CONFESS OR DIE: WHY THREATENING A SUSPECT WITH THE DEATH PENALTY SHOULD RENDER CONFESSIONS INVOLUNTARY

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In July 1997, the rape and murder of a Navy sailor's wife shocked the town of Norfolk, Virginia. Even more shocking was the fact that four Navy sailors, Danial Williams, Joseph Dick, Derick Tice, and Eric Wilson, falsely confessed to the crime.[1] These men became known as the "Norfolk Four." A Norfolk detective, with a history of eliciting false confessions, interrogated the four sailors.[2] Each confessed to the crime, "alter[ing] their confessions to accommodate details fed to them by the police."[3] Nearly twenty years later, a federal judge vacated two of the convictions.[4] Less than a year later, Virginia Governor Terry McAuliffe pardoned the four men.[5]

The Norfolk Four case reveals that the police sometimes obtain false confessions from innocent suspects during interrogations. In the case of the Norfolk Four, the police used a number of tactics to elicit the false confessions. Danial Williams explained that the lead detective "treated him like a criminal from the outset, poking him in the chest, yelling in his face, calling him a liar and telling him, falsely, that he'd failed a polygraph test and that a witness saw him go into the [victim's] apartment."[6] Eric Wilson said that the lead detective "hit him several times and showed him photos of the crime scene and the

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1. Williams v. Brown, 208 F. Supp. 3d 713, 717 (E.D. Va. 2016); Jeffrey Toobin, *The Wrong Guys*, NEW YORKER (Aug. 24, 2009), https://www.newyorker.com/magazine/2009/08/24/the-wrong-guys.

2. *Williams*, 208 F. Supp. 3d at 735 ("Detective Ford has a proven history of eliciting false confessions; he had previously been demoted for securing a series of false confessions. He also has a proven history of manipulating the criminal justice system for financial gain.").

3. *Id.* at 738 n.25.

4. *Id.* at 717–18 ("By any measure, the evidence shows the defendants' innocence—by a preponderance of the evidence, by clear and convincing evidence, by evidence beyond a reasonable doubt, or even by conclusive evidence. . . . [N]o sane human being could find them guilty."); Spencer S. Hsu, *U.S. Judge Vacates Two More Convictions in 'Norfolk 4' Rape and Murder Case*, WASH. POST (Oct. 31, 2016), https://www.washingtonpost.com/local/public-safety/us-judge-vacates-two-more-convictions-in-norfolk-4-rape-and-murder-case/2016/10/31/7a447c7c-9f98-11e6-8d63-3e0a660f1f04_story.html?utm_term=.24d6e8e45f88.

5. Tom Jackman, *'Norfolk 4,' wrongly convicted of rape and murder, pardoned by Gov. McAuliffe*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/03/21/norfolk-4-wrongly-convicted-of-rape-and-murder-pardoned-by-gov-mcauliffe/?utm_term=.b3e2e2b65288.

6. Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES (Aug. 19, 2007), http://www.nytimes.com/2007/08/19/magazine/19Norfolk-t.html.

victim and gave him details about the crime to include in his confession."[7] The police employed one additional tactic. Because the crime at issue involved the rape and murder of a young woman, all four men faced the death penalty under Virginia law if convicted.[8] The police used this to their advantage and threatened the men with the death penalty during the interrogations. The police told them that the only way to avoid the death penalty was to confess.[9] Under the threat of the death penalty, the Norfolk Four falsely confessed to a crime they did not commit.[10] When the police interrogated the true killer over one year later, they told him he could "escape the death penalty" if he implicated the Norfolk Four in his confession.[11] The killer did so in exchange for two life sentences, rather than the death penalty.[12]

This Note will analyze the problem of false confessions and the inadequacy of the test that courts employ to assess the voluntariness and unreliability of confessions made after the police threaten suspects with the death penalty during interrogations. Section I of this paper will provide background on police practices contributing to false confessions. Section II details the inquiry that courts make into the voluntariness of confessions. Section III examines the use of the threat of the death penalty by police to elicit confessions. Section III argues that because the threat of the death penalty during an interrogation drastically undermines the reliability of a subsequent confession, these confessions should be considered per se involuntary and inadmissible.

I. THE RELATIONSHIP BETWEEN FALSE CONFESSIONS AND WRONGFUL CONVICTIONS

Most interrogations are designed to elicit incriminating information from suspects.[13] Police departments have developed tactics that include "psychological influence, persuasion, deception and/or coercion" to advance this goal.[14] While

7. *Id*. The police also fed details of the crime to Danial Williams and Joseph Dick in order to craft their confessions. *Williams*, 208 F. Supp. 3d at 738 n.25.

8. VA. CODE ANN. § 18.2-31(5) (West, Westlaw through end of 2018 Regular Sess. and end of 2018 Sp. Sess. I) (listing as a Class 1 felony "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape . . . ."); *id*. § 18.2-10(a) (providing "death" as an authorized punishment for a Class 1 felony).

9. *Frontline: The Confessions* (PBS television broadcast Nov. 9, 2010), http://www.pbs.org/wgbh/pages/frontline/the-confessions/. Richard Leo, an expert in false confessions and author of a book on the Norfolk Four explained that "[The Norfolk Four] were all threatened with the death penalty. They were told they could receive the death penalty if they didn't confess, and the only way to avoid the death penalty was if they stopped denying and started admitting to what the interrogators believed they had done." *Id*. Joseph Dick said that "he finally gave [Detective] Ford the confession he demanded, 'to avoid the death penalty.'" Berlow, *supra* note 6.

10. Berlow, *supra* note 6.

11. *Id*.

12. *Id*.

13. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the PostDNA World*, 82 N.C. L. REV. 891, 911 (2004).

14. *Id*. at 908.

interrogators do not use these tactics in every interrogation, in some cases their use leads to false confessions and wrongful convictions.[15]

A. The Underlying Purpose of Interrogations and the Tactics Used by Law Enforcement Officers in the Course of Interrogations Contribute to False Confessions

"[T]he singular purpose of American police interrogation is to elicit incriminating statements and admissions," and "ideally a full confession" from a defendant.[16] Modern police practices use psychological techniques to accomplish this goal because they are effective at procuring confessions.[17] Modern psychological interrogation techniques revolve around the idea that human decision-making is characterized by "people mak[ing] optimiz[ed] choices given the alternatives they consider."[18] For this reason, the current method of psychological interrogation in American policing can be described as follows:

> "The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him."
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> . . . Once the investigator has convinced the suspect that he is powerless to change his situation—because his denials will not be accepted and he cannot change the overwhelming incriminating evidence that the police claim to possess—the investigator offers the suspect inducements (i.e., reasons to confess) that are designed to persuade him that he is psychologically, materially and/or legally better off by cooperating with police and confessing. . . .[19]

A psychological interrogation can involve isolating a suspect, attacking a suspect's alibi or version of events, confronting him or her with incriminating evidence, and introducing false evidence, threats, and incentives.[20] Coercive interrogation techniques result in the most false confessions.[21] Social scientists and

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15. *See id*. at 906 (describing "the problem of false confessions as a leading cause of the wrongful convictions of the innocent in America").

16. *Id*. at 911.

17. *Id*. at 909–10; Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

18. Ofshe & Leo, *supra* note 17, at 985.

19. Drizin & Leo, *supra* note 13, at 914–15 (quoting Ofshe & Leo, *supra* note 17, at 985–86).

20. *Id*. at 911–12.

21. *Id*. at 918 ("[P]olice interrogators usually elicit false confessions through the use of coercive inducements that either implicitly or explicitly threaten harm and/or promise leniency . . . . The primary psychological cause of most false confessions is, therefore, the investigator's use of improper, coercive interrogation techniques."). While false confessions are often cited as a leading cause of wrongful convictions, *see The Causes of Wrongful Convictions*, THE INNOCENCE PROJECT (2017), https://www.innocence project.org/causes-wrongful-conviction./, it is impossible to say exactly how many false confessions result from psychological interrogation techniques, *see* Drizin & Leo, *supra* note 13, at 931. The reason for this "is not only because no organization collects data on the annual number of interrogations and confessions, but also because most interrogations are not recorded," which "prevent[s] researchers from obtaining an objective record of the cause of the disputed confession." *Id*.

journalists report "interrogators' threats or promises relating to whether the death penalty will be imposed or whether the defendant will be executed appear to have played a significant part in inducing the defendant's false confession."[22] Additionally, multiple news sources report on the experience of interrogated suspects and illuminate that many exonerated individuals confessed to crimes that they did not commit to avoid the death penalty.[23]

The police use a "range of incentives" when interrogating suspects, ranging from "intangible and nonmaterial psychological and interpersonal benefits" to "outright threats of harm and promises of leniency."[24] The threat of the death penalty, and promises of leniency in exchange for cooperation, is one of many such tactics, and the focus of this Note.

B. False Confessions Can Lead to Wrongful Convictions

"A confession is like no other evidence."[25] This may explain the fact that false confessions are one of the leading causes of wrongful convictions.[26] "[I]nterrogation-induced false confessions are highly likely to lead to the wrongful conviction of the innocent, perhaps more so than any other type of erroneous evidence[,]" because of the evidentiary power of a confession.[27] The evidentiary weight of a confession means that "juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it."[28] One study on false confessions revealed that eighty-one percent "of the innocent defendants [in the sample] who chose to take their case to trial were wrongfully convicted 'beyond a reasonable doubt' even though their confession was ultimately demonstrated to be false."[29]

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22. Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1008 (2003); *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1065, 1097 (2010); Ofshe & Leo, *supra* note 17, at 990, 1047, 1050, 1077–78; Joe Duggan, *Beatrice 6 Member Says the Threat of the Death Penalty Persuaded Her to Confess to a Slaying She Didn't Commit*, OMAHA WORLD-HERALD (Oct. 25, 2016), http://www.omaha.com/news/crime/beatrice-member-says-threat-of-death-penalty-persuaded-her-to/article_51ebcf4f-7299-5d08-8dfa-ebae55f0f5c2.html (documenting the false confession of Ada JoAnn Taylor); Marc Bookman, *The Confessions of Innocent Men*, ATLANTIC (Aug. 6, 2013), https://www.theatlantic.com/national/archive/2013/08/ the-confessions-of-innocent-men/278363/ (documenting the false confessions of Felix Rodriguez and Russell Weinberger); Berlow, *supra* note 6 (documenting the false confession of Joseph Dick); Henry Weinstein, *Freed Man Gives Lesson on False Confessions*, L.A. TIMES (June 21, 2006), http://articles.latimes.com/2006/ jun/21/local/me-confess21 (documenting the false confession of Christopher Ochoa).

23. *See, e.g.*, Duggan, *supra* note 22 (documenting the false confession of Ada JoAnn Taylor); Bookman, *supra* note 22 (documenting the false confessions of Felix Rodriguez and Russell Weinberger); Berlow, *supra* note 6 (documenting the false confession of Joseph Dick); Weinstein, *supra* note 22 (documenting the false confession of Christopher Ochoa).

24. Ofshe & Leo, *supra* note 17, at 990.

25. Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

26. *The Causes of Wrongful Convictions*, *supra* note 21 (of the first 325 DNA exonerations, 27% involved false confessions).

27. Drizin & Leo, *supra* note 13, at 921.

28. *Id*. at 923.

29. *Id*. at 996.

This study reveals the powerful evidentiary value of a confession to a jury. The weight given to confessions in court makes them dangerous to criminal defendants; a confession, false or not, dramatically increases the chance of conviction.

The Norfolk Four are hardly alone in being convicted after a false confession.[30] Another oft-cited case where a false confession led to a wrongful conviction is that of Christopher Ochoa, who was convicted of the rape and murder of a young woman in Texas.[31] In Mr. Ochoa's case, the police told him that he would receive the death penalty unless he cooperated, going so far as to "show[] him photos of death row" and "point[] out the spot on his left arm where the needle would be inserted."[32] Mr. Ochoa has since been exonerated and has sought to bring awareness to the problem posed by false confessions, stating that coerced and false confessions "happen[] a lot more often than people think[.]"[33] While it is impossible to know exactly how often police elicit false confessions,[34] the experiences of people like the Norfolk Four and Mr. Ochoa illustrate that false confessions do happen, and they can lead to innocent people being wrongfully convicted.

II. THE CURRENT VOLUNTARINESS STANDARD DOES NOT ADEQUATELY ACCOUNT FOR HOW THREATS AND PROMISES INFLUENCE A SUSPECT DURING INTERROGATION

In *Bram v. United States*, the United States Supreme Court indicated that voluntariness is a primary concern of the Fifth Amendment's protection against self-incrimination.[35] The Court explained that the Fifth Amendment arose out of a concern that English interrogation techniques might lead to false confessions.[36] The *Bram* Court stated that "a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[37] Since *Bram*, the Court has crafted a framework to analyze when confessions are involuntary, and therefore inadmissible. However, the Court has never fully embraced *Bram*'s broad language.[38]

30. Adam Cohen, *Why Innocent Men Make False Confessions*, TIME (Feb. 11, 2013), http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions/.

31. Paul Duggan, *Murder Case Review Stirs Doubts About Texas Process*, WASH. POST (Oct. 17, 2000), https://www.washingtonpost.com/archive/politics/2000/10/17/murder-case-review-stirs-doubts-about-texas-process/6053a446-5037-40a1-915f-085363c9c57a/?utm_term=.85ad331117fc.

32. *Id.*

33. Weinstein, *supra* note 22.

34. Drizin & Leo, *supra* note 13, at 931.

35. Bram v. United States, 168 U.S. 532, 542 (1897).

36. *Id.* at 543–44.

37. *Id.* at 542–43 (internal citation omitted).

38. White, *supra* note 22, at 1008; *see also* Arizona v. Fulminante, 499 U.S. 279, 285 (1991) ("*Bram* . . . does not state the standard for determining the voluntariness of a confession.").

A. The Current Legal Framework for Voluntariness is a Totality Test, Where No Single Factor is Dispositive of Voluntariness[39]

The United States Supreme Court has held that only voluntary confessions are admissible against a defendant.[40] *Bram* suggested that a confession became involuntary, and therefore inadmissible, if it was "extracted by *any* sort of threats or violence," "obtained by *any* direct or implied promises," or elicited "by the exertion of *any* improper influence."[41] However, nearly one hundred years later, the Court made clear that the sweeping language of *Bram* does not govern the inquiry into a confession's voluntariness when it stated that *Bram* "does not state the standard for determining voluntariness of a confession."[42]

Under the current test, a confession is voluntary if "the confession [is] the product of an essentially free and unconstrained choice by its maker[.]"[43] In answering this question, courts consider the totality of the circumstances, including:

> [T]he characteristics of the accused and the details of the interrogation[,] the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[44]

While no single factor is dispositive of whether a confession is involuntary, courts are skeptical of police tactics that are "offensive *because* they tend to provoke false confessions."[45] As such, courts factor "concerns about reliability" into voluntariness evaluations.[46]

B. The Use of Threats and Promises During an Interrogation Undermines the Voluntariness and Reliability of a Confession

Psychological interrogation "seeks to persuade the suspect that the benefits of . . . confession outweigh the costs of resistance and denial[.]"[47] To accomplish this

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39. It is important to note at the outset that it is impossible to know exactly how often confessions are coerced and involuntary because many interrogations are unrecorded or unreviewed. *See* Ofshe & Leo, *supra* note 17, at 1078; Editorial, *The Importance of Taping Interrogations*, N.Y. TIMES (Sept. 18, 2014), https://www.nytimes.com /2014/09/19/opinion/the-importance-of-taping-interrogations.html.

40. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973); Beecher v. Alabama, 389 U.S. 35, 38 (1967); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynumn v. Illinois, 372 U.S. 528, 534–35 (1963); Leyra v. Denno, 347 U.S. 556, 561 (1954); Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944); *Bram*, 168 U.S. at 542.

41. *Bram*, 168 U.S. at 542–43 (emphasis added) (internal citation omitted).

42. *Fulminante*, 499 U.S. at 285.

43. *Bustamonte*, 412 U.S. at 225.

44. *Id*. at 226 (internal citations omitted).

45. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 27 (2015).

46. *Id*. at 28.

47. Drizin & Leo, *supra* note 13, at 916.

goal, "investigators will sometimes . . . rely on blatant threats of harsher punishment (such as death penalty threats) and explicit promises of leniency (such as offers of outright release from custody) to extract a confession."[48] However, threats and promises raise concerns about the reliability of the resulting confession,[49] and courts weigh these threats or promises when assessing the voluntariness of confessions.[50]

Years of Supreme Court jurisprudence make clear that threats or promises weigh against a finding of voluntariness for a number of reasons.[51] First, the Court acknowledges that interrogations are inherently intimidating and "destructive to human dignity."[52] In *Miranda v. Arizona*, the Court minced no words when describing the practice of interrogation.[53] The Court observed that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals" and that the "interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[54] This led the Court to create affirmative safeguards to help protect suspects subjected to interrogations.[55] Second, the Court recognized that measuring the influence of a threat or promise on the decision to confess is difficult. In *Bram v. United States*, the Court stated that "[a] confession can never be received in evidence where the prisoner has been influenced by any threat or promise," given that "the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner[.]"[56] In *Brady v. United States*, the Court noted that during interrogations, defendants are especially "sensitive to inducement and the possible impact [of promises of leniency] on them [is] too great to ignore and too difficult to assess."[57] For this reason, courts generally worry that certain interrogation practices, including threats and promises by law enforcement officers, may lead to false

48. *Id.* at 917.

49. *See* White, *supra* note 22, at 1008 ("At common law, confessions induced by any threat or promise were excluded as unreliable.").

50. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35, 36–38 (1967) ("[The Police] Chief called him a liar and said, 'If you don't tell the truth I am going to kill you.' The other officer then fired his rifle next to the petitioner's ear, and the petitioner immediately confessed. . . . [P]etitioner's confessions were involuntary."); Haynes v. Washington, 373 U.S. 503, 513–14 (1963) ("Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family Haynes understandably chose to make and sign the damning written statement."); Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("[P]etitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'").

51. At this juncture, it is important to note that the use of misrepresentations or trickery by police, while relevant to the voluntariness inquiry, is insufficient to make a confession inadmissible. Frazier v. Cupp, 394 U.S. 731, 739 (1969).

52. Miranda v. Arizona, 384 U.S. 436, 457–58 (1966).

53. *Id.* at 455–59.

54. *Id.* at 455, 457.

55. *Id.* at 457–58.

56. Bram v. United States, 168 U.S. 532, 543 (1897) (internal citation omitted).

57. Brady v. United States, 397 U.S. 742, 754 (1970) (describing the court's holding in *Bram*).

confessions and wrongful convictions.[58] As such, these tactics are suspect and cut against a finding of voluntariness.[59]

C. Interrogators Threaten Suspects with the Death Penalty as a Way of Procuring Admissions and Confessions

Interrogators employ varying tactics when they threaten suspects with the death penalty. An interrogator "may employ tactics that coerce confessions by blatantly threatening the suspect," or an interrogator "may use an indirect approach by leading a suspect to reason by pragmatic implication that he will receive an extreme punishment if he continues to deny guilt, but lenient treatment if he confesses."[60] Interrogators may also explicitly tell suspects that they can avoid the death penalty if they cooperate and confess.[61] In Mr. Ochoa's case, interrogators showed him pictures of death row and where the needle would be inserted into his arm during a lethal injection.[62] Interrogators then promised him that he would not die if he confessed to the crime.[63] The tactic worked on Mr. Ochoa, who confessed and was convicted.[64]

Potential capital cases involve a disproportionate number of false confessions.[65] This may be because interrogations are more likely to occur during the investigation of serious crimes or because the police feel a special pressure to solve these crimes.[66] Accordingly, the police are more likely to use abusive interrogation tactics in capital cases, which increases the likelihood that the police will elicit a false confession from a suspect in a capital case.[67] As such, threats of the death penalty during interrogations present a special risk of false confessions in these cases.

III. THE THREAT OF THE DEATH PENALTY IN INTERROGATIONS SHOULD RENDER CONFESSIONS INVOLUNTARY AND INADMISSIBLE

The threat "of the death penalty can have a 'uniquely corruptive' effect on a suspect" in an interrogation,[68] as evidenced by real-world cases where innocent people confessed to crimes after being threatened with the death penalty. However, it is impossible to know exactly how often interrogators use threats or promises of

58. Primus, *supra* note 45, at 28 ("[C]ourts are concerned about promises of lenient treatment in exchange for confessions [because they] fear that such promises will cause suspects to confess falsely.").

59. *See supra* note 50.

60. Ofshe & Leo, *supra* note 17, at 987.

61. *Id*. at 990; *see also* Drizin & Leo, *supra* note 13, at 911.

62. Duggan, *supra* note 31; *see also* White, *supra* note 22, at 1008–11.

63. Duggan, *supra* note 31.

64. *Id*.

65. White, *supra* note 22, at 988.

66. *Id*. at 988–90.

67. *Id*. at 991 ("[D]ata show[s] that abusive police interrogation practices are more likely to occur in capital cases . . . and that police-induced false confessions are one of the leading causes of wrongful convictions in capital cases[.]").

68. *Id*. at 1012 (quoting Barry Scheck, co-founder of The Innocence Project).

leniency during interrogations.[69] Similarly, where a suspect "has been influenced by any threat or promise," it is nearly impossible for a court to "measure the force of the influence used" or understand "its effect upon the mind of [each individual] prisoner."[70] However, cases like the Norfolk Four and that of Christopher Ochoa show that the police *do* threaten suspects with the death penalty, and that this threat influences a suspect's decision to confess, which undermines the reliability of the confession and increases the risk of wrongful conviction.[71] These risks cannot be tolerated. Therefore, even though we may never know exactly how often police interrogations result in false confessions, the courts should take affirmative steps to protect against abusive interrogation tactics that contribute to false confessions and wrongful convictions.

The dangers inherent in interrogation, the unreliability of confessions after a suspect has been threatened, and the risk of wrongful convictions stemming from false confessions suggest that threatening suspects with the death penalty should render subsequent confessions involuntary. There are less drastic steps that courts can take to address these issues, including (1) creating a rebuttable presumption that a confession is involuntary, (2) weighing the threat of the death penalty more heavily in the totality analysis, and (3) suggesting best practices to the police. However, a per se rule will most directly address and seek to remedy the problems created by the use of the threat of the death penalty in interrogations. The United States Supreme Court should alter the current totality test for assessing the voluntariness of confessions and create a rule where threatening suspects with the death penalty renders any subsequent confession per se involuntary, and therefore inadmissible.

A. The Threat of the Death Penalty Leads to False Confessions and Wrongful Convictions

The effect that the threat of the death penalty has on suspects in interrogations is clear – it induces innocent people to confess to crimes that they did not commit. After Norfolk police threatened members of the Norfolk Four with the death penalty, they confessed.[72] In the case of the Norfolk Four, Joseph Dick recounted how the lead detective "taunted him incessantly, told him he was lying, shouted at him, threatened him with the 'hoses' and told him he would get the death penalty unless he cooperated," before he confessed "to avoid the death penalty."[73] In yet another case, Damon Thibodeaux falsely confessed to the rape and murder after he was

69. *See* Ofshe & Leo, *supra* note 17, at 1078. One significant reason why is it impossible to know how often police threaten suspects with the death penalty or try to incentivize cooperation with promises of leniency is that many interrogations are unrecorded or not recorded in their entirety. *Id.* As such, in many cases, there is a limited record of what exactly was said during an interrogation. Editorial, *supra* note 39.

70. Bram v. United States, 168 U.S. 532, 543 (1897) (internal citation omitted).

71. Nearly thirty percent of DNA exonerations involve false confessions. *The Causes of Wrongful Convictions*, *supra* note 21.

72. Berlow, *supra* note 6; *Frontline: The Confessions*, *supra* note 9.

73. Berlow, *supra* note 6.

threatened with the death penalty during a nine-hour interrogation.[74] Ada JoAnn Taylor falsely confessed to rape and murder when prosecutors told her that they would not seek the death penalty if she pleaded guilty and confessed.[75] Christopher Ochoa falsely confessed to murder after the police told him that he would receive the death penalty unless he cooperated and showed him how he would be executed.[76] These false confessions all led to wrongful convictions.

What is more, the threat of the death penalty can be used to coerce factually guilty suspects into implicating innocent individuals in their crime. In the case of the Norfolk Four, a Norfolk police detective told the real culprit that "in order to 'escape the death penalty,' he would have to sign off on 'a version of the story that [he had] never heard of before'" and implicate four other men in the crime.[77] He did so to avoid the death penalty.[78] Similarly, Kimber Edwards, an autistic man who falsely confessed to murder, was implicated by the real killer after prosecutors promised "that he would be spared the death penalty if he implicated Edwards."[79] These are only two examples of cases in which interrogators used the threat of the death penalty to seal the fate of innocent defendants. The threat not only coerces false confessions from innocent suspects, but also encourages guilty suspects to implicate others who had no involvement in the crime. Therefore, suspects must be protected during interrogations and death penalty threats should render any subsequent confession per se involuntary and inadmissible.

B. The Uniquely Dangerous Threat of the Death Penalty Requires a Universal Per Se Rule: The Threat of the Death Penalty During an Interrogation Renders a Subsequent Confession Involuntary and Inadmissible

United States Supreme Court jurisprudence creates rules to protect criminal defendants in two areas where a defendant's constitutional rights are particularly vulnerable: police interrogations[80] and capital cases.[81] Given that both police

74. Douglas A. Blackmon, *Louisiana Death-Row Inmate Damon Thibodeaux Exonerated with DNA Evidence*, WASH. POST (Sept. 28, 2012), https://www.washingtonpost.com/national/louisiana-death-row-inmate-damon-thibodeaux-is-exonerated-with-dna-evidence/2012/09/28/26e30012-0997-11e2-afff-d6c7f20a83bf_story.html.

75. Duggan, *supra* note 22.

76. Duggan, *supra* note 31; *see also* White, *supra* note 22, at 1008–11.

77. Berlow, *supra* note 6.

78. *Id.*

79. Brandon L. Garrett, *Serving Life for a Lie?*, HUFFINGTON POST (Oct. 8, 2015), https://www.huffingtonpost.com/entry/serving-life-for-a-lie_b_8266012.html.

80. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

81. A criminal defendant is entitled to heightened protections when he faces the death penalty because "[w]hen a defendant's life is at stake, the Court [is] particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). One example of a procedural protection came from *Lockett v. Ohio*, where Chief Justice Burger, joined by three other justices, said that a sentencer might "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.). The Chief Justice rested his opinion on the idea that

interrogations and the death penalty pose unique threats to a defendant's constitutional rights, the dangers associated with the threat of the death penalty during an interrogation should be of particular concern for the Court. For this reason, the Court should adopt a per se rule that the threat of the death penalty during an interrogation renders a subsequent confession involuntary and inadmissible.

The United States Supreme Court protects suspects during interrogations through the creation of per se rules. In *Miranda v. Arizona*, the Court recognized that an interrogation is uniquely intimidating and established "proper safeguards" to protect suspects accused of crimes.[82] The Court reaffirmed this stance in *Dickerson v. United States* when it held that *Miranda* was a "constitutional decision" that could not be "overruled by an Act of Congress."[83] *Miranda* and *Dickerson* established a per se remedy for suspects whose constitutional rights were violated during interrogations—if a suspect is not properly advised of his rights prior to custodial interrogation, his subsequent statement is inadmissible.[84] The Court established another per se rule in *Edwards v. Arizona*, holding that police could not re-initiate an interrogation after a defendant invoked his right to counsel and that violation of this rule would render any subsequent statement inadmissible.[85] These cases show that interrogation is inherently coercive and that sometimes, in extreme cases, per se rules are established by the Court to protect those subjected to police interrogation.

Threatening a suspect with the death penalty in interrogations creates such an extreme case because the threat of the death penalty is highly coercive and drastically undermines the reliability of any subsequent admission or confession,[86] which then contributes to the possibility of a wrongful conviction.[87] The fact that death penalty is coercive is evidenced by the fact that courts handle capital cases differently from other criminal matters. The Supreme Court has repeatedly held that death is different from all other forms of punishment,[88] and that capital defendants are entitled to heightened procedural protections.[89] Although the Court has

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"[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Id.* at 605.

82. *Miranda*, 384 U.S. at 467.

83. Dickerson v. United States, 530 U.S. 428, 432 (2000).

84. *Id.*; *Miranda*, 384 U.S. at 444–45.

85. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981); *see also* Solem v. Stumes, 465 U.S. 638, 647 (1984) (characterizing the *Edwards* decision as a "*per se* approach").

86. *See* White, *supra* note 22, at 1008.

87. Nearly thirty percent of DNA exonerations involve false confessions. *The Causes of Wrongful Convictions*, *supra* note 21.

88. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 605–06 (2002) ("[T]here is no doubt that '[d]eath is different.'"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) ("[The] qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)("[T]he penalty of death is qualitatively different from a sentence of imprisonment.").

89. *Ring*, 536 U.S. at 606; *see also* Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 348 (2000).

hesitated to rest its decisions on the theory that "death is different" in recent years, the fact remains that death is different for two primary reasons. First, execution is irrevocable.[90] Second, the death penalty is the most severe punishment imposed by the criminal justice system.[91] For these reasons, the threat of the death penalty can be especially coercive in eliciting false confessions.[92] The uniquely coercive nature of this threat warrants an equally unique remedy: a per se rule that the threat of the death penalty during an interrogation renders a confession involuntary, and therefore inadmissible.

The Supreme Court tackled thorny issues presented by police interrogation in cases like *Miranda*, *Dickerson*, and *Edwards*. In those cases, the Court expressed concern surrounding the use of abusive interrogation tactics and systematically undermined the constitutional rights of suspects. To address these concerns, the Court created per se rules to protect suspects subjected to interrogation. However, these cases, and the current voluntariness test, do not adequately protect suspects from the intimidation and coercion that stems from the threat of the death penalty.

Real-world cases involving false confessions reveal that the police use the threat of the death penalty to exact confessions from suspects.[93] Data shows "that police-induced false confessions are one of the leading causes of wrongful convictions in capital cases."[94] Even though courts consider threats used in interrogations to determine the voluntariness and admissibility of confessions prior to trial, the fact remains that the current voluntariness test is insufficient to address this issue. It is time for the Court to closely examine the acceptability of certain police interrogation tactics, and the Court must address the issues surrounding the role of the death penalty in the interrogation room. It is time to consider adopting another per se rule.

C. Alternative Remedies to Protect Against Wrongful Convictions if a Per Se Rule Proves Unworkable

While using the threat of the death penalty during interrogations should render any resulting confessions per se involuntary, courts are hesitant to establish per se rules.[95] However, *some* rule or remedy is necessary here. Should courts be unwilling to adopt the per se rule proposed above, courts should consider one or more of the following remedies.

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90. Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004).

91. *Id.*

92. *See supra* Section III(A). Again, it is impossible to know exactly how often interrogations result in false versus truthful confessions because there are not records of every interrogation leading to a confession.

93. *See supra* Section III(A); White, *supra* note 22, at 1008; Ofshe & Leo, *supra* note 17, at 990, 1047, 1050, 1077–78.

94. White, *supra* note 22, at 991.

95. *See, e.g.*, Solem v. Stumes, 465 U.S. 638, 648 (1984) (noting "[t]he Court had several times refused to adopt per se rules governing the waiver of Miranda rights").

1. The Threat of the Death Penalty Could Create a Rebuttable Presumption that a Confession is Involuntary

A court considers the totality of the circumstances in determining whether a confession was voluntarily made.[96] While no single factor is dispositive in the voluntariness inquiry, courts generally consider the following factors:

> [T]he characteristics of the accused and the details of the interrogation[,] the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[97]

However, even in a totality analysis where no single factor is dispositive, courts are especially skeptical of police tactics that "tend to provoke false confessions."[98] Accordingly, courts often pay special attention to "concerns about reliability" when assessing voluntariness.[99] Because threats of the death penalty raise serious questions about reliability, one example of an alternative solution to this problem may be to create a rebuttable presumption of involuntariness when the threat of the death penalty is employed as an interrogation tactic.

Courts could choose to presume that any confession elicited after the police threatened a suspect with the death penalty, either implicitly or explicitly,[100] is involuntary and inadmissible. To ensure that this presumption does not operate as a per se rule, the prosecution would have the opportunity to rebut the presumption with evidence supporting the voluntariness of the confession. In cases where the presumption is properly rebutted, the court would weigh all of the factors considered in the current totality test. This approach would recognize the coercive power of the threat of the death penalty while also preserving the totality test and providing courts with the flexibility to decide issues of voluntariness on a case-by-case basis. While a per se rule would better protect criminal suspects from this abusive interrogation tactic, a rebuttable presumption provides an alternative solution to the problem.

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96. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

97. *Id.* (citations omitted).

98. Primus, *supra* note 45, at 27.

99. *Id.* at 28.

100. As explained above, interrogators threaten suspects with the death penalty both implicitly and explicitly. *See* Drizin & Leo, *supra* note 13, at 916–18. In explicit cases, interrogators "rely on blatant threats of harsher punishment (such as death penalty threats) and explicit promises of leniency (such as offers of outright release from custody) to extract a confession." *Id.* at 917. In other cases, interrogators may give information that allows suspects to read between the lines. *See id.* For example, perhaps an interrogator tells a suspect that the crime is a capital offense or a death case, which allows the suspect to infer that the death penalty is involved. The explicit or implicit nature of the threat aside, a suspect will only confess "after the techniques and strategies of the interrogator have persuaded him that—in light of what he perceives to be his limited options and the consequences of choosing denial over silence—confession is the most rational course of action." *Id.* at 918.

2. *Courts Could Weigh the Threat of the Death Penalty More Heavily in the Totality of the Circumstances Analysis*

The current totality test weighs the "characteristics of the accused and the details of the interrogation" in each case.[101] Courts could take steps to protect criminal suspects subject to interrogation by weighing the threat of the death penalty more heavily than other factors in the totality analysis. In other words, the threat of the death penalty could tip the scales toward involuntariness. While a per se rule against the admissibility of confessions exacted following the threat of the death penalty would best prevent the admission of false confessions and likely reduce the chances of wrongful convictions, weighing the use of the death penalty as an interrogation tactic more heavily in the totality test is a step in the right direction.

3. *Courts Could Encourage Police Departments to Adopt "Best Practices" that Discourage the Mention of the Death Penalty During Interrogations*

The Supreme Court has issued a number of decisions that suggest best practices for those involved in the administration of the criminal justice system. In *United States v. Young*, the Court made clear that prosecutors and defense counsel should keep within "appropriate bounds" "to maintain decorum" and "refrain from interjecting personal beliefs into the presentation of [the] case," and then outlined the limitations that should exist when making arguments.[102] In *Gregg v. Georgia*,[103] Justices Stewart, Powell, and Stevens noted that concerns about the arbitrary and capricious nature of the death penalty "are best met by a system that provides for a bifurcated proceeding[,]" in which guilt is determined separate and apart from the sentence.[104] States took note of the Court's directive; today, every state with the death penalty has adopted bifurcated capital trials.[105] In *Arizona v. Youngblood*, the Court did not impose an affirmative duty on the police to preserve *all* evidence in a case, but did suggest that in certain circumstances it is prudent for the police to take affirmative steps to preserve evidence

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101. *Bustamonte*, 412 U.S. at 226.

102. United States v. Young, 470 U.S. 1, 8–14 (1985).

103. 428 U.S. 153, 188–89 (opinion of Stewart, Powell, and Stevens, JJ.). The Court stated:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id.

104. *Id.* at 195.

105. Robin E. Abrams, *A Capital Defendant's Right to a Continuance Between the Two Phases of a Death Penalty Trial*, 64 N.Y.U. L. REV. 579, 609 n.229 (1989) ("[E]very state with the death penalty provides some form of a bifurcated trial.").

nonetheless.[106] Courts declare what the law is,[107] but they may also suggest best practices.

To combat the coercive effect of the threat of the death penalty in an interrogation, courts might consider suggesting certain "best practices" to guide police procedures. Specifically, courts could caution law enforcement officials about the dangers of threatening suspects with the death penalty and indicate that a "best practice" would include not mentioning the death penalty during an interrogation. Considering that law enforcement officials often do not know what the exact charge will be at the outset of an interrogation, this best practice should not inhibit the investigatory goals of law enforcement officers. While suggesting best practices does not change the courts' analysis of the voluntariness of confessions, it could potentially discourage the use of the death penalty as an interrogation tactic and reduce the number of false confessions.

While a per se rule is a sweeping response to the problem of false confessions and coercive interrogation tactics, one is appropriate where the police threaten the death penalty to induce a suspect to confess. Therefore, police use of the threat of the death penalty during an interrogation should render subsequent confessions involuntary and inadmissible.

CONCLUSION

Interrogation tactics are designed to elicit confessions.[108] In order to procure a confession, police may explicitly state or subtly imply that a suspect will be subjected to the death penalty unless he confesses.[109] At present, the use of threats is only one factor in a court's assessment of the voluntariness of a confession. As evidenced by the experience of numerous exonerees, this has not protected against the admission of false confessions into evidence and subsequent wrongful convictions.[110] For this reason, a new protection is needed: The threat of the death penalty during an interrogation should render any subsequent confession per se involuntary, and therefore inadmissible.

106. Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (explaining that the Court is unwilling to "impos[e] on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution," but noting that preservation required in "class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant").

107. Marbury v. Madison, 5 U.S. 137, 177 (1803).

108. Drizin & Leo, *supra* note 13, at 911.

109. Ofshe & Leo, *supra* note 17, at 990.

110. Drizin & Leo, *supra* note 13, at 909–10, 914–15.