure the most urgent issue: that a criminal defendant's right to due process varies depending on the jurisdiction of prosecution. Nevertheless, this Note argues that the Supreme Court should read the Constitution so that: (1) criminal defendants have standing to contest admission of coerced witness testimony; and (2) all coerced statements of a witness will be excluded, regardless of their reliability. This method will best uphold the policy of the exclusionary rule: to deter police misconduct and protect the constitutional due process rights of criminal defendants.

A. Exclusion of All Coerced Witness Statements Regardless of Reliability

While there is no consensus on whether admitting coerced witness testimony in a defendant's trial violates his due process rights, one issue that nearly all courts address in this context is the reliability of the statements in question. In fact, it seems that reliability is the common denominator of all the approaches taken in regard to coerced witness testimony: all courts would reverse a conviction that rested entirely on an unreliable coerced statement.²⁶⁰ Some courts justify suppression of coerced witness testimony

257. See *supra* notes 192-206, 226-256 and accompanying text.

258. See *supra* note 217 and accompanying text.

259. See *supra* notes 227, 241 and accompanying text.

260. See *supra* notes 219-222, 237 and accompanying text.

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on evidentiary concerns,²⁶¹ while other courts rely on constitutional grounds.²⁶² The bottom line, however, is that the reliability of the coerced statements dictates how coerced witness testimony is treated in court. Moreover, while the Supreme Court rejects the notion that unreliability is a proper ground to exclude involuntary confessions made by a defendant,²⁶³ I argue that the voluntary standard which controls due process analysis is in fact looking to the reliability of the statements, albeit indirectly. Furthermore, I argue that because reliability of statements is of great concern in due process analysis, all statements produced by police coercion (from a defendant or witness) should be banned from use at a defendant's trial, not because they are *in fact* unreliable, but rather because they are *inherently* unreliable.²⁶⁴ Banning the use of all inherently unreliable statements provides courts with a bright line rule in cases of police coercion that is easy to implement, and importantly, accomplishes the Supreme Court's stated purpose of the exclusionary rule: to deter police misconduct adequately and efficiently.

First, the voluntariness requirement is not completely divorced from reliability.²⁶⁵ In fact, the voluntariness requirement is a product of the common law rule of evidence aimed solely at preventing unreliable confessions from entering into evidence against a criminal defendant.²⁶⁶ The common law assumed that innocent defendants normally have no incentive to subject themselves to criminal prosecution and detention, so where no alternative incentives were at play (i.e., coercive pressures), the confession was assumed to be true.²⁶⁷ Nevertheless, no such presumption of truthfulness was granted where physical or psychological pressure had been exerted on

261. In *Samuel*, the court stated that if a defendant is convicted solely on the basis of unreliable information, "no reasonable judge or jury could find that the defendant's guilt has been proved beyond a reasonable doubt," thus he would have been deprived of "liberty without due process of law." *Samuel v. Frank*, 525 F.3d 566, 569 (7th Cir. 2008) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18 (1979)). Under this method, the court would allow admission of unreliable statements into evidence and permit the jury to make a credibility determination. If in the appellate court's opinion, the jury made the wrong credibility determination and convicted on grounds where there was indeed reasonable doubt, it would reverse the conviction allowing for a new trier of fact to hear the case. It is at that point, post-conviction, that the defendant's constitutional right to a fair trial has been violated.

262. Courts in the *Gonzales-Clanton* camp would reach the same result as *Samuel*, but more efficiently. Faced with coerced statements, which are inherently unreliable, the court would deny admission into evidence because a conviction based on that statement would deprive the defendant of a fair trial. See *Dickerson v. United States*, 530 U.S. 428, 433-34 (2000).

263. See *supra* note 128 and accompanying text.

264. See *supra* note 37 and accompanying text.

265. See *supra* note 70 and accompanying text.

266. See *supra* notes 57-61 and accompanying text.

267. See *supra* notes 39-41 and accompanying text.

the confessor because the individual may have been incentivized to confess to escape an aversive interrogation, secure a promised benefit, or avoid a threatened harm.²⁶⁸ These statements were involuntary and “inherently unreliable.”²⁶⁹ For instance, in the Central Park Jogger case, the young boys were innocent of the crimes which they were accused of but confessed because the police made explicit promises that if they confessed, they would be treated as witnesses, not suspects.²⁷⁰ In other words, the false promises made by police gave the boys an incentive to confess to crimes they did not commit, believing that doing so would actually exonerate them.²⁷¹ The boys’ confessions should have seemed suspicious to the court, but were unfortunately admitted as voluntary statements.²⁷²

The common law rule was adopted by the Supreme Court, and *Brown v. Mississippi* made the voluntariness requirement the touchstone of the constitutional right to due process.²⁷³ *Brown* specifically cites to the unreliability of the defendant’s confession as a primary concern of due process violations.²⁷⁴ The Court’s rationale was that involuntary confessions are inherently less trustworthy, thus violating constitutionally protected principles of fundamental fairness.²⁷⁵ The Court has since questioned *Brown*’s rationale, as trustworthiness proved not to be the exclusive policy underlying due process concern.²⁷⁶ Nevertheless, in *Colorado v. Connelly*, the Court’s most direct attack on reliability, the due process violation complaint involved no police overreaching, and thus was factually different from other due process violations.²⁷⁷ In *Connelly*, the defendant was compelled by God to speak, and not by police coercion.²⁷⁸ *Connelly* permitted the use of the defendant’s statement in light of the fact that no police coercion had been at play, and made clear that the reliability of the statements were of no importance.²⁷⁹ Admittedly, it can be argued that statements made by a mentally insane person, as in *Connelly*, are equally as unreliable as statements made by a person under coercive pressure from the police. The Fourteenth Amendment, however, only covers state action, and thus

268. See *supra* notes 39-41 and accompanying text.

269. See *supra* note 38 and accompanying text.

270. See *supra* notes 42-53 and accompanying text.

271. See *supra* notes 42-53 and accompanying text.

272. See *supra* notes 42-53 and accompanying text.

273. See *supra* note 66 and accompanying text.

274. See *supra* note 70 and accompanying text.

275. See *supra* note 70 and accompanying text.

276. See *supra* note 71.

277. See *supra* notes 88-89 and accompanying text.

278. See *supra* note 88.

279. See *supra* note 89.

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the lack of police coercion in *Connelly* is critically important.²⁸⁰ Moreover, since *Connelly*, reliability remains in the consciousness of judges making voluntariness determinations. *Clanton v. Cooper* is case-in-point. The court found that “[c]onfessions wrung out of their makers may be less reliable than voluntary confessions” and that use of such statements in a criminal trial violates due process of law.²⁸¹ Thus, even where the Supreme Court purports to ignore reliability concerns, it can never divorce them from the voluntary requirement of due process.

Second, because the reliability of a defendant’s confession is of implicit importance in due process analysis, the reliability of a coerced witness statement should also be accounted for, as a coerced witness is even more unreliable than a coerced defendant. While a criminal defendant has every incentive to withstand police coercion and avoid falsely incriminating himself, a witness has no obvious reasons to endure third-degree police tactics. Therefore, when a witness is faced with coercive pressures to make a statement against another person, he must balance the harm of the coercion with telling the police what they want. It is not surprising that the balance falls on the side of telling the police the information they demand, regardless of whether or not it is true. So while a coerced confession is “inherently untrustworthy,” coerced statements made by witnesses who have essentially no incentive to be honest are even *more so*. Thus, where courts justify exclusion of confessions made by a defendant on the basis of unreliability, and even when they do not do so explicitly, they should also exclude coerced witness statements because such statements are likely *more* unreliable.

Moreover, in an effort to provide courts with an easily administrable test, and to best protect criminal defendants’ due process rights, all statements produced by police coercion (whether from a defendant or witness) should be banned from use at a defendant’s trial. Because all coerced statements can be presumed to be *inherently* unreliable, none should be admitted into evidence. Arguments that this bright line rule may hinder police investigative efforts are well founded. I argue, however, that police should be held to a higher standard when an individual’s liberty is at stake. To truly deter police misconduct in criminal investigations, the state must be punished when it produces inherently unreliable evidence by way of coercion.

280. *See supra* notes 67-68 and accompanying text.

281. *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997) (quoting *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994)); *see supra* note 237. For other cases concerning “unreliability,” *see supra* note 245.

Lastly, corroboration is not enough to cure due process violations. If corroborating evidence is available, the police should be made to rely on that alone. I disagree with those courts that grant standing to defendants to object to the use of coerced witness testimony, but find no due process violation where the statements are corroborated. In *Brown v. Mississippi*, all of the defendants were fed specific confessions by their interrogators who were familiar with the crime scene.²⁸² It was thus no wonder that the confessions were corroborated by physical evidence. As this case illustrates, corroborating evidence cannot always be trusted, and thus should not be allowed to override the due process concerns in admitting coerced witness statements.

Banning the use of all inherently unreliable statements will adequately and efficiently accomplish the stated purpose of the exclusionary rule—detering police misconduct.

B. Voluntariness of a Witness's Statement is the Correct Standard of Due Process

Whether a due process right of the defendant has been violated by the use of a coerced witness testimony at his trial is determined by looking at whether the witness's statements were involuntary. The voluntariness test is the appropriate rubric for analyzing due process violations. Rather than analyzing the confines of the exclusionary rule as the courts in *Gonzales* and *Clanton* did,²⁸³ some courts simplified the inquiry of whether the use of coerced witness testimony violated the defendant's due process rights by looking to whether the criminal defendant was granted a "fair trial" overall.²⁸⁴ This approach oversimplifies the issues presented, relies too heavily on a subjective notion of what constitutes a "fair trial," and unnecessarily opens the floodgates to defendants seeking to suppress evidence. The due process inquiry relating to coerced witness testimony must be narrowed so that a defendant may object to suppression only when a witness involuntarily talks to the police (i.e., under coercion).²⁸⁵ By conceptualizing due process under the voluntariness standard, it will limit a defendant's ability to object to anything that seems "unfair."

282. 297 U.S. 278, 282 (1936). *See supra* note 64.

283. *United States v. Gonzales*, 164 F.3d 1285, 1289-92 (10th Cir. 1999); *Clanton*, 129 F.3d at 1157-59.

284. *See supra* notes 252-256 and accompanying text.

285. *See supra* notes 241-244 and accompanying text.

C. Due Process Violations Are a Greater Harm Than Other Constitutional Violations in the Criminal Procedure Context

When evidence is unconstitutionally obtained, the exclusionary rule demands suppression if the underlying police conduct is “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”²⁸⁶ In other words, suppression of evidence is warranted when the benefits of deterring police misconduct outweigh the cost of potentially freeing a guilty defendant and wasting government resources.²⁸⁷ In the context of due process violations, suppression is required without exception because the benefit of deterring police coercion always outweighs the cost of losing evidence needed to convict the defendant.²⁸⁸ In the context of self-incrimination and reasonable search and seizure violations, on the other hand, suppression is subject to many exceptions where the police misconduct was not “sufficiently deliberate” or “sufficiently culpable” to warrant the cost of losing valuable evidence. There are many instances where the prosecution is able to use unconstitutionally obtained evidence in the defendant’s trial.²⁸⁹

The variance in the force of the exclusionary rule (absolute intolerance of police coercion versus occasional intolerance of police failing to administer *Miranda*, or violating search and seizure), coupled with the fact that the Supreme Court has found in every instance that the value of deterring police misconduct by suppressing the fruits of due process violations outweighs the potential cost of losing evidence, demands the conclusion that due process violations caused by police coercion are more offensive to justice and more deserving of protection than self-incrimination and search and seizure violations. It follows that the statements of a coerced witness should also be suppressed in order to adequately deter police coercion and protect due process rights. By allowing the use of coerced witness testimony in a defendant’s trial, the Supreme Court is tacitly signaling that police can utilize the coercive tactics to extract information from a third-party—exactly the type of conduct that the Court seeks to prevent in its confession jurisprudence. Thus, coercion will remain a viable technique in criminal investigation. To adequately deter police coercion, all coerced statements, regardless of the speaker (defendant or witness), must be suppressed.

The extraordinarily high threshold that is required to prove that a statement is involuntary further illustrates the fact that the Supreme Court finds

286. *Herring v. United States*, 129 S. Ct. 695, 702 (2009). *See supra* note 138.

287. *See supra* notes 140-142 and accompanying text.

288. *See supra* note 149 and accompanying text.

289. *See supra* notes 153-179 and accompanying text.

due process violations to be a greater harm than other police misconduct.²⁹⁰ The courts are required to undertake a fact-intensive analysis, looking at the totality of the circumstances surrounding the interrogation.²⁹¹ No single factor is determinative in this analysis of whether the interrogation techniques exerted sufficient pressure on an individual as to “overbear petitioner’s will to resist.”²⁹² In fact, in several cases where courts found the defendant to have no standing to object to the coerced witness testimony on constitutional grounds, the exclusionary rule was never applied because they found that the statements were not in fact involuntary.²⁹³ Therefore, while expanding due process violations to include the use of coerced witness testimony against a criminal defendant is doctrinally vast, in practice, it will affect only a small number of individuals. Thus, the Supreme Court should expand the due process protection afforded to criminal defendants and exclude witness testimony that has been coerced by police.

D. The Policy Considerations that Support the Exclusion of Coerced Confessions Will be More Completely Achieved by Excluding Coerced Witness Statements

The underlying premise on which the United States judicial system rests is that a criminal suspect is innocent until proven guilty. As the Supreme Court so adeptly stated: “[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.”²⁹⁴ Thus, defendants’ statements

290. *See supra* notes 72-96 and accompanying text.

291. *See supra* notes 73-93 and accompanying text.

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

293. *Valdez v. McKune*, 266 F. App’x 735, 739 (10th Cir. 2008) (declining to find a due process violation because even assuming the defendant had standing, the facts did not support that the witness was improperly coerced); *Samuel v. Frank*, 525 F.3d 566, 568 (7th Cir. 2008) (finding a teenage mother’s statements voluntary despite the fact that “[t]he officers . . . created the impression that unless she cooperated in their investigation of the defendant they would make sure she did not get her baby back”); *United States v. Dowell*, 430 F.3d 1100, 1107 (10th Cir. 2005) (denied that the witness statements were involuntary where “federal agents contacted [the witness] ‘continuously’ and told him if he did not cooperate ‘he would be facing 25 to 40 years in jail’ . . . but that they would go easy on him if he ‘cooperated’”); *United States v. Gonzales*, 164 F.3d 1285, 1287-89 (10th Cir. 1999) (statements made by witness found to be voluntary despite the fact that the arrest warrant for the witness contained an “escape clause” that asserted the witness would be arrested and held in detention unless she “cooperate[d] fully and truthfully and accurately and completely reveal[ed]” to the government her involvement in the crimes, despite that the warrant “was blatantly tailored to obtain information and testimony” from the witness, because she “could escape arrest [only] if she divulged everything she knew about the Garcia homicide”).

294. *Rogers*, 365 U.S. at 541.

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are admissible into evidence *only if* they are established to be the product of the speaker's free choice (i.e., voluntary).²⁹⁵

Common law required a defendant's statements to be voluntary to ensure that the evidence was a reliable admission of guilt.²⁹⁶ The Due Process Clause demands voluntary statements, and the exclusionary rule deters future police misconduct.²⁹⁷ "The due process clause requires that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁹⁸ The Court applies the exclusionary rule in an effort to achieve its goal of deterring police misconduct.²⁹⁹

This policy objective is unquestionably supported by fifty years of confessional jurisprudence in the United States, establishing a nationwide "feeling that the police must obey the law while enforcing the law."³⁰⁰ The Supreme Court went so far as to say that: "[I]n the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."³⁰¹ Moreover, physical and psychological police coercion is abhorrent to basic principles of human rights and fundamental fairness.³⁰² For these reasons, the Supreme Court demands that police refrain from using coercive interrogation methods when interrogating a criminal defendant.³⁰³

I argue that *all* coercive police practices pose a similarly severe threat to due process rights. The Supreme Court's main impetus for excluding the product of due process violations is to deter police misconduct.³⁰⁴ The policy justifications behind the exclusionary rule in the context of coerced confessions apply with equal force to coerced witness testimony. For this reason, this Note advocates for the application of the exclusionary rule to coerced witness testimony. By so reading the Due Process Clause, the goals of the exclusionary rule are better served because the police cannot use the standing requirement as a legal scapegoat in coercing a witness. Currently, in jurisdictions where the exclusionary rule does not bar coerced

295. *See supra* note 69 and accompanying text.

296. *See supra* notes 40-41 and accompanying text.

297. *See supra* note 128 and accompanying text.

298. *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

299. *See supra* notes 127-32 and accompanying text. Whether the exclusionary rule is effective in achieving this end is of great debate and beyond the scope of this Note.

300. *Jackson v. Denno*, 378 U.S. 368, 386 (1964) (quoting *Spano v. New York*, 360 U.S. 315, 320-21 (1959)).

301. *Id.*

302. *See supra* note 71 and accompanying text.

303. *See supra* note 69 and accompanying text.

304. *See supra* note 128 and accompanying text.

witness testimony, the police are able to evade the requirements of the Due Process Clause by coercing witnesses who may or may not have the information sought, instead of coercing the defendants themselves. Take for instance *Samuel v. Frank*, where the prosecution lacked the direct evidence needed to convict the defendant.³⁰⁵ The police attended a child custody conference for Tisha, a fifteen-year-old teenage mother, and threatened to take her newborn into state custody unless she “cooperated.”³⁰⁶ After the infant was placed in foster care, Tisha offered statements to the police incriminating the defendant, which were then used in trial against him.³⁰⁷ By coercing Tisha, the police avoided having to coerce the defendant into incriminating himself, which would have unquestionably been inadmissible in trial. The court justified its decision to admit Tisha’s statements into evidence by finding that the State’s behavior was legitimate and not coercive.³⁰⁸ Further, it took comfort in the fact that Tisha’s statements were corroborated by other evidence, and discredited the fact that Tisha recanted her statements twice in judicial proceedings.³⁰⁹ Even if Tisha’s statements were corroborated, it does not explain why the court allowed them to be admitted into evidence. If Tisha’s recanted statements provided information that other evidence already established, the court serves no purpose by allowing the statements to be admitted. To the contrary, the court deprived the defendant of his right to a fair trial under the Due Process Clause and actually condoned police misconduct.

By limiting the exclusionary rule to prohibit only coercion of the defendant, courts fail to effectively pursue the Supreme Court’s stated goal of preventing police coercion in law enforcement, and its secondary goals of upholding the integrity of the judiciary, and instilling public trust in the legal system. To effectively achieve these ends, the Supreme Court must address the issue of coerced witness statements and forbid their admission against a criminal defendant. Until then, defendants are inadequately protected from due process violations.

CONCLUSION

The crux of the matter presented in this Note is that a defendant’s right to due process varies depending on the jurisdiction in which he or she is prosecuted. Some courts, such as those in the Seventh Circuit, hold that the

305. See *Samuel v. Frank*, 525 F.3d 566, 567 (7th Cir. 2008). See *supra* notes 191-223 and accompanying text.

306. See *supra* notes 199-201 and accompanying text.

307. See *supra* notes 202-204 and accompanying text.

308. See *supra* note 223 and accompanying text.

309. See *supra* notes 222-223 and accompanying text.

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admissibility of coerced witness testimony is not a constitutional matter, but rather an evidentiary one suitable for the jury.³¹⁰ Other courts, including those in the Fifth and Tenth Circuits, find that a defendant has standing to object to coerced witness testimony on the grounds of a possible due process violation.³¹¹ This Note argues that the due process rights of a defendant are indeed violated when police coerce a third-party and the resulting statements are entered into the defendant's criminal trial for four reasons.

First, coerced statements are inherently unreliable and should be excluded on that basis alone.³¹² It is difficult to ascertain whether a coerced statement is representative of the actual truth, but it can be presumed to be of untrustworthy quality because of the means by which it was extracted. Moreover, coerced witness statements are likely to be more unreliable than a defendant's coerced statements. While the Supreme Court overtly denies reliability as a relevant factor in its due process analysis, this is moot, as it is impossible to divorce the voluntariness requirement from an underlying concern with reliability.³¹³ By suppressing all coerced witness statements, courts are able to easily and uniformly administer the "voluntariness" test, and protect a defendant's due process rights.

Second, whether a due process right of a defendant has been violated by the use of coerced witness testimony at trial is determined by looking at whether the witness's statements were involuntary, not whether there was a fair trial. This serves to limit the scope of the expanded rights being granted.

Third, a defendant's due process rights must be protected. The exclusionary rule is not an immutable remedy and is only applied when the value of deterring police misconduct outweighs the cost of suppressing evidence. In the context of due process violations, the Supreme Court has found that the value of deterring police coercion is always greater than the cost of losing evidence. Compare this to the exclusionary rule in the context of self-incrimination and search and seizure violations—both of which are riddled with exceptions and allow tainted evidence to be used against defendants. The Supreme Court has implicitly suggested that due process violations are a greater harm than other constitutional violations, and require greater protection. By finding that the use of coerced witness testimony is violative of a defendant's due process rights, the Supreme Court will announce a rule

310. *See supra* notes 217, 222 and accompanying text.

311. *See supra* notes 224-255 and accompanying text.

312. *See supra* note 37 and accompanying text.

313. *See supra* notes 265-279 and accompanying text.

consistent with that already in place: that due process rights of a defendant must be protected at all costs from police coercion.

Last, the purpose of the exclusionary rule in the context of coerced confessions is to discipline police, as well as to protect the individual rights guaranteed by the Constitution. The exclusionary rule is of little value in achieving those ends, however, unless the rule is expanded to exclude witness testimony that has been coerced by police. Where the police are granted an exception through which they may coerce a witness and still gain admissible evidence, there is no incentive to comply with the law. The Supreme Court must find that a criminal defendant's right to due process is violated where the prosecution enters coerced witness testimony into evidence against him.