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Colorado v. Connelly: The Gratuitous Union of Voluntariness and State Coercion, 21 J. Marshall L. Rev. 199 (1987)

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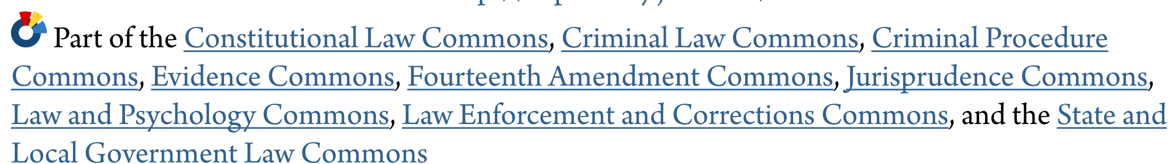
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COLORADO v. CONNELLY:* THE GRATUITOUS UNION OF VOLUNTARINESS AND STATE COERCION

The concept of voluntariness is the bedrock of modern confession law[1]. A voluntary confession[2] must be the product of the suspect's free will and rational choice.[3] Involuntary confessions are inadmissible as evidence not only because of their unreliability,[4] but also because their use violates the due process clause of the fourteenth amendment.[5] The importance of this concept, however, is surpassed by its ambiguity.[6] Although several centuries of Anglo-American confession law have seasoned the concept of voluntariness,[7] a precise methodology for the determination of voluntariness

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* 107 S. Ct. 515 (1986).

1. Confession law and voluntariness should not be confused with the privilege against self-incrimination. M. BERGER, TAKING THE FIFTH 100 (1980). The privilege against self-incrimination involves the defendant's right to remain silent during official proceedings without fear of being held in contempt. *Id.* Voluntariness, however, concerns a suspect's rights during extrajudicial interrogation. *Id.*

2. A confession is an extrajudicial, "express statement admitting some essential part of the evidence charged, going directly to evidence of guilt." J. WIGMORE, LAW OF EVIDENCE § 204, at 212 (1935). Confessions are distinguished from "admissions" which consist of an "admission or acknowledgement of a fact or facts tending to prove guilt but falling short of an admission to all essential elements of the crime." MCCORMICK ON EVIDENCE 362 (3d ed. 1984).

3. Parker v. North Carolina, 397 U.S. 790, 804 (1970); Townsend v. Sain, 372 U.S. 293, 307 (1963); Culombe v. Connecticut, 367 U.S. 568, 583 (1961); Blackburn v. Alabama, 361 U.S. 199, 207-08 (1960).

4. Although for centuries voluntariness was synonymous with reliability, Y. KAMISAR, MODERN CRIMINAL PROCEDURE 553-54 (5th ed. 1980) [hereinafter CRIMINAL PROCEDURE], the United States Supreme Court, in Rogers v. Richmond, 365 U.S. 534 (1961), held that voluntariness must be determined without regard for the trustworthiness of the confession. *Id.* at 544. While reliability cannot be weighed in a determination of voluntariness, the objective of ensuring the reliability of evidence remains part of the rationale underlying the voluntariness doctrine. Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 69 (1974). *See also* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, WASH. U.L.Q. 275, 291 (1975).

5. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

6. The critical role of voluntariness in criminal procedure is reflected by the fact that any conviction based on evidence which includes an involuntary confession will be automatically reversed regardless of the significance of the remaining evidence. Stroble v. California, 343 U.S. 181, 190 (1952); Malinski v. New York, 324 U.S. 401, 404 (1945). This rule ensures due process in official proceedings and "deters the prosecution from supplementing other evidence by introducing a confession of questionable validity in order to secure a conviction." Y. KAMISAR, *What Is An Involuntary Confession?*, in POLICE INTERROGATION AND CONFESSIONS 1 (1980).

7. The concept of voluntariness is deeply rooted in English common law. McCORMICK, *supra* note 2, at 372; Dix, *supra* note 4, at 279; *Developments in Law—*

continues to elude legal scholars. In *Colorado v. Connelly*,[8] the United States Supreme Court again attempted to clarify the standards for the admissibility of confessions by predicating involuntariness on police coercion. The Court addressed the issue of whether a defendant's deficient mental state, in the absence of police coercion, renders a confession involuntary under the due process clause of the fourteenth amendment.[9] The Court held that police coercion is necessary for a finding of involuntariness[10] and that a defendant's mental state alone is never dispositive of the due process inquiry.[11]

Confessions, 79 HARV. L. REV. 935, 954 (1966) [hereinafter *Confessions*]. Prior to the adoption of the voluntariness rule in the English courts, confessions were admissible regardless of the method of extraction. MCCORMICK, *supra* note 2, at 372. As a result, until the mid-1600's, even torture was accepted as a method of persuasion. *Confessions*, *supra*, at 954. In The King v. Rudd, 168 Eng. Rep. 160 (K.B. 1775), the English Court manifested an unwillingness to use confessions elicited by threat or promise. *Id.* at 161. Finally, in The King v. Warickshall, 168 Eng. Rep. 234 (K.B. 1783), the English Court held that a "confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected." *Id.* at 235. The rationale for this holding was the belief that improperly induced confessions were not reliable and, due to the strong evidence of guilt afforded by a confession, reliability must be ensured. *Confessions*, *supra*, at 954. The original objective of the voluntariness doctrine, then, was to ensure the reliability of evidence. In order to assess the reliability of a confession, the English courts determined whether the confession was "voluntarily" offered. *Id.* at 955. Almost any inducement, with the exception of deception, could render a confession involuntary and automatically exclude a confession from admission into evidence regardless of its potential reliability. *Id.*

The American courts adopted the English evidentiary rule of voluntariness with certain alterations. Dix, *supra* note 4, at 284. Rather than automatically excluding an improperly induced confession, the American courts attempted to assess the reliability of the statements. *Id.* The initial willingness of the American courts to dabble with the tricky question of reliability, instead of following the strict exclusionary rule of the English courts, represents the emergence of the confusion and unpredictability that continues to pervade confession law.

In 1884, in its first confession case, the United States Supreme Court formally adopted the voluntariness doctrine. Hopt v. Utah, 110 U.S. 574 (1884). The Court recognized the doctrine as a part of federal evidence law, having no constitutional implications. *Id.* at 583-85. The *Hopt* Court held that confessions were not admissible if the confession

> appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. at 585. While the *Hopt* holding incorporated the voluntariness doctrine into federal law, such was not the case with state law. Because the doctrine was adopted as a federal evidentiary rule, it was not binding upon the states. It was not until 1936, in *Brown*, 297 U.S. at 278, that the voluntariness doctrine adopted in *Hopt* shed its evidentiary nature and assumed a constitutional dimension which then imposed the voluntariness doctrine upon the states. *Id.*

8. 107 S. Ct. 515 (1986).
9. *Id.* at 518.
10. *Id.* at 522.
11. *Id.* at 521.

On August 18, 1983, Connelly approached a police officer and stated that he wanted to discuss a murder which he had committed.[12] The officer immediately read Connelly his *Miranda* rights.[13] After acknowledging that he understood his rights,[14] Connelly recounted the details of the murder and took the officers to the murder scene.[15] The next day, in an interview at the public defender's office, Connelly became "visibly disoriented" and stated that he confessed to the murder under the direction of "voices" which told him to either confess or commit suicide.[16] Following this interview, a state psychiatrist examined Connelly and diagnosed him as mentally incompetent.[17] The state doctors treated Connelly until March 18, 1984, when they considered him competent to stand trial.[18]

At the preliminary hearing, Connelly moved to have his confession suppressed.[19] The court-appointed psychiatrist testified that Connelly was suffering from chronic schizophrenia and had been in a psychotic state at the time of his confession.[20] The doctor further testified that Connelly's auditory hallucinations rendered him incapable of making free and rational choices.[21] In the doctor's opinion,

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12. *Id.* at 518.

13. Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* Court established procedural rules that protect a suspect during custodial interrogation. Specifically, the *Miranda* rules require that

> [p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id. at 444. Statements obtained in violation of the *Miranda* rules are inadmissible as evidence. *Id.*

14. *Connelly*, 107 S. Ct. at 518.

15. *Id.* The lack of corroborating evidence in support of Connelly's statements is a critical factor not discussed by the *Connelly* Court which goes to the heart of the question of the reliability of Connelly's confession. Connelly stated that he had murdered a young girl in the Denver area in November of 1982. *Id.* After checking their files, the police found that the body of an unidentified girl was discovered in April 1983. *Id.* The police were unable, however, to verify that the unidentified girl was the woman named by the defendant. *Id.* at 530 (Brennan, J., dissenting). Finally, there was no physical evidence which could implicate Connelly in the murder of the unidentified girl. *Id.* These facts contribute to the uncertainty of the reliability of Connelly's confession, but were never considered by the Court.

16. *Id.* at 518-19. Connelly believed that he was the reincarnation of Jesus and that the voice he heard was the voice of God. *Id.* at 526 (Brennan, J., dissenting)

17. *Id.* at 519.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* Concerning Connelly's hallucinations, the doctor testified that at the time Connelly was read his *Miranda* rights, he "probably had the capacity to know that he was being read his *Miranda* rights, [but] he wasn't able to use the information because of the command hallucinations that he had experienced." *Id.* at 526 (Brennan, J., dissenting) (citing 1 Record 56-57).

Connelly's psychosis provoked his confession.[22] Based on this testimony, the Colorado trial court, while finding no police misconduct, determined that the defendant's mental illness destroyed his volitional ability and compelled him to confess.[23] Consequently, the court held that Connelly's statements were involuntary and inadmissible.[24] The Colorado Supreme Court affirmed the trial court's holding.[25] The court held that the presence or absence of police coercion is not determinative of voluntariness and that a suspect's rational judgment and free will may be overborne by mental illness.[26]

The United States Supreme Court granted certiorari[27] in order to address the issue of whether, in the absence of police coercion, a confession is involuntary under the due process clause of the fourteenth amendment when the confessor's mental illness has impaired his rational judgment and free will.[28] The Court reversed the Colorado Supreme Court and held that police coercion is a prerequisite of involuntariness[29] and that a defendant's deficient mental condition, on its own, is never conclusive of voluntariness. [30]

The Court began its reasoning by asserting that the due process clause of the fourteenth amendment protects suspects from offensive interrogation techniques.[31] The Court noted that it first applied the due process clause to state confession cases in 1936,[32] in *Brown v. Mississippi*,[33] as a response to torturous interrogation techniques. In *Brown*, interrogators tortured the suspects until they confessed.[34]

22. *Id.* at 519.
23. *Id.*
24. *Id.* In reaching its decision, the trial court relied on Townsend v. Sain, 372 U.S. 293 (1963). See *infra* notes 91-97 and accompanying text for a discussion of *Townsend*.
25. Colorado v. Connelly, 702 P.2d 722 (Colo. 1985).
26. *Connelly*, 107 S. Ct. at 519.
27. Colorado v. Connelly, 106 S. Ct. 785 (1986).
28. *Connelly*, 107 S. Ct. at 518.
29. *Id.* at 522.
30. *Id.* at 521.
31. *Id.* at 520.
32. Before 1936, the Court had no authority in state confession law. Federal evidentiary rules did not, and still do not, apply to the states. Furthermore, the fifth amendment privilege against self incrimination was not imposed on the states until 1964, in Malloy v. Hogan, 378 U.S. 1 (1964). In 1936, in Brown v. Mississippi, 297 U.S. 278 (1936), the Court established the due process clause of the fourteenth amendment as the basis for its authority in state confession law. *See* M. BERGER, TAKING THE FIFTH 104-05 (1980).
33. 297 U.S. 278 (1936).
34. *Id.* at 282-83. In *Brown*, three defendants were accused and convicted of murder. *Id.* at 279. All of the defendants claimed to be innocent. *Id.* The first defendant was hanged from a tree, released, and hanged again to force a confession from him. *Id.* at 281. Still claiming innocence, the man was then tied to the tree and whipped until he finally confessed. *Id.* The interrogators forced the remaining two defendants to strip and then whipped them with a buckle attached to a leather strap. *Id.* at 282. These two also confessed. *Id.*

The *Brown* Court held that Brown's confession was involuntary because the methods used to extract the confession were so offensive to traditional notions of justice that they violated the defendant's right to due process.[35] After noting that all of its confession cases since *Brown* have exhibited some element of police coercion, the *Connelly* Court concluded that the due process analysis applied only to coercive state activity.[36] Consequently, the Court held that absent police coercion "causally related to the confession," there is no basis for declaring a confession involuntary under the due process clause of the fourteenth amendment.[37]

Although the Court held that a finding of involuntariness requires the existence of police coercion, the Court conceded that the defendant's mental condition is a significant factor in the determination of voluntariness.[38] The Court qualified the significance of the

35. *Id.* at 286. The *Brown* Court specifically held that "[t]he due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Id.* (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). The *Brown* Court further held that "the *use* of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* (emphasis added). Two important factors concerning this holding should be noted: first, the *Brown* Court focused on the requirement of fundamental fairness generally, not on police coercion specifically; second, the Court confirms that the due process requirements are applicable to all state agencies ("whether through one state agency or another") and not just the police department. *Id.* The *Connelly* holding, restricting due process violations to police coercion, directly conflicts with the more comprehensive and demanding nature of the *Brown* holding.

36. *Connelly*, 107 S. Ct. at 520. Neither precedent nor logic support the Court's conclusion. The Court based this conclusion on the observation that all past confession cases include some element of police coercion. *Id.* Logically, the Court cannot validly assume that a factor is a requirement for involuntariness simply because the factor appears in all past confession cases. While it is true, especially in the earliest confession cases in which police brutality was blatant and severe, that police coercion was determinative in calculating voluntariness, the Court never before regarded this factor as conditional to involuntariness. The *Connelly* Court misinterpreted the determinative nature of coercion in the past cases as indicating that coercion is a precondition to involuntariness.

37. *Id.* at 519.

38. *Id.* at 520. It is significant that the Court relies on Spano v. New York, 360 U.S. 315 (1959), in conceding that mental capacity has become more significant in the voluntariness calculation. While *Spano* considered the mental capacity of the defendant, *id.* at 322, the case is primarily recognized for the deceptive methods used to elicit the defendant's confession. In fact, the *Spano* Court did not even mention mental capacity when it concluded that the defendant's "will was overborne by official pressure, fatigue and sympathy falsely aroused . . . ." *Id.* at 323. The effect of the *Connelly* Court's use of *Spano* is to minimize the true significance of mental capacity in the voluntariness test. In effect, the *Connelly* Court conveniently neglected to cite holdings more indicative of the significance of mental capacity in the voluntariness equation. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963) (confession involuntary because the defendant was under the influence of a medication which affected his mental capabilities); Blackburn v. Alabama, 361 U.S. 199 (1960) (defendant's confession ruled involuntary due to his insanity at the time of the confession); Fikes v. Alabama, 352 U.S. 191 (1957) (defendant's weak mind contributed to his inability to resist questioning).

defendant's mental state, however, by holding that mental condition, in and of itself, is not dispositive of the due process inquiry.[39] In drawing this conclusion, the Court refuted the respondent's contention that in both *Blackburn v. Alabama*[40] and *Townsend v. Sain*[41], the defendants' mental states were determinative of a finding of involuntariness. The *Connelly* Court held that while the defendants' mental states were highly significant in those cases, the evidence of police overreaching was the "integral" element in finding the confessions involuntary.[42] The Court concluded that requiring police coercion for a finding of involuntariness was consistent with settled law.[43]

An analysis of *Connelly* in light of the voluntariness rationale and settled confession law reveals three flaws in the Court's holding. The first and most significant defect in the *Connelly* holding is that it is founded on the Court's misconception of the role of due process in confession law. The *Connelly* Court incorrectly limited violations of the due process clause to incidents of state coercion. The second flaw in the *Connelly* holding is that it undermines the original objective of the voluntariness doctrine, which is to ensure the reliability of evidence. Finally, while claiming to have followed settled confession law, the Court blatantly misinterpreted and misapplied precedent in an effort to justify its holding. These defects support the conclusion that the Court's reasoning in *Connelly* fails to substantiate the unprecedented requirement of police coercion for a finding of involuntariness.

In order to properly assess the merits of the *Connelly* holding, it is essential to understand the rationale underlying the voluntariness doctrine. When the American courts adopted the concept of voluntariness from the English common law,[44] the courts used the concept only as a rule of admissibility necessary to ensure the relia-

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39. *Connelly*, 107 S Ct. at 521. To buttress this conclusion, the Court noted that a holding in favor of Connelly would require the Court to "establish a brand new constitutional right" that would force the court to make "inquiries into the state of mind of a criminal defendant who has confessed." *Id.* at 521-22. The Court's line of reasoning in this section is particularly perplexing because the Court seems to suggest that in the past the Court ignored the defendant's state of mind. In fact, the very nature of the Court's own test for voluntariness, requiring a free will and rationale intellect, necessitates an inquiry into the state of mind of the defendant. *See* Blackburn v. Alabama, 361 U.S. 199 (1960). "The inquiry most . . . consistently made in the voluntariness cases has been into the defendant's state of mind at the time a challenged confession was made." *Confessions*, *supra* note 7, at 973.

40. 361 U.S. 199 (1960).

41. 372 U.S. 293 (1963).

42. *Connelly*, 107 S. Ct. at 520-21.

43. *Id.* at 521.

44. *See supra* note 7 for a discussion of the history of the concept of voluntariness.

bility of evidence.[45] If a confession was not voluntary, the courts presumed it was unreliable[46] and, therefore, inadmissible as evidence.[47] As American courts became more concerned with fairness in extrajudicial procedures, the voluntariness rationale acquired a constitutional focus.[48] In 1936, in *Brown v. Mississippi*,[49] the Court held

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45. Because the American courts adopted the voluntariness doctrine as a federal rule of evidence, the rule could not be enforced on the states. It was only after Brown v. Mississippi, 297 U.S. 278 (1936), that the doctrine finally applied to the states.

46. This assumption is based on the belief that, under coercion, a defendant will offer a confession not because he is guilty, but because he is trying to spare himself the discomfort of a prolonged, possibly painful, interrogation. McCORMICK, supra note 2, at 372.

47. Hopt v. Utah, 110 U.S. 574 (1884).

48. The Court's shift to a constitutional focus in confession law is generally attributed to the historical preference in America for an accusatorial, as opposed to an inquisitorial, system of justice. The accusatory system is the "[s]ystem of American jurisprudence in which the government accuses and bears the burden of proving the guilt of a person for a crime; to be distinguished from inquisitorial system." BLACK'S LAW DICTIONARY 21 (5th ed. 1979). In Chambers v. Florida, 309 U.S. 227 (1940), the Court noted that the

> determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

Id. at 237-38.

The shift that occurred in confession law in 1936 was not solely due to the American ideal of the accusatorial system of justice. O. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 37-49 (1973). In addition, and probably more immediately significant at the time, was the social and political atmosphere of the day. *Id.* One of the more serious issues facing America in 1936 was the uncontrolled, brutal nature of police interrogations. *Id.* In 1931, the National Commission on Law Observance and Enforcement published the *Report on Lawlessness in Law Enforcement* (1931) (commonly known as the Wickersham Report), in which the committee reported the widespread use of the "third degree" in police interrogations. *Id.* at 1-33. Studies also showed that police brutality against poor black citizens was particulary severe. STEPHENS, *supra*, at 36-38. The revelations of police brutality raised anew doubts concerning the adequacy of procedural safeguards in state criminal procedure.

Other social realities of the time may also have contributed to the Court's shift to a position of more control in state procedures. *Id.* at 39-42. Among other factors that may have influenced the *Brown* Court were the growing interest in social and political reform, the growth in organized crime in the 1920's and the rise of the totalitarian regimes in Russia, Italy, and, finally, in Germany. *Id.* Consequently, in addition to the Court's preference for an accusatorial system of justice, its decision in *Brown* was likely influenced by the myriad of social and political factors of the time which inspired procedural reform aimed at achieving greater control over police activity and the states' criminal process.

that in order for a confession to be admissible, the actions of the state[50] must conform to traditional notions of justice as required by the due process clause of the fourteenth amendment.[51] Since 1936, then, the objectives of the voluntariness doctrine have been twofold: to ensure reliability of evidence and to prevent unfairness in the use of confessions. The holding in *Connelly* is inconsistent with both of these objectives.

The most serious flaw in the *Connelly* holding is that it is founded on a misconception of the role of due process in confession law. The purpose of due process is to guarantee procedural standards[52] which will prevent fundamental unfairness in the use of confessions.[53] *Connelly*, however, restricts the application of due process to incidents of state coercion.[54] This restriction cannot be reconciled with the nature of the voluntariness doctrine or with the Court's own tests for voluntariness.

The essence of the voluntariness doctrine demands that the due process guarantee of fundamental fairness embrace more than mere protection from police coercion.[55] Because the Court has long recognized voluntariness as the procedural standard for the admission of a confession into evidence,[56] a confession is only admissible under

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49. 297 U.S. 278 (1936).

50. The actions of the state that are subject to the due process requirements include the actions of all state agencies, not just the police department. *See supra* note 35 for a case citation and further explanation of this point.

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

52. The fourteenth amendment "was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority." Chambers v. Florida, 309 U.S. 236 (1940) (footnote omitted).

53. In Lisenba v. California, 314 U.S. 219 (1941), the Court distinguished the exclusionary rule of the voluntariness doctrine from the role of due process in confession law:

> The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence . . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false.

Id. at 236. While the aim of due process is still to prevent fundamental unfairness, the distinction between the role of due process and the role of the exclusionary rule of the voluntariness doctrine has substantially diminished. *Confessions, supra* note 7, at 961.

54. Colorado v. Connelly, 107 S. Ct. 515, 520 (1986).

55. In Brown v. Mississippi, 297 U.S. 278 (1936), when the Court merged the due process requirements with the voluntariness doctrine, it did not limit due process to state coercion. Rather, the Court applied the requirements to "state action" in general. *Id.* at 286. In fact, the *Brown* Court held that "the *use* of [coerced] confessions . . . as the basis for conviction and sentence was a clear denial of due process." *Id.* (emphasis added). Consequently, the *Connelly* Court undermined the intentions of the *Brown* Court by restricting violations of the due process clause to incidents of state coercion.

56. *See* Bram v. United States, 168 U.S. 532, 540-43 (1897) (admission of defendant's involuntary statements would constitute reversible error); Hopt v. Utah, 110 U.S. 574 (1884) (involuntary confessions are inadmissible).

the due process clause if it satisfies the voluntariness test. The voluntariness test, which requires that a confession be the product of free will and rational choice,[57] is not satisfied, as the *Connelly* Court contends, simply because a confession is offered in the absence of police coercion.[58] Rather, a confession must reflect a free exercise of the defendant's will and intellect.[59] Therefore, a confession that is not voluntary in fact, regardless of the presence or absence of police coercion, must be considered involuntary and inadmissible under the due process clause.[60] *Connelly*, which deems any confession voluntary if it is not coerced by the state, is inconsistent with this conclusion.

The *Connelly* Court's narrow interpretation of the role of due process is not only inconsistent with the essence of the voluntariness doctrine, it also undermines the Court's own tests for fundamental fairness and voluntariness. The unique nature of each confession case has prevented the Court from defining specific due process requirements applicable to all situations.[61] Instead, in evaluating fun-

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57. Blackburn v. Alabama, 316 U.S. 199, 207-08 (1960).

58. In the earliest confession cases, the voluntariness test focused, by necessity, on police brutality. The more sophisticated tactics used by modern day police require a more sophisticated voluntariness test; one not determined merely on the basis of police coercion. *Confessions*, *supra* note 7, at 973-75. Thus, the modern voluntariness test should include consideration of "whether the pressures exerted by the police or the mental state of the defendant proved *too great* an obstacle to the defendant's exercise of his own judgement." *Id.* at 974. (Emphasis in original).

59. In Parker v. North Carolina, 397 U.S. 790 (1970), the Court determined that "a confession is not voluntary merely because it is the 'product of sentient choice,' if it does not reflect a free exercise of the defendant's will." *Id.* at 803 (citing Haley v. Ohio, 332 U.S. 596, 606 (1948)). In an earlier case, Reck v. Pate, 367 U.S. 433 (1961), the Court noted that "whether a confession was extracted by coercion does not depend simply upon whether the police resorted to the crude tactic of deliberate physical abuse . . . . The question in each case is whether a defendant's will was overborne at the time he confessed." *Id.* at 440.

60. The Court in Townsend v. Sain, 372 U.S. 293 (1963), confirmed the fact that a confession which is not the product of free intellect is inadmissible. *Id.* at 307-09. Similarly, in Ziang Sung Wan v. United States, 266 U.S. 1 (1924), the Court held that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat. A confession is voluntary if, and only if, it was, in fact, voluntarily made." *Id.* at 14.

61. The problem of precisely defining voluntariness has plagued the United States Supreme Court since its first confession case in 1884. In Hopt v. Utah, 110 U.S. 574 (1884), the Court noted that the admissibility of confessions "so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases." *Id.* at 583. In reference to the interrogation procedures used by the police, the Supreme Court, in Culombe v. Connecticut, 367 U.S. 568 (1961), conceded that it "is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved . . . ." *Id.* at 601.

The Supreme Court did attempt to devise specific requirements for the admissibility of confessions. In Mcnabb v. United States, 318 U.S. 332 (1943), the Court held

damental fairness, the Court relies on general tests, such as whether, given the "totality of circumstances," [62] the defendant's will was "overborne" [63] at the time of the confession.[64] Under this test, if a defendant's will is overborne, the confession is considered involuntary and is inadmissible under the due process clause.[65] The unrestrictive nature of this inquiry necessarily precludes reliance on a single, mandatory requirement, such as police coercion, for a finding of involuntariness. In fact, until *Connelly*, the Court never evaluated fundamental fairness or determined voluntariness in light of a single, controlling criterion.[66] Having adopted such a standard in *Connelly*, the Court has effectively rendered impotent its own test for

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that a confession could be excluded if it was obtained after an unnecessary delay in presenting the defendant before a magistrate. This federal rule of procedure, however, was not applicable to the states. Subsequently, in Malloy v. United States, 354 U.S. 449 (1957), the Court expanded this rule to include unnecessary delays for the purpose of conducting an interrogation. Through Miranda v. Arizona, 384 U.S. 436 (1966), the Court introduced specific procedural requirements for custodial interrogations into state procedure. *See supra* note 13 for a discussion of *Miranda*. The Court hoped that the specific requirements of *Miranda* would render the voluntariness test, with all its ambiguities, obsolete. *See* M. BERGER, TAKING THE FIFTH 125-160 (1980). *See also* Dix, *supra* note 4, at 295-300. The reality is that the voluntariness test is needed as much after *Miranda* as before. Any rights waived by a suspect, including *Miranda* rights, must be waived voluntarily. In addition, even if a suspect waives his *Miranda* rights, any subsequent confession must be shown to have been voluntary. Dix, *supra* note 4, at 298-99. Consequently, the Court's efforts to replace the voluntariness doctrine, while somewhat successful on the federal level, have proven futile on the state level.

62. Among the factors considered in the totality of circumstances test are the age of the suspect, *e.g.*, Haley v. Ohio, 332 U.S. 596, 600 (1948), his level of education, *e.g.*, Payne v. Arkansas, 356 U.S. 560, 567 (1958), limited intelligence, *e.g.*, Fikes v. Alabama, 352 U.S. 191, 193 (1957), length of detention and psychological coercion, *e.g.*, Chambers v. Florida, 309 U.S. 227, 230-32 (1940), repeated and lengthy interrogation, *e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944), and the deprivation of food and sleep, *e.g.*, Reck v. Pate, 367 U.S. 433, 441-42 (1961).

63. In determining whether a confession is inadmissible because the defendant's will was overborne, the

> ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534 (1961). The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

64. The general tests used by the Court, until *Connelly*, considered all factors relevant, but none determinative. Dix, *supra* note 4, at 293. The result is that the Court has escaped the responsibility of ruling on the significance of any one factor in the voluntariness equation. Consequently, the general nature of the tests have only contributed to the ambiguity that characterizes confession law. *See* CRIMINAL PROCEDURE, *supra* note 4, at 557-59.

65. Malloy v. Hogan, 378 U.S. 1, 7 (1964); Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

66. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

determining fundamental fairness and voluntariness.

The effect of the *Connelly* Court's misconception of the role of due process in confession law will be to deny defendants, such as Connelly, due process in the use of their confessions. At the time of his confession, Connelly suffered from mental disorders that prevented him from making free and rational choices.[67] Under the Court's own test, Connelly's will was overborne and his confession involuntary because his mental illness prevented him from exercising a free will and rational intellect.[68] Yet, according to the *Connelly* Court, the absence of state coercion enables a state to admit a defendant's involuntary confession into evidence.[69] Such an admission would deny Connelly due process[70] by violating the procedural due process requirements of the voluntariness doctrine.[71]

The second defect in the *Connelly* holding is that it frustrates the original objective[72] of the voluntariness doctrine by allowing the admission of unreliable confessions into evidence. In effect, the *Connelly* holding permits the admissibility of all unreliable confessions that are not the product of police coercion.[73] Consequently, absent state coercion, the confession of a psychotic, intoxicated, drugged, or

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67. Connelly v. Colorado, 107 S. Ct. 515, 526 (1986) (Brennan, J., dissenting).

68. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

69. Specifically, the *Connelly* Court held that "the admissibility of this kind of statement is governed by state rules of evidence, rather than by our previous decisions regarding coerced confessions . . . ." *Connelly*, 107 S. Ct. at 518. Consequently, while a defendant will not receive constitutional protection from an unreliable but uncoerced confession, local evidentiary rules still may exclude the confession.

70. The denial of due process is particularly nefarious when the defendant, like Connelly, is so mentally incapable that he cannot effectively exercise his rights. In Blackburn v. Alabama, 361 U.S. 199 (1960), the Court reflected this attitude when it passionately noted that "[s]urely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane . . . ." *Id.* at 207. In *Confessions*, *supra* note 7, at 977, the author, in contemplation of a proper standard for voluntariness, observes that "it would seem that the definition of the standard should logically bear some relation to the suspect's ability to cope with the situation in which he finds himself." Because mentally ill defendants, like Connelly, are unable to cope with an interrogation effectively enough to protect themselves, the use of their confessions clearly offends traditional notions of justice.

71. In Brown v. Mississippi, 297 U.S. 278 (1936), the Court established that the use of an involuntary confession "for conviction and sentence was a clear denial of due process." *Id.* at 286. Also, in Payne v. Arkansas, 356 U.S. 560 (1958), the Court held that where a confession did not constitute an exercise of free will, "its use before the jury . . . deprived [the defendant] of 'that fundamental fairness essential to the very concept of justice'. . . ." *Id.* at 567 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

72. *See supra* note 7 for a discussion of the original objective of the voluntariness doctrine.

73. Because the *Connelly* Court only permits state coerced confessions to be considered involuntary within the meaning of the voluntariness doctrine, all other unreliable confessions will be excluded from the admissibility requirements of the doctrine. Consequently, absent a local law to the contrary, any unreliable confession that is not the product of state coercion may be admitted into evidence.

juvenile defendant, as well as confessions coerced by third parties, may be admissible despite their highly questionable reliability.[74]

A brief analysis of the rationale of the voluntariness doctrine supports the conclusion that the concern for the reliability of confessions should not be restricted to police coerced confessions. The voluntariness doctrine was founded on the premise that involuntary confessions are unreliable.[75] *Connelly* established that only police coerced confessions are involuntary[76] and, therefore, only police coerced confessions can be considered unreliable within the meaning of the voluntariness doctrine. This result is unacceptable. Because reliability is determined by voluntariness and voluntariness is determined by the ability to exercise free will and rational judgment,[77] *Connelly* implies that only police coercion can impair a defendant's free will and judgment. Empirical evidence suggests, however, that a variety of factors induce involuntary and unreliable confessions.[78] It is not logical, therefore, to restrict involuntariness to police coerced confessions. Such a restriction directly conflicts with the objective of the voluntariness doctrine of ensuring the reliability of evidence.

Connelly's predicament is empirical proof that the Court's holding does not properly address the reliability rationale of the voluntariness doctrine. The state psychiatrist diagnosed Connelly as incompetent, psychotic, schizophrenic, and incapable of consistently relating facts at the time of his confession.[79] The psychiatrist further testified that Connelly was unable to make free and rational choices.[80] In this condition, Connelly was highly susceptible to offering unreliable statements and, therefore, was most deserving of constitutional protection. Nevertheless, because his confession was not the product of police coercion, Connelly was denied this protection and the state court was permitted to admit his confession despite its unreliable nature. Consequently, the *Connelly* holding has undermined the rationale of the voluntariness concept by increasing the likelihood that unreliable confessions will be admitted as evidence.

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74. For a discussion of the legal effect of a confession from a drugged or intoxicated suspect, see W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS 151-53 (1972).

75. *See supra* note 7 for a discussion of the foundation of the voluntariness doctrine.

76. Colorado v. Connelly, 107 S. Ct. 515, 522 (1986).

77. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

78. For example, a suspect who has been drugged or intoxicated against his own will or knowledge might be incapable of exercising a free will and rational judgment despite the absence of police coercion.

79. Colorado v. Connelly, 107 S. Ct. 515, 519, 526 (1986). In addition, Connelly had been hospitalized for psychiatric treatment five times. *Id.* at 526 (Brennan, J., dissenting). Moreover, while doctors treated Connelly "with a variety of medications in the past including antipsychotic medications," Connelly had not received any medication in the six months prior to his confession. *Id.*

80. *Id.* at 526.

The third flaw in the *Connelly* holding is that the Court, while professing to have followed settled confession law,[81] clearly parted with precedent. The backbone of Connelly's case consisted of two major precedents: *Blackburn v. Alabama*[82] and *Townsend v. Sain*.[83] Unable to dispose of these cases as inapposite, the Court was forced to manipulate the holdings to justify its conclusion that police coercion is required for a finding of involuntariness.[84]

In *Blackburn*, the defendant suffered from mental illness and was diagnosed as incompetent and schizophrenic.[85] The defendant, like Connelly, was hospitalized until he was competent to stand trial.[86] The defendant's confession, offered after eight hours of interrogation in a small room, was ruled involuntary and inadmissible.[87] The *Connelly* Court misinterpreted the *Blackburn* decision as dependent on the "integral element" of police overreaching.[88] A careful reading of *Blackburn* discounts this contention. The *Blackburn* Court actually held that the defendant's confession was involuntary because the defendant lacked "rational choice."[89] As an afterthought, the Court noted that the elements of police overreaching only made worse the denial of due process.[90] The clear implication is that the mental deficiency of the defendant was enough to render his confession involuntary. This conclusion is supported by precedent. In *Townsend v. Sain*,[91] the Court stated, in reference to *Blackburn*, that it "held irrelevant the absence of evidence of improper

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81. *Id.* at 521.
82. 361 U.S. 199 (1960).
83. 372 U.S. 293 (1963).
84. *Connelly*, 107 S. Ct. at 522.
85. *Blackburn*, 361 U.S. at 200-01. Blackburn had a history of mental illness. *Id.* In 1944, Blackburn had been discharged from the army as permanently disabled by psychosis. *Id.* at 200. Blackburn was charged with a robbery which occurred while he was absent without permission from a mental ward. *Id* at 201.
86. *Id.* at 202.
87. *Id.* at 204.
88. *Connelly*, 107 S. Ct. at 520 (1960).
89. *Blackburn*, 361 U.S. at 207.
90. *Id* at 207-08. The *Blackburn* Court specifically found that

> the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of person in this fashion. And when other pertinent circumstances are considered . . . the chances of the confessions' having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.

Id. See also Fikes v. Alabama, 352 U.S. 191 (1957) (confession of a defendant with a low mentality held involuntary).
91. 372 U.S. 293 (1963).

purpose on the part of the questioning officers."[92] Nevertheless, the *Connelly* Court overlooked this interpretation of *Blackburn* in favor of a construction more suited to its conclusion; police coercion is necessary for a finding of involuntariness.

The *Connelly* Court again engaged in a form of creative interpretation to dispose of *Townsend*. In *Townsend*, the defendant was given medication, while in custody, to keep him calm.[93] Shortly thereafter, the defendant responded to the officers' questions and confessed. The interrogating officers were not told that the drug administered to the defendant could have the effect of truth serum.[94] Because the officers were unaware of the drug's special qualities, the Court found no police impropriety. Nevertheless, the *Townsend* Court ruled that the defendant's statements were involuntary because they were not "the product of free intellect." [95] The Court held that the absence of police impropriety was insignificant and that any confession which is "in fact" involuntary is inadmissible.[96] The *Connelly* Court blatantly ignored this holding[97] and, instead, reasoned that the presence of police overreaching in both *Townsend* and *Blackburn* supports the conclusion that police coercion is a requirement for a finding of involuntariness.

The unfavorable consequences of the *Connelly* holding will extend beyond the case itself to infect both criminal procedure in general and confession law in particular. In criminal procedure, the *Connelly* holding will prove detrimental to the integrity of the fact finding process. One of the effects of the *Connelly* holding will be to make more likely the introduction of unreliable confessions into evidence. Once a confession is in evidence, the burden of evaluating reliability rests with the jury. Yet, given the irrepressible power of a confession, however unreliable, to bias the mind of the trier of fact

92. *Id.* at 309. The *Townsend* Court specifically noted, in reference to the holding in *Blackburn*, "that we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time." *Id.*

93. The medication was hyoscine which can have the effect of truth serum. *Id.* at 308.

94. *Id.*

95. *Id.*

96. *Id.* The Court emphasized that it would be

> difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a "truth serum." It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.

Id. (Emphasis in original).

97. In fact, the *Connelly* Court actually referred to the conduct of the police officers in both *Townsend* and *Blackburn* as "police wrongdoing" despite the fact that the holdings of both of these cases clearly state that there was no police impropriety. *Connelly*, 107 S. Ct. at 521.

and to seal the fate of the defendant, the ability of the jury to objectively determine guilt or innocence will effectively be diminished.

In addition to undermining the fact finding process, the *Connelly* holding will also have a detrimental effect on confession law. Prior to *Connelly*, confession law suffered from ambiguity. In the wake of *Connelly*, this ambiguity deteriorated into incomprehensibility. While claiming to follow settled confession law, the *Connelly* Court struck out on its own and created an unprecedented standard for involuntariness; the existance of police coercion. This unjustified requirement has altered the voluntariness test of free will and rational judgment to a test for police coercion. Such a test is contrary to precedent and to the objectives of the voluntariness doctrine. Consequently, in its effort to clarify the doctrine of voluntariness, the *Connelly* Court succeeded only in contributing to the confusion that pervades confession law by gratuitously linking involuntariness and state coercion.

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