Notes

The Admissibility of Foreign Coerced Confessions in United States Courts: A Comparative Analysis

American lower courts are presently conflicted over whether foreign coerced confessions are admissible under the Due Process Clause. The confusion can be traced largely to the Supreme Court's opinion in Colorado v. Connelly *which justified the exclusion of involuntary confessions only in the deterrence of wrongful police action. This Note offers a solution to the current circuit split by examining the justifications foreign jurisdictions and international courts offer to explain the exclusion of coerced confessions.*

A review of international reasoning indicates that a strong majority of courts exclude coerced confessions out of a protest against admitting coerced evidence into judicial proceedings. This Note argues that this approach would more fully protect the values codified in the Due Process Clause.

INTRODUCTION

The global war on terror has increased the tension between two principles: the rule of law on the one hand, and the effective prosecution of heinous acts on the other.[1] The rule of law reflects a

1. Richard Goldstone, *The Tension between Combating Terrorism and Protecting Civil Liberties*, *in* HUMAN RIGHTS IN THE 'WAR ON TERROR' 157, 157 (Richard Wilson ed., 2005).

principle that certain rights receive absolute protection.[2] However, the global demand for effective prosecution of terrorism has often placed pressure on these absolute prohibitions.[3] This struggle has plagued international legal fora.[4] Courts around the globe have been called on to play a major role in adjudicating the proper balance of these ideals.[5] The Israeli Supreme Court noted the inherent tension involved in these types of decisions:

> We are aware that this decision does not ease dealing with [terrorism]. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties.[6]

The extraterritorial nature of terrorism has exacerbated these difficulties.[7] Because terrorism is a global issue, it has forced cross-jurisdictional legal responses,[8] leading to significant cooperation be-

---

2. Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414 (1988).

3. Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89 (2001).

4. *See, e.g.*, Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001); Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23 (2006).

5. Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002).

6. *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods*, 38 I.L.M. 1471, 1488 (1999).

7. Silvia Borelli, *Terrorism and Human Rights: Treatment of Terrorist Suspects and Limits on International Co-operation*, 16 LEIDEN J. INT'L L. 803, 803 (2003) (noting the difficulties of securing jurisdiction over suspected terrorists).

8. *See, e.g.*, Eric H. Holder, Jr., U.S. Att'y Gen., Remarks at the United Nations Secretary-General's Symposium on International Counter-Terrorism Cooperation (Sept. 19, 2011), *available at* http://usun.state.gov/briefing/statements/2011/172772.htm.

tween states in the investigation and prosecution of crimes.[9] The United Nations Security Council has codified this need for cooperation, noting that, "terrorism can only be defeated . . . by a sustained comprehensive approach involving . . . collaboration of all states."[10] The United States Congress,[11] the Council of Europe,[12] and the African Union[13] have also explicitly articulated the need for international cooperation in prosecuting terrorism. Increased international cooperation to combat terrorism has vastly expanded the reach of American law enforcement and the capacity of foreign-obtained evidence to enter American courtrooms.[14] Presently, American courts are conflicted regarding whether the Due Process Clause of the United States Constitution protects defendants from admission of confessions coerced by foreign officers.[15] The debate centers on the values which underlie the exclusion of involuntary confessions.[16] This Note offers a solution to that conflict by examining these values both in American courts and abroad.

As a preliminary matter, it is important to understand the conditions that suspected terrorists may face in foreign interrogations. In recent years, when suspected terrorists have been interrogated, the means used for questioning have often exceeded accepta-

9. Nora Bensahel, *A Coalition of Coalitions: International Cooperation Against Terrorism*, 29 STUD. IN CONFLICT AND TERRORISM 35 (2006); Derek Reveron, *Old Allies, New Friends: Intelligence-Sharing in the War on Terror*, 50 ORBIS 453 (2006).

10. S.C. Res. 1456, U.N. Doc. S/RES/1456 (2003).

11. 6 U.S.C. § 195(c) (2006).

12. Council of Europe, Convention on the Prevention of Terrorism, *opened for signature* May 16, 2005, E.T.S. No. 196.

13. Protocol to the OAU Convention on the Prevention and Combating of Terrorism, *adopted* July 8, 2004.

14. Mark Gyandoh, *Foreign Evidence Gathering: What Obstacles Stand in the Way of Justice*, 15 TEMP. INT'L & COMP. L.J. 81, 82 (2001).

15. *See generally* Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 672 (2008); M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 360–63 (2003). It should be noted that many scholars, as well as courts, have grappled with these issues in the context of the Fourth Amendment, Fifth Amendment Self-Incrimination Clause, and Sixth Amendment. *See, e.g.*, Jessica Schneider, *The Right to Miranda Warnings Overseas: Why the Supreme Court Should Prescribe a Detailed Set of Warnings for American Investigators Abroad*, 25 CONN. J. INT'L L. 459 (2010).

16. *See infra* Part II.

ble limits.[17] For example, in *Agiza v. Sweden*, the Committee Against Torture[18] documented the interrogation methods used against a suspected terrorist in Egypt.[19] Mr. Agiza alleged that during his flight to Egypt, he was "bound by hands and foot."[20] Upon arrival he was subjected to advanced interrogation methods[21] including electrical shocks,[22] solitary confinement,[23] and restriction from toilet facilities.[24] These methods were employed to secure his confession. Similarly, the European Court of Human Rights has noted the risk of torture that suspected terrorists face in Tunisia[25] including "electric shock,"[26] "beatings and cigarette burns,"[27] and "hanging from the cell bars until loss of consciousness."[28] If a suspected terrorist makes a confession under these circumstances to foreign interrogators and then is brought to trial in the United States, should that confession be admissible in American courts? This Note attempts to answer that question.

Part II of this Note examines the traditional American jurisprudence on the admissibility of coerced confessions. It begins by explaining how traditional standards governing the admissibility of coerced confessions have become blurred in the context of extraterritorially coerced confessions. It then examines cases from the Sec-

17. *See generally* Christopher Shaw, *The International Proscription against Torture and the United States' Categorical and Qualified Responses*, 32 B.C. INT'L & COMP. L. REV. 289 (2009); Mark Elliott, *United Kingdom: The "War on Terror," U.K.-style—The Detention and Deportation of Suspected Terrorists*, 8 INT'L J. CONST. L. 131 (2010).

18. The Committee Against Torture is the monitoring body of the Convention Against Torture. Its duties include monitoring compliance, adjudicating individual complaints, issuing interpretations of the Convention, and conducting investigations into country compliance. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 17, *entered into force* June 26, 1987, 1465 U.N.T.S. 85.

19. Agiza v. Sweden, Communication No. 223/2003, U.N. Doc. Cat/C/34/D/233/2003 (2005).

20. *Id.* ¶ 2.6.

21. *Id.*

22. *Id.* ¶ 2.8.

23. *Id.*

24. *Id.*

25. Saadi v. Italy, App. No. 37201/06, Eur. Ct. H.R. (2008).

26. *Id.* ¶ 143.

27. *Id.*

28. *Id.* ¶ 84.

ond, Fourth, and Ninth Circuits that have addressed the issue of the admissibility of foreign coerced confessions and highlights the doctrinal lines on which they disagree.

Part III introduces the international comparative framework as a mechanism for solving difficult constitutional questions. It outlines both the benefits and the drawbacks of a comparative methodology. It then suggests some of the parameters under which comparative study may be fruitful.

Part IV applies a comparative methodology to the law on coerced confessions. It examines the justifications for exclusion that are given by domestic courts in Canada, Australia, the United Kingdom, the Republic of Ireland, South Africa, Japan, and Germany, as well as international tribunals,[29] all of whom have excluded coerced confessions.

Part V seeks to synthesize these values as a mechanism for solving the circuit split in the United States. It suggests that the exclusion of coerced confessions should extend to cases where the United States government did nothing illegal or wrong in interrogation simply because courts themselves should protest against coerced confessions by excluding them. That is, courts should not condone the practice of coercing confessions, even if no consequentialist reason can be given for exclusion.

I. THE VOLUNTARINESS REQUIREMENT: FROM THE TRADITIONAL APPROACH TO MODERN CONFUSION

A. Bram*,* Brown*, and the Traditional American Exclusionary Approach to Foreign Coerced Confessions*

On July 13, 1896, the crew aboard the merchant vessel *Herbert Fuller* awoke to screaming and a gurgling sound.[30] The first mate, Bram, investigated the noises and discovered that the captain, his wife, and the second mate had all been murdered.[31] The crew's suspicion fell on two men: Bram and a seaman named Brown. The

29. These tribunals include, *inter alia*, the European Court of Human Rights, the Inter-American Commission of Human Rights, the Committee Against Torture, the Human Rights Committee, and various international criminal tribunals.

30. Bram v. United States, 168 U.S. 532, 534–35 (1897).

31. *Id.* at 535.

crew handed them over to local authorities in Halifax, Nova Scotia.

Upon arrival in Nova Scotia, a detective with the Halifax Police Department ordered Bram to his office. There, Bram was stripped, searched, and told that the department was convinced that Bram had committed the murders. He was then told that if he had an accomplice, he should say so in order to avoid the totality of the crime being placed on his shoulders.[32] The detective told Bram that Brown had seen him commit the murders while working the wheel; Bram replied that Brown could not have seen him.[33]

At trial in the United States, the prosecution argued that the statement—Brown could not have seen me—amounted to a confession, and Bram was convicted.[34] On appeal, defense counsel argued that the confession had been involuntarily induced.[35] The Court agreed and reversed.[36] It began by discussing the application of the voluntariness requirement in England and the state courts.[37] It noted that Bram had been confined in "the office of the detective, and there, when alone with him in a foreign land, while he was in the act of being stripped . . . of his clothing, was interrogated by the officer."[38] Although the Court recognized that "these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted,"[39] the totality of the circumstances indicated that Bram's statements had been made under coercion.[40] The Court therefore rejected the use of the statements, finding that "[a] plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of."[41]

Bram was not a radical decision at the time it was announced. In fact, the "compulsion" language the Court used in *Bram* had been

32. *Id.* at 539.
33. *Id.*
34. *Id.* at 537.
35. *Id.* at 540.
36. *Id.* at 569.
37. *Id.* at 558–59.
38. *Id.* at 563.
39. *Id.*
40. *Id.* at 564.
41. *Id.*

announced twenty months earlier in *Wilson v. United States*.[42] In *Wilson*, a magistrate questioned the defendant in the presence of a large mob which had apparently talked about lynching the defendant; the magistrate did not offer inducements or threaten the defendant.[43] The Court allowed the use of Wilson's statements:

> [W]e are not prepared to hold that there was error in its admission in view of its nature and the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert.[44]

The *Wilson* Court appears to have decided that the use of the evidence was permissible because there had been no overt threats against Wilson by the magistrate and because he had not directly confessed.[45] However, the Court noted the general rule that "the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."[46]

It is important to note that the Court's reasoning never mentioned that Bram's interrogators were foreign. The Court seemed to view *Bram* as a similar case to *Wilson*.[47] Therefore, from its inception, the Due Process Clause was thought to protect against both foreign and domestically induced confessions.

This conception of the voluntariness requirement remained dominant, although seldom used, for much of the next half century. In *Brown v. Mississippi*, the Court found the voluntariness requirement applicable to confessions at the state court level.[48] This decision launched a period where the Court would apply and refine the voluntariness requirement much more frequently.[49] The test that

42. Wilson v. United States, 162 U.S. 613 (1896).

43. *Id.* at 615.

44. *Id.* at 624.

45. *Id.*

46. *Id.* at 623.

47. Alan G. Gless, *Self-Incrimination Privilege in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion*, 45 AM. J. LEGAL HIST. 391, 464 (2001).

48. Brown v. Mississippi, 297 U.S. 278, 287 (1936).

49. Dickerson v. United States, 530 U.S. 428, 433 (2000).

emerged examined the totality of the circumstances[50] in order to determine whether the defendant's will was overcome.[51] Although this jurisprudence has never been explicitly overruled,[52] the Warren Court, in the mid-twentieth century, shifted its inquiry towards the procedural requirements of custodial interrogations rather than the substantive degree of coercion.[53] But even as the Court turned away from the voluntariness test articulated in *Bram* and *Wilson*, it did not indicate that foreign coerced confessions were admissible or to be treated distinctly from domestically coerced confessions.[54]

B. The Connelly *Turn, Emphasis on Deterrence, and Confusion in the Lower Courts*

The stability of lower court consensus was thrown into flux by the truly bizarre factual situation presented to the Supreme Court in *Colorado v. Connelly*.[55] In 1983, Officer Patrick Anderson of the Denver Police Department was approached by Francis Connelly who, without prompting, stated that he had "murdered someone and wanted to talk about it."[56] Connelly proceeded to confess to the unsolved murder of a young female and then brought the detective to the exact scene of the alleged crime.[57] The next morning, Connelly was interviewed by the public defender's office where he became "visibly disoriented" and stated that "voices" had told him to come to Denver and he "had followed the directions coming from these voices in confessing."[58] At a preliminary hearing, Connelly moved to suppress all of his statements.[59] Psychiatrists testified that he was suffer-

50. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49, 55 (1962); Reck v. Pate, 367 U.S. 433, 440 (1961); Stein v. New York, 346 U.S. 156, 185 (1953); Malinski v. New York, 324 U.S. 401, 404 (1945).

51. Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973).

52. *Dickerson*, 530 U.S. at 433.

53. *See e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964).

54. United States v. Mundt, 508 F.2d 904 (10th Cir. 1974); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972).

55. Colorado v. Connelly, 479 U.S. 157 (1986).

56. *Id.* at 160.

57. *Id.*

58. *Id.* at 161.

59. *Id.*

ing from chronic schizophrenia and that Connelly's interviews revealed that he indeed believed that he was "following the 'voice of God'" when he confessed.[60] In fact, at the time of his confession, Connelly believed that God was requiring him either to confess or commit suicide.[61] In sum, a psychiatrist testified that Connelly, although not significantly impaired in his cognitive abilities, had suffered from "command hallucinations" that interfered with his ability to make free choices at the time of confessions.[62]

The Colorado trial court suppressed Connelly's statements because they were involuntary, even though they found that the police had done nothing wrong.[63] The Colorado Supreme Court affirmed.[64] In reversing, the U.S. Supreme Court recast the voluntariness inquiry as a question of police overreach, noting that:

> While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that, as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. 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."[65]

The Court buttressed its requirement of state action by examining the values which underlie the voluntariness requirement. It argued that exclusion of involuntary confessions was almost entirely

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 162.

64. *Id.*

65. *Id.* at 163–64 (citations omitted).

premised on deterring future wrongful police action: "[t]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."[66] Although the Court noted other potential values served by the voluntariness requirement, such as evidentiary reliability, it did not find them controlling, noting that "[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[67] Rather, the Court argued that the Due Process Clause left evidentiary reliability "to be resolved by state laws governing the admission of evidence."[68]

The *Connelly* Court fundamentally altered the traditional due process voluntariness protections by collapsing the entire basis of the voluntariness requirement into limiting police overreach, stating "we hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[69] Lower courts have subsequently struggled to determine how to apply the state action requirement in the context of foreign interrogations.[70]

C. The Circuit Split: The Cases of Wolf*,* Sameleh*, and* Abu Ali

Almost immediately following *Connelly*, the Ninth Circuit, in *United States v. Wolf*,[71] confronted a case where the defendant argued that his confession was involuntary because it had been procured through threats by a Mexican police officer.[72] Like most circuits, the Ninth Circuit had held in *Brulay*—prior to *Connelly*—that foreign coerced confessions must be excluded under the Due Process

66. *Id.* at 166.

67. *Id.* at 167.

68. *Id.*

69. *Id.*; Darmer, *supra* note 15, at 364.

70. It should be noted that *Connelly* as a factual matter does not mandate a fundamental reconceptualization of the Due Process Clause's voluntariness requirements. A compulsion from God's voice is very different from other situations of purported compulsion, particularly the foreign officer coercion examined here. Therefore, it would not be inconsistent to hold that *Connelly* was correctly decided and still exclude foreign coerced confessions.

71. United States v. Wolf, 813 F.2d 970 (9th Cir. 1987).

72. *Id.* at 972.

Clause.[73] In *Wolf*, the court rejected the defendant's argument that he had been coerced as a factual matter,[74] but also noted that *Connelly* had thrown its previous due process jurisprudence into doubt:

> The continuing vitality of this holding in *Brulay* was cast into serious doubt by *Colorado v. Connelly*, where the Supreme Court considered a defendant's claim that his confession was "involuntary" because it was the product of mental delusion. While admittedly no state action was responsible for eliciting the confession, the defendant argued that the introduction of the confession as evidence in a criminal proceeding constituted a state action depriving him of his right not to be convicted based upon an involuntary confession. The Court rejected this argument, holding that the introduction of evidence into a judicial proceeding does not by itself satisfy the "state action" requirement for triggering the constitutional protection against involuntary confessions. According to the Court, such an understanding "fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[75]

The court did not resolve the continuing vitality of the *Brulay* doctrine, preferring to decide *Wolf* more narrowly on its facts.[76] The Ninth Circuit has yet to revisit the issue, although lower courts within the Circuit continue to apply the *Brulay* rule by assuming without deciding that *Connelly*'s police action requirement applies to all police.[77]

Over ten years later, the Second Circuit encountered a similar

---

73. Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967).

74. *Wolf*, 813 F.2d at 975.

75. *Id.* at n.3 (internal citations omitted).

76. *Id.*

77. *See, e.g.*, United States v. Navarro-Montes, 2011 WL 317718, at *5 (S.D. Cal. Jan. 27, 2011) (noting that "The Ninth Circuit has stated that 'we assume without deciding that the constitutional protection against involuntary confessions applies to confessions coerced by foreign police.' Thus, if a court finds that a defendant made an inculpatory statement to foreign officials of his own free will, without duress or coercion, the statement may be used against him in later proceedings.") (internal citations omitted).

legal question in *United States v. Salameh*.[78] There, the defendant argued that his incriminating statements should be excluded because they were made following ten days of incarceration and torture in an Egyptian jail.[79] The court rejected the argument. Citing *Connelly*, it held:

> [W]hile it is reasonable that Egyptian incarceration and torture, if true, would likely weaken one's mental state, one's mental state does not become part of the calculus for the suppression of evidence unless there is an allegation that agents of the United States engaged in some type of coercion. Because Abouhalima does not contend that federal agents either mentally or physically coerced his remarks during that interrogation, there is no basis for inquiry into a possible constitutional violation. Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.[80]

The Second Circuit has yet to fully revisit the issue.[81] However, two district courts, although outside the context of foreign confessions, have used the *Salameh* precedent to find that unless government malfeasance is alleged, courts need not inquire into the context of a confession.[82]

Ten years later, in *United States v. Abu Ali*, the Fourth Circuit considered the same issue.[83] Mr. Abu Ali was arrested in Saudi Arabia on suspicion of terrorism and confessed to Mabahith, the Saudi secret police.[84] The FBI was notified of Abu Ali's arrest, but was

78. United States v. Salameh, 152 F.3d 88, 117 (2d. Cir. 1998).

79. *Id.*

80. *Id.* (internal citations and quotations omitted).

81. *But see In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 203 (2d Cir. 2008) (noting that in the context of a *Miranda* warning, issued during a joint venture, statements made to a foreign officer must be voluntary).

82. United States v. Sanderson, 2011 WL 87298 at *2 n.1 (D. Conn. Jan. 11, 2011); United States v. Rivera, 2006 WL 1980312 at *8 (D. Conn. July 13, 2006).

83. United States v. Abu Ali, 528 F.3d 210, 231 (4th Cir. 2008).

84. *Id.* at 224.

denied access to the prisoner.[85] The United States did not gain custody over the defendant until he was indicted and extradited for trial.[86] At trial, Abu Ali claimed that his confession to Saudi police should have been suppressed as involuntary as it had been coerced.[87] Relying on pre-*Connelly* opinions in its brief discussion of law, the court found that foreign coerced confessions would be excludable under the Due Process Clause[88] but nonetheless affirmed the district court's finding that there was in fact no coercion.[89]

Demonstrably, *Connelly* has divided circuit courts, with the Fourth and Ninth Circuits holding in dicta that it does not preclude the exclusion of foreign coerced confessions and the Second Circuit concluding in dicta that it does.

II. JUSTIFICATIONS FOR THE VOLUNTARINESS REQUIREMENT: A COMPARATIVE APPROACH

Resolution of the circuit split will depend on the values that courts emphasize to justify the voluntariness requirement. Scholarship has suggested that the major move by the *Connelly* Court was to justify the voluntariness requirement only in terms of deterrence of American police rather than in its traditional, more multi-faceted, justifications.[90] Consequently, the values that underlie the voluntariness requirement will, in many ways, determine how extensive its reach should be. This Note will seek to determine those values by examining how other jurisdictions have justified the exclusion of coerced confessions. However, before turning to an analysis of what values American and global courts have emphasized to justify the voluntariness standard, it is first necessary to examine the benefits and limitations of comparative constitutionalism as a framework, in order to generate an appropriate methodology for a comparison of the values underlying the exclusion of coerced evidence internationally.

---

85. *Id*. at 225.

86. *Id*.

87. *Id*. at 231.

88. *Id.* at 232–33.

89. *Id.* at 234.

90. *See, e.g.*, Alfredo Garcia, *Mental Sanity and Confessions: The Supreme Court's New Version of the Old "Voluntariness" Standard*, 21 AKRON L. REV. 275 (1988).

A. Comparison as a Means of Constitutional Interpretation: The Benefits and the Costs

1. The Benefits of Comparison as a Means of Interpretation

Proponents of comparative constitutionalism highlight a number of benefits to the methodology. The foremost justification is also the simplest: different legal systems often encounter similar problems, and foreign jurisprudence often offers reasoning that is persuasive and applicable to the American context. Justice Sandra Day O'Connor defended this justification before the American Society of International Law, before which she noted that distinguished jurists abroad had often devoted significant judicial resources to solving issues novel to American law and should therefore be considered persuasive authority at times.[91] Chief Justice William Rehnquist also articulated this justification for a comparative methodology, arguing that as more countries' constitutional legal systems thrive, judges should look internationally to see how other courts have reasoned.[92] Justice Ruth Bader Ginsburg has praised this justification of comparative law because it allows beneficial and novel legal tools to quickly spread between jurisdictions.[93] The fact that "[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems" suggests a need for comparative frameworks in order to efficiently reach optimal judicial solutions.[94] This pragmatic justification has found significant support in scholarship; for example, a noted comparative law casebook argues "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation."[95] Bruce

91. Sandra Day O'Connor, Keynote Address at the 96th Annual Meeting of the American Society of International Law, *in* 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002).

92. William Rehnquist, *Constitutional Courts—Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

93. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 332 (2004).

94. Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20, 20 (1998).

95. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 15 (Tony Weir trans., 3d ed. 1998).

Ackerman has argued, therefore, that comparative constitutional analysis should focus on finding "common problem[s] confronting different 'constitutional courts'" and then comparing their "coping strategies" in order to illuminate the best judicial solutions.[96] Judge Patricia Wald perhaps most succinctly describes this justification:

> [C]itizens of most countries have common aspirations, a sense of dignity and worth, and intuitions and feelings about justice. Why then would we consciously shut the door to American judges on looking at the law of these countries as it affects the basic human needs and dilemmas of their people?[97]

The second justification proffered is a recognition that American law shares common values with other legal systems. This appears to be the justification underlying Justice Anthony Kennedy's citation of the European Court of Human Rights in *Lawrence v. Texas*, where he argued "to the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[98] This desire for shared international values has been echoed throughout American jurisprudence.[99] Anne-Marie Slaughter has maintained that international comity may act as an interpretive presumption of an integrated legal system, where reasons to diverge from foreign courts must be articulated.[100]

A third justification offered for comparative constitutional reasoning is that many nations, particularly common law nations, share a legal history with the United States; consequently, their judicial decisions may be "relevant and informative" to answering do-

96. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997).

97. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 441–42 (2004).

98. Lawrence v. Texas, 539 U.S. 558, 576 (2003).

99. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804); The Paquete Habana, 175 U.S. 677, 700 (1900); Harry A. Blackmun, The Supreme Court and the Law of Nations, Remarks on the Occasion of Professor Louis Henkin's Retirement as President of the American Society of International Law (Apr. 7, 1994), *reprinted in* 104 YALE L.J. 39, 45–46 (1994).

100. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1115 (2000).

mestic questions.[101] This is perhaps the least controversial rationale for the use of comparative reasoning. Courts routinely look to U.K. precedents in order to understand the historical development of a constitutional guarantee.[102] Judge Diarmuid O'Scannlain has summarized this rationale by noting that "[t]ruly, we are all part of the same common-law family."[103] Moreover, the legal traditions of many countries have been deeply influenced by that of the United States.[104] Judge Guido Calabresi has therefore argued that we should look to their practice in dealing with analogous legal problems; he explained "[w]ise parents do not hesitate to learn from their children."[105]

2. Risks of a Comparative Legal Framework as a Means of Constitutional Interpretation

The principal objection to a comparative methodology is one of selection bias. When jurists and scholars avail themselves of the breadth of nonbinding foreign jurisprudence, they can, and often do, cherry-pick the best cases to make their argument with very limited negative implication, little contextual analysis, and little consideration of countervailing examples.[106] This argument was made by Justice Antonin Scalia in his dissent in *Roper v. Simmons*, where he maintained that "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."[107] Academics have asserted that the Supreme Court's almost exclusive use of European law may be inappropriate as a

101. Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting).

102. Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 6 (2006); Slaughter, *supra* note 100, at 1116.

103. Diarmuid O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law*, 80 NOTRE DAME L. REV. 1893, 1894 (2005).

104. Mads Andenas & Duncan Fairgrieve, *Intent on Making Mischief: Seven Ways of Using Comparative Law*, *in* METHODS OF COMPARATIVE LAW 25, 40 (Pier Giuseppe Monateri ed., 2012).

105. United States v. Manuel, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

106. *See* Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 67 (2004).

107. Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

source of comparison, exacerbating the selection bias problem.[108] This criticism has not been limited to those that oppose comparative constitutionalism as a methodological framework. Bruce Ackerman, for example, has called for caution in choosing countries to compare and for analytic rigor in noting the differences between the points of comparison.[109] Likewise, Vicki Jackson has argued that controlling for "false necessities" is a major difficulty of and a major cause of the ambivalence towards comparative frameworks.[110] That is, comparison may allow for fruitful borrowing of ideas and reasoning between legal systems, but only if those ideas are truly comparable rather than incidentally so.[111] Jackson emphasizes that many hard-to-measure variables, such as culture, may make it difficult to draw true comparisons between different legal systems or even when analyzing seemingly similar problems.[112]

Additionally, comparative constitutionalism has been criticized as being irrelevant given the exceptional nature of the American political and legal systems. For example, Justices Scalia and Thomas have argued that foreign law is simply irrelevant because the U.S. Constitution is unique and foreign law involves interpretation of other documents.[113] Likewise, Chief Justice Rehnquist has contended that, in the context of the cruel and unusual punishment clause of the Eighth Amendment, the inquiry that matters is the one into the national, rather than the international, consensus.[114] Scholars have attempted to limit the "irrelevance" argument to certain legal questions the very nature of which requires exceptionalism, rather than apply it to comparative methodology as a whole.[115]

Finally, scholars have argued that the use of comparative

108. Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 325 (2005).

109. Ackerman, *supra* note 96, at 794.

110. Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 597 (1999).

111. *Id.*

112. *Id.* at 618–19.

113. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia J., dissenting).

114. Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, J., dissenting).

115. *See* Jackson *supra* note 110, at 590; Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47 (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1231 (1999).

sources may undermine democratic values, particularly in situations where judicial resolution depends on complicated value judgments.[116] These scholars point to the methodological debate in *Atkins v. Virginia* as a harbinger of the difficulties of comparative methodologies. There, the Court found a national consensus prohibiting the execution of the mentally disabled and concluded that it was in conformity with an international consensus.[117] However, it is easily imaginable that there are cases where national and international attitudes diverge, and, in those cases, some have argued that reliance on international sources may undermine democratic values.[118] Judge J. Harvie Wilkinson III has stressed this position, arguing that "[t]he use of international law to resolve social issues of domestic import runs counter to the democratic accountability and federal structure envisioned by our Constitution."[119]

3. The Parameters of a Fruitful Comparative Framework: Building a Comparison that Avoids the Risks

Given the benefits and challenges of a comparative methodology, a salient comparative analysis must seek the most relevant comparisons while limiting false, irrelevant, or misleading comparisons. It must use relevant foreign and international materials evenhandedly, rather than cherry-picking only the most useful examples.[120] This approach implies an examination of multiple foreign sources. Moreover, justifications must be given for which foreign sources are employed in line with the three bases for resort to foreign sources identified above.[121] Additionally, those sources must be vetted to avoid false comparison.[122] One mechanism for limiting false comparison is to use foreign law to illuminate principles that have already been articulated by American courts—this mechanism controls

116. *See, e.g.*, Alford, *supra* note 106, at 58.

117. *Atkins*, 536 U.S. 304, 316 (2002).

118. Alford, *supra* note 106, at 61.

119. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 429 (2004).

120. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 69–70 (2004).

121. *Id.* at 73.

122. *Id.* at 70.

for variables such as cultural or political exceptionalism.[123]

This Note will compare the values underlying the voluntariness requirement in the United States with those in Australia, Canada, the United Kingdom, the Republic of Ireland, South Africa, Japan, and Germany. In addition, it will examine the jurisprudence of international tribunals such as the European Court of Human Rights, the Inter-American Commission on Human Rights, the United Nations Committee Against Torture, the United Nations Human Rights Committee, and international criminal tribunals.

The jurisdictions of comparison chosen serve four purposes. First, Australia, Canada, South Africa, the Republic of Ireland, and the United Kingdom are all common law countries which share a similar constitutional and legal tradition with the United States.[124] Their encounters with the question of foreign coerced confessions therefore shed light on the American jurisprudential landscape. Second, the Japanese Constitution[125] serves as a useful historical comparison because it was drafted with considerable influence from American lawyers before the voluntariness requirement faded into relative obscurity in American jurisprudence.[126] Third, the German inquisitorial system employs a different structural methodology to attain the same goals as the adversarial system and therefore serves as a useful counterpoint in the analysis.[127] Finally, the examination of international tribunals offers a unique perspective from newer courts whose constitutive documents often include specific provisions excluding coercion of confessions. Moreover, their interpretations are authoritative, although not always binding,[128] interpretations of legally binding obligations[129] that states have established as common min-

123. Jackson, *supra* note 110, at 619.

124. *See, e.g.*, John R. Sutton, *Imprisonment and Social Classification in Five Common-Law Democracies, 1955–1985*, 106 AM. J. SOC. 350 (2000).

125. NIHONKOKU KENPO [KENPO] [CONSTITUTION] (JAPAN), *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html

126. Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, 53 L. & CONTEMP. PROBS. 17, 18 (1990).

127. Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFF. L. REV. 122, 124 (1966).

128. Jones v. Saudi Arabia [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) [23, 56] (appeal taken from Eng.) (noting that the CAT did not have binding authority).

129. *See, e.g.*, Kevin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*,

imum standards of human rights.[130]

III. THE JUSTIFICATIONS FOR A DUE PROCESS VOLUNTARINESS REQUIREMENT

Prior to *Connelly*, there were rich and multifaceted justifications proffered in support of the voluntariness requirement by American courts.[131] These justifications included the following: deterrence of wrongful police conduct;[132] concern about the reliability of the evidence obtained through confession;[133] and protest against a court's participation in the use of coerced evidence.[134] This diversity of justifications reflected that the admission of coerced evidence has diverse and significant costs, including risks of violence,[135] degradation of the courts,[136] and fundamental unfairness.[137] To a large extent, the applicability of the voluntariness requirement to actions of foreign law enforcement officials could depend on which justifications, or blend of justifications, American courts choose to emphasize.[138]

Choosing any of the justifications has consequences; for example, adopting solely a deterrence justification could allow for the admission of coerced confessions into evidence in situations where there are reasons to believe there will be no deterrent effect served by exclusion.[139] Indeed, in other areas of law where the American courts have emphasized deterrence, evidence has been admitted

---

42 VAND. J. TRANSNAT'L L. 905, 919 (2009) (in regard to treaty bodies).

130. Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740, 749 (1994).

131. *See, e.g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 266 (1985); Darmer, *supra* note 15, at 365.

132. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

133. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

134. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

135. *Brown*, 297 U.S. at 287.

136. Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

137. Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 64 (1989).

138. Garcia, *supra* note 90, at 275.

139. Benner, *supra* note 137, at 136.

where the courts believe there will be no meaningful deterrent effect. For instance, circuit courts have articulated a foreign exception to the *Miranda* rule—accepting into evidence un-Mirandized statements given to foreign officials.[140] In *United States v. Welch*, the Second Circuit considered whether to admit un-Mirandized statements made to a Bahamian police officer.[141] The court allowed the statements into evidence reasoning that "since the *Miranda* requirements were primarily designed to prevent United States police officers from relying upon improper interrogation techniques and as the requirements have little, if any, deterrent effect upon foreign officers," *Miranda* need not apply to foreign interrogations.[142] Similarly, in *United States v. Chavarria*, the Ninth Circuit noted that because American courts have little deterrent effect on foreign actors, *Miranda* does not apply to foreign interrogations.[143]

Emphasizing the reliability justification may have a similar impact on the admissibility of coerced confessions, potentially lowering the bar for their admission.[144] For example, judges and jurors may not be able to identify in an individual case whether the purported coercion actually suggests unreliability.[145] This may allow instances of coerced confessions to slip into courtrooms. Moreover, even when courts do identify certain circumstances that suggest unreliability, the circumstances are often difficult to generalize into clear rules.[146] The inability to create clear, enforceable rules about what behaviors make evidence unreliable increases the likelihood that coerced confessions will be occasionally admitted. This process can be demonstrated by examining the parallel question of the admission of evidence proffered by jailhouse informants. Courts routinely note that there are significant reliability concerns with jailhouse inform-

140. Darmer, *supra* note 15, at 351.

141. United States v. Welch, 455 F.2d 211, 212 (2d Cir. 1972).

142. *Id.* at 213.

143. United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971).

144. However, it could be possible to craft prophylactic evidence rules that seek to exclude ex ante unreliable coerced confessions. In other areas of the law where evidence is thought to be inherently unreliable, broad prophylactic rules seek to exclude evidence. *See* FED. R. EVID. 404(b).

145. Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 278–79 (1975).

146. Scott A. McCreight, Colorado v. Connelly: *Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207, 212 (1987).

ants.[147] Nonetheless, because it is difficult to identify which informants are unreliable, the general rule has been to admit the evidence to the jury and allow juror weighing.[148]

Finally, although emphasizing the protest justification—which excludes coerced evidence as inherently harmful to courts—would create a clear rule against the admission of coerced evidence, it would also require courts to articulate a theory of a just judiciary.[149] This injects significant subjectivity into the question of what evidence to exclude, which risks unpredictability.[150] Additionally, it has been argued that legal rules premised on judicial value judgments are unmoored from binding law, risking roll-back at judicial whim.[151]

Although each of these justifications has at times appeared prominent in American jurisprudence,[152] comparison with foreign courts attempting to grapple with the costs and benefits of adopting any justification may serve to elucidate the rationales for applying the voluntariness requirement to foreign induced confessions. This inquiry seeks to identify the proper balance of justifications. By examining the justifications proffered in other jurisdictions,[153] this Note concludes that American courts should adopt a more nuanced understanding of the rationale for exclusion of coerced confessions, particularly one that also emphasizes the protest justification.

A. Deterrence Justification

The American criminal justice system has a long history of

147. *See, e.g.*, Northern Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001).

148. Jack Call, *Judicial Control of Jailhouse Snitches*, 22 JUST. SYS. J. 73, 75 (2001).

149. Benner, *supra* note 137, at 137.

150. For example, there has been significant discussion of the unpredictability of having judges determine a theory of what rights are fundamental. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 777–78 (2d ed. 1988).

151. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

152. Benner, *supra* note 137.

153. A number of the cases examined in this Note arise from allegations of torture. The cases are examined for the justifications they give for excluding or admitting coerced evidence, not for the means of coercion. In principle, these justifications should be transsubstantive. In any event, the post-*Connelly* case law on this issue has largely revolved around allegations of torture, as noted in both *Samaleh* and *Abu Ali*. *See* United States v. Abu Ali, 528 F.3d 210, 231 (4th Cir. 2008); United States v. Salameh, 152 F.3d 88, 117 (2d. Cir. 1998).

seeking mechanisms to prevent the deplorable use of coerced confessions and has therefore required that "police must obey the law while enforcing the law."[154] Therefore, when a court finds that a confession has been coerced by police misconduct it will refuse to sanction such police tactics and therefore exclude the coerced testimony.[155] In *Watts v. Indiana*, Justice William Douglas described the intended deterrent effect of the exclusion of forced confessions as a method of condemning incorrect police procedures.[156] In cases where only the deterrence justification is used, American courts have noted that they are "not tasked with supervising the behavior of foreign actors because the penalty for misconduct—suppression—will have no deterrent effect on foreign actors abroad."[157]

Although this logic has generally been applied to un-Mirandized statements,[158] a similar logic would apply to the voluntariness standard. In fact, scholarship has indicated that grounding the due process voluntariness requirement in deterrence alone could open American courts to coerced confessions from abroad.[159] One could certainly argue that in an era of globalized policing,[160] American courts could indeed deter foreign police activities. However, this argument has not yet been successful in American courts.[161] *Connelly* grounded the entire justification for the exclusion of coerced confessions in the deterrence justification.[162]

B. Evidentiary Reliability Justification

Traditional American jurisprudence grounded the exclusion of involuntary confessions on their inherent unreliability. The Court

154. Spano v. New York, 360 U.S. 315, 320 (1959).

155. Brown v. Mississippi, 297 U.S. 278, 287 (1936).

156. Watts v. Indiana, 338 U.S. 49, 57 (1949) (Douglas, J., concurring).

157. Condon, *supra* note 15, at 673.

158. *See, e.g.*, United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971).

159. Mark A. Godsey, Miranda*'s Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden*, and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1733–34 n.131 (2002).

160. *See, e.g.*, Mathieu Deflem, *Global Rule of Law or Global Rule of Law Enforcement? International Police Cooperation and Counterterrorism*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 240 (2006).

161. *See, e.g.*, United States v. Janis, 428 U.S. 433, 455–56 n.31 (1976).

162. Colorado v. Connelly, 479 U.S. 157, 166 (1986).

in *Bram*, for instance, explained that coerced confessions must be excluded because "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner . . . ."[163] The Court therefore concluded that the law of nature "commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."[164] However, following *Bram*, American courts quickly abandoned reliability as a justification for exclusion of forced confessions. In 1941, the Court noted that the "aim of the requirement of due process is not to exclude presumptively false evidence . . . ."[165] By 1961, the Supreme Court had abandoned this justification in its entirety:

> To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.[166]

Conversely, courts in the United Kingdom have predominantly grounded the exclusion of coerced confessions in their unreliability. English common law for centuries emphasized the inherent unreliability of coerced confessions as the reason justifying exclusion.[167] For example, in the 1783 case of *R. v. Warickshall*, English courts pointed to the inherent unreliability of coerced confessions as one of the main reasons for their exclusion.[168] Later cases stated that unreliability was one of the major reasons, along with strands of deterrence

163. Bram v. United States, 168 U.S. 532, 543 (1897) (citations omitted).

164. *Id.* at 546 (citations omitted).

165. Lisenba v. California, 314 U.S. 219, 236 (1941).

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

167. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [11].

168. R. v. Warickshall (1783) 168 Eng. Rep. 234 (K.B.) 1 Leach 263.

and protest, justifying the exclusion of coerced confessions.[169] In *Lam Chi-Ming v. The Queen*,[170] the Privy Council summarized the traditional exclusionary rule, noting that it had expanded to include multiple justifications:

> Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.[171]

Therefore, absent any statutory expansion, the common law also excluded evidence procured from third-party coercion.[172]

The law of confessions in England is now governed by the Police and Criminal Evidence Act, which provides:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused, it is represented to the court that the confession was or may have been obtained:
>
> (a) by oppression of the person who made it; or
>
> (b) in consequences of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequences thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.[173]

The United Kingdom's emphasis on unreliability, both under the common law and under the Police and Criminal Evidence Act, is

169. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [17].

170. Lam Chi-Ming v. The Queen [1991] 2 A.C. 212 (P.C.) (appeal taken from H.K.).

171. *Id.* at 220.

172. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [52].

173. Police and Criminal Evidence Act, 1984, c. 60, § 76(2) *available at* http://www.legislation.gov.uk/ukpga/1984/60/section/76?view=plain.

evidenced in the 2005 case before the House of Lords, *A v. Secretary of State for the Home Department*.[174] In that case, the applicants contended that evidence procured through torture by foreign agents[175] was used against them before the Special Immigration Appeals Commission (SIAC), a special court with expertise concerning deportation of national security threats.[176] SIAC had held that the evidence was admissible and that the risk of torture went to the weight of the evidence.[177] On appeal, a split court upheld the SIAC decision.[178] The House of Lords overturned this ruling,[179] noting that the exclusionary rule was grounded primarily by a desire to exclude the inherently unreliable evidence obtained through torture.[180] Lord Carswell, although acknowledging the protest justification, addressed the reliability justification:[181]

> The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice. The unreliability of such evidence is notorious: in most cases one cannot tell whether correct information has been wrung out of the victim of torture—which undoubtedly occurred distressingly often in Gestapo interrogations in occupied territories in the Second World War—or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering. Reliable testimony of the latter comes from Senator John McCain of Arizona, who when tortured in Vietnam to provide the names of the members of his flight squadron, listed to

174. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71.

175. *Id.* [9].

176. *Id.* [6].

177. *Id.* [9].

178. *Id.*

179. *Id.*; *see also* EILEEN SKINNIDER, THE ART OF CONFESSIONS: A COMPARATIVE LOOK AT THE LAW OF CONFESSIONS—CANADA, ENGLAND, THE UNITED STATES AND AUSTRALIA, INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY 29 (2005), *available at* http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/ES%20PAPER%20CONFESSIONS%20REVISED.pdf.

180. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [39].

181. However, this description does also seem to include a protest justification.

> his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse."[182]

Therefore, the Lords declined to accept the evidence even though British agents had not ordered or participated in the torture.[183]

C. Protest Justification

American courts have occasionally couched the voluntariness requirement in a desire to preserve the sanctity of the court system. That is, evidence was excluded as a protest against the methods used being brought before the court. For example, in *Aschraft v. Tennessee*, the Court noted that coerced confessions must be excluded because "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government."[184] The protest justification therefore excludes coerced testimony not because of its effects but because of the means itself.[185] However, this conception of the voluntariness requirement appears to have fallen out of favor in American law.[186]

Interestingly, the protest justification appears to underlie how American military courts[187] explain the exclusion of involuntary confessions given to foreign interrogators.[188] For example, in *United States v. Murphy*, a Marine was apprehended by Naval Investigative Services (now known as the Naval Criminal Investigative Services) on drug charges; under the Status of Forces agreement, Japan asserted jurisdiction.[189] Murphy confessed to the Japanese authorities and

182. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [147].

183. *Id.* [45].

184. Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

185. Chambers v. Florida, 309 U.S. 227, 241 (1940).

186. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 166 (1986).

187. It should be noted that many of these cases do not arise under the Due Process Clause but rather under Status of Forces Agreements or military regulation. Nonetheless, their reasoning may serve to elucidate the values underlying the exclusion of coerced evidence.

188. Jacob A. Ramer, *Evidence Obtained by Foreign Police: Admissibility and the Role of Foreign Law*, 68 A.F. L. REV. 207, 219 (2012).

189. United States v. Murphy, 18 M.J. 220, 223 (C.M.A. 1984).

was subsequently charged by the U.S. military.[190] On appeal, the accused argued that his statements to the Japanese investigators were involuntary because he had been led to believe that if he confessed to the Japanese that he would be given leniency both in Japanese courts and by the American military.[191] Although the court found that, as a factual matter, Murphy had not been coerced into confessing, it did note that Japanese coercion could have been grounds to exclude his confession even though there was no deterrent impact of American military courts over Japanese prosecutors.[192] Post-*Connelly* opinions have employed a similar decision calculus.[193] Consequently, in *United States v. Kofford*, the court excluded a confession made to Japanese interrogators because the confession was likely not voluntary.[194] The 2009 Military Commissions Act codifies the protest justification, excluding evidence obtained by torture or cruel, inhuman, or degrading treatment, whether or not obtained by color of law.[195]

Although these decisions were decided under military procedure rather than constitutionally mandated procedure, they are significant insofar as they demonstrate that the protest justification is not anathema to American jurisprudence or values.

Similarly, Canadian conceptions of the voluntariness requirement seem to be grounded in the protest justification. The exclusionary rule in Canada is governed by Section 24(2) of the Canadian Charter of Rights and Freedoms, which is part of the 1982 Constitution Act.[196] It provides:

> Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice

190. *Id.*

191. *Id.* at 224.

192. *Id.* at 227.

193. *See, e.g.*, United States v. Pinson, 56 M.J. 489, 493–95 (C.A.A.F. 2002).

194. United States v. Kofford, 2006 WL 4571895 at *7 (N-M. Ct. Crim. App. Dec. 12, 2006).

195. 10 U.S.C. § 948r (2009).

196. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

into disrepute.[197]

In *R. v. Hodgson*, the Canadian Supreme Court noted that the voluntariness requirement is partially grounded in "the need to ensure fairness by guarding against improper coercion by the state."[198] The court went on to admit Hodgson's confession because, although it was made under threat of force, it was made to a private citizen.[199] This "person-in-authority test" appears to draw on some deterrent principles. However, it would probably not preclude the exclusion of foreign induced confession; the court noted that "person-in-authority" means those formally engaged in arrest, detention, examination, or prosecution of the accused.[200] A foreign law enforcement officer would likely fit into this category.

Additionally, Canadian common law voluntariness requirements may justify exclusion even when the Charter does not. For example, Judge Frank Iacobucci has noted that:

> These various differences illustrate that the *Charter* is not an exhaustive catalogue of rights. Instead, it represents a bare minimum below which the law must not fall. A necessary corollary of this statement is that the law, whether by statute or common law, can offer protections beyond those guaranteed by the *Charter*. The common law confessions rule is one such doctrine, and it would be a mistake to confuse it with the protections given by the *Charter*.[201]

Therefore, even if the Charter would not preclude foreign induced confessions, common law voluntariness rules might.[202] Canadian common law voluntariness rules are quite robust:

> Voluntariness is the touchstone of the confessions rule. Whether the concern is threats or promises, the lack of an operating mind, or police trickery that unfairly denies the accused's right to silence, this

197. *Id.* § 24(2).

198. R. v. Hodgson [1998] 2 S.C.R. 449, 450 (Can.).

199. *Id.* at 449–50.

200. *Id.* at 450.

201. R. v. Oickle, [2000] 2 S.C.R. 3, 25 (Can.).

202. Danny Ciraco, *Reverse Engineering*, 11 WINDSOR REV. OF LEGAL & SOC. ISSUES 41, 47 (2001).

> Court's jurisprudence has consistently protected the accused from having involuntary confessions introduced into evidence. If a confession is involuntary for any of these reasons, it is inadmissible.[203]

Australian courts also emphasize the protest justification. In *R v. Swaffield*, the High Court of Australia described a three-part test for the admissibility of confessions: (1) was the statement voluntary; (2) if so, is it reliable; (3) if so, should it be excluded in the exercise of discretion?[204] This final criterion of admissibility seeks to exclude confessions where admission would be unfair.[205] The High Court of Australia has defined the inquiry into the fairness concerns: "[A]ll that seems to be intended is that [the judge] should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused."[206] That is, courts will exclude even reliable, voluntary confessions in order to protect the integrity of the courts.[207] For example, in *R v Ireland*, the High Court of Australia noted, in excluding coerced evidence, that "[c]onvictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."[208]

The protest justification also underlies Japanese law on confessions. During the post-World War II occupation, American lawyers noted that the problem of forced confessions had plagued prewar Japan.[209] The subsequent Constitution responded to this concern.[210] Article 36 of the Constitution contains an absolute ban on the infliction of torture.[211] Article 38 provides significant protections against coerced confessions:

---

203. R. v. Oickle, [2000] 2 S.C.R. 3, 43 (Can.)

204. SKINNIDER, *supra* note 179, at 26.

205. Michael McCoy, *Is There a Need for* Miranda*: A Look at Australian and Canadian Interrogation*, 17 ARIZ. J. INT'L & COMP. L. 627, 640 (2000).

206. *McDermott v The King* [1948] 76 CLR 501, 513 (Austl.).

207. *Cleland v The Queen* [1982] 151 CLR 1, 16 (Austl.).

208. *The Queen v Ireland* [1970] 126 CLR 321, 335 (Austl.).

209. 1 Supreme Commander for the Allied Powers, Government Section, Political Reorientation of Japan, Sept. 1945–Sept. 1948, 192 [hereineafter SCAP].

210. Daniel Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 425 (1991).

211. NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 36 (Japan).

> No person shall be compelled to testify against himself. Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession.[212]

The criminal code was written to enforce this provision: Article 319(1) of the Japanese Code of Criminal Procedure requires the exclusion of any confession that is suspected not to have been made voluntarily.[213] The occupation officials argued that this provision was intended to "exclud[e] from evidence confessions . . . whose voluntary character [is] in any way suspect."[214] Although Japanese courts have subsequently limited the scope of the constitutional protections by narrowly reading the scope of the term "voluntary,"[215] the American drafters' understanding of the voluntariness requirement at the time of the framing was clearly quite robust.[216] Moreover, there appears to be a turn towards the protest justification in Japanese case law, with some courts beginning to exclude evidence obtained through coercion.[217]

South African courts have recently adopted the protest justification as well. In *Mthembu v. State*, the Supreme Court of Appeal excluded evidence of a robbery obtained through torture.[218] The Court justified this exclusion by noting:

> To admit [the evidence] would require us to shut our eyes to the manner in which the police obtained this information . . . . More seriously, it is tantamount to involving the judicial process in "moral defilement." This "would compromise the integrity of the judicial

212. *Id*. art. 38.

213. KEIJI SOSHOHO [CODE OF CRIMINAL PROCEDURE], Act No. 131 of 1948, art. 319(1) (Japan), *available at* http://www.japaneselawtranslation.go.jp/law/detail/?id=2056&vm=02&re=02&new=1.

214. Richard B. Appleton, *Reforms in Japanese Criminal Procedure Under Allied Occupation*, 24 WASH. L. REV. 401, 424.

215. Foote, *supra* note 210, at 457.

216. *See id.* at 425.

217. Foote, *supra* note 210, at n.226 (citing Tokyo Chiho Saibansho [Tokyo Dist. Ct.] Dec. 16, 1987, 1275 HANJI 35).

218. *Mthembu v. State* (379/2007) (2008) ZASCA at 51 (S. Afr.).

> process (and) dishonour the administration of justice." In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.[219]

British law has also voiced the protest justification. As early as 1846, British courts noted that the use of coercive means to discover evidence was anathema to the idea of a fair judiciary.[220] In *Pearse v. Pearse*,[221] the court stressed that:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination . . . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much . . . .[222]

In a more recent decision, *A & Ors v. Secretary of State for the Home Department*, a majority of the Lords discussed unreliability. Nonetheless, Lord Hope of Craighead argued that:

> The use of such evidence is excluded not on grounds of its unreliability—if that was the only objection to it, it would go to its weight, not to its admissibility—but on grounds of its barbarism, its illegality and its inhumanity. The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such

219. *Id.* ¶ 36.

220. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [13].

221. Pearse v. Pearse, [1846] 1 De G & Sm [H.L.] 12.

222. *Id.* at 28–29.

methods to the executive.[223]

Lord Brown of Eaton-Under-Heywood decided on similar grounds, arguing that admission of any evidence obtained from torture:

> [w]ould . . . bring British justice into disrepute. And this is so notwithstanding that the appellant was properly certified and detained by the Secretary of State in the interests of national security, notwithstanding that the legislation (now, of course, repealed) allowed the appellant's continuing detention solely on the ground of suspicion and belief, notwithstanding that the incriminating coerced statement was made not by the appellant himself but by some third party, and notwithstanding that it was made abroad and without the complicity of any British official.[224]

Similarly, the Republic of Ireland appears to apply a protest justification. In *People v. O'Brien*, the Supreme Court of Ireland noted that "to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement."[225]

German law does not generally have mandatory constitutional or statutory exclusions of evidence nor is there a general exclusionary rule, which would render illegally obtained evidence inadmissible.[226] However, German law makes clear that coerced confessions must be excluded.[227] Therefore, section 136a of the *Strafprozessordnug* provides:

> (1) The freedom of the accused to make decisions and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, the administration of drugs, torment, deception or hypno-

223. A & Ors v. Secretary of State for the Home Department, [2005] UKHL 71, [112].

224. *Id*. [165].

225. People v. O'Brien [1965] IR 142, 150 (Ir.).

226. Sabine Gless, *Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial—Germany*, in GERMAN NATIONAL REPORTS TO THE 18TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW (Jurgen Basedow, Uwe Kischel & Ulrich Sieber eds. 2010).

227. Christian Fahl, *The Guarantee of Defence Counsel and the Exclusionary Rules of Evidence in Criminal Proceedings in Germany*, 8 GERMAN L.J. 1053, 1062 (2007).

> sis. Coercion may be used only in so far as it is permitted by the law on criminal procedure. Threatening the accused with measures that are not permitted under the law on criminal procedure or holding out the prospect of an advantage that is not contemplated by statute shall be prohibited.
>
> (2) Measures which impair the accused's memory or ability to understand and accept a given situation (*Einsichtsfähigkeit*) shall not be permitted.
>
> (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused consents to their use.[228]

Germany therefore categorically prohibits the use of coerced confessions in courts as a fundamental notion of the judiciary.[229] It should be noted, however, that as a practical matter this categorical prohibition is rarely ever required because German courts require a high degree of substantiation for claims of torture.[230]

D. The Perspective of International Courts

International fora have increasingly taken a major role in protection from coerced confession.[231] This transition has occurred for two reasons. First, international human rights conventions have codified protections against coerced evidence,[232] allowing for easier challenges to coercive behavior.[233] Second, the number and jurisdictional

228. Strafprozessordnug [StPO] [Code of Criminal Procedure], Apr. 7, 1987, Bundesgesetzblatt [BGBl. I] 1074, as amended, §136(a) (Ger.).

229. Fahl, *supra* note 227, at 1062.

230. Timo Kost, *Mounir El Motassadeq—A Missed Chance for Weltinnenpolik*, 8 GERMAN L.J. 443 (2007).

231. *See, e.g.*, Winston Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87 (2001).

232. *See, e.g.*, ICCPR art. 14, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171; Convention Against Torture, *supra* note 18, art. 15.

233. Thomas Buergenthal, *Evolving International Human Rights System*, 100 AM. J. INT'L L. 783 (2006).

reach of international tribunals has drastically expanded.[234] Therefore, the perspective of international tribunals may serve as an important basis of comparison.[235]

1. The European Court of Human Rights

In the last decade, the European Court of Human Rights has considered the admissibility of coerced confessions in *Jalloh v. Germany*,[236] *Harutyunyan v. Armenia*,[237] *Gafgen v. Germany*,[238] and *Othman v. United Kingdom*.[239] The case law of the European Court of Human Rights demonstrates an evolution of the rationale underlying exclusion from a purely deterrence-based approach to a multifaceted approach. This may serve as a useful case study for a potentially similar evolution in the United States.

As a preliminary matter, it is important to give a brief sketch of the European Convention on Human Rights' protections against coerced confessions. The European Convention does not derive the voluntariness requirement from a protection of due process—rather, the protection comes from the blending of two explicit articles. Article 3 provides an absolute prohibition on torture.[240] Article 6 provides the right to a fair trial.[241] The jurisprudence on the voluntariness requirement comes from an interpretation of these two articles.

In *Jalloh*, the defendant was convicted in German courts of drug trafficking.[242] The principal evidence adduced against Mr. Jalloh at trial was a "bubble containing 0.2182 grams of cocaine" which had been forcibly removed from Mr. Jalloh's body with an

234. Roger Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC. INT'L L. PROC. 160, 160 (2000).

235. Jonathan Charney, *The Impact of the International Legal System on the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 700 (1999).

236. Jalloh v. Germany, App. No. 54810/00 Eur. Ct. H.R. (2006).

237. Harutyunyan v. Armenia, App. No. 36549/03 Eur. Ct. H.R. (2007).

238. Gafgen v. Germany, App. No. 22978/05, Eur. Ct. H.R. (2010).

239. Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, Eur. Ct. H.R. (2012).

240. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

241. *Id.* art. 6.

242. Jalloh v. Germany, App. No. 54810/00 Eur. Ct. H.R. ¶ 20 (2006).

emetic.[243] Before the European Court, Jalloh argued that the use of an emetic was either torture or cruel, inhuman, or other degrading treatment and therefore the trial had been unfair.[244]

The European Court began its discussion by noting that the prohibition against torture "enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the European Convention on Human Rights prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[245] The European Court therefore excluded the evidence because it extinguished the fairness of Jalloh's trial.[246] Importantly, though the European Court's reason for exclusion was primarily one of deterrence, it noted that admission of torture evidence would "serve to legitimate indirectly the sort of morally reprehensible conduct" which the prohibition on torture sought to proscribe.[247]

The European Court went further in *Harutyunyan*.[248] There, the defendant was convicted before an Armenian court of premeditated murder.[249] The primary evidence brought against the defendant was the testimony of two servicemen, A and T.[250] The defendant brought claims before the European Court of Human Rights alleging violations of the European Convention on Human Rights.[251] Specifically, Harutyunyan argued that his conviction was unfair because the testimony of A and T had been coerced.[252]

The European Court found that A and T had been coerced to give evidence.[253] It then noted:

Incriminating evidence—whether in the form of a

243. *Id.* ¶ 13.

244. *Id.* ¶ 89.

245. *Id.* ¶ 99.

246. *Id.* ¶ 108.

247. *Id.* ¶ 105.

248. Harutyunyan v. Armenia, App. No. 36549/03 Eur. Ct. H.R. (2007).

249. *Id.* ¶ 19.

250. *Id.* ¶ 26.

251. *Id.* ¶ 55.

252. *Id.*

253. *Id.* ¶ 59.

> confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law." [254]

The European Court went on to reject the state's argument that the coercion was not relevant because A and T gave their testimony to officers who did not engage in any coercive activities.[255] The European Court noted that even when a third party engages in coercion, that bad act may forever taint the testimony.[256] Although, the European Court did not explicitly repudiate the *Jalloh* deterrence justification in *Harutyunyan*, the decision cast the deterrence rationale into some doubt because the party to the confession could not control third-party coercion. Although no deterrence justification applied, the European Court still found the evidence to be inadmissible.[257]

In *Gafgen*, the European Court was forced to consider the admissibility of coerced evidence obtained in an emergency situation. Mr. Gafgen had kidnapped and killed a young child;[258] he then deposited a ransom note with the child's parents asking for one million euros in exchange for their living son.[259] After he picked up the ransom, Gafgen was arrested.[260] The police believed throughout the interrogation that the child was still alive.[261] In order to try to ascertain the child's whereabouts, German police threatened and beat Gafgen.[262] He subsequently disclosed the location of the child's body.[263]

254. *Id.* ¶ 63.

255. *Id.* ¶ 65.

256. *Id.*

257. *Id.* ¶ 66.

258. Gafgen v. Germany, App. No. 22978/05, Eur. Ct. H.R. ¶ 11 (2010).

259. *Id.* ¶ 12.

260. *Id.* ¶ 13.

261. *Id.* ¶ 20.

262. *Id.* ¶ 15.

263. *Id.* ¶ 16.

Germany then brought criminal proceedings against Gafgen using his confession as evidence.[264] Gafgen argued that his confession was coerced and therefore should be excluded.[265] The European Court held that the evidence must be excluded because, citing *Jalloh*, "any other conclusion would only serve to legitimise, indirectly, the sort of morally reprehensible conduct which the authors of Article 3 of the convention [prohibiting torture] sought to proscribe or, in other words, to afford brutality the cloak of law."[266] Therefore, the European Court appears to have adopted a blend of the deterrence and protest justification.

The *Jalloh* case grounded the exclusion of torture evidence primarily in deterrence, excluding evidence in order to prevent future torture.[267] In *Gäfgen*, the European Court applied this deterrent justification but blended with a protest justification, even in situations of extreme emergency.

In *Othman*, the European Court greatly expanded the rationale for excluded torture evidence.[268] There, the European Court considered a number of human rights claims relating to the proposed transfer of a terrorist suspect from the United Kingdom to Jordan.[269] In particular, the European Court considered the claim that the transfer would violate human rights because there was a real risk that, at Othman's trial in Jordan, evidence obtained through torture would be introduced.[270] The European Court began this discussion by noting that "international law, like the common law before it, has declared its unequivocal opposition to the admission of torture evidence. There are powerful legal and moral reasons why it has done so."[271] The European Court then noted a number of reasons underlying the exclusion of tortured evidence. First, citing *Jalloh*, the European Court identified that admission of torture evidence legitimated the

264. *Id.* ¶ 24.

265. *Id.* ¶¶ 24, 37, 40.

266. *Id.* ¶ 167 (internal quotations and citations omitted).

267. Jalloh v. Germany, App. No. 54810/00 Eur. Ct. H.R. ¶ 105 (2006).

268. Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, Eur. Ct. H.R. ¶ 264 (2012).

269. *Id.* ¶ 8.

270. *Id.* ¶ 263.

271. *Id.* ¶ 264.

practice of torture.[272] Second, the court noted that tortured evidence was unreliable and unfair.[273] Finally, the European Court stated its fundamental reason for exclusion:

> [N]o legal system based upon the rule of law can countenance the admission of evidence—however reliable—which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.[274]

Therefore, the European Court found the transfer of Othman would violate the Convention[275] because the risk of torture at a Jordanian trial was "not only immoral and illegal, but also entirely unreliable."[276]

The expansion of the rationales underlying the exclusion of torture evidence at work in *Othman* demonstrates the importance of understanding the rationale of exclusion. Deterrence alone would not have precluded the evidence. Jordan is not a party to the European Court and may not be deterred by its decisions. Nonetheless, the European Court's expanded understanding of the exclusionary rule justified exclusion on protest and reliability grounds.

2. The American Human Rights Regime: The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights

The American Convention on Human Rights[277] includes explicit protection against coerced confessions. Article 8(3) provides

---

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* ¶ 287

276. *Id.* ¶ 267.

277. The United States has signed but not ratified the convention. *See* List of Signatory Parties to the American Convention on Human Rights, *available at* http://www.oas.org/en/Iachr/mandate/Basics/4.RATIFICATIONS%20AMERICAN%20CONVENTION.pdf.

that "[a] confession of guilt by the accused shall be valid only if it is made without coercion of any kind."[278]

The Inter-American Commission of Human Rights has emphasized deterrence in its jurisprudence on Article 8(3). In *Manríquez v. Mexico*,[279] the Commission was confronted with a case of torture leading to a confession.[280] It rejected the confession, noting that "[h]istorical experience has clearly shown that giving evidentiary effect to extrajudicial statements, or statements made during the investigative stage of the proceedings, is an incentive to use torture when the police prefer to save on investigative effort, extracting a confession from the accused."[281] The Commission has found that mistreatment short of torture must also be excluded.[282] The American Court of Human Rights has also found that Article 8(3) requires the exclusion of coerced evidence,[283] although its basis for doing so was not stated.[284]

3. International Criminal Tribunals

International criminal tribunals have adopted a blend of the protest and reliability justifications. For example, in 1994, the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted an exclusionary rule for coerced evidence.[285] It provided that "no evidence shall be admitted if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to,

278. American Convention on Human Rights art. 8(3), Nov. 22, 1969, 1144 U.N.T.S. 143.

279. Manríquez v. Mexico, Case 11.509, Inter-Am. Comm'n H.R., Report No. 2/99, OEA/Ser. L/V/11.102, doc. 6 rev. ¶¶ 2–4 (1999), *available at* http://cidh.org/annualrep/98eng/Merits/Mexico%2011509.htm.

280. *Id.* ¶ 25.

281. *Id.* ¶¶ 78–79.

282. Montealegre v. Nicaragua, Case 10.198, Inter-Am. Comm'n H.R., Resolution 29/89, OEA/Ser.L/V/II.77, doc. 7 rev.1 (1989).

283. Lori Berenson-Mejia v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119 ¶ 174 (Nov. 25, 2004).

284. Joseph May, Lori Berenson v. Peru*, An Analysis of Selected Holdings by the Inter-American Court of Human Rights*, 20 AM. U. INT'L L. REV. 867, 898 (2005) (noting that the court has not yet made its Article 8(3) jurisprudence clear).

285. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 95, Dec. 10, 2009, IT/32/Rev.44 (hereinafter ICTY).

and would seriously damage, the integrity of the proceedings."[286] In applying this rule, the ICTY noted that its goal was ensuring the "surest way to protect the integrity of the proceedings."[287] The International Criminal Tribunal for Rwanda (ICTR) adopted an identical rule.[288] The Statute of the Special Court for Sierra Leone (SCSL) includes a similar rationale for exclusion providing for the exclusion of evidence "if its admission would bring the administration of justice into serious disrepute."[289] The Rome Statute of the International Criminal Court also includes provisions that exclude evidence that would damage the integrity of the court.[290] The International Criminal Court therefore appears to have adopted the protest justification as grounds to exclude coerced testimony.

4. The Committee Against Torture and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Article 15 of the CAT,[291] provides that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings."[292]

The Committee Against Torture has held that the obligations of Article 15 extend to situations where the use of tortured evidence in a third state is alleged.[293] In *P.E. v. France*,[294] the Committee

286. *Id.*

287. Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1997).

288. International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 95, June 29, 1995, ITR/3/Rev.1.

289. Special Court for Sierra Leone, Rules of Procedure and Evidence, Rule 95, amended Mar. 7, 2003.

290. Rome Statute of the International Criminal Court, art. 69(7), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

291. The United States has signed and ratified the Convention Against Torture (CAT). *See* Status of the CAT, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en#EndDec.

292. *See* Convention Against Torture, *supra* note 18, art. 15.

293. Tobias Thienel, *The Admissibility of Evidence Obtained by Torture Under International Law*, 17 EUR. J. INT'L L. 349, 360.

294. P.E. v. France, Communication No. 193/2001, Decision, U.N. Doc.

considered the claim of a German national who was arrested in France.[295] Spain requested extradition.[296] The appellant protested that the reasons underlying the extradition request were based on evidence obtained by torture.[297] The Committee noted that the requirements of Article 15 extend to all national courts regardless of where the alleged torture takes place because of the "absolute nature of the prohibition of torture."[298] This reasoning forms the basis of later Committee decisions.[299] In fact, the Committee has called upon states to amend their national laws to exclude tortured evidence, even when state actors are not complicit.[300]

The Committee Against Torture therefore derives the inadmissibility of coerced confessions in part from the absolute prohibition on torture contained in Article 2 of the Convention.[301] In turn, Article 2 seemingly incorporates the protest justification. The Committee Against Torture has, for example, noted that the obligations to prevent torture are absolute[302] and *jus cogens*.[303] Labeling the obligation to prevent torture as a *jus cogens* norm indicates that it is a fundamentally important norm from which no derogation is permitted.[304] That is to say, torture and other cruel, inhuman, or degrading treatment constitute conduct which states, regardless of circumstances, are not permitted to condone. The conception of the exclusionary rule found in Article 15 therefore most closely aligns with the protest justification.

CAT/C/29/D/193/2001 (Nov. 21, 2002).

295. *Id.* ¶ 2.1.

296. *Id.* ¶ 2.2.

297. *Id.* ¶ 2.4.

298. *Id.* ¶ 6.3.

299. G.K. v. Switzerland, Communication No. 219/2002, Views, U.N Doc. CAT/C/30/D/219/2002 ¶ 6.10 (May 7, 2003).

300. MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 508 (2008).

301. Convention Against Torture, *supra* note 18, art. 2.

302. Committee Against Torture, General Comment 2, ¶ 5, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

303. *Id.* ¶ 1.

304. *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

5. The International Covenant on Civil and Political Rights and the Human Rights Committee

Article 14(g) of the ICCPR[305] enshrines the right of an individual not to "be compelled . . . to confess guilt."[306] The Human Rights Committee, the ICCPR's treaty body, has argued that Article 14 requires that "[d]omestic law must ensure that statements or confessions are not obtained in violation of article 7 [prohibiting cruel, inhuman, or degrading treatment] of the Covenant in order to extract a confession."[307] Consequently, in *Bakhridin v. Tajikistan*, the Human Rights Committee found that Tajikistan violated its human rights obligation by admitting evidence that had been coerced from a defendant's son.[308]

The Human Rights Committee has grounded this exclusion in the absolute prohibition of cruel, inhuman, or degrading treatment.[309] Subsequently, the Committee's jurisprudence on Article 14 mirrors its statements on Article 7.[310] This jurisprudence, much like the jurisprudence of the Committee Against Torture, seems to implicitly endorse a protest justification for the exclusion of coerced confessions. Consequently, the Human Rights Committee has argued that in order to introduce a confession, the state must always bear the burden to demonstrate voluntariness.[311]

CONCLUSION

A review of the practice of foreign jurisdictions indicates that

305. The United States has signed and ratified the ICCPR, *supra* note 232; *see* Status of the ICCPR, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-4&chapter=4&lang=en#EndDec.

306. ICCPR, *supra* note 232, art. 14.

307. Human Rights Committee, General Comment 32, ¶ 41, U.N. Doc CCPR/C/GC/32 (Aug. 23, 2007).

308. Human Rights Committee, Bakhridin Kurbonov and Dzhaloliddin Kurbonov v. Tajikistan, Communication No. 1208/2003 ¶6.3, U.N. Doc. CCPR/C/86/D/1208/2003 (Mar. 16, 2006).

309. Human Rights Committee, General Comment 32, *supra* note 307, ¶ 6.

310. Human Rights Committee, Paul Kelly v. Jamaica, Communication No. 253/1987 ¶ 5.5, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (Apr. 8, 1991).

311. Human Rights Committee, Concluding Observations of the Human Rights Comm. on Romania, U.N. Doc. CCPR/C/79/Add.111 (July 28, 1999).

most courts justifies the exclusion of at least some coerced evidence based in part on a protest justification—that is, a view that coerced evidence taints the legitimacy of the judicial process and consequently is simply beyond the province of what courts should sanction. The courts of Canada, the United Kingdom, Japan, South Africa, Germany, the Republic of Ireland, and Australia all employ this justification to exclude evidence. Similarly, the European Court of Human Rights, the Committee Against Torture, the Human Rights Committee, and international criminal tribunals decline to admit coerced confessions based in part on the protest justification. The European Court of Human Rights appears to have given the issue the most thought in its recent *Othman* decision, where it observed that the exclusion of coerced evidence is based on many values, including deterrence, evidentiary reliability, and the protest justification.

The discussion above does not indicate that the United States has misconstrued or misstated the rationales underlying the voluntariness rule. Each of the principles discussed in this Note have at one time or another been identified and applied by United States courts. Rather, courts around the world have currently identified and applied a significantly more diverse set of values that protect defendants against the admission of coerced confession than have some of their American counterparts. In fact, the majority of courts sampled now justify the exclusion of coerced confessions by arguing that courts should not admit these confessions—in other words, these courts protest their role in the use of these confessions.

That is not to say that *Connelly* was wrongly decided. In fact, deciding *Connelly* under the protest justification may very well have resulted in the same outcome—hearing confessions compelled by the voice of God is very different than admitting confessions coerced by foreign authorities. Rather, extending *Connelly* to the question of foreign coerced confessions severely oversimplifies the reasons and benefits obtained from the exclusion of coerced confessions. It risks both the admission of unreliable evidence and a corruption of the judicial process. If American courts do not expand their rationale for excluding coerced evidence, then important values, which have been identified both domestically and internationally, would be ignored.

Evan Ezray∗

∗ Head Notes Editor, *Columbia Journal of Transnational Law*; J.D. Candidate,

Columbia Law School, 2014; B.A. University of California at Berkeley, 2010. The author would like to thank Professor Sarah Cleveland for her thoughtful comments. The author is also thankful to Benjamin W. Schrier, Aidan T. Grano, and Carol Choate for their input on early drafts. The author is indebted to the entire *Journal* staff, and he would like to especially thank Sam Levander, Jack Schinasi, and Ramya Ravishankar. Most importantly, the author would like to thank Alicia Lobeiras and my family for their support.