

*LEGO V. TWOMEY: THE IMPROBABLE RELATIONSHIP  
BETWEEN AN OBSCURE SUPREME COURT DECISION  
AND WRONGFUL CONVICTIONS\**

Michael D. Pepson\*\* and John N. Sharifi\*\*\*

INTRODUCTION

There is no greater failure of our criminal justice system than the conviction and imprisonment, or execution, of an innocent person. Notwithstanding the myriad constitutional and evidentiary principles designed to minimize the risk of wrongful convictions, empirical evidence has irrefutably shown that wrongful convictions have occurred, and continue to occur, with some regularity.<sup>1</sup> What causes wrongful convictions? And how can we minimize the frequency with which they happen?

In this Article, we will advance the argument that the underlying cause of many wrongful convictions is a relatively obscure Supreme Court opinion, which, in large measure, has escaped serious academic or judicial scrutiny: *Lego v. Twomey*.<sup>2</sup> And we will attempt to demonstrate that revisiting and overruling the *Lego* decision would significantly reduce the rate at which wrongful convictions occur.

*Lego* holds that the preponderance-of-the-evidence standard—the lowest standard of proof in all of our jurisprudence—is constitutionally sufficient to adjudicate the admissibility of allegedly involuntary confessions.<sup>3</sup> As a practical matter,

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\*\* J.D., The Catholic University of America, Columbus School of Law (2008).

\*\*\* Adjunct Professor of Law, The Catholic University of America, Columbus School of Law; The Law Offices of John N. Sharifi, LLC; LL.M., The George Washington University Law Center (2005); J.D., The Catholic University of America, Columbus School of Law (2002). Former Trial Attorney, Maryland Office of the Public Defender. Founder, Mid-Atlantic Innocence Project, Columbus School of Law Chapter.

1. See Talia Fischer & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 875 (2008) (“A 2005 study estimated that thousands of individuals in the United States have been wrongfully convicted over the past three decades, many on the basis of false confessions.”). See generally Edward J. Sackman, *False Confessions: Rethinking a Contemporary Problem*, 16 KAN. J.L. & PUB. POL’Y 208 (2007).

2. 404 U.S. 477 (1972); see also *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (reaffirming that “[w]henver the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence.”)

3. *Lego*, 404 U.S. at 489. The underlying facts were summarized as follows:

Petitioner *Lego* was convicted of armed robbery in 1961 after a jury trial in Superior Court, Cook County, Illinois. The court sentenced him to prison for 25 to 50 years. The evidence introduced against *Lego* at trial included a confession he had made to police after arrest and while in custody at the station house. Prior to trial *Lego* sought to have the confession suppressed. He did not deny making it but did challenge that he had done so voluntarily. The trial judge conducted a hearing, out of the presence of the jury, at which *Lego* testified that police had beaten him about the head

this standard of proof often renders the suppression hearing—the evidentiary hearing in which this admissibility determination takes place—a *fait accompli*.<sup>4</sup> (This is true *a fortiori* because notwithstanding substantial evidence that police perjury is prevalent at such hearings, there is a judicial propensity toward accepting police officers' testimony at face value,<sup>5</sup> irrespective of how improbable it may be.)<sup>6</sup> This is a problem because if a defendant's confession is admitted into evidence—true or false, coerced or voluntary—empirical evidence strongly suggests that, in practice, the jury will almost invariably convict that defendant of whatever crime he or she is charged with, even if the putative confession is largely uncorroborated and the weight of the evidence suggests that the defendant is innocent.<sup>7</sup> In other words, whether the confession is admitted into evidence is usually outcome determinative: the preliminary fact finding that occurs in a voluntariness hearing functions as a *de facto* trial on the ultimate issue of guilt.<sup>8</sup> In effect, then, *Lego's* holding undermines *In re Winship's*<sup>9</sup> mandate that every fact necessary to prove the charged crime must be established beyond a reasonable doubt<sup>10</sup>—that is, the presumption of innocence—and, more importantly, its holding significantly increases the probability that an innocent person will be wrongfully convicted.

There is an enormous human cost associated with *Lego* and its progeny: actually innocent defendants are, in fact, wrongfully convicted as a direct result of the low

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and neck with a gun butt. His explanation of this treatment was that the local police chief, a neighbor and former classmate of the robbery victim, had sought revenge upon him. *Lego* introduced into evidence a photograph that had been taken of him at the county jail on the day after his arrest. The photograph showed that [his] face had been swollen and had traces of blood on it. *Lego* admitted that his face had been scratched in a scuffle with the robbery victim but maintained that the encounter did not explain the condition shown in the photograph. The police chief and four officers also testified. They denied either beating or threatening petitioner and disclaimed knowledge that any other officer had done so. The trial judge resolved this credibility problem in favor of the police and ruled the confession admissible.

*Id.* at 480.

The trial judge did not enunciate on the record the standard of proof he used to adjudicate the admissibility of *Lego's* putative confession; however, under Illinois law, "a confession challenged as involuntary could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence." In the interest of brevity, it is sufficient here to note that, on appeal, *Lego* asserted that his constitutional rights were violated when the trial judge used the preponderance standard—rather than the beyond-a-reasonable-doubt standard—to determine the admissibility of his alleged confession. *See id.* at 480-81.

4. *See infra* Part VI.

5. In the interest of uniformity, the authors will employ the terms "police" and "police officers" to encompass and refer to all law enforcement personnel (e.g., officers, agents, and detectives).

6. *See infra* Part VI.A-B.

7. *See infra* notes 164-79 and accompanying text.

8. *See infra* notes 164-80 and accompanying text. *See generally* Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 4-6 (2008) (noting link between admission of false confessions and wrongful convictions).

9. 397 U.S. 358 (1970).

10. *Winship*, 397 U.S. at 364.

burden of proof prescribed by the *Lego* Court and reiterated by its progeny. With the advent of DNA testing, the specter of an innocent person being wrongfully convicted of a crime based on a false confession is no longer merely an abstract or theoretical concern; it is a well-documented practical reality. In this Article, we deal not with civil remedies or the like but rather the moral—and constitutional—imperative against imprisoning, and perhaps even executing, innocent people.

This Article posits that, with respect to evidentiary challenges that implicate reliability concerns, raising the constitutional minimum standard of proof to beyond a reasonable doubt at suppression hearings is not only a constitutional imperative but, as a practical matter, perhaps the most effective means of minimizing wrongful convictions. To be sure, our proposed solution to the problem of wrongful convictions is quite pragmatic and has the advantage of simplicity. But the notion that, at least in some circumstances, a heightened burden of proof at suppression hearings is a constitutional imperative also finds support in the *Lego* decision itself.

The *Lego* decision is unusual because the Court qualified its holding with language suggesting that it may be provisional in nature and thus open to reconsideration if good cause could be shown. Specifically, the *Lego* Court implicitly invited reconsideration of its holding at a future time if substantial evidence accumulated demonstrating that federal constitutional rights have indeed been adversely affected as a result of determining admissibility by preponderant evidence. This Article argues that, since *Lego*, substantial empirical evidence has accumulated demonstrating a but-for causal connection between use of the preponderance standard at suppression hearings in which the admissibility of confessions are litigated and wrongful convictions.<sup>11</sup> In short, the authors argue that the *Lego* decision can be directly linked to the convictions of numerous actually innocent persons—thereby adversely affecting federal constitutional rights<sup>12</sup>—and, therefore, should be revisited.

In Part I, we will sketch the manner in which preliminary admissibility challenges are litigated. Part II attempts to frame the problem we seek to address

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11. See, e.g., Fischer & Rosen-Zvi, *supra* note 1, at 875 (“Numerous empirical studies have established a strong causal connection between police interrogation, false confessions, and wrongful convictions . . .”).

12. The Due Process Clause, for example, “has been interpreted to require that the government employ procedures that will protect the innocent from wrongful conviction.” Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2013 & n.65 (1998) (listing cases) (emphasis added). *But cf.* Justice Scalia’s dissent in a recent case:

This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.

*In re Davis*, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting); and *Herrera v. Collins*, 506 U.S. 390, 407-12 (1993) (intimating that conviction of the innocent is not a per se due-process violation).

through a comparative study of the different burdens of proof in American jurisprudence and their interplay with our society's values. Part III offers an in-depth critique of the *Lego* Court's analysis. In Part IV, we will explore the *Lego* majority's assertion that there is no correlation between the standard of proof used in preliminary admissibility determinations and the reliability of jury verdicts, or, put differently, that there is no correlation between preliminary and ultimate fact finding. Part V will argue that the *Lego* majority mistakenly conflated the various constitutionally based exclusionary doctrines, which, in part, led the Court to craft an unduly low standard of proof. Part VI advances the argument that there is good cause to revisit the *Lego* decision, and it explores the improbable dialectic between police perjury at suppression hearings, trial judges' frequent acceptance of suspect police testimony as dispositive on the issue of admissibility, the standard of proof used to determine admissibility, and the frequency with which wrongful convictions occur. In Part VII, we attempt to demonstrate that the use of a standard of proof that creates a substantial risk of wrongful convictions implicates criminal defendants' federal constitutional rights. In Part VIII, we argue that *stare decisis* principles do not require deference to the *Lego* decision. Finally, we conclude our argument and submit that raising the standard of proof in certain types of suppression hearings is an effective way to reduce the probability of wrongful convictions..

## I. MOTIONS TO SUPPRESS EVIDENCE

### A. *Initiating the Motion*

Jurists and laymen alike generally recognize that they have rights that are implicated when they are stopped, searched, questioned, or arrested by law enforcement, but few unfamiliar with criminal law understand when and how those rights are enforced. If a defendant is charged with a crime and wants to argue that certain prosecution evidence was obtained in violation of his or her constitutional rights, when and how is the argument made? More importantly, what is the remedy for that violation? Before any litigation related to the admissibility of confessions actually begins, the defense must move to initiate the process. Enter motions to suppress and suppression hearings.

Following the arrest and initial appearance of the defendant, and after he or she has either retained counsel or counsel has been appointed,<sup>13</sup> defense counsel will generally file written pre-trial motions. One of these pre-trial motions will often be a motion to suppress evidence.<sup>14</sup> It is in this written pleading that the defendant alleges a violation of his or her constitutional rights and preserves the issue for

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13. Of course, the defendant may have counsel even prior to the arrest. Regardless, the retention or appointment of counsel will precede the preliminary hearing. *See Adams v. Illinois*, 405 U.S. 278, 279 (1972).

14. *See* FED. R. CRIM. P. 12(b)(3)(C). However, in some state courts or in juvenile proceedings, there may be no requirement to file a motion to suppress pre-trial. *See, e.g., In re Victor B.*, 646 A.2d 1012, 1014 (Md. 1994)

further review.<sup>15</sup> The allegations vary, and there may be several allegations in a single motion (e.g., the traffic stop was made without reasonable suspicion, the arrest or search was not supported by probable cause, and the ensuing confession was coerced). Here, the defendant is moving to preclude the prosecution from being able to use at trial evidence—e.g., tangible evidence (drugs, weapons, documents, etc.), statements of the defendant (written or oral), or in- and out-of-court identifications of the defendant (photo array, show-up, or lineup)—which may have been obtained through a violation of the defendant's constitutional rights.<sup>16</sup> The motion can be filed regardless of the defendant's guilt or innocence.

### B. The Suppression Hearing

Perhaps as early as the arraignment, the court will have designated a pre-trial date for the motions hearing in which the motion to suppress will be litigated.<sup>17</sup> This all-important evidentiary hearing—the suppression hearing—can be succinctly described as “[a] . . . proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally.”<sup>18</sup> But as the Supreme Court observed in *Waller v. Georgia*,<sup>19</sup> as a practical matter, “suppression hearings often are as important as the trial itself.”<sup>20</sup> It should come as no surprise, then, that a ruling in a suppression hearing is often outcome determinative.<sup>21</sup> Put differently, whether a criminal defendant is ultimately convicted may turn not on his or her actual guilt or innocence but rather on whether the prosecution is permitted to adduce the evidence at issue as proof of guilt.

Far from a mere formality or empty procedural mechanism whereby “clearly” guilty defendants may escape punishment on so-called legal technicalities,<sup>22</sup> suppression hearings and the exclusionary remedies available at these hearings, *inter alia*, give substance to the constitutional guarantees that stand as a barrier to

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(holding that state rule requiring pre-adjudicatory motion to preserve objection to the admissibility of evidence at an adjudicatory hearing does not apply to juvenile proceedings).

15. See, e.g., *Lawn v. United States*, 355 U.S. 339, 353 (1958) (overruling of pretrial motion to suppress generally preserves point for review).

16. As a general proposition, if a motion to suppress is granted, not only is evidence that is obtained as a *direct result* of a violation of the defendant's rights excluded but also evidence that is only *indirectly* acquired through the underlying violation. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)). This is known as the “fruit of the poisonous tree” doctrine and works to exclude derivative evidence.

17. E.g., FED. R. CRIM. P. 12(c). Again, court practices vary according to local rule.

18. BLACK'S LAW DICTIONARY 1291 (5th ed. 1979).

19. 467 U.S. 39 (1984).

20. *Waller*, 467 U.S. at 46 (citation omitted).

21. See *United States v. Raddatz*, 447 U.S. 667, 677-78 (1980) (noting in dictum that “the resolution of a suppression motion can and often does determine the outcome of the case . . .”).

22. Cf. *Stein v. New York*, 346 U.S. 156, 196-97 (1953) (“We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty.”), *overruled by Jackson v. Denno*, 378 U.S. 368 (1964).

untrammelled State interference with our basic individual liberties and fundamental rights.<sup>23</sup> These pivotal hearings not only provide a forum for enforcing constitutional mandates but also safeguard the integrity of the fact finding process itself.<sup>24</sup> To be sure, such hearings sometimes operate to exclude highly probative evidence of guilt to deter future constitutional violations, which, as an incidental cost, may allow some guilty defendants to escape conviction. But, more importantly, these hearings also operate to exclude evidence that is false, misleading, or unreliable yet highly prejudicial. They thereby safeguard *actually innocent* defendants from wrongful conviction.<sup>25</sup>

The rules governing suppression hearings differ from those governing criminal trials.<sup>26</sup> The format of such hearings, however, strongly “resembles a bench trial: witnesses are sworn and testify, and . . . counsel argue their positions.”<sup>27</sup> Accordingly, the evidence adduced at a suppression hearing usually consists of the live testimony of witnesses. Defendants have a right to testify,<sup>28</sup> although taking the opportunity to do so is a tactical decision and may, in any event, be a futile effort.<sup>29</sup> Consequently, the vast majority of witnesses at suppression hearings are law enforcement agents called by the prosecution.<sup>30</sup> (When the issue to be determined is whether there was a constitutional violation based on the facts or circumstances surrounding, for example, a defendant’s putative written confession, it is likely that a police officer—not a civilian—was present when the alleged confession was made.)<sup>31</sup> Ultimately, the presumably neutral and detached magistrate presiding over the hearing will evaluate the evidence presented and decide whether a constitutional or evidentiary violation has occurred.

The dispositive importance of police officers’ testimony in suppression hearings

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23. See *infra* Parts II-III.

24. See *United States v. Jenkins*, 728 F.2d 396, 399 (6th Cir. 1984) (“In addition to protecting the rights of the defendant, the [suppression] hearing serves to prevent the perpetration of a fraud upon, and the making a mockery of, the judicial process.”), *cert. denied*, 439 U.S. 1115 (1979); see also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (exclusion justified by “imperative of judicial integrity”); *Gannett Co. v. De Pasquale*, 443 U.S. 368, 390 n.20 (1979) (noting, *inter alia*, that “the entire purpose of a pretrial suppression hearing is to ensure that the accused will not be unfairly convicted by contaminated evidence”).

25. See *infra* Parts IV-VII.

26. See *United States v. Matlock*, 415 U.S. 164, 172-73 (1974) (“[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence.”).

27. *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

28. See, e.g., FED. R. EVID. 104(d).

29. See *infra* Part VI.A-B; see also *United States v. Quesada-Rosal*, 685 F.2d 1281, 1283 (11th Cir. 1982) (“[U]se of prior inconsistent statements given at a suppression hearing can [generally] be used to impeach a defendant’s trial testimony.”).

30. See Charles L. Becton, *The Drug Courier Profile: “All Seems Infected That Th’ Infected Spy, As All Looks Yellow to the Jaundic’d Eye”*, 65 N.C. L. REV. 417, 469 (1987) (noting that “defendants rarely testify at suppression hearings”); see also Kathleen Mahoney, Comment, *Drug Trafficking at Airports—The Judicial Response*, 36 U. MIAMI L. REV. 91, 99 (1981) (“Arresting officers, unlike defendants, ordinarily are required to testify at suppression hearings.”).

31. See *infra* Part VI.A-B.

is readily apparent to courts, commentators, prosecutors, and defense attorneys alike.<sup>32</sup> The court's attention will be primarily focused on, for example, the testimony of the arresting officer as to the reason for the stop, the timing of the search, the administration of *Miranda*, or the method of interrogation. Those who are unfamiliar with criminal litigation may underestimate the extent to which officers recognize the pivotal nature of their testimony. Veteran police officers have participated in these hearings countless times, and many are seasoned courtroom affiants; moreover, most officers understand the significance of the pending motion and that, if it is granted, the defendant may be completely exonerated by virtue of suppression.<sup>33</sup> As a result, police officers' testimony at suppression hearings is regularly tainted with bias.<sup>34</sup> It is within this rubric that the trial judge must determine, after the close of the evidence, whether the prosecution has proven (stated more accurately, whether a police officer's testimony has

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32. See *infra* Part VI. As Christopher Slobogin has observed, the frequency with which police perjury occurs at suppression hearings is an open secret:

In one survey, defense attorneys, prosecutors, and judges estimated that police perjury at Fourth Amendment suppression hearings occurs in twenty to fifty percent of the cases. Jerome Skolnick, a veteran observer of the police, has stated that police perjury of this type is "systematic." Even prosecutors—or at least former prosecutors—use terms like "routine," "commonplace," and "prevalent" to describe the phenomenon. Few knowledgeable persons are willing to say that police perjury about investigative matters is sporadic or rare, except perhaps the police, and . . . even many of them believe it is common enough to merit a label all its own.

Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041-42 (1996) (citations omitted). And as Professor Welsh White elucidates: "While empirical data relating to judges' or juries' assessment of credibility in suppression of confession cases is lacking, it is generally believed that . . . where the confession's admissibility depends on whether the judge believes the police or the suspect's testimony, judges invariably believe the police." WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 192 (2001).

33. See *infra* notes 256-57 and accompanying text. Professor Morgan Cloud put it as follows:

Many officers become experienced witnesses. By virtue of their work they are likely to have testified many times, and to have refined and improved their techniques with practice. They are as comfortable in court as any witness who is likely to be subjected to vigorous cross-examination can be. As a result, their courtroom demeanor is likely to be good, and they are likely to tell stories bearing at least some indicia of substantive plausibility . . . . The problem is that some officers have learned to describe investigations that conform to constitutional requirements—regardless of the reality of the investigation.

Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1322 (1994); see *People v. Berrios*, 270 N.E.2d 709, 714-16 (N.Y. 1971) (Fuld, C.J., dissenting) (noting that even the then-District Attorney of New York County wrote in his brief that "'judges, prosecutors, defense attorneys and police officials—have privately and publicly expressed the belief that in some substantial but indeterminable percentage of dropsy cases, the [police] testimony . . . is tailored to meet the requirements of search-and-seizure rulings'"); see also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914-15, 917 (1991) (arguing that police officers shape their testimony at suppression hearings to conform to Fourth Amendment standards).

34. See *infra* Part VI.A. See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (containing a good discussion of police bias and how it may affect police testimony); Stuntz, *supra* note 33, at 914-15 (discussing reasons for police officer bias and the relationship between that bias and police perjury at suppression hearings).

established) the absence of a violation of the defendant's constitutional rights.<sup>35</sup>

However, the minimum burden of proof under which the Supreme Court has allowed these critical preliminary factual determinations to be made—i.e., the constitutional minimum—is merely a preponderance of the evidence.<sup>36</sup> With such a low burden of proof as the norm, it should come as no surprise, then, that the vast majority of motions to suppress are denied.<sup>37</sup> Many of those denials, however, are likely not a direct reflection of the merits of the defendants' claims but rather a function of the ease with which that low burden can be overcome. In other words, the controlling standard of proof in a suppression hearing is often dispositive on the merits.<sup>38</sup>

This Article, as alluded to earlier, addresses the overwhelming need to challenge the constitutionality of using the preponderance standard to adjudicate admissibility challenges raised under the Fifth and Fourteenth Amendments concerning the admissibility of criminal defendants' allegedly self-inculpatory statements as well as in- and out-of-court identifications.<sup>39</sup> As we have stated and will discuss in greater detail *infra*, the use of such a low burden of proof leads to erroneous denials of many meritorious suppression motions and effectively renders hollow many criminal defendants' core constitutional rights; more disturbingly, it contributes mightily to the problem of wrongful convictions.

In an attempt to illustrate the fundamental flaws with the use of the preponderance standard to adjudicate certain types of preliminary admissibility challenges, we begin with a comparative analysis. Below, we discuss the various standards of proof in American jurisprudence and their import. Indeed, in a very real sense, the use of different standards in various areas of litigation resonates far beyond the courthouse; for the choice of a particular standard of proof is a direct reflection of our society's hierarchy of values.<sup>40</sup> The following section attempts to elucidate

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35. See *infra* Part VI.A-B. See generally FED. R. CRIM. P. 12(d), (f).

36. See, e.g., *Lego v. Twomey*, 404 U.S. 477 (1971), reaffirmed by *Colorado v. Connelly*, 479 U.S. 157 (1986).

37. See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 226 (1987) (discussing that the data from his study of "the role and impact of motions to exclude evidence in felony criminal cases drawn from samples of nine middle-sized jurisdictions in three states (Illinois, Michigan, and Pennsylvania)" led him to conclude that "[t]he success rate of . . . motions [to suppress] is . . . marginal—about 17% of motions to suppress physical evidence are granted . . . , about 5% for identifications . . . , and 5% for confessions . . . ." (citation omitted)); see also *United States v. Bennett*, 514 A.2d 414, 417 (D.C. 1986) (Mack, J., dissenting) ("Without reference to statistics, I believe I can say with some degree of confidence, that the vast majority of motions to suppress evidence are denied by the trial courts.").

38. See Timothy J. Martens, *The Standard of Proof for Preliminary Questions of Fact Under the Fourth and Fifth Amendments*, 30 ARIZ. L. REV. 119, 122 (1988) (arguing that "the significance of the choice of standards [of proof] cannot be overstated"); see also Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 280 (1975); Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1309-11 (1977). See generally *State v. Robinson*, 351 N.E.2d 88, 91-92 (Ohio 1976) (containing a good overview of the concept); BLACK'S LAW DICTIONARY 1405 (6th ed. 1990) (defining "standard of proof" as "[t]he burden of proof required in a particular type of case").

39. U.S. CONST. amend. XIV; U.S. CONST. amend. V.

40. See *infra* Part II.B.

some of the problems with using the preponderance standard to make certain preliminary admissibility determinations in criminal cases.

## II. STANDARDS OF PROOF

### A. *The Three Burdens*

As a general proposition, our jurisprudence has produced three distinct standards of proof, which may be understood as existing on a continuum: proof by a preponderance of the evidence, proof by clear-and-convincing evidence, and proof beyond a reasonable doubt.<sup>41</sup> Each is distinct as to meaning and application.

At one end of the spectrum, the preponderance standard—the weakest standard of proof—as its name implies, merely requires proof by preponderant evidence (i.e., “taking the evidence as a whole, the fact to be proved is more probable than not”).<sup>42</sup> Because, as a definitional matter, the preponderance standard only requires that a material proposition be established as true with a probability of over fifty percent<sup>43</sup>—in essence, this standard merely requires that the factfinder have a degree of confidence marginally greater than he or she would if flipping a coin (i.e., a belief that the evidence is more than in equipoise)—“[t]he litigants thus share the risk of error in roughly equal fashion.”<sup>44</sup> In light of this lax evidentiary standard’s propensity to distribute the risk of erroneous fact finding evenly between the parties, this standard has been deemed entirely appropriate for the resolution of disputes in which “society has a minimal concern with the outcome”,<sup>45</sup> e.g., a “typical civil case involving a monetary dispute between private parties.”<sup>46</sup> More germane to this Article, this standard has also been deemed by the Supreme Court to be constitutionally sufficient for all preliminary fact finding in

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41. See *Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (outlining the three standards of proof along a spectrum). See generally *United States v. Fatico*, 458 F. Supp. 388, 403-06 (E.D.N.Y. 1978) (providing an overview of the various standards of proof courts employ).

42. *White v. Am. Int’l Group, Inc.*, 08-1238 (La. App. 5 Cir. 3/24/09), 11 So. 3d 21, 23 (2009); see *Beerman v. City of Kettering*, 237 N.E.2d 644, 651 (Ohio C.P. 1965) (“The preponderance of the evidence is defined as the greater weight of the evidence, evidence that is more probable, more persuasive and of greater probative value.”). See generally *James Wilsman, Felton v. Felton: A Case Study*, 45 CLEV. ST. L. REV. 579, 583 (1997) (providing a general overview of the preponderance standard).

43. See *United States v. Schipani*, 289 F. Supp. 43, 55-56 (E.D.N.Y. 1968) (“The level of burden of proof (persuasion) with respect to the material proposition will be . . . a preponderance— . . . the trier must be convinced, on the basis of his evaluation of the evidence, that the proposition is more probably true than false (50+% Probable for purposes of this analysis).”); *Martens, supra* note 38, at 122; see also *Fatico*, 458 F. Supp. at 403 (“Quantified, the preponderance standard would be 50+% Probable.”).

44. *Addington*, 441 U.S. at 423; see *Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (discussing the correlation between the use of the preponderance standard and erroneous results, the Court observed in dictum: “A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case.”).

45. *Addington*, 441 U.S. at 423.

46. *Id.*; see *In re Winship*, 397 U.S. 358, 371-72 (Harlan, J., concurring) (“In a civil suit between two parties for monetary damages . . . we view it as no more serious . . . for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.”)

criminal cases.<sup>47</sup>

In other cases, where the stakes are “higher” and the nature and extent of the litigants’ interests differ, the more rigorous clear-and-convincing standard of proof is used,<sup>48</sup> e.g., involuntary civil commitment proceedings,<sup>49</sup> deportation proceedings,<sup>50</sup> and termination-of-parental-rights hearings.<sup>51</sup> The clear-and-convincing standard is an intermediate burden of proof—i.e., “more than a mere preponderance, but not to the extent of such certainty as is required by beyond a reasonable doubt as in criminal cases”<sup>52</sup>—which has been defined as “that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.”<sup>53</sup> Unlike the preponderance standard, this heightened standard of proof serves as a procedural safeguard that shifts the risk of error to the party bearing the burden of proof.<sup>54</sup> The highest standard of proof—proof beyond a reasonable doubt—is reserved for criminal cases where, at least insofar as elements of the charged offense are concerned, its status as a constitutional imperative is axiomatic.<sup>55</sup> Although the beyond a reasonable doubt standard is not readily susceptible to definition, the following is

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47. See notes 97-111 and accompanying text.

48. See *Santosky*, 455 U.S. at 756 (“This Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’”) (quoting *Addington*, 441 U.S. at 424). See generally *Fatico*, 458 F. Supp. at 404-06 (detailing the circumstances in which the clear-and-convincing standard or its equivalent is used).

49. In concluding that the clear-and-convincing standard was constitutionally required at involuntary civil commitment proceedings, the Court reasoned that involuntary civil commitment constitutes a “significant deprivation of liberty that requires due process protection”: “The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” *Addington*, 441 U.S. at 425-27.

50. *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 285-86 (1966) (holding that, in light of the severe consequences of deportation, “no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true”); see also *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (“[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be clear, unequivocal, and convincing and not leave the issue in doubt.”) (internal quotations omitted).

51. In *Santosky*, in holding that “due process requires that the State support its allegations by at least clear and convincing evidence,” 455 U.S. at 748, in a termination-of-parental-rights hearing, the Court emphasized the “fundamental liberty interest of natural parents in the care, custody, and management of their child.” *Id.* at 753.

52. *Cross v. Ledford*, 120 N.E.2d 118, 123 (Ohio 1954)

53. *Id.*; accord *Fred C. Walker Agency, Inc. v. Lucas*, 211 S.E.2d 88, 92 (Va. 1975) (same). See generally *Fatico*, 458 F. Supp. at 404-06 (describing with specificity the clear-and-convincing standard).

54. *Cf. Woodby*, 385 U.S. at 285 (“[I]t does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.”).

55. See *In re Winship*, 397 U.S. at 364 (holding that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged”); see also *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). *But cf. Patterson v. New York*, 432 U.S. 197, 208 (1977) (“Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”).

one possible formulation of the concept:

It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.<sup>56</sup>

The principle that people cannot be convicted of a crime except upon proof beyond a reasonable doubt is not merely some transient and provincial notion, but an elementary precept of our system of jurisprudence.<sup>57</sup> Indeed, the fundamental notion of procedural due process enshrined in the Constitution subsumes within it a guarantee that, as a condition precedent to the imposition of criminal punishment on an individual, the State must affirmatively “pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime charged.”<sup>58</sup> The constitutionalization of this standard represents an effort to “give concrete substance to the presumption of innocence”<sup>59</sup>—the notion that, as Sir William Blackstone eloquently put it, “it is better that ten guilty persons escape than that one innocent suffer.”<sup>60</sup> The rationale undergirding the requirement of an enhanced standard of proof in criminal cases is bottomed on the nature of what is at stake (i.e., the accused’s liberty or, at times, life):<sup>61</sup> “[T]he interests of the defendant are of such

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56. CAL. PENAL CODE § 1096 (Deering 2008) (Presumption of Innocence; Definition); see *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (Mass. 1850) (opining that reasonable doubt “is a term often used, probably pretty well understood, but not easily defined” and analogizing the concept to “feel[ing] an abiding conviction, to a moral certainty” that a given proposition is true) (emphasis added); cf. *McCullough v. State*, 657 P.2d 1157, 1159 (Nev. 1983) (“The concept of reasonable doubt is inherently qualitative.”). As Professor Underwood explains, this standard of proof effectively gives criminal defendants a substantial advantage, because “so long as the evidence is not overwhelming, the dispute is too close for decision, and the loss falls on the government as the party with the burden.” Underwood, *supra* note 38, at 1301.

57. See Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457 (1989) (“The presumption [of innocence] has been called the ‘golden thread’ that runs throughout the criminal law, heralded as the ‘cornerstone of Anglo-Saxon justice,’ and identified as the ‘focal point of any concept of due process.’” (citation omitted)). See generally *Coffin*, 156 U.S. at 453-61 (detailing the historical origin and evolution of the presumption of innocence).

58. *In re Winship*, 397 U.S. at 364; *accord* *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“[N]o man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.”). In the words of Justice Harlan, “due process, as an expression of fundamental procedural fairness, requires a more stringent standard [of proof] for criminal trials than for ordinary civil litigation.” *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring). See also *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting) (“This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”).

59. *In re Winship*, 397 U.S. at 363. See generally Sundby, *supra* note 57, at 460 (explaining, “[t]he level at which the presumption of innocence is set reflects society’s weighing of . . . two injustices—acquitting the guilty and convicting the innocent . . .”).

60. 4 WILLIAM BLACKSTONE, COMMENTARIES 352 (1769).

61. See *In re Winship*, 397 U.S. at 363 (“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”).

magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.”<sup>62</sup>

### B. Reflection of Values

The choice of a particular burden of proof reflects a societal value judgment as to which party should bear the risk of fact finding errors. Writing for a unanimous Court, then-Chief Justice Burger observed in *Addington v. Texas*:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.<sup>63</sup>

As Justice Harlan elucidated in his concurring opinion in *In re Winship*, in a judicial proceeding involving a factual dispute, the factfinder can never know with absolute certitude what actually happened.<sup>64</sup> Instead, the factfinder will only be able to, at best, “acquire . . . a belief of what probably happened.”<sup>65</sup> By necessary implication, then, “the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions.”<sup>66</sup>

Given that factfinders will inevitably make mistakes, the precise burden of proof employed will, in criminal cases, *inter alia*, “influence the relative frequency” with which errors benefiting the guilty or, conversely, errors leading to the conviction of the innocent occur:

If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular

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62. *Addington v. Texas*, 441 U.S. 418, 423 (1979); see *Speiser*, 357 U.S. at 525-26 (“Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him,” in part, through requiring the State to establish the defendant’s guilt beyond a reasonable doubt.); see also *In re Winship*, 397 U.S. at 361 (noting that the beyond-a-reasonable-doubt standard “dates at least from our early years as a Nation”).

63. *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring)); see *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (“*Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.”).

64. *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring).

65. *Id.*; see *Speiser*, 357 U.S. at 525 (“There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account.”).

66. *In re Winship*, 397 U.S. at 370 (Harlan, J., concurring).

kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.<sup>67</sup>

As Justice Brennan opined in dictum in his dissent in *Lego*, then, the choice to use a particular standard of proof in criminal cases has substantial social costs: “Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent. Conversely, imposing the burden of proof beyond a reasonable doubt means that more defendants who are in fact guilty are found innocent.”<sup>68</sup> Consequently, as then-Chief Justice Burger observed in *Addington*, “even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a ‘standard of proof is more than an empty semantic exercise’”<sup>69</sup>—given the nature of the interests at stake, this proposition is true *a fortiori* in criminal trials.<sup>70</sup>

Writing for the Court in *In re Winship*, Justice Brennan emphasized the “vital role” that the beyond-a-reasonable-doubt standard of proof plays in our criminal law jurisprudence and advanced several cogent justifications—both pragmatic and normative—for utilizing it in criminal cases:

*It is a prime instrument for reducing the risk of convictions resting on factual error . . . .*

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot

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67. *Id.* at 371. As Justice Harlan explained in his concurring opinion in *In re Winship*,

In a civil suit between two private parties for money damages . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor . . . .

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

*Id.* at 371-72; cf. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1322-26 (1982) (outlining the results of surveys assessing the manner in which judges quantify each burden of proof).

68. *Lego v. Twomey*, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting).

69. *Addington*, 441 U.S. at 425 (citation omitted). In his view, “In cases involving individual rights, whether criminal or civil, [the] standard of proof [at a minimum] reflects the value society places on individual liberty.” *Id.* (quotation omitted) (alterations in original); see also McCauliff, *supra* note 67, at 1319 (“While burdens of proof analyzed from the point of view of the decisionmaker emphasize degrees of belief and the operation of probability theory, the same burdens examined from the point of view of societal values focus on the risk that the decision is incorrect.”).

70. See *supra* notes 55-62 and accompanying text.

adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with the utmost certainty.<sup>71</sup>

In stark contrast to civil litigation, in which the risk of error is in relative equipoise, in criminal cases “our society imposes almost the entire risk of error upon itself,” in large measure, through the beyond-a-reasonable-doubt standard.<sup>72</sup> As Professor Barbara Underwood has observed, the reasonable-doubt rule can be understood to “reduc[e] the likelihood of an erroneous conviction” by “tilting the scales in favor of the defendant.”<sup>73</sup> In the words of another scholar, Professor Barbara Underwood, this heightened burden functions to create a “deliberate imbalance in favor of the defendant”<sup>74</sup> and reflects “a societal judgment that an individual’s liberty interest transcends the state’s interest in obtaining a criminal conviction.”<sup>75</sup> Put differently, “the requirement of proof beyond a reasonable doubt in a criminal case . . . [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”<sup>76</sup>

That value determination, however, is not without limits: “mistakes are inevitable no matter how many precautions we take; the only way to prevent all risk of wrongful convictions is to prosecute no one.”<sup>77</sup> And when judicial emphasis is placed on crime-control values rather than individual rights, one can naturally expect resistance to any proposed expansion of the highest burden of proof. This normative conflict weighs heavily on our discussion.

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71. *In re Winship*, 397 U.S. at 363-64 (emphasis added); accord *Addington*, 441 U.S. at 428 (“The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free.”); cf. *Patterson v. New York*, 432 U.S. 197, 208 (1977) (“The social cost of placing the burden on the prosecution to prove guilt beyond a reasonable doubt is . . . an increased risk that the guilty will go free.”). See generally Underwood, *supra* note 38, at 1306-07 (noting that *inter alia*, reasonable-doubt “rule is meant to affect the outcome of individual cases, reducing the likelihood of an erroneous conviction”).

72. *Addington*, 441 U.S. at 424; cf. *In the Matter of Samuel W.* 247 N.E.2d 253, 259 (N.Y. 1969 (Fuld, C.J., dissenting)) (“Manifestly, a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.”), *overruled by In re Winship*, 397 U.S. at 372. See generally Underwood, *supra* note 38, at 1299-1306 (1977) (outlining the manner in which the beyond a reasonable doubt standard affects fact finding in criminal trials).

73. Underwood, *supra* note 38, at 1307.

74. Sundby, *supra* note 57, at 458.

75. *Id.*; see *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (“The stringency of the ‘beyond a reasonable doubt’ standard bespeaks the ‘weight and gravity’ of the private interest affected, society’s interest in avoiding erroneous convictions, and a judgment that those interests together require that ‘society [impose] almost the entire risk of error upon itself.’” (quoting *Addington*, 441 U.S. at 423-24 (alterations in original))).

76. *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring); see Sundby, *supra* note 57, at 461 (“Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.” (footnote omitted)).

77. Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 138 (2008).

### C. *Due Process versus Crime Control*

The dialectic between competing interests in criminal law has certainly aroused the intellectual curiosity of scholars. In his seminal article, “Two Models of the Criminal Process,” Professor Herbert Packer, in an effort to elucidate “the normative antinomy that runs deep in the life of the criminal law,” proposed two distinct, polarized models of the criminal justice system, embodying competing value systems: the Due Process Model and the Crime Control Model.<sup>78</sup> Notwithstanding the abstract nature of Professor Packer’s dichotomous models, his construct provides a useful lens through which to view the concrete question at hand: should the burden of proof be raised at some types of suppression hearings?

The dialectic between the two models, insofar as it is germane to this Article, can be briefly sketched as follows: the Crime Control Model is grounded in the notion “that the repression of criminal conduct is by far the most important function to be performed by the criminal process.”<sup>79</sup> Given its utilitarian, consequentialist emphasis on efficiency,<sup>80</sup> this model operates under an assumption that “preliminary screening processes operated by the police and the prosecuting officials contain adequate guarantees of reliable fact finding.”<sup>81</sup> (Suppression hearings, of course, would qualify as such a “preliminary screening process.”) Conversely, the Due Process Model rejects this premise and is largely animated by a fundamental “distrust of the fact finding process,” recognizing the possibility of human error and emphasizing the potential for mistakes in the fact finding process:

[P]eople are notoriously poor observers of disturbing events—the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion, so that the police end up hearing what the suspect thinks they want to hear rather than the truth; witnesses may be animated by a bias or interest that no one would trouble to discover except one specially charged with protecting the interests of the accused—which the police are not.<sup>82</sup>

Instead, the Due Process Model advocates the use of rigorous procedural safeguards to account for the possibility of human error,<sup>83</sup> and it emphasizes the central

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78. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5-7 (1964). For an insightful and thorough critique of Professor Packer’s proposed models, see generally Kent Roach, *Criminology: Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999); Findley, *supra* note 77.

79. Packer, *supra* note 78, at 9.

80. *Cf. id.* at 15 (“[T]he Due Process Model rejects [the Crime Control Model’s emphasis on efficiency]. If efficiency suggests shortcuts around reliability, those demands must be rejected. The aim of the process is at least as much to protect the factually innocent as it is to convict the factually guilty.”).

81. *Id.* at 13.

82. *Id.* at 14.

83. *Id.* at 14-15. Professor Packer further states:

role the adversarial system plays in ensuring accuracy in the criminal justice system.<sup>84</sup>

Professor Packer describes the juxtaposition of values this way:

Just as the Crime Control Model is more optimistic about the unlikelihood of error in a significant number of cases, it is also more lenient in establishing a tolerable level of error. The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime . . . .<sup>85</sup>

Professor Packer's construct thus frames the issue at a theoretical, normative level, for as Professor Scott Sundby observes: "How far we extend the presumption of innocence is an issue of balancing society's interest in controlling crime and society's interest in not convicting innocent individuals."<sup>86</sup>

But the question whether a higher standard of proof is a constitutional imperative in suppression hearings in which the admissibility of evidence is challenged based on alleged Fifth and Fourteenth Amendment violations concerns more than abstract, normative, or moral value judgments; it also necessarily implicates core constitutional rights.<sup>87</sup> As the Court has recognized in dictum in a different context, "[r]aising the standard of proof would [also] have both practical and

The ideology of due process is far more deeply impressed on the formal structure of the law than is the ideology of crime control . . . . The possibilities of human error being what they are, further scrutiny is necessary, or at least must be available, lest in the heat of battle facts have been overlooked or suppressed.

*Id.*

84. *Id.* at 9 ("The Crime Control Model tends to deemphasize this adversary aspect of the process; the Due Process Model tends to make it central."). *Cf.* ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* 40 (Greenwood Press 1992) (noting that, in recent years, the Court has embraced crime-control values at the expense of due-process norms); *Kansas v. Ventris*, 129 S. Ct. 1841, 1849 (2009) (Stevens, J., dissenting) ("Today's decision is lamentable . . . also because it is another occasion in which the Court has privileged the prosecution at the expense of the Constitution.").

85. Packer, *supra* note 78, at 15. *Cf.* Findley, *supra* note 77, at 147 (proposing a third model—the reliability model—which, in essence, merges Professor Packer's two models and instead "focus[es] on best practices to protect the innocent without sacrificing public safety").

86. Sundby, *supra* note 57, at 459. *But cf.* Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 592 (1990) (Professor Dripps submits that with respect to constitutional criminal procedure issues, "in constitutional terms the relevant value is not finding the truth but preventing unjust punishment").

87. *E.g.*, criminal defendants' Fifth Amendment privilege against compelled self-incrimination and right of silence, *see* *Miranda v. Arizona*, 384 U.S. 436, 468-470 (1966), and due process right against the use of a coerced confession at trial; *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964). The burden of proof with which alleged violations of criminal defendants' rights are adjudicated significantly affects their actual prospects for vindicating those rights: the lower the burden of proof the State is required to meet, the more likely it is that the State will be able to establish the absence of a constitutional violation (even where the defendant's constitutional rights were, in fact, infringed), and vice versa.

symbolic consequences.”<sup>88</sup>

With that said, the *Lego* majority analyzed the question whether the Constitution required a heightened burden of proof at *Jackson* hearings through the lens of the Crime Control Model;<sup>89</sup> innocence values were treated as an ancillary concern.<sup>90</sup> But the *Lego* opinion is unusual in that, in apparent recognition that the factual assumptions undergirding its holding may have been flawed, the Court almost explicitly left open the possibility that its holding could be revisited if empirical evidence demonstrated that the standard of proof it enunciated was insufficient to protect criminal defendants’ constitutional rights.<sup>91</sup>

### III. *LEGO V. TWOMEY*

#### A. *History, Holding, and Connelly’s Extension*

The line of Supreme Court cases holding that the preponderance standard is constitutionally sufficient to resolve admissibility issues in criminal cases traces its genesis to *Lego v. Twomey*,<sup>92</sup> where the Court held, 4-3, that the preponderance standard was adequate to safeguard defendants’ due-process rights during voluntariness hearings.<sup>93</sup> A careful parsing of the *Lego* opinion, however, reveals its shortcomings. As we will discuss below, *Lego*’s holding is based on dubious—if not patently false—factual assumptions and reasoning that is specious at best, if not outright disingenuous.<sup>94</sup> Fortunately, however, and rightfully so, the opinion leaves open the possibility of revisiting its holding.<sup>95</sup>

The *Lego* decision, in large measure, was borne out of the Court’s decision in

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88. *Santosky v. Kramer*, 455 U.S. 745, at 764 (1982); see Martens, *supra* note 38, at 127-28 (arguing that “[i]ncreasing the burden of proof [at suppression hearings] . . . impresses the factfinder with the importance of the decision and reduces the risk that illegally obtained evidence will be admitted”); see also Saltzburg, *supra* note 38, at 282-83.

89. See generally *United States v. Mostellar*, 165 Fed. App’x 831 (11th Cir. 2006). The court stated:

Under *Jackson v. Denno*, a defendant has a right “to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness [i.e., a *Jackson* hearing].”

A *Jackson* hearing is “constitutionally mandated for a defendant who timely urges that his confession is inadmissible because not voluntarily given.”

*Id.* at 835 (citations omitted). When the issue at a suppression hearing, discussed *supra*, is the voluntariness of a confession, the hearing may be specifically referred to as a *Jackson* hearing.

90. See *infra* Part III.

91. See *infra* notes 123-25, 274-77 and accompanying text.

92. 404 U.S. 477, 489 (1972) (holding that “the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary”); accord *Colorado v. Connelly*, 479 U.S.157, 168-69 (1986) (holding, *inter alia*, that the prosecution must prove waiver of *Miranda* rights by a preponderance of the evidence); *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974) (in resolving a Fourth Amendment issue, the Court noted in dictum that “the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence”).

93. *Lego*, 404 U.S. at 489. For a brief recitation of the underlying facts, see *supra* note 3.

94. See *infra* Parts IV-VII.

95. See *Lego*, 404 U.S. at 488-89.

*Jackson v. Denno*,<sup>96</sup> which held that a criminal defendant challenging the admissibility of a confession on the ground that it was coerced is constitutionally entitled to “an adequate evidentiary hearing productive of reliable results concerning the voluntariness of his confession.”<sup>97</sup> Although it addressed, in general terms, the constitutional requirements of a voluntariness hearing, the *Jackson* Court declined to delineate the applicable burden of proof,<sup>98</sup> which contributed to a divergence of authority on that issue.<sup>99</sup>

Eight years after the *Jackson* decision, the Court granted certiorari in *Lego v. Twomey* to close that interstice and resolve a split among the circuits and state courts,<sup>100</sup> and it directly addressed a question left open by the *Jackson* Court: precisely what burden of proof, if any, must the prosecution meet at a *Jackson* voluntariness hearing to comply with due process-based constitutional strictures?<sup>101</sup> In a narrow 4-3 decision,<sup>102</sup> over a vigorous dissent, the *Lego* majority held that, consistent with the Constitution, the prosecution need only establish the voluntariness of a confession by a preponderance of the evidence.<sup>103</sup> According to Professor Stephen Saltzburg, the four-justice majority reached its holding “[w]ith

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96. 378 U.S. 368 (1964).

97. *Id.* at 394. The *Jackson* Court noted that such a hearing must be conducted by a factfinder other than the “convicting jury.” *See id.* at 392-95. During a so-called *Jackson* hearing, “both the underlying factual issues and the voluntariness of [the challenged] confession are . . . determined.” *Id.* at 380. It should be noted that *Jackson* concerns the admissibility of an allegedly coerced confession (i.e., whether the jury may consider it as substantive evidence of guilt). This is separate and distinct from the issue of an alleged confession’s credibility, which, provided it is deemed voluntary and admitted into evidence, is left up to the jury. *See id.* at 386-87, n.14; *see also Lego*, 404 U.S. at 485 (“Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions.”).

98. *See Jackson*, 378 U.S. at 404-05 (Black, J., dissenting in part and concurring in part) (opining that “[a]nother disadvantage to the defendant under the Court’s new rule is the failure to say anything about the burden of proving voluntariness”).

99. *See Lego*, 404 U.S. at 480, n.1 (stating that “since *Jackson*, state and federal courts have addressed themselves to the [burden of proof] issue with a considerable variety of opinions”).

100. *See id.* at 478-80, n.1 (highlighting the divergence of authority regarding the appropriate standard of proof at voluntariness hearings). *See generally* Saltzburg, *supra* note 38, at 276, n.19 (noting conflicting authority).

101. *See Lego*, 404 U.S. at 484.

We did not think it necessary, or even appropriate, in *Jackson* to announce that prosecutors would be required to meet a particular burden of proof in a *Jackson* hearing held before the trial judge. Indeed, the then-established duty to determine voluntariness had not been framed in terms of a burden of proof . . . .

*Id.*; *Jackson*, 378 U.S. 368; *see also* Saltzburg, *supra* note 38, at 272 n.4 (“Almost no scholarly attention has been given to the standards that the factfinder should use in resolving preliminary fact questions . . .”).

102. As Professor Stephen Saltzburg explains, “[t]he case was briefed and argued before Justices Powell and Rehnquist joined the Supreme Court bench.” Saltzburg, *supra* note 38, at 275 n.13.

103. *Lego*, 404 U.S. at 489. It should be noted, however, that *Lego* addressed only the minimum quantum of proof required by the United States Constitution. Justice White explained, “[o]f course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.” *Id.* As Professor Stephen Saltzburg notes, the *Lego* Court “assume[d] that the prosecution bears the burden of proof, and this assumption had been virtually universal on the part of lower courts.” Saltzburg, *supra* note 38, at 277 n.21.

surprising ease”;<sup>104</sup> indeed, if his assertion that “[w]ithout explicitly stating as much, the four Justices whose position prevail[ed] assume[d] that the preponderance of the evidence standard is appropriate for purposes of deciding preliminary facts” is accurate,<sup>105</sup> then the Court’s conclusion was, in essence, a *fait accompli*. For, as he points out, the Court seemed to *ipse dixit* subscribe to the so-called traditional evidentiary view that the preponderance standard should govern *all* admissibility determinations involving preliminary factual questions.<sup>106</sup>

Eighteen years after *Lego* prescribed the preponderance standard as the constitutional minimum standard of proof for resolving preliminary factual disputes regarding the voluntariness of alleged confessions, *Colorado v. Connelly*<sup>107</sup> was decided.<sup>108</sup> In *Connelly*, five members of the Supreme Court took the highly unusual step of deciding an “issue neither raised nor briefed by either party”:<sup>109</sup> whether merely requiring the prosecution to prove waiver of *Miranda* rights by preponderant evidence was constitutionally sufficient.<sup>110</sup>

Not surprisingly, the five justices who elected to decide that issue both reaffirmed *Lego*’s basic holding and extended it to alleged *Miranda* violations.<sup>111</sup> Writing for the *Connelly* majority, then-Chief Justice Rehnquist cursorily summarized (or parroted) the *Lego* majority’s rationale and reasoned syllogistically: “If, as we held in *Lego v. Twomey*, the voluntariness of a confession need be

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104. Saltzburg, *supra* note 38, at 276.

105. *Id.* at 277.

106. *See id.* at 273-76, nn.5-7; *see also* *Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (noting that the Supreme Court has “traditionally required” that admissibility determinations hinge on preliminary questions of fact “be established by a preponderance of proof”).

107. 479 U.S. 157 (1986).

108. *Id.* The underlying facts of *Connelly* are rather bizarre and not particularly germane to this Article. *See id.* at 160-64 (outlining relevant facts). It is sufficient here to note that the petitioner in *Connelly* suffered from a severe mental illness and was apparently experiencing “command hallucinations” when he approached an off-duty police officer and confessed to a murder. *See id.* at 161. The Court ostensibly granted *certiorari* in that case to address the question whether “the United States Constitution requires a court to suppress a confession when the mental state of the defendant, at the time he made the confession, interfered with his ‘rational intellect’ and his ‘free will,’” because that confession was involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Id.* at 159. With respect to that issue, the Court held 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.” *Id.* at 167.

109. *Id.* at 84 n.5 (Brennan, J., dissenting); *see id.* at 171 (Blackmun, J., concurring in part and concurring in the judgment) (noting the burden of proof “issue was neither raised nor briefed by the parties, and . . . is not necessary to the decision”); *id.* at 173-74 (Stevens, J., concurring in the judgment in part and dissenting in part) (dissenting “from the Court’s disposition of the question that was not presented by the certiorari petition,” concerning the applicable burden of proof); *see also* *Colorado v. Connelly*, 474 U.S. 1050, 1051 (1986) (Brennan, J., dissenting from briefing order) (“The Court’s treatment of this case provides another clear example of why there is concern that the Court engages in injudicious efforts to assist prosecutors. *Today, the Court takes the unprecedented step of rewriting a prosecutor’s certiorari petition for him . . .*” (emphasis added)).

110. *See Connelly*, 479 U.S. at 168.

111. *See id.* (“We now reaffirm our holding in *Lego*: Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence.”).

established only by a preponderance of the evidence, then a waiver of the auxiliary protections established in *Miranda* should require no higher burden of proof.”<sup>112</sup> In essence, that was the extent of his analysis.

Although the *Lego* and *Connelly* Courts ostensibly addressed a relatively narrow question, their rationales and holdings have been broadly construed and widely applied, particularly in the federal courts.<sup>113</sup> To be sure, the primary question addressed in *Lego v. Twomey* may, at first glance, seem rather arcane; indeed, the quantum of proof required at a suppression hearing may seem to be an issue of ancillary—if not tangential—relevance to the outcome of the case.<sup>114</sup> In suppression hearings in which alleged Fifth and Fourteenth Amendment constitutional violations are litigated, however, the ramifications of the particular burden of proof that is employed cannot be overstated.<sup>115</sup>

At bottom, the petitioner in *Lego* argued that the procedural rubric within which the voluntariness of his extrajudicial confession was litigated was constitutionally deficient because the prosecution was not required to prove beyond a reasonable doubt that his confession was, in fact, voluntarily rendered.<sup>116</sup> In support of his contention that the highest standard of proof—proof beyond a reasonable doubt—was constitutionally mandated at voluntariness hearings, he raised two principle arguments:<sup>117</sup> (1) “he was not proved guilty beyond a reasonable doubt as required by *In re Winship* . . . , because the confession used against him at his trial had been proved voluntary only by a preponderance of the evidence”;<sup>118</sup> and (2) even assuming arguendo that *In re Winship* was inapposite, “evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to those values that exclusionary rules are designed to serve.”<sup>119</sup>

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112. *Id.* at 169; see Martens, *supra* note 38, at 127 n.70 (“The *Connelly* majority relied on the Court’s analysis in *Lego v. Twomey* for the proposition that the voluntariness determination is not related to the reliability of jury verdicts.” (citation omitted)).

113. See, e.g., *Connelly*, 479 U.S. at 169 (applying *Lego*’s holding to *Miranda* waivers); *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984) (addressing alleged Fourth Amendment violation and citing *Lego* for the proposition that “the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence” (citing *Matlock*, 415 U.S. at 178 n.14)); see Saltzburg, *supra* note 38, at 276 n.18 (*Lego* “derives its importance from its complete rejection of the beyond a reasonable doubt standard of proof in a context (i.e., voluntariness of confessions) that makes the applicability of this standard in any other context unlikely, at least in federal courts.”).

114. *But see* *United States v. Schipani*, 289 F. Supp. 43, 55 (E.D.N.Y. 1968) (acknowledging that with respect to a motion to suppress, “the precise weight of the government’s burden may” be outcome determinative).

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

116. See *United States ex rel. Lego v. Pate*, 308 F. Supp. 38, 40 (N.D. Ill. 1970), *aff’d*, *Lego*, 404 U.S. at 482-89.

117. The *Lego* Court cursorily rejected as without merit the “petitioner’s final contention that, even though the trial judge ruled on his coercion claim, he was entitled to have the jury decide the claim anew,” *Lego*, 404 U.S. at 489, which is beyond the scope of this article.

118. *Id.* at 482.

119. *Id.* at 487.

With respect to the majority's first assertion, Justice White, writing for the majority, posited that "[i]mplicit in the claim [that the evidentiary procedure at issue contravenes *In re Winship's* constitutional mandate] is an assumption that a voluntariness hearing is designed to enhance the reliability of jury verdicts."<sup>120</sup> In other words, in Justice White's view, that argument was implicitly grounded in the notion that "the purpose of a voluntariness hearing is . . . to implement the presumption of innocence."<sup>121</sup> In summarily dismissing as without merit the argument that voluntariness hearings require "the highest standard of proof . . . [in order] to insure the reliability of jury verdicts,"<sup>122</sup> Justice White opined:

Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*. . . . A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard.<sup>123</sup>

After acknowledging that the argument that the beyond a reasonable doubt standard was constitutionally required to meaningfully safeguard the values and policies undergirding the exclusionary rules "is straightforward and has appeal," the *Lego* Court dispensed with the petitioner's second claim on the ground that those independent values, in themselves, do not necessitate a heightened burden of proof in judging admissibility: "[W]e are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt."<sup>124</sup>

Furthermore, without recognizing a distinction between the rationale and substantive basis for exclusion under the Fifth or Fourteenth Amendments and the rationale and substantive basis for exclusion under the Fourth Amendment,<sup>125</sup> the

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120. *Id.* at 482. *In re Winship*, 397 U.S. 358 at 364 (1969), dispelled any doubts concerning the "constitutional stature of the reasonable-doubt standard" in criminal cases and "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

121. *Lego*, 404 U.S. at 487.

122. Saltzburg, *supra* note 38, at 277.

123. *Lego*, 404 U.S. at 486-87 (citing *In re Winship*, 397 U.S. 358). According to Justice White, "*Winship* went no further than to confirm the fundamental right that protects 'the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Id.* at 486 (quoting *In re Winship*, 397 U.S. at 363).

124. *Id.* at 488.

125. Compare *United States v. Raddatz*, 447 U.S. 667, 678 n.4 (1980) ("[T]he exclusion of involuntary confessions derives from the [Fifth] Amendment itself.") (quoting *United States v. Janis*, 428 U.S. 433, 443-44 (1976)), and *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) ("When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: *protection of the courts from reliance on untrustworthy evidence.*" (emphasis added)), with Pa. Bd. of Prob. &

majority engaged in value-neutral cost-benefit analysis and reasoned:

This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.<sup>126</sup>

Finally, in support of its conclusion that the Constitution does not compel a stricter standard of proof, the *Lego* Court, in essence, advanced an almost utilitarian, quasi-“no-harm, no-foul” justification for adhering to the traditional view that preliminary findings of fact need only be established by a preponderance of the evidence:<sup>127</sup>

[F]rom our experience over *this period of time no substantial evidence has accumulated* that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that *admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time.*<sup>128</sup>

### B. *Lego*: Open to Reconsideration?

The *Lego* opinion is unusual in that the majority used provisional language, which perhaps reflected a tacit recognition that it confronted an issue of first impression. The Court's holding, moreover, intimated that although the values served by the exclusionary rules, standing alone, were insufficient to justify a stricter standard of proof, an empirically demonstrable correlation between the lower standard of proof used to judge admissibility and either the unreliability of admissibility rulings (or jury verdicts) or substantial evidence that federal constitutional rights have suffered as a result of determining admissibility by the prepon-

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Parole v. Scott, 524 U.S. 357, 362 (1998) (noting a Fourth Amendment violation occurs when evidence seized illegally rather than when it is used). See *infra* Part V. See generally Martens, *supra* note 38, at 123 (observing that the Fifth Amendment's exclusionary rules are justified by different considerations than the Fourth Amendment's exclusionary rule).

126. *Lego*, 404 U.S. at 489.

127. See Saltzburg, *supra* note 38, at 276 (characterizing the *Lego* decision as a “leading example of the traditional evidentiary approach to preliminary fact questions”).

128. *Lego*, 404 U.S. at 488-89 (emphasis added); see also Martens, *supra* note 38, at 124 (noting that “[i]n support of its holding, the [*Lego*] Court cited a lack of evidence that constitutional rights had suffered from the use of a lower standard for determining admissibility”).

derance standard may warrant a reevaluation of the issue presented.<sup>129</sup> Thus, the *Lego* Court's opinion can fairly be read to indicate that an empirically demonstrable causal nexus between the preponderance standard and either the abridgment of individuals' constitutional rights or the reliability of admissibility decisions, considered in conjunction with the abstract values served by the exclusionary rules, may require—as a matter of constitutional law—the adoption of a more stringent standard of proof at certain types of admissibility hearings in criminal cases.

With that said, in light of not only the Supreme Court's subsequent constitutional criminal procedure jurisprudence but also empirical evidence that casts serious doubt on the factual assumptions relied upon by the *Lego* majority, its holding and rationale are open to serious question on several grounds: first, the *Lego* Court's holding, in large measure, rests on the flawed, unsupported factual assumption that a lower standard of proof does not adversely affect the reliability of jury verdicts.<sup>130</sup> Second, in dismissing the petitioner's ancillary values-based argument, the majority mistakenly conflated the rationales and policy considerations undergirding several constitutionally distinct exclusionary rules,<sup>131</sup> thereby failing to accord appropriate deference to the innocence values served by the exclusion of involuntary confessions.<sup>132</sup>

And third, both the practical realities in the courtroom, including the prevalence of police perjury and judicial bias at suppression hearings, and subsequent technological developments—most notably the advent of DNA testing, which has provided compelling evidence that federal rights have indeed suffered from determining admissibility by a preponderance of the evidence—have provided precisely the “good cause” for revisiting its holding contemplated by the *Lego* Court.<sup>133</sup> These issues will each be addressed in turn.

#### IV. ANSWERING THE CALL TO REVISIT *LEGO*: COERCED CONFESSIONS AND RELIABILITY

##### A. Presenting Juries with Unreliable Evidence

As Professor Stephen Saltzburg points out, because “Justice White concedes that the Court has always recognized reliability problems with coerced confessions,”<sup>134</sup> his denial of any nexus between the reliability of jury verdicts and the standard of proof used to determine the admissibility of allegedly coerced

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129. See *Lego*, 404 U.S. at 488-89.

130. As Professor Saltzburg correctly opines: “[T]he fatal flaw in *Lego* is too much reliance upon the unsupported, and probably unsupportable, assertion that the decision would have no impact on the reliability of jury verdicts.” Saltzburg, *supra* note 38, at 280.

131. See *infra* Parts IV-V.

132. See *infra* Parts IV-V.

133. See *supra* notes 126-28 and accompanying text. Cf. *infra* Parts VI-VII.

134. Saltzburg, *supra* note 38, at 279.

confessions is problematic, if not an outright *non sequitur*.<sup>135</sup> To be sure, as Justice White correctly points out, the *test* used to determine whether a challenged confession is voluntary is utterly divorced from the probable veracity of that confession, and rightly so;<sup>136</sup> because the use of coerced confessions is constitutionally objectionable not only due to the danger that they are false or unreliable but also because the methods used to obtain them are offensive to some of our society's core values.<sup>137</sup> In other words, "the likelihood that the confession is untrue . . . is [not] the sole interest at stake."<sup>138</sup> Rather, the categorical proscription against the use of coerced confessions instead gives concrete substance to a "complex of values" that—even today—undergirds this constitutional stricture, all of which are inextricably intertwined.<sup>139</sup>

Neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake . . . . "The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."<sup>140</sup>

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135. *Id.*; see *Lego*, 404 U.S. at 486 ("[T]he purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts . . . .").

136. See *Lego*, 404 U.S. at 484 n.12; see also *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993) (describing the due process-based "totality of the circumstances" test for whether a confession is voluntary and providing nonexclusive list of factors considered); *Culombe v. Connecticut*, 367 U.S. 568, 603-06 (1961) (discussing the due process voluntariness test in detail); 21A CAL. JUR. 3D CRIMINAL LAW: TRIAL § 629 (2009) (noting both state and federal courts "apply a 'totality of circumstances' test to determine . . . voluntariness").

137. See *Rogers v. Richmond*, 365 U.S. 534, 540-541 (1961) (opining that coerced confessions are excluded "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . ."); *Rochin v. California*, 342 U.S. 165, 172-3 (1952) (explaining that states may not base convictions on coerced confessions); cf. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 533 (2003) (explaining that, at common law, there were three overlapping rationales for suppressing confessions: "(1) to prevent unreliable evidence from reaching the jury; (2) to use only statements taken without coercion; (3) to prove guilt only with statements that manifest a minimal level of mental freedom . . ."); WHITE, *supra* note 32, at 2 ("The exclusionary rule [regarding coerced confessions] was animated by both a skepticism as to coerced statements' reliability and a concern for protecting individual autonomy.").

138. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); see *United States v. Jones*, 23 C.M.R. 87, 90 (C.M.A. 1957) ("While it is true that an involuntary confession may be untrustworthy and hence unworthy of belief, it is also true that a confession may be absolutely truthful yet inadmissible because of involuntariness."); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("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.").

139. *Blackburn*, 361 U.S. at 207. But see *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." (internal citation omitted)).

140. *Blackburn*, 361 U.S. at 207 (quoting *Spano v. New York*, 360 U.S. 315, 320-21 (1959)); see also Noel Moran, Comment, *Confessions Compelled by Mental Illness: What's an Insane Person to Do?*, 56 U. CIN. L. REV. 1049, 1053 (1988) ("Other articulated values . . . include the deterrence of coercive police behavior and the inherent unfairness of convicting the accused based on a coerced confession."). See generally *State v. Glover*,

To be sure, the Court's recent confession jurisprudence indicates that reliability has been relegated to an ancillary concern.<sup>141</sup> In the past century, there has been a noticeable shift in the doctrinal underpinnings of the Court's confession jurisprudence, with an increasing emphasis on the need to curb abusive police practices.<sup>142</sup> In part, this shift may be attributed to the Court's evolving interpretation of the various constitutional provisions it has construed so as to include proscriptions against the admission of coerced statements in criminal trials<sup>143</sup>—e.g., the Court's recent propensity to analyze confession cases under the Fifth Amendment's Self-Incrimination Clause rather than the Fourteenth Amendment's Due Process Clause.<sup>144</sup>

Irrespective of whether reliability is still the juridical touchstone for evaluating the admissibility of confessions, however, the use of coerced confessions as substantive evidence of guilt does implicate reliability values.<sup>145</sup> That the voluntariness of confessions is evaluated without reference to their probable truth or falsity, for example, does not mean that, as an empirical matter, the question whether a

343 So. 2d 118, 130-31 (La. 1977) (discussing *Blackburn*); Scott A. McCreight, Comment, *Colorado v. Connelly: Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207, 211 (1987) ("By the early 1960s, the Court had recognized that the due process voluntariness doctrine protected a 'complex of values,' representing at least three separate concerns": addressing the problem of police coercion, ensuring the reliability of suspects' confessions, and respect for the dignity of the individual.)

141. See, e.g., *Connelly*, 479 U.S. at 165-66 ("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.") (quoting *Lisenba*, 314 U.S. at 236)); see also OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 17 (1973) ("Current Supreme Court restrictions on the admissibility of confessions bear little resemblance, either in scope or in purpose, to the original English common-law rule excluding involuntary confessions . . . [which] was . . . aimed not at objectionable interrogation practices per se, but at the protection of the defendant against an erroneous conviction.").

142. See Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 239 & n.124 (2006). Davies stated:

The shift from reliability to police methods as the primary rationale for suppressing confession evidence occurred during the early part of the twentieth century, after the Supreme Court began to base its orders of exclusion on Fifth Amendment privilege and due process grounds rather than evidentiary grounds, thereby 'constitutionalizing' the law of confessions.

*Id.* at 239; see also George E. Dix, *Federal Constitutional Confession Law: The 1985 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 263-64 (1988) ("Whether this shift in emphasis reflected a perception that confession cases no longer implicated reliability interests or an expansion of due process to include dignity as well as reliability concerns is not clear, but the flavor of the cases strongly suggests the latter.") [hereinafter *Constitutional Confession Law*].

143. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (analyzing admissibility of defendants' statements under Fifth Amendment); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (invoking Due Process Clause to reverse a criminal conviction based on a confession obtained by physical coercion); *Bram v. United States*, 168 U.S. 532, 542 (1897) (explaining voluntariness inquiry "controlled by . . . the Fifth Amendment['s] Self-Incrimination Clause"); see also *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (holding that the Sixth Amendment mandated exclusion of incriminating statements "deliberately elicited from [an indicted accused] in the absence of his counsel").

144. See McCreight, *supra* note 140, at 212-14 (noting trend toward analyzing confessions under Fifth and Sixth Amendments).

145. See *infra* notes 149-188 and accompanying text; see also *infra* Part VII.

given confession is coerced is divorced from the question whether that confession is reliable and trustworthy.<sup>146</sup> Quite the contrary, the two questions are very much interrelated, for police coercion can and does lead to false confessions, which, in turn, often lead to wrongful convictions.<sup>147</sup>

Writing for the majority in *Escobedo v. Illinois*,<sup>148</sup> Justice Goldberg elucidated the following “lesson of history, ancient and modern”: “[A] system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, *be less reliable* and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.”<sup>149</sup> Indeed, as Professor Akhil Amar suggests, reliability was among the core concerns that impelled the development of constitutional proscriptions against the use of compelled self-inculpatory statements:<sup>150</sup> “[T]he clear meaning of the rule against compelled self-incrimination—that self-incriminating words compelled from a defendant must be excluded from his criminal case—and the best reason underlying that

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146. See *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) (“We have . . . not required a finding of reliability for involuntary confessions only because *all* such confessions have been excluded upon a finding of involuntariness, regardless of reliability.”) (emphasis in original); see also *Hopt v. Utah*, 110 U.S. 574, 85 (1884) (noting that “the presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made” involuntarily).

147. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901-10 (2004) (exploring the relationship between police coercion and false confessions); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) (discussing how frequently police induce false confessions); see also *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (noting that reviewing court must “exercise extreme caution” before determining an involuntary confession harmless beyond a reasonable doubt); *Michigan v. Tucker*, 417 U.S. 433, 448 (1974) (explaining that pressure associated with coerced confession “may override a particular suspect’s insistence on innocence”).

148. 378 U.S. 478 (1964).

149. *Id.* at 488-489 (emphasis added); see 8 WIGMORE, EVIDENCE 309 (3d ed. 1940) (observing that in “[a]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof . . . [.] ultimately, the innocent are jeopardized” (emphasis in original)); *Constitutional Confession Law*, *supra* note 142, at 256 (“Historically, the common-law courts sought to protect . . . [criminal defendants’ accuracy] interest. Their perception that juries’ reliance on confessions sometimes endangered defendants’ interest in trial accuracy led them to impose the condition of voluntariness on the admissibility of defendants’ confessions.”); see also Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 321 (1998) (“By the late eighteenth century, treatise writers were describing a general rule forbidding the admission of involuntary confessions on the basis of their untrustworthiness.”); WHITE, *supra* note 32, at 2 (noting that “by the sixteenth century, the English common-law courts stated that using torture to obtain a confession was impermissible”); *Dist. Atty’s Office v. Osborne*, 129 S. Ct. 2308, 2322 n.4 (2009) (“requirement . . . that confessions be voluntary had ‘roots’ going back centuries”).

150. At this juncture, it should be noted that several constitutional provisions may be invoked to challenge the admissibility of confessions. See Penney, *supra* note 150, at 310 (“In the past one hundred years, the admissibility of confessions has been dealt with under the auspices of the common law of evidence; prompt appearance legislation; and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.”); see also *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (discussing various constitutional provisions used to challenge admissibility of confessions).

rule—[is] reliability . . . .”<sup>151</sup> And, in fact, as Professor Yale Kamisar points out, the “voluntariness” test traces its genesis to concerns regarding the reliability of coerced confessions:

[T]he “voluntariness” test started out as a rule protecting against the danger of untrustworthy confessions. It is also true that for a long time thereafter the rule that a confession was admissible so long as it was “voluntary” was more or less an alternative statement of the rule that a confession was admissible so long as it was free of influence that made it unreliable or “probably untrue.”<sup>152</sup>

The idea that involuntary confessions should be excluded, in part, because they are inherently unreliable is no mere transient or provincial notion; rather, it is as deeply rooted in our history and jurisprudence as the presumption of innocence.<sup>153</sup> Indeed, as Professor Welsh White has pointed out, at common law, concern as to the reliability of a confession was a *sine qua non* for its exclusion—that is, a confession was not excluded on the ground that it was the product of coercion—and when English and early American courts characterized a confession as involuntary, what they were really saying was that it was *untrustworthy*.<sup>154</sup>

Accordingly, the Supreme Court has recognized on numerous occasions—

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151. Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 859 (1995). *But see* *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (stating that “the Fifth Amendment’s privilege against self-incrimination is not an adjunct to the ascertainment of truth”).

152. Yale Kamisar, Response, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 937 (1995) [hereinafter “*Fruits*”]; *see* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 93 (1989) (observing that, historically, the “concern with ‘voluntariness’ stemmed from the recognition that a tortured confession might be false”).

153. Sir William Blackstone, for example, evinced a concern with the reliability of confessions, noting that “hasty, unguarded confessions, made to persons having no such authority [as magistrates] . . . are the weakest and most suspicious of all testimony . . . seldom remembered accurately, or reported with due precision.” 4 BLACKSTONE, COMMENTARIES \*357. *See, e.g.*, *R. v. Warickshall*, 168 Eng. Rep. 234, 236 (K.B. 1783); *Bram v. United States*, 168 U.S. 532, 542-49 (1897) (noting that historically the exclusion of coerced statements has been grounded, in part, in the need to advance reliability interests); *see also* WHITE, *supra* note 32, at 2 (“By the seventeenth century, it was recognized both in England and on the Continent that . . . [abusive interrogation] practices w[ere] likely to produce false confessions.”); Amar & Lettow, *supra* note 151, at 865 (“Some leading Framers thought of the Self-Incrimination Clause as a protection against torture, which might often lead to unreliable confessions.”); *Clifton v. United States*, 371 F.2d 354, 362 (D.C. Cir. 1966) (Leventhal, J., concurring) (voluntariness hearings “ha[ve] the deepest roots in our Constitution and system of jurisprudence”), *cert. denied*, 386 U.S. 995 (1967). *See generally* Penney, *supra* note 150, at 314-32 (outlining the history and development of our early confession jurisprudence); *Miranda v. Arizona*, 384 U.S. 436, 459-66 (1966) (detailing the historical evolution of the privilege against compelled self-incrimination).

154. Professor Welsh White put it this way:

At common law, confessions were excluded *only* when there was a concern as to their reliability . . . . Although the English and early American courts sometimes stated that such confessions would be excluded as involuntary, the term involuntary could then be equated with untrustworthy. Thus, the confession was excluded, not because it was induced by coercive or improper government conduct, but because it was unreliable. English and American courts continued to exclude confessions of dubious reliability as involuntary throughout the nineteenth and first half of the twentieth centuries.

pre- and post-*Lego*—that coerced confessions raise reliability concerns. As far back as 1896, the Supreme Court voiced misgivings about the trustworthiness of involuntary confessions: “[T]he presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made” as a result of coercion.<sup>155</sup> In *Miranda*, for example, the Court quoted approvingly the following language from the Wickersham Report: “Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions . . . .”<sup>156</sup> Likewise, the *Jackson* Court explained that “[i]t is . . . inescapably clear that . . . the use of involuntary confessions . . . [is forbidden, in part,] because of the probable unreliability of confessions that are obtained in a manner deemed coercive.”<sup>157</sup>

Notwithstanding the primacy of what has been described as the “police methods” rationale in the Court’s more recent confession cases,<sup>158</sup> the Court has

Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111-12 (1997) [hereinafter *False Confessions*]; see Davies, *supra* note 142, at 238 (“[T]he early common-law voluntariness doctrine was a rule of evidence,” under which confessions were excluded “due to some doubt about the confession’s evidentiary integrity, i.e., its truthfulness”); see also *Brown v. Walker*, 161 U.S. 591, 596-597 (1896) (“The maxim *nemo tenetur seipsum accusare* [“no one is bound to accuse himself”] . . . [which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.”]).

155. *Wilson v. United States*, 162 U.S. 613, 622 (1896) (citation omitted).

156. *Miranda*, 384 U.S. at 447 (quoting IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931) [hereinafter Wickersham Report]); accord *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964) (noting in dictum, “our distrust of self-deprecatory statements” and explained that the privilege against compelled self-incrimination “while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent’” (citations omitted)); *Reck v. Pate*, 367 U.S. 433, 447 (1961) (Douglas, J., concurring) (“Experience . . . teaches that confessions born of long detention under conditions of stress, confusion, and anxiety are extremely unreliable.”); *Spano v. New York*, 360 U.S. 315, 320 (1959) (“The abhorrence of society to the use of involuntary confessions does . . . [in part, rest] on their inherent untrustworthiness.”); *Payne v. Arkansas*, 356 U.S. 560, 568 n.15 (1958); *Stein v. New York*, 346 U.S. 156, 192 (1953) (“[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence.”), *overruled by Jackson*, 378 U.S. 368; *Rochin v. California*, 342 U.S. 165, 173 (1952) (noting in dictum that the use of involuntary verbal confessions is “constitutionally obnoxious,” *inter alia*, “because of their unreliability”); *Lisenba v. California*, 314 U.S. 219, 236 (1941) (“The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence.”). *Cf.* “*Fruits*,” *supra* note 152, at 939 (contending that when *Miranda* was decided “the concern about unreliability” continued to influence coerced confession cases but had ceased to be the primary consideration).

157. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); see *Bradford v. Michigan*, 394 U.S. 1022, 1023 (1969) (Warren, C.J., dissenting from denial of writ of certiorari) (“It is now a commonplace that coerced confessions are inadmissible at criminal trials because[, *inter alia*,] they are *untrustworthy* . . . .” (emphasis added)); *Gallegos v. Nebraska*, 342 U.S. 55, 70 (1951) (Jackson, J., concurring) (observing that coerced confessions have been “shown by legal experience to be intrinsically unreliable”); *cf.* *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (“To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy.”).

158. See Davies, *supra* note 142, at 239. Professor Davies illustrates the distinction as follows:

[W]hile British (and later, early American) jurists used the voluntariness doctrine to resolve questions about a confession’s reliability . . . . [C]ontemporary voluntariness inquiries seek primar-

continued to express concern over the reliability of coerced statements.<sup>159</sup> For example, in *Michigan v. Tucker*,<sup>160</sup> decided two years after *Lego*, the Court alluded to the reliability concerns underlying the constitutional strictures mandating exclusion of involuntary statements, explaining that categorical exclusion is justified, *inter alia*, by the need to “protect[] . . . the courts from reliance on untrustworthy evidence.”<sup>161</sup>

More recently, the Court observed that the Fifth Amendment privilege against compelled self-incrimination, augmented by *Miranda*, does not “serve some value necessarily divorced from the correct ascertainment of guilt,”<sup>162</sup> thus implicitly recognizing a relationship between the constitutional proscriptions against the admission of compelled statements and the ultimate reliability of jury verdicts. And in 2000, in *Dickerson v. United States*, the Court yet again noted that courts have historically excluded coerced confessions because they are “inherently untrustworthy.”<sup>163</sup>

A myriad of lower courts have likewise expressed concern about the reliability, or verity, of involuntary confessions.<sup>164</sup> In *Michaud v. State*,<sup>165</sup> for example, the court explicitly stated that coerced “confessions are excluded *because they are untrustworthy.*”<sup>166</sup> Many lower court decisions that were rendered after *Lego* but prior to *Connelly* manifest a similar concern with the reliability of coerced confessions.<sup>167</sup> And indeed, even after *Connelly* was

ily to restrict the methods by which confessions may be secured—the emphasis is on the process of the interrogation, rather than on the substance (or reliability) of what was obtained thereby.

*Id.* at 238.

159. *But see id.* at 239 (arguing that by the 1960s the “police methods rationale” was displacing rather than supplementing the “original reliability rationale for suppressing confessions of guilt”).

160. 417 U.S. 433 (1974).

161. *Id.* at 448; *accord* *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (“Our interpretation of the Due Process Clause has been shaped by [a] preference for accusatorial practices . . .” (citations omitted)).

162. *Withrow*, 507 U.S. at 692. *Cf.* *Oregon v. Elstad*, 470 U.S. 298, 308 (1985) (noting that one aim of the Fifth Amendment is to “assur[e] trustworthy evidence” (discussing *Michigan v. Tucker*, 417 U.S. 433, 445 (1974))); *United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality) (noting the “Fifth Amendment goal of assuring trustworthy evidence” (quoting *Oregon v. Elstad*, 470 U.S. 298, 308 (1985))).

163. *Dickerson*, 530 U.S. at 433 (2000) (“The roots of th[e] voluntariness] test developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy.”).

164. *See generally infra* notes 158-62 and accompanying text (discussing the Supreme Court’s concerns regarding the unreliability of coerced confessions).

165. 215 A.2d 87 (Me. 1965).

166. *Id.* at 93 (“Involuntary confessions are excluded because they are untrustworthy . . .”) (quoting *People v. Atchley*, 346 P.2d 674, 768, 769 (Cal. 1959)); *accord* *People v. Rand*, 21 Cal. Rptr. 89, 91 (Cal. Dist. Ct. App. 2d 1962) (same); *State v. Smith*, 242 P.2d 942, 944 (Or. 1965) (involuntary confessions inadmissible because experience has shown them to be of “doubtful credibility”); *see also* *State v. Turnbow*, 354 P.2d 533, 542 (N.M. 1960) (“Until a prima facie [voluntariness] showing is made . . . a confession cannot be received in evidence *because it is untrustworthy.*” (emphasis added)).

167. *See, e.g., State v. Churchill*, 646 P.2d 1049, 1053 (Kan. 1982); *People v. White*, 257 N.W.2d 912, 921 (Mich. 1977) (“We . . . hold that an involuntary confession because of its untrustworthy evidentiary value is not

decided,<sup>168</sup> lower courts have continued to evince concerns regarding the trustworthiness of involuntary statements.<sup>169</sup> In fact, some state courts currently require the prosecution to affirmatively establish the admissibility of defendants' self-inculpatory statements beyond a reasonable doubt.<sup>170</sup>

Expounding on the nexus between the standard of proof used to resolve preliminary admissibility issues and the ultimate reliability of jury verdicts, Professor Saltzburg notes that, at times, a causal connection exists: "When the purpose of a rule of competency is to enhance the reliability of a jury verdict, the greater the risk of error in preliminary fact finding, the greater the risk of error in the final judgment by the jury."<sup>171</sup> With respect to confessions, this is true *a fortiori*, because the admission of a confession—coerced or voluntary, true or false—is often, as a practical matter, outcome determinative.<sup>172</sup> Both courts and commentators have long recognized the uniquely prejudicial character of a confession, irrespective of its veracity.<sup>173</sup> Indeed, the confession has been described as the "queen of proofs," given its generally decisive impact on the jury's

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usable" for any purpose. (quoting *People v Reed*, 224 N.W.2d 867, 873 (Mich. 1975)); *People v. Switzer*, 355 N.W.2d 670, 672 (Mich. Ct. App. 1984) ("[A]n involuntary confession is always of questionable trustworthiness."). See generally *In Interest of G.G.P.*, 382 So. 2d 128, 129 (Fla. Dist. Ct. App. 1980) (stating that courts must exclude involuntary evidence).

168. See *Davies*, *supra* note 142, at 240-41 (suggesting that *Colorado v. Connelly* stands for the proposition that reliability concerns are no longer regarded as a constitutional basis for excluding coerced confessions).

169. See, e.g., *State v. Walker*, 493 N.W.2d 329, 333 (Neb. 1992) ("The especially damning nature of a confession requires the State to prove the statement was voluntary before it is admissible."); *State v. Hatcher*, 2000 Ohio App. LEXIS 535 at \*5 (Ohio Ct. App. Feb. 17, 2000) (equating an involuntary statement with an untrustworthy statement); *State v. Evans*, 944 P.2d 1120, 1128 (Wyo. 1997) (coercive interrogation tactics create "the risk of unreliable confessions"); see also *People v. Willis*, 831 N.E.2d 531, 536 (Ill. 2005); *State v. Wilson*, 755 S.W.2d 707, 709 (Mo. Ct. App. 1988); Cf. *People v. Enright*, 504 N.Y.S.2d 834 (N.Y. App. Div. 1986) ("In cases of confessions occurring while in a state of self-induced inebriation, a key issue is the trustworthiness of the statements." (citation omitted)). See generally *Albritton v. State*, 769 So. 2d 438, 441 (Fla. Dist. Ct. App. 2d 2000) (holding that a State must show a confession to be voluntary for it to be admitted into evidence).

170. See, e.g., *State v. Franklin*, 803 So. 2d 1057 (La. Ct. App. 2001); 803 So. 2d 1057, 1064 (noting that at a hearing on a motion to suppress, it is the State's burden to prove confession's voluntariness beyond a reasonable doubt); *State v. Gravel*, 601 A.2d 678, 681 (N.H. 1991) (discussing the State's burden to prove defendant's waiver of *Miranda* rights beyond a reasonable doubt).

171. Saltzburg, *supra* note 38, at 291; see *Martens*, *supra* note 38, at 131 ("[T]he facts surrounding an allegedly coerced confession may not only resolve the preliminary question of fact, but they may significantly impact on the outcome of the case as well.").

172. See *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) ("Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process."). *But cf.* *Leo & Ofshe*, *supra* note 147, at 476 ("Though juries tend to regard confessions as the most probative and damning evidence of guilt possible, they sometimes acquit defendants who have confessed falsely.").

173. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (characterizing a confession as "the most compelling possible evidence of guilt"); *Clifton v. United States*, 371 F.2d 354, 362 (D.C. Cir. 1966) (noting that a *Jackson* voluntariness hearing "relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury"); *Martens*, *supra* note 38, at 123-24 ("No class of evidence is more prejudicial than a confession . . . . Because of the prejudicial potential of a confession its reliability is of great significance."); Saltzburg, *supra* note 38, at 293 (same).

decision.<sup>174</sup> In short, confessions have a propensity “to dominate all other case evidence and lead a trier of fact to convict the defendant”<sup>175</sup> irrespective of the weight of the evidence adduced by the defense that suggests a contrary conclusion.<sup>176</sup>

Ironically, almost twenty years after *Lego* was decided, in *Arizona v. Fulminante*,<sup>177</sup> the same Justice White who cast the deciding vote and authored the majority opinion in *Lego* and would later side with the majority in *Connelly* wrote that “a confession is like no other evidence”; therefore, in assessing whether admission of a coerced confession constitutes harmless error, a reviewing court must “exercise extreme caution” because of “the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury . . . .”<sup>178</sup> In *Fulminante*, moreover, he parted ways with a bare majority of the Court over the question whether the admission of a coerced confession was amenable to *Chapman* harmless-error analysis.<sup>179</sup> Indeed, Justice White analogized the admission of a coerced confession to the omission of a reasonable doubt instruction, which “distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof,”<sup>180</sup> and he would have held—along with three other justices—that the erroneous admission of an involuntary confession could not be assessed under *Chapman* but rather required automatic reversal.<sup>181</sup>

Reasoning analogically, in light of the foregoing discussion, and given that four

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174. See PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000) (“Confession has for centuries been regarded as the ‘queen of proofs’ in the law: it is a statement from the lips of the person who should know best.”); see also *Brown v. Walker*, 161 U.S. 591, 596 (1896) (“[T]he admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence . . . .”); Kenji Yoshino, *Miranda’s Fall?*, 98 MICH. L. REV. 1399, 1406-07 (2000) (“[T]he confession is seen today, as in the medieval period, as the ‘queen of proofs,’ the dispositive mark of individual guilt.”).

175. Leo & Ofshe, *supra* note 147, at 429.

176. Justice Brennan, for example, submits that “[t]riers of fact accord confessions such heavy weight in their determinations that ‘the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.’” *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)).

177. 499 U.S. 279 (1991).

178. *Id.* at 296 (emphasis added).

179. See *id.* at 289-90. See generally *Chapman v. California*, 386 U.S. 18, 22-24 (1967) (explaining the *Chapman* harmless-beyond-a-reasonable-doubt standard of review).

180. *Arizona v. Fulminante*, 499 U.S. 279, 291 (1991) (White, J., dissenting in part).

181. See *id.* at 288-95 (White, J., dissenting in part). Expounding on the constitutional distinction between the erroneous admission of coerced confessions and less egregious constitutional errors, Justice White elucidated: “[A] coerced confession is fundamentally different from other types of erroneously admitted evidence . . . .” *Id.* at 289 (White, J., dissenting in part) (citations omitted) (emphasis added). Cf. *id.* at 313 (Kennedy, J., concurring in the judgment) (cautioning that “[i]f the jury believes that a defendant has [confessed], it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case”). Justice White’s conclusion is also bolstered by language in the *Chapman* decision suggesting that admission of a coerced confession in a criminal trial is of one of a very limited class of errors that are of such magnitude that they operate to deprive a defendant of his or her fundamental right to a fair trial and, as a result, always vitiate the defendant’s

Supreme Court justices on the *Fulminante* Court viewed the absence of a coerced confession as a *sine qua non* of any constitutional conviction—a view that is necessarily premised, in part, on the reality that petit juries will all too often regard *any* confession as conclusive, irrefutable proof of guilt—it is curious that the *Lego* Court concluded that the absence of coercion need only be established by the same standard of proof used in simple negligence cases (i.e., marginally more likely than a coin flip). This is all the more perplexing because if a voluntariness hearing does indeed often function as a de facto trial on the issue of guilt<sup>182</sup>—which, regardless of any lofty judicial rhetoric to the contrary, appears to be the case<sup>183</sup>—it follows that using the preponderance standard to assess the admissibility of a challenged confession is the functional equivalent of using that standard at the trial proper.

In other words, if the prosecution sustains its burden of proving the confession voluntary, then, as a practical matter, it will in so doing effectively carry its burden of proof in the trial proper.<sup>184</sup> The salient point, as Justice Brennan posited in his dissenting opinion in *Lego*, is that “the same considerations that demand the reasonable-doubt standard when guilt or innocence is at stake also demand that standard when the question is the admissibility of an allegedly involuntary confession.”<sup>185</sup> This is because, as Professor Saltzburg has observed, “The stronger the link between preliminary and ultimate fact finding, the greater the danger that error in the former will distort the reliability of the latter.”<sup>186</sup>

### B. *The Nexus Between Preliminary and Ultimate Fact Finding*

The following categorical syllogism illustrates the link between the standard of proof used at *Jackson* voluntariness hearings and the ultimate reliability of jury verdicts: As a major premise, use of the preponderance standard in voluntariness

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conviction. *See Chapman*, 386 U.S. at 23 & n.8 (highlighting as fundamental coerced confession, actually biased trial judge, and complete denial of counsel).

182. *See McCreight*, *supra* note 140, at 219 (“The fact finding process accords confessions an extreme weight . . . . Because of the extreme effect a confession may have on a jury, an unreliable confession has a strong potential for resulting in conviction of the innocent.”); *see also United States v. Schipani*, 289 F. Supp. 43, 58 (E.D.N.Y. 1968) (“Frequently, having lost on a motion to suppress, the defendant’s chance of avoiding conviction is hopeless.”).

183. *See Davies*, *supra* note 142, at 250 (“[S]tudies of false confessions suggest that once a jury is exposed to a false confession, the chance that the jury will convict on the basis of that confession is substantial.”); Leo & Ofshe, *supra* note 147, at 429; WHITE, *supra* note 32, at 123 (“Empirical data shows that modern jurors are likely to give great weight to suspects’ confessions, whether or not they are reliable . . . .”).

184. *See supra* notes 175-185 and accompanying text.

185. *Lego v. Twomey*, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting). As Professor Davies points out, there is a consensus understanding among pro-reform academics that the best way to ameliorate the problem of false confessions is to “modify existing constitutional tests for voluntariness (under the Due Process Clause) and compulsion (under the Fifth Amendment privilege against self-incrimination) to increase the number of confessions suppressed under those tests.” Davies, *supra* note 142, at 230. Justice Brennan’s proposed remedy, i.e., adopting a higher standard of proof at certain types of suppression hearings, which we advocate in this Article, would have the same effect but has the advantage of simplicity. *See Lego*, 404 U.S. at 490-95.

186. Saltzburg, *supra* note 38, at 283.

hearings necessarily leads to the admission of more false confessions than would a higher standard of proof.<sup>187</sup> As a minor premise, confessions are so inherently prejudicial that, as a practical matter, in the vast majority of cases in which a confession is offered into evidence against a criminal defendant—whether that confession is true or false—that defendant will be convicted of whatever crime to which he or she allegedly confessed.<sup>188</sup> Therefore, because the preponderance standard necessarily results in the admission of more false confessions than would a higher standard of proof, and, as a result, more actually innocent people are wrongly convicted, it necessarily follows that the use of the weakest standard of proof in voluntariness hearings does indeed have an adverse impact on the reliability of jury verdicts.<sup>189</sup>

This proposition also holds true with respect to statements or confessions that are the product of *Miranda* violations,<sup>190</sup> as well as unduly suggestive eyewitness identifications,<sup>191</sup> both of which implicate the aforementioned reliability concerns.<sup>192</sup> Because those types of evidence are given an unduly strong presumption

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187. See Martens, *supra* note 38, at 132 (“Under the preponderance standard, significantly more arguably unreliable evidence will be admitted.”); cf. *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (“Because the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession’s reliability.”).

188. See Davies, *supra* note 142, at 251 (“[E]mpirical studies show that jurors routinely fail to appreciate the serious possibility that voluntary confessions can in fact be false, and are thus staggeringly susceptible to the persuasive effect of confessions.”). Leo & Ofshe’s study demonstrates,

[T]hat confession evidence substantially biases the trier of fact’s evaluation of the case in favor of prosecution and conviction, even when the defendant’s . . . confession [is uncorroborated] . . . and the other case evidence strongly supports his innocence . . . . Often . . . [false confessions] result in wrongful conviction and incarceration, sometimes even execution.

Leo & Ofshe, *supra* note 147, at 491-92; see also *State v. Foster*, 183 P. 397, 398 (N.M. 1919) (“[W]here a confession is admitted . . . the average jury . . . will in the great majority of cases say the prisoner has confessed, and therefore is guilty beyond a reasonable doubt”); E. CLEARY, *MCCORMICK ON EVIDENCE* 316 (2d ed. 1972) (characterizing “the decision to confess before trial” as an effective “waiver of the right to require the state at trial to meet its heavy burden of proof”).

189. Judicial suppression of confessions, however, necessarily vitiates a false confession’s potential to distort the jury’s fact finding. See, e.g., *State v. Sawyer*, 561 So. 2d 278, 296-297 (Fla. Dist. App. Ct. 1990) (suppressing murder defendant’s confession due to police detective’s *Miranda* violations); see Leo & Ofshe, *supra* note 147:

In all sixty cases documented in this article judicial suppression of the confession would almost certainly have caused the prosecutor to dismiss all charges against the defendant because in each of these cases no credible evidence linked the suspect to the crime and varying amounts of evidence indicated that the suspect was factually innocent.

*Id.* at 475 n.393; see also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88-91 (2008) (discussing study in which it was revealed that in 31 cases, suspects falsely confessed to crimes they did not commit but were wrongfully convicted).

190. See *infra* Parts V.B, VI.C.iii.

191. See *infra* Part VI.C.iv.

192. Professor Saltzburg put it thus:

If coerced confessions are in fact frequently unreliable, then it follows that a coerced confession can improperly influence a jury in its determination of guilt. Hence, the greater the risk of error in

of verity by most juries yet of suspect veracity, inaccurate preliminary factual determinations that lead to the erroneous admission of the foregoing species of evidence may have equally grave consequences for a criminal defendant.<sup>193</sup> And, like involuntary confessions, it is empirically demonstrable that the erroneous admission of these categories of evidence does, in fact, have a deleterious effect on the reliability of jury verdicts.<sup>194</sup>

The *Lego* Court, however, was not persuaded by what has today proven to be a practical reality: a low standard of proof leads to the erroneous admission of coerced confessions, which, in turn, often leads to unreliable verdicts. To be sure, the *Lego* Court's decoupling of the standard of proof used to evaluate the voluntariness of confessions and the reliability of jury verdicts was a profound error in judgment. At the time of the opinion, the correlation between coerced confessions and unreliable verdicts was a matter of logic. But now, the empirical evidence is also quite clear. The erroneous admission of coerced confessions may be directly linked to cases in which factually innocent defendants were wrongfully convicted,<sup>195</sup> thereby exposing the flawed factual assumptions undergirding the *Lego* Court's reliability analysis—beyond a reasonable doubt, if you will.

Unfortunately, the *practical* problems with the *Lego* Court's factual assumptions are not the end of the *Lego* Court's shoddy legal analysis; the opinion's *theoretical* underpinnings are similarly flawed. Specifically, the *Lego* Court carelessly and incorrectly merged several constitutionally based exclusionary principles under the broad auspice of "the exclusionary rule." This troubling feature of the *Lego* opinion is discussed in detail below.

## V. ANSWERING THE CALL TO REVISIT *LEGO*: THE COURT'S CONFLATION OF DIFFERENT EXCLUSIONARY RULES

### A. *Unconstitutionally Obtained Evidence Distinguished From Unconstitutionally Used Evidence*

As Professor Arnold Loewy has propounded, the exclusion of unconstitutionally obtained evidence is either premised on the belief that exclusion will deter the police from obtaining evidence in a manner that offends the Constitution in the *future* or the notion that there is a categorical, exceptionless, constitutional proscription against its *use* at trial:

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resolving preliminary questions of fact relating to coercion, the greater the chance that the accuracy of the ultimate fact finding may be impaired by untrustworthy evidence.

[T]he same defect inheres in standards of proof that fail to reflect the risk of reliability of evidence other than confessions.

Saltzburg, *supra* note 38, at 280.

193. See *infra* Parts V.B, VI.C.iii-iv.

194. See *infra* Parts VI.C.iii-iv.

195. See *infra* Part VI.C.

Under one theory, evidence is excluded because the police have unconstitutionally obtained the evidence and exclusion is thought desirable to deter such police behavior in the future by precluding a substantial benefit from such misconduct. Under the other theory, the evidence is excluded because the *Constitution guarantees the defendant a procedural right to exclude the evidence.*<sup>196</sup>

The specific nature of the constitutional violation at issue and the specific rights that that violation implicates, then, determine whether the improper police conduct constitutes the constitutional violation or, alternatively, whether the admission into evidence (use) of the product of the police's conduct offends the Constitution.<sup>197</sup> Professor Loewy correctly postulates that "whether evidence is unconstitutionally obtained or unconstitutionally used" is of constitutional import, and that "the [Supreme] Court's frequent failure to think in these terms has caused it to overlook" the ramifications of that distinction.<sup>198</sup>

The *Lego*<sup>199</sup> and the *Connelly*<sup>200</sup> decisions are illustrative of the Court's propensity to incorrectly merge the various constitutionally based (or mandated) rules of exclusion. In both cases, the Court conflated the Fifth and Fourteenth Amendment rules of exclusion with the Fourth Amendment's exclusionary rule, e.g., the *Lego* and *Connelly* majorities both emphasized the deterrence-based rationale that undergirds the Fourth Amendment's exclusionary rule without acknowledging the reliability-based concerns that have historically justified the exclusion of coerced confessions,<sup>201</sup> which, although no longer a *sine qua non* for exclusion, continue to have some vitality. A necessary corollary is that, in both

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196. Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 907 (1989) (emphasis added). In *United States v. Patane*, 542 U.S. 630 (2004), a case in which the Court did in fact draw this distinction, for example, the Court refused to apply the fruit-of-the-poisonous-tree doctrine to physical evidence obtained as a result of *Miranda* violations and observed: "[J]ust as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." *Id.* at 637 (plurality); accord *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (stating compelled statements "may not be used against a defendant at trial . . . but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs . . ."); see *Miranda v. Arizona*, 384 U.S. 467, 468 n.37 (1966) ("[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact he stood mute or claimed his privilege in the face of accusation.").

197. See Loewy, *supra* note 196, at 907-08 (exploring this distinction); see also *Dickerson v. United States*, 530 U.S. 428, 441 (2000) (recognizing "that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment").

198. Loewy, *supra* note 196, at 908.

199. See *Lego v. Twomey*, 404 U.S. 477, 489 (1972) ("[E]xclusionary rules are very much aimed at deterring lawless conduct by police and prosecution. . . .").

200. See *Colorado v. Connelly*, 479 U.S. 157, 169 (1986) (quoting *Lego*, 404 U.S. at 489); Cf. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (citing *Connelly*, 479 U.S. at 166, in the context of the Court's Fourth Amendment analysis).

201. See *supra* notes 201-02 and accompanying text. Cf. *supra* notes 151-56 and accompanying text.

cases, the majority failed to recognize that the different constitutionally grounded exclusionary rules should be accorded disparate constitutional treatment.<sup>202</sup>

Not all exclusionary rules are the same. Some accrete to and *effectuate* constitutional rights; others are constitutional rights *per se*. Exclusion of coerced statements<sup>203</sup> and tainted eyewitness identifications<sup>204</sup> under the Fifth and Fourteenth Amendments is grounded in constitutional proscriptions against the *use* of that evidence. Conversely, the exclusion of evidence obtained in violation of the Fourth Amendment is not a personal constitutional *right* in itself but rather a judicially created remedy intended to effectuate our Fourth Amendment right against unreasonable searches and seizures.<sup>205</sup>

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202. Unlike the *Lego* and *Connelly* decisions, in *Kansas v. Ventris*, 129 S. Ct. 1841 (2009), the Supreme Court elucidated the constitutional distinction between exclusion pursuant to the Fifth Amendment's Self-Incrimination Clause and exclusion of evidence obtained in violation of the Fourth Amendment:

The Fifth Amendment . . . is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. The Fourth Amendment, on the other hand . . . says nothing about excluding their fruits from evidence; exclusion comes by way of deterrent sanction rather than to avoid violation of the substantive guarantee. Inadmissibility has not been automatic, therefore, but we have instead applied an exclusionary-rule balancing test.

*Ventris*, 129 S. Ct. at 1845; *see also* *Withrow v. Williams*, 507 U.S. 680, 686-96 (1993) (discussing differences between Fourth Amendment exclusionary rule and Fifth Amendment, Sixth Amendment, and *Miranda* exclusionary rules).

203. *See* *United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality) (noting "the Self-Incrimination Clause contains its own exclusionary rule," which is automatic and "self-executing"); *Chavez v. Martinez*, 538 U.S. 760, 769 (2003) ("[T]hose subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial."); *Withrow*, 507 U.S. at 691-92 ("[*Miranda* safeguards 'a fundamental trial right.'") (quotation omitted); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (Fifth Amendment "privilege against self-incrimination . . . is a fundamental trial right of criminal defendants . . . [A] constitutional violation occurs only at trial") (citations omitted); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("[A]ny criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law.") (emphasis in original); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("the prosecution *may not use* statements" obtained outside of *Miranda's* strictures) (emphasis added); *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964); *Leyra v. Denno*, 347 U.S. 556, 558 (1954) (stating "use . . . of a defendant's confession obtained by coercion" is unconstitutional); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) ("The Constitution . . . stands as a bar against the conviction of any individual . . . by means of a coerced confession."); *Crooker v. California*, 357 U.S. 433, 434 (1958) ("Fourteenth Amendment prohibits use of coerced confessions."); *Chambers v. Florida*, 309 U.S. 227, 228 (1940) (same); *White v. Texas*, 310 U.S. 530, 532 (1940); *Brown v. Mississippi*, 297 U.S. 279, 286 (1936) (*use* of coerced confession violates due process).

204. *See* *Foster v. California*, 394 U.S. 440, 443 n.2 (1969) ("[I]n some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law."); *Biggers v. Tennessee*, 390 U.S. 404, 406 (1968) ("[A] procedure of identification may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' that due process of law is denied when evidence of the identification is used at trial.") (citation omitted); *see also* *Manson v. Brathwaite*, 432 U.S. 98, 109-14 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations."). *See generally* Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 619 n.173 (2007) ("Due process . . . requires the exclusion of eyewitness identifications that are thought to be the product of unduly suggestive identification procedures absent sufficient indicia of reliability.") (emphasis added).

205. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998) ("[T]he government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution. Rather, a Fourth

Unlike the question whether physical evidence that is obtained in violation of the Fourth Amendment's proscription against unreasonable searches and seizures should be excluded pursuant to a judicially-created, consequentialist exclusionary doctrine designed to deter *future* Fourth Amendment violations,<sup>206</sup> the question whether to exclude statements, as well as both in- and out-of-court identifications—and even some physical evidence<sup>207</sup>—that are the product of certain categories of Fifth or Fourteenth (and perhaps Sixth<sup>208</sup>) Amendment violations is not amenable to utilitarian cost-benefit analysis.<sup>209</sup> Rather, the categorical, per se, and exceptionless exclusion of such evidence is a constitutional imperative.<sup>210</sup> Between these two constitutional extremes lies the *Miranda* exclusionary rule, which is both prophylactic and constitutional in character and is justified by a dual rationale: deterrence and trustworthiness.<sup>211</sup>

### B. *Miranda's Exclusionary Rule*

In 1966, the Court's decision in *Miranda v. Arizona*<sup>212</sup> revolutionized its confession jurisprudence by extending the scope of the Fifth Amendment's privilege against compelled self-incrimination beyond the trial proper and into the stationhouse,<sup>213</sup> thereby explicitly broadening its ambit to encompass police-

Amendment violation is 'fully accomplished' by the illegal search or seizure . . .") (citations omitted); *United States v. Calandra*, 414 U.S. 338, 348 (1974) ("[T]he [Fourth Amendment exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right . . ."). *Cf. Hudson*, 547 U.S. at 593-599 (holding the Fourth Amendment exclusionary rule does not apply to violations of the knock-and-announce rule). *See generally* Lester v. Chicago, 830 F.2d 706, 710-711 (7th Cir. 1987) ("Unlike the Fourteenth Amendment, 'the Fourth Amendment is specifically directed to methods of arrest and seizure of the person.'") (citations omitted).

206. *See generally* Loewy, *supra* note 196, at 908-13 (detailing theory undergirding the Fourth Amendment's exclusionary rule).

207. *See Rochin v. California*, 342 U.S. 165, 172-74 (1952) (holding Due Process requires the exclusion of physical evidence obtained by methods that "shock the conscience"); *Chavez*, 538 U.S. at 773 (same).

208. For a compelling argument that the Constitution proscribes the *use* of evidence obtained in violation of the Sixth Amendment right to counsel, see Loewy, *supra* note 196, at 928-33. As noted *infra*, Sixth Amendment rules of exclusion are beyond the scope of this article.

209. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 459 (1979) ("The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination . . . Balancing [of interests], therefore, is not simply unnecessary. It is impermissible.").

210. *See Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009) ("Whether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated. Sometimes that explicitly mandates exclusion from trial, and sometimes it does not.").

211. *See Oregon v. Elstad*, 470 U.S. 298, 308 (1985) (noting the *Miranda* exclusionary rule's "twin rationales—trustworthiness and deterrence . . ."). *But cf. Missouri v. Seibert*, 542 U.S. 600, 623 (2004) (O'Connor, J., dissenting) ("This Court has made clear that there simply is no place for a robust deterrence doctrine with regard to violations of *Miranda v. Arizona*.").

212. 384 U.S. 526 (1966).

213. *Id.* at 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."). *See generally* WHITE, *supra* note 32, at 47-48 (sketching concerns that impelled *Miranda* decision); Evan H. Caminker, *Miranda and some Puzzles of*

initiated interrogations that take place after a suspect is in custody, irrespective of whether that suspect has been formally arrested or charged.<sup>214</sup>

And, more importantly, the *Miranda* Court crafted a rule of exclusion that swept more broadly than the existing constitutional proscriptions against the use of coerced statements in criminal trials,<sup>215</sup> holding that “the prosecution *may not use* statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>216</sup> The *Miranda* Court, moreover, emphasized the “heavy burden” the government must meet to prove a waiver of *Miranda* rights,<sup>217</sup> which suggests that the *Miranda* Court envisaged the use of a high standard of proof to establish waiver of *Miranda* rights.<sup>218</sup> The *Connelly* Court, however, concluded that, notwithstanding language to the contrary in the *Miranda* decision and its progeny, the Constitution only required the prosecution to prove waiver by preponderant evidence.<sup>219</sup>

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“Prophylactic” Rules, 70 U. CIN. L. REV. 1, 2-3 (2001) (reviewing pre and post-*Miranda* doctrinal rules for custodial interrogation).

214. See *Miranda*, 384 U.S. at 444-45 (extending the protections of the Fifth Amendment to include police-initiated custodial interrogation, defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way”).

215. See Leslie A. Lunney, *The Erosion of Miranda: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 731-32 (1999) (discussing the standards governing the admissibility of confessions before the *Miranda* decision); see also WHITE, *supra* note 32, at 48 (noting that before *Miranda*, “[t]o the extent that lower courts were unwilling to credit suspects’ truthful testimony relating to abusive interrogation practices, the Court’s institutional limitations presented a nearly insuperable barrier to eliminating such practices”).

216. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). The *Miranda* Court held that a suspect must give four warnings prior to in-custody interrogation, which he could waive; “[b]ut unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.” *Id.* at 479. The *Miranda* Court, therefore, created an ostensibly irrebuttable presumption that pre-*Miranda* warning statements that are the product of post-custodial interrogation are compelled within the meaning of the Fifth Amendment. See *New York v. Quarles*, 467 U.S. 649, 657-60 (1984) (O’Connor, J., concurring in part and dissenting in part) (characterizing the *Miranda* decision as “[h]old[ing] unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it”).

217. See *Miranda*, 384 U.S. at 475 (stating “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his” rights); see also *Tague v. Louisiana*, 444 U.S. 469, 471 (1980); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (“The courts must presume that a defendant did not waive his rights; the prosecution’s burden is great . . .”). Cf. WHITE, *supra* note 32, at 60 (arguing that “*Miranda* might have had more effect . . . if the Court had . . . giv[en] substance . . . to the rule that the government must meet ‘a heavy burden’ to establish” waiver).

218. See *Miranda*, 384 U.S. at 475 (“This Court has always set high standards of proof for the waiver of constitutional rights and we re-assert these standards as applied to in-custody interrogation.” (citation omitted)). But see WHITE, *supra* note 32, at 119 (noting that *Miranda*, as interpreted by later cases, does not set a high standard for proving waiver, allowing the State “to establish the admissibility of confessions given during secret interrogations *solely* on the basis of police testimony”); *Butler*, 441 U.S. at 373 (noting that a written waiver of *Miranda* rights is “[n]either necessary [n]or sufficient to establish waiver,” which, by implication, means that uncorroborated police testimony may be sufficient). But Cf. *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) (“Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.”).

219. See *supra* notes 111-14 and accompanying text.

Modern interrogation practices generally do not involve the level of physical abuse and torture contemplated by the common-law voluntariness tests, but yet all too often, they involve more subtle, psychological, but nonetheless insidious and invidious forms of coercion,<sup>220</sup> which create an equivalent danger of eliciting false or unreliable confessions.<sup>221</sup> The *Miranda* decision was, in large measure, driven by this reality; and its seminal holding was grounded in the need to create constitutionally based procedural safeguards to give concrete substance to our Fifth Amendment privilege against compelled self-incrimination,<sup>222</sup> which, in part, serves to guard against this danger.<sup>223</sup> The disjunction between theory and practice that generated the need for *Miranda*'s prophylactic constitutional safeguards is best described by Professor Yale Kamisar:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of the veritable mansion? Ah, there's the rub. Typically he must pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

In this "gatehouse" of American criminal procedure . . . the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics and techniques most appropriate for the occasion": he is "game" to be stalked and cornered. Here ideals are checked at the door, "realities" faced and the prestige of law enforcement vindicated.<sup>224</sup>

To be sure, as is the case with coerced statements generally, statements or confessions elicited in violation of *Miranda*'s strictures generally have a patina of

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220. See *Miranda*, 384 U.S. at 448 ("[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented . . . [And] . . . 'coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960))).

221. See *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (noting that "there is mounting empirical evidence that the[] pressures [of custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed" (citation omitted)); see also Drizin & Leo, *supra* note 147, at 906-07 (detailing the disturbing frequency with which suspects confessed to crimes they did not commit but of which they were wrongly convicted). As Professor Welsh White points out, the famous 1931 Wickersham Commission Report on Lawlessness in Law Enforcement highlighted this same concern, "conclud[ing] that police employment of the third degree . . . produced a danger of false confessions that in some cases resulted in wrongful convictions." WHITE, *supra* note 32, at 19 (citing Wickersham Report, *supra* note 156).

222. See *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966) ("We granted certiorari . . . to give *concrete constitutional guidelines* for law enforcement agencies and courts to follow." (emphasis added)).

223. In *Michigan v. Payne*, 412 U.S. 47 (1973), for example, the Court characterized *Miranda* as a case "in which the Court established rules to govern police practices during custodial interrogations in order . . . to [*inter alia*] assure the reliability of statements made during those interrogations," *id.* at 53, which were "designed to preserve the integrity of a phase of the criminal process." *Id.*; accord *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (observing in dictum that "*Miranda* provide[s] important new safeguards against the use of unreliable statements at trial" by "guard[ing] against the possibility of unreliable statements in every instance of in-custody interrogation").

224. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 11-38, 19-20 (A. Howard ed., 1965).

truth; however, experience has ineluctably demonstrated that, like coerced confessions, the patina of verity is all too often illusory.<sup>225</sup> With that said, the *Lego* majority's assertion that the exclusion of involuntary confessions and, per *Miranda*, the exclusion of confessions flowing from custodial interrogations in which *Miranda*'s strictures were not adhered to constitute instances where "without regard to its probative value, evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts" is simply incorrect.<sup>226</sup> Rather, notwithstanding the recent primacy of other rationales for excluding such evidence, the Court has, in both prior and subsequent opinions, continued to acknowledge an important teaching of history: those exclusionary principles exist, in part, to enhance the reliability of jury verdicts by preventing the factfinder from considering what has not only long been regarded as but experience has shown to be intrinsically unreliable evidence.<sup>227</sup>

*Miranda*'s Fifth Amendment-based rule of exclusion is distinguishable, however, from the categorical proscription against *any* use of actually coerced confessions in criminal trials.<sup>228</sup> Unlike categorical exclusion of coerced statements under the due process voluntariness test, statements that are the product of *Miranda* violations that do not involve actual compulsion may, nonetheless, be used at trial in certain instances.<sup>229</sup>

Moreover, the precise character of the *Miranda* exclusionary rule is unclear.<sup>230</sup> On the one hand, in *Dickerson*, the Court held that the *Miranda* Court promulgated a constitutional rule.<sup>231</sup> And the Court has held that, unlike Fourth Amendment violations, *Miranda* violations constitute a cognizable federal habeas claim,<sup>232</sup> reasoning, *inter alia*, that the *Miranda* exclusionary rule is distinct from the Fourth Amendment exclusionary rule in that it is justified, in part, by the need to protect against the admission of unreliable evidence, which could lead to erroneous

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225. See *infra* Part VI.C.iii.

226. *Lego v. Twomey*, 404 U.S. 477, 488 (1971) (emphasis added); *accord Connolly*, 479 U.S. 157, 168 (1986) (quoting statement approvingly).

227. See *supra* notes 150-92 and accompanying text.

228. Cf. *Dist. Atty's Office v. Osborne*, 129 S. Ct. 2308, 2322 n.4 (2009) ("*Miranda* devised rules to safeguard a constitutional right the Court had already recognized."). See generally *United States v. Patane*, 532 U.S. 630, 638-40 (2003) (plurality) (noting distinction).

229. See, e.g., *New York v. Quarles*, 467 U.S. 649, 655 (1983) (holding that "there is a 'public safety' exception" to *Miranda*); *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (holding that statements taken in violation of *Miranda* may be used to impeach a defendant's trial testimony, "provided of course that the trustworthiness of the evidence satisfies legal standards" (emphasis added)).

230. See generally Rosenthal, *supra* note 204, at 579-603.

231. *Dickerson v. United States*, 530 U.S. 428, 432 (2000) ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress . . ."). For a good discussion of *Miranda*'s constitutional basis, see generally Lawrence H. Tribe, *Reflections on Unenumerated Rights*, 9 U. PA. J. CONST. L. 483, 490-91 (2007).

232. See *Withrow v. Williams*, 507 U.S. 680, 682-83 (1993).

convictions.<sup>233</sup> And, as is the case with involuntary confessions, *Miranda* is violated, if at all, only when improperly elicited statements are adduced at trial as substantive evidence of guilt; the police's failure, even when deliberate, to give the required *Miranda* warnings is not a constitutional violation in itself.<sup>234</sup> But, on the other hand, there is authority suggesting that *Miranda*'s prophylactic protections "sweep[] more broadly than the Fifth Amendment" requires;<sup>235</sup> and even the *Miranda* Court noted that its rule of exclusion, although the constitutional minimum, was but one way of meaningfully safeguarding our fundamental Fifth Amendment right against compelled self-incrimination.<sup>236</sup>

But, notwithstanding that the constitutional status of the exclusionary rule announced in the *Miranda* decision is rather murky,<sup>237</sup> it is clear that one of the justifications undergirding that rule is that statements elicited through pernicious, psychologically coercive interrogation practices raise reliability concerns.<sup>238</sup> Moreover, empirical evidence demonstrates that there is indeed a nexus between police use of the psychologically coercive interrogation practices that the *Miranda* Court sought to proscribe and false confessions, even in the absence of physical coercion.<sup>239</sup> Unless *Connelly* is repudiated, as Professor White explains, *Miranda*'s constitutionally based safeguards will continue to be of questionable efficacy

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233. See *id.* at 692 ("[T]he Fifth Amendment 'trial right' protected by *Miranda* [does not] serve some value necessarily divorced from the correct ascertainment of guilt . . . . By bracing against 'the possibility of unreliable statements in every instance of in-custody interrogation,' *Miranda* serves to guard against 'the use of unreliable statements at trial.'" (citation omitted)).

234. See *Patane*, 542 U.S. at 640-42.

235. *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); see *Quarles*, 467 U.S. at 654 ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974))). See generally Rosenthal, *supra* note 204, at 579-81 (discussing authority suggesting *Miranda* is prophylactic in nature).

236. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.").

237. Compare *Chavez v. Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) ("The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause. *Miranda* mandates a rule of exclusion. It must be so characterized . . . ."); *Orozco v. Texas*, 394 U.S. 324, 326 (1969) ("We . . . hold that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*."), and *Tucker*, 417 U.S. at 445 ("This Court said in *Miranda* that statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial."), with *Elstad*, 470 U.S. at 306 ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."), and *Quarles*, 467 U.S. 649, 655 n.5 (1984). See generally Loewy, *supra* note 196, at 916-17 & n.52-54 (discussing conflict of authority concerning *Miranda*'s prophylactic safeguards).

238. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. REV. 479, 497 (2006) (asserting that *Miranda* exclusionary rule, in part, is designed to exclude unreliable confessions); see also *Withrow*, 507 U.S. at 692.

239. See Drizin & Leo, *supra* note 147, at 908-23 (exploring relationship between the social psychology of custodial interrogation and false confessions and noting prevalence of false confessions); *Corley*, 129 S. Ct. 1558, 1570 (2009); see also Findley, *supra* note 77, at 163 ("Standard police interrogation training teaches police a very aggressive, guilt-presuming approach whose goal is to obtain a confession, not elicit information."). See generally

because of the *Miranda* Court's "failure to address the problem of inadequate fact-finding in interrogation cases and its failure to provide restrictions on police interrogation methods that are likely to produce untrustworthy statements."<sup>240</sup> Therefore, the same concerns that drive the need for a heightened standard of proof in suppression hearings challenging confessions on voluntariness grounds also apply where *Miranda* violations are alleged.

### C. Different Rationales for Different Exclusionary Rules

The differing constitutional status of the various constitutionally rooted rules of exclusion is attributable, at least in part, to the distinct concerns that impelled their development. Timothy Martens's observation that the "fundamental rationale that raises . . . preliminary fact question[s] at suppression hearings] is vastly different in [F]ifth [A]mendment cases than in [F]ourth Amendment cases" is instructive on this point: "If a question is raised regarding the voluntariness of a confession, the reliability of the evidence itself is suspect. In a preliminary challenge under the [F]ourth [A]mendment, the method used to obtain the evidence is scrutinized. There is no question of the reliability of the evidence."<sup>241</sup> The same trustworthiness concerns that inhere in Fifth Amendment challenges are equally applicable with respect to certain Fourteenth Amendment challenges.<sup>242</sup>

This being so, Professor Saltzburg's assertion that the appropriate standard of proof for preliminary fact finding "will differ according to whether or not the rule of exclusion relates to reliability" seems quite apposite to the issue at hand.<sup>243</sup> And it is reasonable to infer that the Constitution requires a higher burden of proof at suppression hearings where the *use* of evidence, as opposed to the method with which it was obtained, is challenged on constitutional grounds that implicate reliability values—i.e., instances where the evidence at issue may very well be false, highly misleading, or otherwise untrustworthy. Because, unlike constitutional challenges based on the method with which concededly reliable and probative evidence was obtained, which, if successful, actually detract from the truth-seeking function of the court,<sup>244</sup> the resolution of constitutional challenges to the *use* of evidence that raises trustworthiness concerns has the potential to

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WHITE, *supra* note 32, at 19-27 (sketching link between psychologically coercive interrogation practices that involve isolating and pressuring suspects and false confessions).

240. WHITE, *supra* note 32, at 123.

241. Martens, *supra* note 38, at 123.

242. See *supra* notes 141-92 and accompanying text.

243. Saltzburg, *supra* note 39, at 290. Professor Saltzburg offers a cogent and persuasive argument for a higher burden of proof in cases in which evidence is challenged on constitutional grounds that implicate reliability interests. See *id.* at 290-91.

244. See *United States v. Leon*, 468 U.S. 897, 906-08 (1984). The Fourth Amendment's exclusionary rule is premised on the notion that the exclusion of physical evidence obtained in violation of the Fourth Amendment will give substance to the values protected by the Fourth Amendment by creating a disincentive for police to violate its tenets—namely, they cannot use unconstitutionally obtained to convict the defendant. See *generally id.* at 906-13; *Mapp v. Ohio*, 367 U.S. 643 (1961). The constitutional violation occurs when the police seize the

adversely affect the accuracy of the fact finding that occurs in the criminal trial proper—perhaps laying the groundwork for a wrongful conviction.<sup>245</sup> The *Lego* Court did not draw this distinction. Its failure to do so is particularly glaring with regard to confessions. Therefore, the two foundational premises that formed the bedrock of the *Lego* decision were, and still are, without merit.

For all of its faulty reasoning, however, the *Lego* Court did have the foresight to invite further review of its holding at a later time by couching its decision in provisional language, suggesting that if experience demonstrated its shortcomings, it would be ripe for reconsideration.<sup>246</sup> Indeed, the opinion explicitly stated that from the Court's experience *at that time*, "no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of evidence."<sup>247</sup> Without empirically demonstrable "good cause" to impose a higher burden of proof,<sup>248</sup> the *Lego* Court concluded that the preponderance standard was adequate—but it left the door open for future reconsideration of its holding.

Based on the available empirical data, the authors believe that, at this time, substantial evidence has accumulated showing that federal rights *have* suffered *as a result* of the *Lego* decision, which calls for a reconsideration of *Lego's* holding for reasons entirely separate and apart from criticism of the Court's reasoning. The empirical data and scholarship concerning the practical realities on the ground (i.e., in the courtroom), moreover, has illuminated a disturbing trend: police officers commonly commit perjury at suppression hearings, trial judges often accept that perjured testimony based, in part, on the low standard of proof employed at those hearings, which then, in turn, leads to wrongful convictions based on erroneously admitted evidence.

## VI. ANSWERING THE CALL TO REVISIT *LEGO*: THE DISJUNCT BETWEEN THEORY AND PRACTICE

In the years following the *Lego* decision, credible anecdotal and empirical evidence has emerged suggesting that *Lego's* essential holding was indeed premised on flawed factual assumptions and has had a deleterious effect on criminal defendants' federal constitutional rights. There is troubling evidence that although police perjury is fairly commonplace at suppression hearings, trial judges all too

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evidence as opposed to when the unconstitutionally obtained evidence is offered against the defendant. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998).

245. *See* Saltzburg, *supra* note 39, at 297 (arguing that "it is reasonable to distinguish between coerced confession cases and search and seizure cases and to place a greater burden on the prosecution in proving evidentiary facts in the former than in the latter"); *United States v. Schipani*, 289 F. Supp. 43, 58 (E.D. N.Y. 1968) (noting "that exclusion in 'coercion' cases was historically based upon lack of probative force, while exclusion of other kinds of illegal evidence has been based upon purely extrinsic policies").

246. *See* *Lego v. Twomey*, 404 U.S. 477, 488-89 (1972).

247. *Id.*

248. *Id.*

often accept police testimony without serious scrutiny, thereby significantly increasing the probability of erroneous fact finding—and the probability that highly prejudicial but false, unreliable, or otherwise misleading evidence will be proffered against an *actually innocent* criminal defendant at his or her trial, thereby substantially increasing the likelihood of a miscarriage of justice. Empirical evidence demonstrates, moreover, that there have been a disturbing number of cases in which the trial judge denied an *actually innocent* defendant's motion to suppress his or her—*false*—confession (or an eyewitness's incorrect identification), allowing the State to adduce highly prejudicial but misleading evidence at his or her trial and, ultimately, resulting in that defendant's wrongful conviction. Those issues are explored below.

### A. *Police Perjury*

There is no evidence that the *Lego* Court had the benefit of documentation and literature concerning the frequency with which police officers lie on the witness stand. But given that the available evidence suggests that suppression hearings are fertile grounds for this type of police misconduct, its prevalence should be factored into any decision as to the appropriate burden of proof in a criminal proceeding in which the outcome generally rests heavily on police officers' testimony.

The testimony offered by police officers is central to the fact finding that occurs at suppression hearings. Lay people are seldom witness to the circumstances surrounding, for example, a challenged extrajudicial statement of the defendant, and they seldom testify at suppression hearings. Although the defendant may testify,<sup>249</sup> those with a prior record are at a significant disadvantage,<sup>250</sup> and, in a similar vein, as mentioned above, those with an eye towards testifying at trial may forego testifying pre-trial for tactical reasons. Consequently, it is quite common to find the only live testimony at a suppression hearing to be the uncorroborated testimony of a police officer. The crucial determination as to whether the defendant's confession will be used against her, then, often comes down to nothing more than how the police officer recounts the circumstances surrounding the confession—and generally that police officer knows exactly what the judge needs to hear to find the confession admissible.<sup>251</sup> Worse yet, trial judges generally

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249. Cf. FED. R. EVID. 104(d).

250. See, e.g., FED. R. EVID. 609(a) (permitting a witness's criminal record to be admitted into evidence).

251. See WHITE, *supra* note 32, at 78:

In determining whether incriminating statements are likely to be admissible, moreover, the police may take into account two factors favoring admissibility: first, lower courts (especially trial courts) are inclined to interpret post-*Miranda* doctrine in a way that is favorable to the police; and, second, at least in cases where the interrogation is not recorded or otherwise transcribed, police testimony can be shaped so as to reduce the likelihood of a finding of nonwaiver.

resolve credibility determinations in favor of police officers;<sup>252</sup> the practical reality is that, absent affirmative and compelling proof of police misconduct, officers' testimony is usually credited and motions to suppress are generally denied.<sup>253</sup> This leaves the door wide open for police perjury.

After *Lego*, much has been written about the prevalence of police perjury, or "testilying," at suppression hearings.<sup>254</sup> Indeed, one commentator has gone so far as to postulate that there is a consensus understanding among scholars that police

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252. See *infra* Part VI.B. As a practical matter, preliminary hearings concerning the admissibility of a suspects' alleged inculpatory statements, for example, often devolve into credibility—i.e., "swearing"—contests between the officers involved and the suspect. See, e.g., *Stephan v. State*, 711 P.2d 1156, 1158 & n.5 (Alaska 1985) (opining that credibility contests "are typical" in suppression hearings involving the admissibility of a defendant's inculpatory statements and listing cases); Stanley Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1573 n.266 (1983) ("Lower courts consistently . . . resolve[] the 'swearing contest' over what took place during police interrogation in favor of the police."). In voluntariness hearings, for example, as the *Jackson* Court observed, the "facts are frequently disputed, questions of credibility are often crucial. . ." *Jackson v. Denno*, 388 U.S. 368, 390 (1963). As a result, appellate review provides, at best, a limited additional safeguard against the prejudicial effects of an erroneously admitted coerced confession. See *id.* at 390-91.

253. Walter Bugden, Jr., and Tara Isaacson describe the practical realities this way:

Motions to suppress are seldom won when the defendant must persuade the trial court that he, and not the police officer, has told the truth. Instead, when defendants prevail at motion hearings, they do so most often when the judge accepts as true every word spoken by the police, but still concludes that the undisputed facts permit ruling in favor of the accused.

Walter F. Bugden, Jr. & Tara L. Isaacson, *Crimes, Truth and Videotape: Mandatory Recording of Interrogations at the Police Station*, UTAH BAR J. Sept.-Oct. 2006, at 28, 29 (2006), available at [http://www.utahbar.org/barjournal/pdf/2006\\_sept\\_oct.pdf](http://www.utahbar.org/barjournal/pdf/2006_sept_oct.pdf); see Laurie L. Levenson, Symposium, *The Rampart Scandal, Policing the Criminal Justice System: Unnerving the Judge: Judicial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 787, 796 (2001) (stating that at suppression hearings, "judges are often called upon to determine whether the police officer's testimony is reliable enough to permit admission of the evidence. Judges tend to evade this responsibility by not questioning an officer's testimony unless the defense has demonstrated indisputably that the officer has lied").

254. See, e.g., Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demands Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 78 n.311 (1991) ("One discussion of police ethics characterizes police perjury as so widespread that it is one of eight basic orientations that police recruits learn: 'Lying and deception are an essential part of the police job, and even perjury should be used if it is necessary to protect yourself to get a conviction on a 'bad guy.'" (citation omitted)); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 699 (1996) [hereinafter *Police, Plus Perjury*]; David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 35-36 (1994) (stating that in the early 1990s, the Mollen Commission concluded that police perjury was widespread in New York); Slobogin, *supra* note 32, at 1043 ("[T]he most common venue for testilying is the suppression hearing . . ."); Jennifer E. Koepke, Note, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 221 (2000) ("Police perjury is a widely known problem in the legal system . . ."); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987) ("Virtually all of the [Chicago police] officers [who participated in the survey] admit that the police commit perjury, if infrequently, at suppression hearings."). Courts have also recognized the problem of police perjury at suppression hearings. See, e.g., *Lambert v. Blackwell*, 962 F. Supp. 1521, 1548-61 (E.D. Pa. 1997) (In granting the petitioner's habeas corpus petition, the court concluded that her first-degree murder conviction rested, in part, on the most likely perjured testimony of "at least six" police officers), *vacated*, 134 F.3d 506 (3d Cir. 1997); *People v. McMurty*, 314 N.Y.S.2d 194 (N.Y. Crim. Ct. 1970).

perjury is not only pervasive but systemic at suppression hearings: “substantial evidence demonstrates that police perjury is so common that scholars describe it as a ‘subcultural norm rather than an individual aberration.’”<sup>255</sup> In the words of Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit: “It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers.”<sup>256</sup>

Even as an open secret, however, the charade continues. After the close of evidence and during argument, prosecutors at suppression hearings often attempt to persuade the court of the legality of the officers’ actions by repeating the same rhetorical question: why would the officer lie? A good opponent, however, should be quick to cite a number of reasons, for police officers often have an incentive to lie at such hearings. It may be in the officer’s penal or pecuniary interest to lie,<sup>257</sup> or, alternatively, an officer may face enormous pressure from his or her peers to distort the truth.<sup>258</sup> Or an officer may be motivated to lie for less invidious, even noble, reasons. For example, a police officer may subjectively believe that lying at suppression hearings is an acceptable practice because it facilitates the admission of evidence that helps get dangerous criminals off of the streets (a primitive sort of utilitarian, ends-justify-the-means moral calculus).<sup>259</sup> In this vein, H. Richard

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255. Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 448 (2008) (internal quotation omitted); see Slobogin, *supra* note 32, at 1041-48 (noting the widespread belief that police perjury is commonplace). Cf. Robert P. Burns, *Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision*, 85 J. CRIM. L. & CRIMINOLOGY 843, 863 n.99 (1995) (“Though no one can be aware of its true extent, there are reasons to believe that [police perjury] is pervasive.”).

256. See Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 404 (1999) (quoting Stuart Taylor, Jr., *For the Record*, AM. LAW. Oct. 1995, at 72).

257. See WHITE, *supra* note 32, at 19 (stating that the Wickersham Commission concluded that “the prevalence of the third degree corrupted fact-finding, leading the police to commit perjury . . .” (citing Wickersham Report, *supra* note 156)); Stanley Z. Fischer, “*Just the Facts, Ma’am*”: *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 15 (1993) (“Police lie to protect themselves against civil liability for false arrest or the use of excessive force.”).

258. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 914-15 (1991). Stuntz argues:

The police officer has some incentives (which judges recognize) to distort his testimony, such as a partisan desire to win, or the wish to avoid seeing his work come to naught . . . [, moreover,] police officers may face a temptation to lie in order to win at the suppression hearing, secure in the knowledge that even truthful testimony from defendants will be less credible than officers’ falsehoods.

*Id.*; Koepke, *supra* note 254, at 221 (“Police perjury has become very common in brutality cases, primarily because of the pressures an officer receives from his colleagues.”).

259. Professor Kamisar, for example, submits that police officers are innately prone to distort their testimony in suppression hearings so as to lead the trial judge to admit challenged evidence:

It is not because a police officer is more dishonest than the rest of us that we should demand an objective recodation of the critical events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and reinterpret past events in a light most favorable to himself—that we should not permit him to be “a judge in his own cause.”

Ulliver, a former prosecutor, submits that police perjury manifests itself most frequently in the form of “the instrumental adjustment”: “A slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result.”<sup>260</sup>

Any challenge to *Lego* should begin with the understanding that perjury is very common among police officers at suppression hearings. Had the *Lego* Court been made privy—in the form of solid authority made part of the record—to what we now know to be true, it may have been more reluctant to reach the result that it did. Although it is near impossible to root out police perjury—or any perjury for that matter—it is not difficult to create a prophylactic measure that will ensure that the judiciary will apply the utmost scrutiny to suspect testimony. After all, as Professor David Dorfman submits, police may lie in court simply because “judges allow them to get away with it.”<sup>261</sup> In other words, the judiciary is not without blame. After all, in the end, it is the trial courts that make preliminary admissibility determinations. But can they be trusted to impartially evaluate police testimony?

### B. Judicial Bias

Perjury would not be such a central issue in suppression hearings if the courts gave police officers’ testimony the level of scrutiny experience has shown to be warranted. Surely the *Lego* Court assumed that trial judges, per the judicial oath, would evaluate evidence fairly and impartially at suppression hearings, unaware of the institutional bias toward accepting police testimony.

Today, however, there is substantial anecdotal evidence that, notwithstanding the prevalence of police perjury and irrespective of its causes, as a practical matter, the testimony of police officers generally receives more credence than defendants’

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YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 137 (1980) (quotation omitted); see Harris, *supra* note 254, at 34-35 (arguing that in the context of search-and-seizure suppression hearings, police officers may adopt a “kind of ‘ends justify the means’ thinking, in which testimony gets adjusted in hindsight so that the prosecution can succeed”). Professor Slobogin asserts:

The most obvious explanation for all of this lying is a desire to see the guilty brought to “justice.” As law enforcement officers, the police do not want a person they know to be a criminal to escape conviction simply because of a ‘technical’ violation of the Constitution, a procedural formality, or a trivial “exculpatory” fact.

Slobogin, *supra* note 32, at 1044; see also Stuntz, *supra* note 258, at 915 n.75 (1991) (Professor Stuntz asserts that “[a] generally honest police officer may well be more willing to lie at a suppression hearing than in a warrant application, because at that point the officer knows the suspect is guilty, and that fact may make lying more morally palatable.”); Police, *Plus Perjury*, *supra* note 254, at 698 n.20 (“In a typically measured comment, Alan Dershowitz declared that ‘almost all police lie about whether they violated the Constitution in order to convict guilty defendants.’” (quoting ALAN DERSHOWITZ, *THE BEST DEFENSE* xxi (1982))).

260. Police, *Plus Perjury*, *supra* note 254, at 699 (quoting H. RICHARD ULLIVER, *TEMPERED ZEAL* 115-16 (1988)); see McClurg, *supra* note 256, at 412-13 (arguing that “the most prominent explanation for police lying is a false belief that the end of convicting guilty persons justifies illicit means,” characterizing this justification as a sort of “ends-means rationalization”).

261. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 465 (1999).

testimony at suppression hearings.<sup>262</sup> This is directly attributable to the partiality of many trial judges. Indeed, there is substantial anecdotal evidence that, at least in the context of suppression hearings, many judges are biased in favor of police officers. The following comments by one judge are illustrative of this point:

Many times, I feel the police are lying, but I can't make a finding on a hunch. I've got to have some facts. If the defense can't show anything, that the police officer is telling a lie, then I have to find for the policeman . . . You walk into a case and as a rule you believe the police officer—you've got to believe police more than defendant.<sup>263</sup>

As a result, judges often give officers' testimony the benefit of the doubt so as to admit statements that are the product of alleged constitutional violations, accepting as true testimony that strains credulity to admit what they may view as highly probative evidence of guilt.<sup>264</sup> The following remarks by Judge Seay concerning his decision to deny a suppression motion are instructive on this issue: "Well, whatever the issue . . . when you've got sworn testimony from two police officers and they're testifying, sometimes you don't have much other than that and you have to go along with the sworn testimony but it does really stretch the imagination . . . ."<sup>265</sup>

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262. See, e.g., *Harris v. State*, 678 P.2d 397, 414 (Alaska Ct. App. 1984) (Singleton, J., concurring and dissenting) ("[I]n the absence of a tape recording, the prosecuting authorities invariably win the swearing contest" between a police officer and a defendant at a suppression hearing.). Professor White has noted:

While empirical data relating to judges' or juries' assessment of credibility in suppression of confession cases is lacking, it is generally believed that at least in cases involving the classic 'swearing' contest, where the confession's admissibility depends on whether the judge believes the police or the suspect's testimony, judges invariably believe the police.

WHITE, *supra* note 32, at 192; see also Stuntz, *supra* note 258, at 914-15 (stating that in a suppression hearing, the "credibility gap between officer and defendant creates an opportunity for effective perjury by the police"); Koepke, *supra* note 254, at 222 n.45 ("Judges . . . are really left with no choice but to presume an officer's honesty." (citation omitted)). See generally McClurg, *supra* note 256, at 403-06 (arguing that trial judges accept police officers' testimony over that offered by defendants in the vast majority of suppression hearings).

263. *Police, Plus Perjury*, *infra* note 254, at 700 (quoting Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 119 (1992) (ellipsis in original) [hereinafter *Heater Factor*]); see Bugden & Isaacson, *supra* note 253, at 29-30 (arguing that "there is an unspoken bias that guides the judge when he or she serves as the trier of fact in the credibility contest between the testimony of a police officer and the testimony of the accused").

264. See WHITE, *supra* note 32, at 119 (arguing that judges are inclined to accept police testimony over that of defendants); Harris, *supra* note 254, at 33 ("[I]t is lower courts' consistent view of [police officers'] testimony that is troubling. These courts do not simply hear the police testimony, consider it, and decide whether to accept it in accordance with the usual model of court as fact-finder. Rather, they usually just accept it without question. Judges rarely express skepticism about this testimony . . . .") Cf. Levenson, *supra* note 253, at 790 ("[J]udges unwittingly participate in police perjury and misconduct by not critically examining police credibility during proceedings before the court . . . . [J]udges appear to have been ignoring telltale signs that police officers fabricate testimony to obtain convictions.").

265. *Police, Plus Perjury*, *supra* note 254, at 696 (quoting Joint App'x at 34-35, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717) (alterations added)); see Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 255 (1998)

Suspect police testimony that is offered in suppression hearings may be passively accepted by judges for a myriad of reasons,<sup>266</sup> notwithstanding widespread judicial awareness of the problem of police perjury.<sup>267</sup> For example, a judge may be motivated to accept testimony that he or she subjectively believes to be of questionable veracity by an earnest desire to ensure that an “obviously guilty” criminal defendant gets convicted,<sup>268</sup> elevating a utilitarian concern for achieving justice in the concrete case over a more Kantian, principled respect for not only our specific constitutionally grounded individual rights but also the fundamental values that undergird those rights. Or, alternatively, a judge may accept suspect testimony from a police officer for more pragmatic reasons, e.g., he or she may be reluctant to accuse a police officer of lying in open court.<sup>269</sup> Or, as some commentators have suggested, judges may be inclined to accept as true police

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(Professor Alan Dershowitz describes the scene at some suppression hearings thus: “all of the officers involved parrot the bogus testimony, and the judge ‘shakes his head in knowing frustration, but accepts the officers’ account as credible.” (citation omitted)).

266. Jennifer Koepke, for example, posits that the following excuses are among those offered for the criminal justice system’s tolerance of policy perjury:

- 1) it is impossible to determine if a witness is lying; 2) judges dislike the possibility of suppressing evidence due to police perjury; 3) many judges believe that most defendants in the system are guilty; 4) judges are more likely to believe an officer’s testimony rather than the defendant’s; and 5) judges do not enjoy accusing other government officials of lying.

Koepke, *supra* note 254, at 222.

267. *Cf.* McClurg, *supra* note 256, at 403-04.

[J]udges ‘almost always’ accept the officer’s word . . . not necessarily because the officer’s word is more credible. Judges know about police lying . . . . One practical explanation is that, while judges know as a general matter that police officers lie, they may find it difficult to make that determination in a particular case.

*Id.*

268. WHITE, *supra* note 32, at 191 (Judges “will be keenly aware that excluding . . . [a] confession will be extremely damaging to the government’s case”; as a result, they “may be even more reluctant than jurors . . . to have their ruling on the voluntariness of a confession result in the acquittal of an apparently guilty defendant.”); McClurg, *supra* note 256, at 405 (noting argument that judges who “believe[] the defendant to be guilty and adopt[] the police officer’s ‘end justifies the means’ rationale for violating the Constitution and lying under oath to avoid setting a criminal free” may be prone to accept perjured testimony).

269. Professor Donald Dripps describes the dilemma that trial judges face in suppression hearings involving credibility contests this way:

The police story may be improbable, but police officers must be presumed honest, and the defendant’s word is worthless.

In a swearing contest, the trial judge can discredit the police testimony only by branding the police as liars and accepting the word of an apparent felon. Typically the police, rather than the felon, will be telling the truth, but in a significant number of cases the police account is false. Nonetheless judges decide cases one at a time, so the police almost always win the swearing contest.

*Police, Plus Perjury*, *supra* note 254, at 697; *see* McClurg, *supra* note 256, at 405 (noting that a possible explanation for judges’ reluctance to discount police testimony is that they “do not like to call other government officials liars, especially those who regularly appear in their courts” (citation omitted)); *see also* Chin & Wells, *supra* note 265, at 266-65.

testimony they have reason to believe is perjured for more nefarious, self-interested reasons: “judges do not want to generate adverse publicity that portrays them as being ‘soft on crime’; and . . . elected judges are afraid of jeopardizing their chances of reelection.”<sup>270</sup> Indeed, the results of Myron Orfield’s study of the Chicago criminal courts indicate that some judges may actually believe that it is permissible, at least in some instances, to “knowingly accept police perjury as truthful.”<sup>271</sup> But regardless of what motivates some judges to give police testimony a *de facto* presumption of credibility—a presumption that has been described as “improper (and frankly illegal)”<sup>272</sup>—the bottom line is that this judicial practice, when coupled with a low standard of proof, detracts from the accuracy of the fact finding that takes place at suppression hearings.

In denying a motion to suppress evidence that was allegedly the product of a Fourth Amendment violation *because* he was compelled to evaluate the evidence under a low standard of proof, Judge Younger eloquently elucidated the relationship between a low burden of proof, police perjury at suppression hearings, and the risk of erroneous fact finding:

Had the issue been open, I would hold that the People must prove beyond a reasonable doubt that the seizure was lawful. But the issue is closed. The Court of Appeals declares the burden of proof to be the defendant’s. Where the testimony on one side balances the testimony on the other, as here, it is the People who prevail. Defendant’s motion to suppress is therefore denied.

I come to this decision reluctantly. Our refusal to face up to the “drosy” problem [i.e., police lying at suppression hearings for the purpose of getting unconstitutionally obtained evidence admitted] soils the rectitude of the administration of justice. One is tempted to deal with it now by suppressing

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270. McClurg, *supra* note 256, at 405. As Andrew McClurg points out, “even when there is reason to suspect perjury, the political pressure on judges to believe police officers rather than criminal defendants is tremendous.” *Id.* at 410. According to McClurg, a judge may even be “afraid to officially disbelieve police officers even when the judge subjectively believes the officer is lying . . .” *Id.* at 406.

271. *Heater Factor*, *supra* note 263, at 83. Orfield stated:

The [survey’s] respondents, including judges, also believe that judges may purposefully ignore the law to prevent evidence from being suppressed, and even more often, knowingly accept police perjury as truthful. When the crime is serious, this judicial “cheating” is more likely to occur due to three primary reasons; first, the judge’s sense that it is unjust to suppress the evidence under the circumstances of a particular case, second, the judge’s fear of adverse publicity, and third, the fear that the suppression will hurt their chances in judicial elections.

*Id.*

272. Dorfman, *supra* note 261, at 465. Moreover, as Professor Dorfman explains, aside from emboldening law enforcement, judicial tolerance of police perjury may imply an abdication of the judicial role:

The [judicial] wink and the nod conveys many messages—either that the judge is politically hamstrung and so cannot afford to confront the lie; or that the judge defers to the police witness, knowing that confronting the lie aids the defense; or most disturbingly, that the judge actually approves of the lie.

*Id.*

“dropsy” evidence out of hand; yet I cannot. Reason and settled rules of law lead the other way, and Judge [sic] serve[s] the integrity of the means, not the attractiveness of the end.

Somehow, policemen must be made to understand that their duty is no different.<sup>273</sup>

His point is equally valid in every species of suppression hearing, irrespective of the specific nature of the defendant’s claims. As Professor Dorfman suggests, because the judicial fact finding that occurs during pre-trial suppression hearings is almost universally governed by the preponderance standard—“a standard that invites, at most, mild judicial scrutiny” of police testimony—which, in essence, grants judges plenary authority to make credibility determinations, there is little incentive for judges to carefully scrutinize police testimony.<sup>274</sup> But, conversely, if, as a condition precedent to denying a motion to suppress, judges were compelled to find that the prosecution had adduced sufficient evidence to establish the admissibility of the challenged evidence beyond a reasonable doubt (or even by clear-and-convincing evidence), “no doubt the judge-as-fact finder would feel constrained to scrutinize the witness’s reliability more carefully.”<sup>275</sup> In light of substantial evidence that suggests that police perjury is commonplace, such enhanced judicial scrutiny is well warranted.

Whether or not the *Lego* Court was aware of the foregoing bias of many trial judges and the deleterious effect that bias has on the accuracy of the fact finding process, it is now a matter of record. Indeed, if the *Lego* Court had been privy to the quotes and comments of judges cited in this section, it may have been more reluctant to hold that the preponderance standard was constitutionally sufficient. Because judicial bias, when coupled with police perjury, often leads to unreliable admissibility determinations, unreliable jury verdicts thereby follow. With that said, after *Lego*, “substantial evidence has accumulated” that defendants’ core constitutional rights are regularly impinged upon as a direct result of determining admissibility of certain species of evidence by preponderant evidence.<sup>276</sup>

### C. Actual Innocence After *Lego*

#### 1. *Lego* and “Federal Rights”

As discussed *supra*, the *Lego* Court premised its holding, in large measure, on the following factual assumption: the absence of an empirically demonstrable

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273. *People v. McMurty*, 314 N.Y.S.2d 194, 198 (N.Y. Crim. Ct. 1970) (Younger, J.) (citation omitted).

274. Dorfman, *supra* note 261, at 468. Given the high degree of deference appellate courts accord judicial credibility determinations, Professor Dorfman makes a valid point. See *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985) (explaining that if district court’s account of evidence is plausible in light of entire record, the court of appeals may not reverse it even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently).

275. Dorfman, *supra* note 261, at 468.

276. Cf. *Lego v. Twomey*, 404 U.S. 477, 488 (1972).

causal connection between “determining admissibility by a preponderance of the evidence” and the violation of “federal rights.”<sup>277</sup> (*Connelly* reiterated the same.)<sup>278</sup> The *Lego* Court buttressed its conclusion that the preponderance standard was constitutionally sufficient by asserting that the petitioner had failed to adduce any evidence “to suggest that admissibility rulings have been unreliable or otherwise wanting in quality *because* not based on a higher standard.”<sup>279</sup> By negative implication, then, if a but-for causal connection between a low standard of proof and unreliable admissibility determinations could be demonstrated, a higher standard of proof would become a constitutional imperative. And, notably, the *Lego* Court expressly qualified its holding with contingent and temporal language; indeed, there is language in the opinion that suggests that the Court’s holding may have been intended to be provisional.<sup>280</sup>

With that said, both the *Lego* and *Connelly* majorities seemed to assume *ipse dixit* that adopting a stringent standard of proof at suppression hearings in which defendants challenged the admissibility of inculpatory statements or confessions would detract from the central purpose of criminal trials—“decid[ing] the factual question of the defendant’s guilt or innocence”<sup>281</sup>—by creating unwarranted procedural hurdles between the jury and *truthful, reliable* evidence.<sup>282</sup> To be sure, if our criminal justice system was not innocence-weighted but rather guilt-innocence neutral—which is simply not the case—that tacit assumption *may* be justified.<sup>283</sup> But given that the presumption of innocence is the touchstone of our criminal jurisprudence,<sup>284</sup> that foundational assumption is open to serious question.

Experience has irrefutably demonstrated that the historical concern with the reliability of physically (i.e., through torture or other physical abuse) or psychologically coerced statements is indeed well-founded.<sup>285</sup> And indeed, it is difficult to

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277. *See id.* at 488.

278. *See Colorado v. Connelly*, 479 U.S. 157, 169 (1986).

279. *Lego*, 404 U.S. at 489 (emphasis added).

280. The following language in *Lego* supports this conclusion: “*Without good cause*, we are unwilling to . . . revis[e] the standards [of proof] applicable in collateral proceedings [e.g., suppression hearings]. Sound reason for moving further in this direction has not been offered here *nor do we discern any at the present time.*” *Id.* at 488-89 (emphasis added). And it goes without saying that Supreme Court precedent is not immutable, which should be especially true where, as in *Lego*, the Court uses qualified, contingent, or temporal language. *Cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2516 (2009) (suggesting that changed conditions may warrant reevaluation of Section 5 of the Voting Rights Act of 1965).

281. *Connelly*, 479 U.S. at 166 (citation omitted).

282. *See id.* (explaining that the Court in *Lego* cautioned against expanding current exclusionary rules that prevent admission of truthful and probative evidence to state juries); *see also Lego*, 404 U.S. at 489 (implicitly characterizing rules excluding allegedly involuntary confessions as “barriers to placing *truthful and probative evidence* before . . . juries” (emphasis added)).

283. *See supra* notes 58-77 and accompanying text.

284. *See In re Winship*, 397 U.S. at 363 (explaining that the reasonable doubt standard embodies a presumption of innocence) (quoting *Coffin*, 156 U.S. at 453).

285. *See infra* Part VI.C.iii.

characterize *false* confessions as either truthful or probative evidence or, for that matter, conclude that preventing juries from considering statements that are untrue as substantive evidence of guilt—a *fortiori* because of juries' propensity to focus on putative confessions, irrespective of their veracity, to the exclusion of other evidence—somehow deflects the criminal trial from its basic purpose: ascertaining whether the defendant, in fact, committed the charged crimes.<sup>286</sup>

## 2. *The Nexus Between Suppression Hearings and Wrongful Convictions*

After *Lego*, subsequent technological developments—most notably the advent of DNA testing<sup>287</sup>—have made it possible to conclusively establish the actual innocence of prisoners who had been wrongly convicted of crimes they did not commit, at least in large measure, because of their *false* inculpatory statements.<sup>288</sup> If there had been any lingering doubts before, these actual-innocence cases have forever disabused us of the notion that defendants' self-incriminating statements are somehow inherently credible and probative of guilt, and they poignantly illustrate how a failure to carefully scrutinize the circumstances under which defendants' alleged inculpatory statements were obtained creates a real and substantial risk of erroneous convictions.<sup>289</sup> (This statement holds true *mutatis*

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286. Professors Richard Leo and Richard Ofshe correctly frame the problem that false confessions pose to what the *Connelly* Court, perhaps disingenuously, asserted is the central purpose of the criminal trial—"decid[ing] the factual question of the defendant's guilt or innocence," *Connelly*, 479 U.S. at 166 (citation omitted)—as follows:

Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant . . . . In a criminal justice system whose formal rules are designed to minimize the frequency of unwarranted arrest, unjustified prosecution, and wrongful conviction, police-induced false confessions rank amongst the most fateful of all official errors.

Leo & Ofshe, *supra* note 147, at 429.

287. Professor Brandon Garrett describes DNA's profound impact on our criminal justice system as follows:

Post conviction DNA testing changed the landscape of criminal justice in the United States. Actors in the criminal system long doubted whether courts ever wrongly convicted people; for example, Judge Learned Hand famously called "the ghost of the innocent man convicted . . . an unreal dream." With the benefit of DNA testing, we now know our courts have convicted innocent people and have even sentenced some to death.

Garrett, *supra* note 189, at 649 (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D. N.Y. 1923)). As of February 2010, 251 people have been exonerated by DNA testing. See The Innocence Project, at ([http://www.innocenceproject.org/Content/Friday\\_Roundup\\_Freedom\\_and\\_Reform\\_from\\_Coast\\_to\\_Coast.php](http://www.innocenceproject.org/Content/Friday_Roundup_Freedom_and_Reform_from_Coast_to_Coast.php)) (last visited March 21, 2010).

288. See Fischer & Rosen-Zvi, *supra* note 1, at 876 ("The strong causal link between false confessions and wrongful convictions has been further substantiated in the DNA era."). See generally Samuel R. Gross et al., Symposium: Innocence in Capital Sentencing, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005) ("In fifty-one of the 340 exonerations between 1989 and 2004—15%—the defendants confessed to crimes they had not committed. In most of these cases it is apparent that the false confessions were coerced by the police.").

289. See *infra* Part VI.C.iii; see also Davies, *supra* note 142, at 250 ("[J]uries are often so unwilling to believe that anyone would confess to a crime that he did not commit that they are likely to convict on the basis of the

*mutandis* with respect to unduly suggestive eyewitness identifications.)<sup>290</sup> For as then-Justice Souter observed in his dissenting opinion in *Kansas v. Marsh*,<sup>291</sup> empirical evidence strongly suggests that the majority of “wrongful convictions and sentences result[] from eyewitness misidentification, false confession, and (most frequently) perjury . . . .”<sup>292</sup>

At least in principle, a suppression hearing is supposed to vet such evidence prior to its presentment to the jury. But that purpose is undercut by a burden of proof that fails to screen out much of the evidence that should have been suppressed. With that said, with respect to cases where an innocent person was wrongly convicted based on unreliable but highly prejudicial evidence that would have been suppressed under a higher burden of proof, the *Lego* and *Connelly* decisions are, in some sense, liable to the individuals, their families, and society as a whole.

### 3. False Confessions

Consider a sample of actual innocence cases in which the following defendants were wrongfully convicted and imprisoned after their motions to suppress their self-inculpatory statements or confessions were denied by the trial court at a suppression hearing:<sup>293</sup> Jeffrey Deskovic,<sup>294</sup> Bruce Godschalk,<sup>295</sup> Travis Hayes,<sup>296</sup> Ronald Jones,<sup>297</sup> John Kogut,<sup>298</sup> Anton McCray,<sup>299</sup> Marvin Mitchell,<sup>300</sup> Calvin

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confession alone, even if no significant or credible evidence confirms the confession and considerable evidence disconfirms it” (quotation omitted)). Cf. WHITE, *supra* note 32, at 42 (observing that the Court has “characterized the rule excluding involuntary confessions as one of the ‘constitutional doctrines protecting the innocent’” (quoting *Stein*, 346 U.S. 156)).

290. See *infra* Part VI.C.iv.

291. 548 U.S. 163 (2006).

292. *Id.* at 210 (Souter, J., dissenting) (citation omitted). Justice Souter observed that the evidence suggests that false convictions may be more likely in serious crimes: “among all prosecutions homicide cases suffer an unusually high incidence of false conviction . . . .” *Id.* (citation omitted).

293. See generally The Innocence Project—Know the Cases: Browse the Profiles, available at <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited March 21, 2010) (sketching the manner in which the following defendants were wrongfully convicted and, ultimately, exonerated and released). This list is representative rather than comprehensive.

294. See *People v. Deskovic*, 201 A.D.2d 579 (N.Y. App. Div. 1994) (holding defendant’s inculpatory statements were properly admitted into evidence). In concluding that the trial court had properly denied Deskovic’s motion to suppress statements, the court opined that “[t]here was overwhelming evidence of the defendant’s guilt in the form of the defendant’s own multiple inculpatory statements . . . .” *Id.* at 580.

295. See *Commonwealth v. Godschalk*, 679 A.2d 1295, 1296-97 (Pa. Super. Ct. 1996).

296. See *State v. Hayes*, 806 So. 2d 816, 826 (La. Ct. App. 2001).

297. See *People v. Jones*, 620 N.E.2d 325, 332 (Ill. 1993).

298. See *People v. Kogut*, 176 A.D.2d 757, 757 (N.Y. App. Div. 1991).

299. See *People v. McCray*, 198 A.D.2d 200, 200-02 (N.Y. App. Div. 1993).

300. See *Commonwealth v. Mitchell*, 619 N.E.2d 619, 621 (Mass. App. Ct. 1993).

Ollins,<sup>301</sup> Peter Reilly,<sup>302</sup> Melvin Lee Reynolds,<sup>303</sup> Yusuf Salaam,<sup>304</sup> Douglas Warney,<sup>305</sup> Earl Washington, Jr.,<sup>306</sup> Kharey Wise,<sup>307</sup> Clyde Charles,<sup>308</sup> and Francis Phillip Hemauer.<sup>309</sup> All of the aforementioned defendants made allegedly self-inculpatory statements or provided oral or even written confessions—notwithstanding their innocence—and that “evidence” was, in turn, presented to an unknowing jury that rendered a guilty verdict, which, in large measure, was based on the defendant’s alleged confession. More germane to this Article, each defendant challenged the admission of those statements or confessions at a pre-trial suppression hearing, where a police officer testified, and a prosecuting attorney then persuaded a trial judge that the State had satisfied its burden of proof.

#### 4. Mistaken Eyewitness Identifications

Motions to suppress mistaken eyewitness identifications of factually innocent criminal defendants are also commonly denied.<sup>310</sup> The troubling evidence of

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301. See *People v. Ollins*, 606 N.E.2d 192, 196 (Ill. App. Ct. 1992).

302. Compare *Reilly v. State*, 355 A.2d 324, 337 n.4 (Conn. Super. Ct. 1976), with *False Confessions*, *supra* note 154, at 125 (noting the Reilly case is “widely accepted as one in which an innocent defendant was convicted on the basis of a false confession.”).

303. Compare *State v. Reynolds*, 619 S.W.2d 741, 747 (Mo. 1981) (per curiam) (“The trial court did not err in refusing to suppress the confession of appellant, and in permitting it to be admitted into evidence.”), with *Welsh S. White, Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 993 n.96 (2003) (discussing that Reynolds’s confession was proven false).

304. See *People v. Salaam*, 187 A.D.2d 363, 363-64 (N.Y. App. Div. 1992). In denying defendant’s motion, the court indicated that it “credit[ed] police officer testimony” over that of the defendant. *Id.* at 364.

305. See *People v. Warney*, 299 A.D.2d 956, 956 (N.Y. App. Div. 2002).

306. See *Washington v. Commonwealth*, 323 S.E.2d 577, 586 (Va. 1984) (in upholding defendant’s conviction for capital murder and death sentence, the court found that the trial court properly denied his motion to suppress inculpatory statements).

307. See *People v. Wise*, 204 A.D.2d 133, 134 (N.Y. App. Div. 1994).

308. See *State v. Charles*, 511 So. 2d 1164, 1168 (La. 1987).

309. Compare *Hemauer v. State*, 218 N.W.2d 342, 345-46 (Wis. 1974) (holding trial court’s denial of Hemauer’s motion to suppress inculpatory statement was proper), with E. Michael McCann, *Opposing Capital Punishment: A Prosecutor’s Perspective*, 79 MARQ. L. REV. 649, 657 (1996) (noting that after serving eight years in prison for abduction, rape, and attempted murder, Hemauer was exonerated by DNA evidence).

310. The denial of motions to suppress identification evidence in cases in which an actually innocent defendant is erroneously convicted is far more common than we would hope. Compare *State v. Waters*, 302 S.E.2d 188, 192 (N.C. 1983) (in affirming denial of defendant’s motion to suppress identification evidence, the court observed “that at no time prior to trial or at trial did the victim make an *incorrect* identification of her assailant” (emphasis added)); *State v. Toney*, 680 S.W.2d 268, 277 (Mo. Ct. App. 1984) (lineup identification of defendant was properly admitted), *overruled on other grounds*, *State v. Carson*, 941 S.W.2d 518, 524 (Mo. 1997); *State v. Beaver*, 963 S.W.2d 474, 474 (Mo. Ct. App. 1998); *Webster v. State*, 474 A.2d 1305, 1321-22 (Md. 1984); *People v. Fappiano*, 139 A.D.2d 524, 524-25 (N.Y. App. Div. 1988) (affirming denial of motion to suppress identification testimony); *People v. Chalmers*, 163 A.D.2d 528, 528 (N.Y. App. Div. 1990) (same); *Commonwealth v. Charles*, 489 N.E.2d 679, 683 (Mass. 1986) (same); *State v. Charles*, 511 So. 2d 1164, 1168 (La. Ct. App. 1987); *People v. Dabbs*, 141 A.D.2d 664, 664 (N.Y. App. Div. 1988); *State v. Jean*, 311 S.E.2d 266, 267 (N.C. 1984) (same); *People v. Daye*, 223 Cal. Rptr. 569, 575 (Cal. Ct. App. 1986) (depublished); *Taylor v. State*, No. 01-95-00495-CR, 1997 Tex. Ct. App. WL 167849, at \*1 (Tex. Ct. App. Apr. 10, 1997); *State v. Brown*, No. L-82-297, 1983 Ohio App. LEXIS 11972, at \*36 (Ohio Ct. App. Sept. 16, 1983), and *State v. Smith*, No. 87AP-85, 1988 Ohio App. LEXIS 3032, at \*17 (Ohio Ct. App. Jul. 28, 1988), with The Innocence Project—Know the Cases: Browse the Profiles,

wrongful convictions in cases involving false confessions notwithstanding, mistaken eyewitness identifications are the leading cause of wrongful convictions.<sup>311</sup> As Professor Michael Hoffheimer suggests, this may be attributable to the fact that juries are often unable to discern whether a given eyewitness identification is accurate but tend to give undue weight to putative eyewitness identifications:

The common knowledge of factfinders does not include an understanding of factors that determine the accuracy of identification testimony: to factfinders eyewitness testimony is credible, and its persuasiveness depends more on the eyewitness's conviction and credibility than on the truth or accuracy of the identification. Factfinders often sympathize with the eyewitness; moreover, eyewitnesses are not subject to effective cross-examination.<sup>312</sup>

With that said, the Supreme Court has interpreted the Constitution so as to preclude the admission of eyewitness identifications borne out of procedures that are “unnecessarily suggestive and conducive to irreparable mistaken identification.”<sup>313</sup> And, irrespective of the underlying rationale for due process-based exclusion of unduly suggestive eyewitness identifications,<sup>314</sup> the Court has made clear that “reliability is the linchpin in determining the admissibility of identifica-

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*available* at <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited August 11, 2009) (noting that all of the abovementioned defendants were released on actual-innocence grounds).

311. See Gross, *supra* note 288, at 542 (“The most common cause of wrongful convictions is eyewitness misidentification. This is not news. It was first shown in 1932 . . . and it is apparent again in our data: In 64% of these exonerations (219/340), at least one eyewitness misidentified the defendant.” (citation omitted)); Findley, *supra* note 77, at 148; *see also* United States v. Wade, 388 U.S. 218, 228-29 (1967) (“A commentator has observed that ‘[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.’”) (citation omitted).

312. Michael H. Hoffheimer, *Criminal Law: Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 589 (1989); *see* Watkins v. Sowders, 449 U.S. 341, 355-56 (1981) (Brennan, J., dissenting) (“[T]here can be little doubt that identification evidence is as potentially unreliable as confession evidence . . . [B]ecause of the extraordinary impact of much eyewitness identification evidence, juries hearing such evidence will be no more able fully to ignore it upon instruction of the trial judge than will juries hearing confession evidence.”).

313. *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *see also* *Foster v. California*, 394 U.S. 440, 442-43 n.2 (1968). As Professor Hoffheimer points out, however, “[t]he test for constitutionally improper identifications is strict: identifications are inadmissible only where the procedures lead to ‘a very substantial likelihood of misidentification’ . . . . Constitutional authority [has] thus recognized but . . . not effectively reduce[d] the dangers of identification error in routine cases.” Hoffheimer, *supra* note 312, at 592-93 (quoting *Neil v. Biggers*, 409 U.S. 188, 198 (1972)).

314. As Professor Hoffheimer notes:

Although the cases interpreting an accused's right to procedural fairness do require exclusion of identifications that are the result of grossly unfair and suggestive identification procedures, the purpose of the exclusionary rule is prophylactic: it is designed to deter improper police suggestion because the undesirable detective procedures offend societal notions of fair play rather than because they have resulted in inaccurate evidence in the particular case.

Hoffheimer, *supra* note 312, at 591 n.15.

tion testimony . . . .”<sup>315</sup>

Given that eyewitness identifications, like self-inculpatory statements, are highly prejudicial and “notoriously unreliable,”<sup>316</sup> it follows that there is a nexus between erroneous denials of motions to suppress identifications on due-process grounds and wrongful convictions. Empirical evidence suggests that there is indeed a connection between the two.<sup>317</sup> Moreover, mistaken eyewitness identifications lead to even more erroneous convictions than false confessions.<sup>318</sup> Therefore, even assuming that it is not a constitutional imperative, given the stakes involved and the potential for erroneous preliminary fact finding, it would, at minimum, be prudent to adopt a heightened standard of proof at suppression hearings in which identifications are challenged on due-process grounds.

#### D. *The Moral and Constitutional Imperative*

In light of the aforementioned cases of actual innocence, and those undocumented, the authors posit that raising the burden of proof in some suppression hearings is not only a constitutional but a moral imperative. How many people are currently incarcerated—perhaps even awaiting their execution—*because* a trial judge determined that the prosecution had established the admissibility of highly prejudicial, yet ultimately false, evidence by preponderant evidence?<sup>319</sup> And what can be done to prevent such injustices?

Unless we, as a society, are prepared to live with the knowledge that innocent people suffer *because* of *Lego*’s holding—viewing their needless and undeserved suffering as an unavoidable collateral cost of “doing something about crime”—a higher burden of proof is required; for, in light of our innocence-weighted system, the constitutional status quo is untenable. It remains that many, if not all, of these gross miscarriages of justice could have easily been avoided by simply raising the burden of proof at pre-trial suppression hearings in which the admissibility of a defendant’s allegedly inculpatory statements or an eyewitness’s in- or out-of-court identification is challenged to proof beyond a reasonable doubt (or at least proof by clear-and-convincing evidence). As alluded to earlier, through the simple expedient of adopting a higher burden of proof at suppression hearings, fewer false confessions (and mistaken eyewitness identifications) will be admitted into evi-

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315. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976); *see also Biggers*, 409 U.S. at 199-200 (setting forth relevant factors to be considered in evaluating likelihood of misidentification).

316. *See* Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1018 n.83 (2002) (“Eyewitness testimony, for example, is widely accepted in the courtroom, yet it has been demonstrated to be ‘notoriously unreliable—in some circumstances more often wrong than right.’” (citation omitted)).

317. *See supra* note 313.

318. *See supra* note 313 and accompanying text.

319. *Cf.* *Dist. Atty’s Office v. Osborne*, 129 S. Ct. 2308, 2321 (2009) (“Whether . . . a federal [constitutional] right [to be released upon proof of actual innocence] exists is an open question.”); *In re Davis*, 130 S. Ct. 1 (2009).

dence against defendants;<sup>320</sup> therefore, fewer actually innocent defendants will be unjustly deprived of their liberty—and perhaps even their lives.<sup>321</sup>

In short, there is a causal connection between the use of a low burden of proof in the suppression hearings in which confessions and eyewitness identifications are challenged and wrongful convictions; therefore, federal constitutional rights are implicated. This is of paramount importance. If it is shown that federal rights have suffered, then the prerequisite for the *Lego* Court's invitation to revisit is holding has been met.<sup>322</sup>

## VII. *LEGO*, WRONGFUL CONVICTIONS, AND DUE PROCESS VIOLATIONS

As Professor Welsh White has observed, “[t]he due process clause has been interpreted to require that the government employ procedures that will protect the innocent from wrongful convictions.”<sup>323</sup> In *Palko v. Connecticut*,<sup>324</sup> for example, Justice Cardozo famously opined: “Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. The hearing, moreover, must be a real one, not a sham or a pretense.”<sup>325</sup> In *Palko*, the Court seemed to eschew form for substance, implying that the procedures a particular situation demands should be determined by reference to what is “essential to the substance of a hearing.”<sup>326</sup> Given that the end result of a suppression hearing conducted under the preponderance standard, for all intents and purposes, is all too often a *fait accompli*—the defendant's motion is denied—it follows that the use of such a low burden of proof, in at least some instances, runs afoul of the Due Process Clauses of the Fifth and Fourteenth Amendments. Because, as a practical matter, the use of such a low standard of proof often makes the hearing at best suspect, and at worst a sham, raising the burden of proof should

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320. Of course, the necessary corollary to this proposition is that more truthful confessions and reliable identifications will also be excluded. See *supra* notes 68-69 and accompanying text.

321. Of course, given the inherent difficulties involved in making empirical determinations about the given weight a particular jury subjectively gave an individual coerced confession or unduly suggestive eyewitness identification, for example, it is difficult to know with any degree of certitude the exact number of wrongful convictions that would be avoided through mandating a higher standard of proof for admitting those species of evidence. However, what empirical evidence is available strongly suggests that this is indeed the case. See, e.g., Leo & Ofshe, *supra* note 147, at 475 n.393; see *supra* Parts IV, VI.C.i-iii.

322. See *supra* notes 128-30 & 280-83 and accompanying text.

323. White, *supra* note 154, at 196. See, e.g., *In re Winship*, 397 U.S. 358, 361 (1970) (mandating beyond-a-reasonable-doubt standard of proof in criminal cases); *Jackson v. Denno*, 378 U.S. 368 (1963); *Manson v. Brathwaite*, 432 U.S. 98, 112 (1976) (noting deterrence of inappropriate police behavior as an important factor in Due Process analysis); see *Barefoot v. Estelle*, 463 U.S. 880, 925 (1983) (Blackmun, J., dissenting) (“[I]t is well established that, because the truth-seeking process may be unfairly skewed, due process may be violated . . . by the admission of certain categories of unreliable and prejudicial evidence.” (citations omitted)).

324. 302 U.S. 319 (1937).

325. *Id.* at 327 (internal citations omitted).

326. *Id.*

be viewed as a constitutional imperative.<sup>327</sup>

Moreover, as Professor White points out, the *Jackson* Court's reasoning indicates that "when a more reliable alternative is available, a procedure under which judges" have untrammelled discretion to find that a confession is voluntary "through examining uncorroborated police testimony . . . fail[s] to meet the constitutional standard of reliability."<sup>328</sup> This is because "[p]rocedural due process is not a static concept"<sup>329</sup> but a flexible and ever evolving notion, which calls for the procedural protections that a particular situation requires.<sup>330</sup> Here, empirical evidence strongly suggests that the preponderance standard is not well suited to the task of ensuring reliable fact finding determinations at suppression hearings.<sup>331</sup>

Furthermore, the adverse effect this low standard of proof has on the accuracy of the jury's ultimate guilt-innocence determination is compounded where—as is the case with alleged self-inculpatory statements and putative eyewitness identifications—the evidence at issue shares two defining characteristics: it is highly prejudicial and raises reliability concerns.<sup>332</sup> Because in circumstances where those species of evidence are challenged on constitutional grounds, if the trial judge erroneously denies a meritorious motion to suppress what is, in fact, untrustworthy evidence, the jury will likely primarily, if not exclusively, focus its attention on that unreliable evidence—setting the stage for a gross miscarriage of justice. Therefore, a criminal defendant may be convicted of a crime he or she did not commit *because* the trial judge determined by preponderant evidence that particularly damaging but unreliable evidence was admissible—in effect, an end-around *In re Winship*'s mandate, which functionally deprives a defendant of

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327. Both the presumption of innocence—given substance by the beyond-a-reasonable-doubt standard of proof—and the notion that coerced statements are intrinsically untrustworthy are deeply rooted in our history and legal tradition, further militating toward the conclusion that due process requires a heightened standard of proof at some types of suppression hearings. *See* United States v. Salerno, 481 U.S. 739, 763 (1987) (Marshall, J., dissenting) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty,' and is established beyond legislative contravention in the Due Process Clause." (quoting *Palko*, 302 U.S. at 325)); *see also* Washington v. Glucksberg, 521 U.S. 702, 709 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (advocating a "careful 'respect for the teachings of history'").

328. White, *supra* note 154, at 191.

329. *Smith v. O'Dea*, 939 S.W.2d 353, 358 (Ky. Ct. App. 1987) (citation omitted).

330. *See* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 60 (1991) (O'Connor, J., dissenting).

331. *See supra* Part VI.C.iii-iv. As discussed *supra*, suppression hearings, more often than not, devolve into credibility contests pitting a police officer's testimony against that of the defendant (assuming that the defendant even elects to testify), *see supra* Part VI.A-B; and, as Professor White explains, there is "strong evidence . . . that . . . [judges'] credibility determinations are frequently incorrect," White, *supra* note 154, at 192.

332. *See* Saltzburg, *supra* note 39, at 280 (exploring the link between preliminary fact finding and ultimate fact finding). In the case of confessions, Professor Saltzburg describes the dialectic between preliminary and ultimate fact finding as follows: "the greater the risk of error in resolving preliminary questions of fact relating to coercion, the greater the chance that the accuracy of the ultimate fact finding may be impaired by untrustworthy evidence." *Id.*

his or her fundamental right to not be convicted of a crime except upon proof beyond a reasonable doubt of every element necessary to constitute that crime.<sup>333</sup> Thus, the *Lego* Court's conclusion to the contrary notwithstanding, in our view, utilizing the preponderance standard to adjudicate the admissibility of the foregoing types of evidence unconstitutionally "undermines the mandate of *In re Winship*,"<sup>334</sup> to borrow a phrase from the majority opinion.

But even assuming, *arguendo*, that *In re Winship* is inapposite, application of the principles announced in *Mathews v. Eldridge*,<sup>335</sup> likewise, leads us to conclude that, at times, an enhanced standard of proof may be a constitutional imperative.<sup>336</sup> In *Mathews v. Eldridge*, the Court delineated a three-factor balancing test for determining what process is due, finding the following three considerations relevant to that inquiry:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>337</sup>

With respect to the first factor, "[t]he 'most elemental' of the liberties protected by the Due Process Clause is 'the interest in being free from physical detention by one's own government.'"<sup>338</sup> With regard to the second factor, experience has demonstrated that the rate at which wrongful convictions based on false confessions or mistaken eyewitness identifications occur is untenably high, and logic dictates that an enhanced burden of proof would necessarily reduce the frequency with which these miscarriages of justice occur.<sup>339</sup> Third and finally, notwithstanding the State's interest in controlling crime, "[t]he state has no legitimate interest in convicting innocent people";<sup>340</sup> and it could meet an enhanced burden of proof

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333. See *In re Winship*, 397 U.S. 358, 363-64 (1970).

334. *Lego v. Twomey*, 404 U.S. 477, 486 (1972).

335. 424 U.S. 319 (1976).

336. Cf. *id.* at 334-35. As the Court noted in *Carey v. Piphus*,

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process. . . ."

435 U.S. 247, 259 (1978) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)).

337. *Mathews*, 424 U.S. at 335.

338. *Dist. Atty's Office v. Osborne*, 129 S. Ct. 2308, 2334 (Stevens, J., dissenting) (citation omitted); see *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.").

339. See *supra* notes 180-87 and accompanying text.

340. Joseph Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 921 (1979); see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when

with minimal inconvenience or expense, e.g., through the relatively simple expedient of videotaping interrogations, at least where feasible.<sup>341</sup>

Having attempted to establish that, since the *Lego* decision, there has been an accumulation of substantial evidence demonstrating that federal rights have suffered as a result of its holding, we must address the proverbial “elephant in the room”—the doctrine of *stare decisis*. That is, even if the link between the low standard of proof used at most suppression hearings and the conviction of actually innocent individuals is acknowledged and accepted as a due process violation, given the weight the law places on precedent, pragmatic considerations may militate against revisiting *Lego*’s holding. The authors readily accept this proposition. However, *stare decisis* is not an immutable and inflexible concept; indeed, as we will explain below, the Supreme Court has made it clear that some decisions need not be accorded deference on *stare decisis* grounds.

#### VIII. *LEGO* DOES NOT DESERVE DEFERENCE ON *STARE DECISIS* GROUNDS

To be sure, pursuant to the doctrine of *stare decisis*,<sup>342</sup> there is a rebuttable presumption against overruling settled precedent.<sup>343</sup> As the Court explained in *Payne v. Tennessee*, the presumption in favor of *stare decisis* is utilized because it advances several important aims of our legal system: “Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>344</sup> As a general proposition, therefore, adhering to past decisions “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . [, often] even where the error is a matter of serious concern . . . .”<sup>345</sup>

“Stare decisis is not an inexorable command,” however, but rather merely “a

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criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”). Even apart from moral, normative concerns about the propriety of punishing innocent people for crimes that they did not commit, convicting the innocent is inconsistent with the three traditional rationales for inflicting punishment: deterrence, retribution, and rehabilitation. See Michael D. Pepson, Comment, *Therapeutic Jurisprudence in Philosophical Perspective*, 2 J.L. PHIL. & CULTURE 239, 258 (2008).

341. See Roberto Iraola, *The Electronic Recording of Criminal Interrogations*, 40 U. RICH. L. REV. 463, 471-77 (2006); see also *Stephan v. State*, 711 P.2d 1156, 1164 (Alaska 1985) (requiring videotaping of interrogations where feasible).

342. See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) (“Stare decisis’ is short for *stare decisis et non quieta movere*, which means ‘stand by the thing decided and do not disturb the calm.’ (internal quotation omitted)).

343. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001) (“American courts of last resort recognize a rebuttable presumption against overruling their own past decisions.”); see also *Northwest Austin Mun. Util. Dist. No. One*, 129 S. Ct. at 2508 (“Our usual practice is to avoid the unnecessary resolution of constitutional questions.”).

344. 501 U.S. 808, 827 (1991).

345. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). *But cf.* CONGRESSIONAL RESEARCH SERV., SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISIONS (1992),

principle of policy and not a mechanical formula of adherence to the latest decision.”<sup>346</sup> And the presumption in favor of the principle of *stare decisis* may be rebutted on several grounds: the prior decision rested on erroneous reasoning; its factual underpinnings have proven to be false; experience demonstrates that a governing decision is unworkable; and, of course, where a precedent is antithetical to our sense of justice or conflicts with the Constitution.<sup>347</sup> It is well settled that if the reasoning undergirding a prior decision is fundamentally flawed, then the principle of *stare decisis* may be ignored.<sup>348</sup> If a prior ruling rests on faulty factual assumptions, moreover, a court may jettison that decision.<sup>349</sup> Pragmatic or prudential considerations may also weigh in favor of revisiting a prior decision.<sup>350</sup> And, at times, substantive justice values may also militate toward the conclusion that *stare decisis* should be ignored in a given case, particularly where experience has revealed a prior decision’s shortcomings.<sup>351</sup> Thus, when “facts have so

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available at <http://www.gpoaccess.gov/constitution/html/scourt.html> (noting that, between 1946 and 1992, the Court reversed itself in well over one hundred cases).

346. *Payne*, 501 U.S. at 828 (quotations omitted); see *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (characterizing the principle of *stare decisis* as a policy); see also James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 376 (1986) (“In truth, [stare decisis] is nothing but the rhetorical ally of those in favor of yesterday’s decisions.”). Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting that “it is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case”).

347. See *supra* notes 244-47 and accompanying text.

348. *Payne*, 501 U.S. at 827 (opining that “when governing decisions are unworkable or are badly reasoned, ‘th[e] Supreme Court has never felt constrained to follow precedent’” (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)); see *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (slip op., at 3) (Scalia, J., concurring opinion) (concluding that *New York v. Belton*, 453 U.S. 454 (1981), should be overruled and observing that “it seems to me ample reason that the precedent was badly reasoned and produces erroneous . . . results”); see also *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) (whether a prior decision is well reasoned is a “relevant factor[] in deciding whether to adhere to the principle of *stare decisis*”).

349. R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOK. L. REV. 973, 1007 (1996) (noting that a “reason for overruling or limiting a precedent is that new information casts doubt on its factual assumptions”); see, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), in part, because that decision rested on patently false factual assumptions); see also *Casey*, 505 U.S. at 863. The I court stated:

While we think *Plessy* was wrong the day it was decided, . . . we must also recognize that the *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

*Id.*

350. See, e.g., *Montejo*, 129 S. Ct. at 2088 (“We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved ‘unworkable’ is a traditional ground for overruling it.” (citation omitted)); *Casey*, 505 U.S. at 854 (“[W]hen th[e] Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”).

351. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (observing in dictum that “it has sometimes been said that a precedent becomes more vulnerable as it becomes outdated and after being “‘tested by

changed, or come to be seen so differently, as to have robbed the old rule of significant . . . justification,” the Court is not constrained to adhere to *stare decisis*, and it may revisit and overrule a prior decision that experience has shown to be unviable.<sup>352</sup>

Application of the foregoing criteria to the rules announced in *Lego* and its progeny indicates that those decisions fall squarely within the class of cases most amenable to revisitation. As discussed *supra*, the majority’s reasoning in *Lego* is fundamentally flawed and inconsistent with the Court’s prior and subsequent suppression jurisprudence.<sup>353</sup> Furthermore, the *Lego* majority relied on factual assumptions that were grossly erroneous when that case was decided, which experience has unequivocally demonstrated: jury verdicts are, in fact, less reliable when petit jurors are allowed to consider false confessions and other forms of patently misleading evidence. And substantial injustices have resulted from *Lego*’s poorly reasoned, factually inaccurate decision: numerous actually innocent people have been erroneously convicted of serious—sometimes capital—crimes and suffered severe deprivations of liberty as a direct consequence of the majority’s holding.<sup>354</sup>

Other factors affecting the degree to which *stare decisis* considerations influence the determination whether to revisit and overrule a prior opinion include the “antiquity of the precedent [and] the reliance interests at stake.”<sup>355</sup> For example, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved”; conversely, “the opposite is true in cases . . . involving procedural and evidentiary rules,”<sup>356</sup> because “rules governing procedures and the admission of evidence in the trial courts . . . do[] not affect the way in which parties order their affairs.”<sup>357</sup> Therefore, as the Court recently elucidated, “Revisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of

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experience, has been found to be inconsistent with the sense of justice or with the social welfare” (citations omitted); see also Kelso & Kelso, *supra* note 349, at 1008 (observing that judges have, at times, overruled, “wrongly decided precedent . . . when the prior opinion is ‘inconsistent with a sense of justice’ or is ‘so clearly an error that its enforcement is for that very reason doomed’” (citations omitted)).

352. *Casey*, 505 U.S. at 855.

353. See *supra* Parts III-V.

354. See *supra* Parts VI.C.iii-iv.

355. *Montejo*, 129 S. Ct. at 2089. But see *id.* at 2092 (Alito, J., concurring). Alito noted:

Earlier this Term, in [*Gant*], the Court overruled [*Belton*], even though that case had been on the books for 28 years, had not been undermined by subsequent decisions, had been recently reaffirmed and extended, had proven to be eminently workable (indeed, had been adopted for precisely that reason), and had engendered substantial law enforcement reliance.

*Id.* (citations omitted).

356. *Payne*, 501 U.S. at 828.

357. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009).

the courts, and experience has pointed up the precedent's shortcomings."<sup>358</sup>

The *Lego* Court addressed an issue of first impression—the minimum burden of proof constitutionally required at voluntariness hearings—scarcely more than forty years ago; consequently, its holding is not deeply rooted in this nation's history or jurisprudence and, therefore, is not entitled to the same level of deference that long-standing, well-settled precedent generally must be accorded. This is so *a fortiori* because the *Lego* decision concerned a procedural issue—albeit one decided on constitutional grounds—and announced a judge-made procedural rule, which concerned an evidentiary matter, i.e., the quantum of proof necessary to admit suspects' confessions. Because *Lego* announced a procedural rule concerning an evidentiary matter, it cannot seriously be contended that its holding has induced substantial reliance by either law enforcement or criminal defendants. Indeed, the notion that anyone orders his or her affairs around the burden of proof employed at suppression hearings is farcical at best (e.g., it must be presumed that the vast majority of criminal defendants have no idea what a burden of proof is, let alone what burden of proof applies at a suppression hearing).<sup>359</sup>

In circumstances in which a prior decision is challenged on constitutional grounds, moreover, a particularly compelling argument for abandoning the principle of *stare decisis* exists:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, th[e] Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.<sup>360</sup>

Consequently, its application is most flexible in cases in which constitutional questions are presented.<sup>361</sup>

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358. *Id.* The degree to which Supreme Court justices question a prior decision is yet another supplemental factor to be considered in assessing whether a given holding must be respected on *stare decisis* grounds. *See id.* at 818 (“Where a decision has ‘been questioned by Members of the Court in later decisions . . .,’ [that] factor[] weigh[s] in favor of reconsideration.” (quoting *Payne*, 501 U.S. at 829-30)). *Cf. Connelly*, 479 U.S. at 185-88 (Brennan, J., dissenting) (criticizing the Court’s holding in *Lego*).

359. *Cf. Dickerson*, 530 U.S. at 443-44 (deciding *stare decisis* considerations weighed against overruling *Miranda*, in part, because it is so embedded in our culture and law enforcement orders its affairs around *Miranda*’s dictates).

360. *Burnet*, 285 U.S. at 406-08 (Brandeis, J., dissenting); *see also Allwright*, 321 U.S. at 665 (“[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions . . . this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.”). *See generally Casey*, 505 U.S. at 854-55 (discussing factors considered in determining whether to follow existing precedent).

361. *See Casey*, 505 U.S. at 854 (noting that “it is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case”); *Payne*, 501 U.S. at 842 (Souter, J., concurring) (“[O]ur ‘considered practice [has] not [been] to apply *stare decisis* as rigidly in constitutional [cases] as in nonconstitutional cases . . . .’” (quotation omitted) (alterations in original)). *See also*

Due process requires the adoption of procedures to protect the innocent against wrongful conviction.<sup>362</sup> At this juncture, experience has unequivocally and irrefutably demonstrated that the burden of proof enunciated in *Lego* and its progeny is causally connected to the wrongful convictions of numerous actually innocent defendants,<sup>363</sup> calling into question whether the use of the weakest standard of proof—i.e., the preponderance standard—in suppression hearings complies with the Due Process Clauses of the Fifth and Fourteenth Amendments. Moreover, a higher standard of proof may be constitutionally mandated to adequately give substance to the accused’s Fifth Amendment right against compelled self-incrimination—which, *inter alia*, categorically forbids the introduction of the accused’s compelled inculpatory statements as evidence against her at trial.<sup>364</sup> Thus, given the constitutional character of these issues, *Lego* and its progeny are particularly apt to be revisited. Indeed, even the *Lego* majority recognized that its holding might need to be revisited on constitutional grounds and overruled at a later time.<sup>365</sup>

#### CONCLUSION

The Supreme Court’s oft-overlooked *Lego* decision may be the single judicial opinion most responsible for the conviction and imprisonment (or even execution) of actually innocent persons. By finding that the preponderance standard of proof is constitutionally sufficient at suppression hearings, *Lego* and its progeny effectively ensured that the fact finding at suppression hearings would often be inaccurate; as a result, all too many false confessions and mistaken eyewitness identifications—the two leading causes of wrongful convictions—have been admitted into evidence against actually innocent defendants, leading to an untold number of wrongful convictions. Moreover, *Lego*’s holding rests on faulty factual assumptions and oversimplified legal reasoning. Fortunately, however, the *Lego* Court indicated that its decision was provisional in nature, leaving the door open for reconsideration if it could be demonstrated at a later date that the preponderance standard did indeed have an adverse impact on federal rights.<sup>366</sup>

Since *Lego*, there has been an accumulation of substantial scientific evidence, empirical data, and legal literature that highlights a problem that the *Lego* Court may have foreseen: the universal application of the preponderance standard at suppression hearings has adversely affected federal rights by all too easily

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Rehnquist, *The Power That Shall Be Vested in a Precedent*, *supra* note 346, at 375 (noting that the “Supreme Court has consistently held that the doctrine of stare decisis should be given a relaxed application in constitutional adjudication”).

362. See *supra* note 325 and accompanying text.

363. See *supra* Part VI.C.

364. See *supra* Part V.

365. See *supra* notes 128-30 & 282-84 and accompanying text.

366. See *supra* notes 282-84 and accompanying text.

allowing for the admission at trial of false confessions and mistaken identifications that would have been excluded under a higher standard of proof, which, in turn, creates an unjustifiable—and perhaps unconstitutional—risk of wrongful convictions. In short, there is an empirically demonstrable causal nexus between *Lego*'s holding and the wrongful conviction of actually innocent defendants. Therefore, the time has come to revisit this poorly reasoned decision. Adopting a heightened burden of proof at certain species of suppression hearings may be the most effective way to minimize the risk of error—defined as the wrongful conviction of the innocent—in our criminal justice system. And indeed, in some cases, it may be a constitutional imperative.