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INACCURACY AND THE INVOLUNTARY CONFESSION: UNDERSTANDING *ROGERS* *V. RICHMOND* RIGHTLY

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Inaccurate, unreliable, or altogether false confessions in custody are not new. Long before the false confessions of the Central Park Five or Brendan Dassey, others had been confessing falsely, without making the news.¹ Often, false confessions include notably inaccurate details. Consider three long past cases.

Stephen Boorn and his siblings were the local misfits in Manchester, Vermont.² And his sister's husband had wanderlust, as the neighbors knew.³ But by the time that Stephen's brother-in-law had been missing for seven years, small-town suspicions prevailed. Stephen's brother was arrested and he eventually accused Stephen of murdering the missing brother-in-law.⁴ He

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¹ The "Central Park Five" is the common description of five teenaged boys who confessed falsely, in coercive interviews by New York police officers, to raping a jogger in Central Park in 1989. *See, e.g.*, Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for \$40 Million*, N.Y. TIMES, June 19, 2014, at A1. Brendan Dassey was a 16-year-old boy with learning disabilities when (after earlier questioning sessions) he finally gave a halting statement inculcating himself in a murder, adopting some accurate details that law enforcement officers provided but getting other details wildly wrong when left to his own claims. His case drew worldwide attention in Netflix's *Making A Murderer*. *Making A Murderer: Plight of the Accused* (Netflix 2015), <https://www.netflix.com/title/80000770> [<https://perma.cc/J379-WCXB>] [hereinafter *Making a Murderer*]; *see also* Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017) (en banc) (holding, 4–3, that the state court findings of voluntariness were not so unreasonable that they could be set aside on federal habeas).

² EDWIN M. BORCHARD, CONVICTING THE INNOCENT FOR ERRORS OF CRIMINAL JUSTICE 15–21 (1932). Borchard was a Yale professor of international law, not especially interested in criminal law for its own sake, but convinced that governments have a moral responsibility to compensate wrongly convicted people. In path breaking work, he and a research assistant collected and documented 65 cases of innocent people convicted and imprisoned. *See also* Bernard C. Gavit, *Book Review*, 8 IND. L.J. 147 (1932) (reviewing EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932)).

³ BORCHARD, *supra* note 2, at 15.

⁴ *Id.* at 17.

relayed to authorities the story of the murder that he claimed Stephen told him, implicating himself, too.⁵

Months after Stephen's ensuing arrest, during which authorities pressed him intermittently to admit murder, Stephen did confess.⁶ He told a story rich in detail but very different than the one his brother attributed to him—and a story that did not implicate the brother, although again, his brother had implicated himself.⁷

With the two confessions, supplemented by a jailhouse informant's claim that Stephen's brother had confessed colorfully to him with yet a third version of the murder, a jury convicted both brothers.⁸ They would hang.⁹

That is, they would until the murdered brother-in-law returned reluctantly, but in fine health, from New York.¹⁰ He had left because he was tired of marriage to Stephen's sister.¹¹ But no, the two Boorn brothers never had hurt him.

Well to the south and almost exactly one hundred years later, Louise Butler and George Yelder, a married man, were carrying on an affair in rural Lowndes County, Alabama.¹² Louise's two nieces, 14 and 9, lived with her, as did her 12-year old daughter.¹³ One day, Louise was in a jealous rage, believing that George and the 14-year old niece had coupled in her absence.¹⁴ Louise beat the niece, who then disappeared.¹⁵

Eventually, through the efforts of a deputy sheriff, the two remaining girls told a gruesome story of how Louise and George murdered the 14-year old niece with an ax, dismembered her body, gathered it in a sack, and dumped the sack in the river nearby.¹⁶ There was no physical evidence supporting the story.¹⁷ In the custody of the sheriff himself, after several days Louise supposedly gave a loosely similar confession, differing in some details.¹⁸ She also showed the sheriff the spot on the river bank where she

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 17–18.

⁸ *Id.* at 18.

⁹ *Id.*

¹⁰ *Id.* at 20.

¹¹ *Id.*

¹² *Id.* at 40–45.

¹³ *Id.* at 40.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 40–41.

¹⁷ *Id.*

¹⁸ *Id.* at 42.

and George had pitched the body into the water.¹⁹ Louise then recanted almost immediately.²⁰

After a jury convicted George and Louise of murder, the dead niece turned up in a neighboring county, living with other relatives to whom she had fled after Louise beat her.²¹ Apparently, she did not like Aunt Louise.

Turning north again and back seventeen years, John “Dogskin” Johnson was lurching through life in Madison, Wisconsin.²² He seems to have had limited intellect, people thought him strange, and being drunk much of the time did not help.²³ When a neighboring 7-year-old girl disappeared from bed overnight and turned up murdered in a nearby lake, suspicion fell on Dogskin.²⁴ Investigators faced at least three problems, though. First, a tiny broken pane in the garret room in which the little girl slept with her two brothers and the family dog would not have allowed the girl out, let alone a grown man in.²⁵ Second, the brothers and the dog, crammed into the small room, had not awakened.²⁶ Third, Dogskin’s wife said he had not left their house that night.²⁷

Arrested anyway, Dogskin Johnson maintained innocence in an “all-night grilling” and won his release.²⁸ But then the police learned of his prior record for taking liberties with girls and two commitments to “insane asylums.”²⁹ They arrested him again.³⁰

After his re-arrest, Dogskin again withstood hard interrogation by police officers for hours.³¹ He insisted that he was innocent.³² The police learned from him, though, that he once had watched the brutal torture and lynching of a black man.³³ That experience left him terrified of mobs.³⁴ And it gave his interrogators the edge.

¹⁹ *Id.*

²⁰ *Id.* at 42.

²¹ *Id.* at 43.

²² *Id.* at 112–21.

²³ *Id.* at 113–16.

²⁴ *Id.* at 112–14.

²⁵ *Id.* at 114, 116.

²⁶ *Id.* at 119.

²⁷ *Id.* at 114.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 116.

³⁴ *Id.* at 116–17.

In a ruse, the police eventually told Dogskin that a mob was gathering for him outside the jail.³⁵ Panicked, he confessed in detail.³⁶ He also insisted on pleading guilty that very day and won a promise that if he did, the police would spirit him to the state penitentiary far from town immediately.³⁷ He pled guilty and the police kept their word (and their ruse), slipping him out of town in the backseat of a car and insisting that he hide under a blanket for the first ten miles.³⁸ Dogskin was in prison the night of his plea.³⁹ His conviction rested on the confession alone, corroborated only by the fact that the girl was dead.⁴⁰

Like many prisoners before and since, Dogskin soon began to write from his prison cell, urging his innocence.⁴¹ He had confessed only to avoid a violent death at the hands of a mob, he insisted.⁴² It took nine years, but eventually a former judge became convinced that Dogskin was telling the truth: he was innocent.⁴³ The former judge persuaded the governor to order a pardon hearing.⁴⁴ Publicity about that hearing prompted a surprise witness to come forward, a good friend of the dead girl's mother.⁴⁵ That woman relayed how she had seen the girl's mother burning bloody bedding and a little nightgown in the kitchen the morning after her disappearance.⁴⁶ The woman also had learned that the night before, the girl's father—drunken during a card game in that same kitchen—had bashed the girl behind the ear with a beer bottle, causing her to pitch headfirst and unconscious into the stove.⁴⁷ The father carried the little girl upstairs to her cot and the family found her dead in bed later.⁴⁸ They hired a man to dispose of her body after hiding it at home.⁴⁹

³⁵ *Id.* at 115–16.

³⁶ *Id.* at 120–21.

³⁷ *Id.* at 115.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 114–15.

⁴¹ *Id.* at 115–16.

⁴² *Id.* at 113–14.

⁴³ *Id.* at 114.

⁴⁴ *Id.*

⁴⁵ *Id.* at 115–16.

⁴⁶ *Id.* at 116.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

The statute of limitations on second-degree murder had passed, so the girl's father escaped justice.⁵⁰ But Dogskin was freed after more than ten years in prison.⁵¹

I

Butler's judge probably excluded at least one of her statements after her recantation and Boorn's jury seems to have rejected his written confession (convicting him all the same). But Johnson pled guilty and it appears that at least some of their wildly incorrect statements got to the Boorn and Butler juries.⁵² Because the three cases arose between 1819 and 1928 in state courts, American judges would not have recognized a basis in the federal constitution to exclude the statements, state law aside.⁵³ Still, the confessions' unreliability, their outright lack of veracity, begged even then the question: did Stephen Boorn, Louise Butler and the two girls, and Dogskin Johnson speak voluntarily?

This Article explores the relationship between inaccuracy and involuntariness and why courts mistakenly believe that they must ignore that relationship. Part II begins with an overview of the relationships between accuracy or inaccuracy of details in confessions, and voluntariness or involuntariness of those incriminating statements. It identifies broadly, too, the systemic values at stake in those relationships.

Part III follows with a brief history of the legal rationales supporting exclusion of involuntary statements, tracing them lightly as they have changed over time. It is background here and does not pretend to be a comprehensive account.

Part IV introduces the principal case that established a mechanical symmetry from the exclusive truth-seeker's perspective, the United States Supreme Court's 1961 decision in *Rogers v. Richmond*.⁵⁴ That part looks first at *Rogers* itself, and then at how courts have applied its test to bar

⁵⁰ *Id.* at 118.

⁵¹ *Id.* at 110–18. As to the interrogation, Borchard described an “all-night grilling,” “hours of rapid-fire and relay examination,” and “hammering at” Johnson with the aid of an outside Burns Detective Agency employee. *Id.* at 112.

⁵² ROB WARDEN, WILKIE COLLINS' THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS 121–22, 153 (2005).

⁵³ The federal government would not begin to exclude coerced confessions used in state courts until 1936, when in *Brown v. Mississippi* the Supreme Court held that a defendant's involuntary confession extracted by use of police violence violated the Due Process Clause of the Fourteenth Amendment. 297 U.S. 278 (1936). Later cases would develop further the federal courts' role in review of coerced confessions used in state courts. *See infra* Part III.

⁵⁴ 365 U.S. 534 (1961).

consideration of both accuracy and inaccuracy of a confession in deciding voluntariness.

Part V explains why courts have been both casual and wrong in that application. It argues that only accuracy of details should be excluded as irrelevant to voluntariness. Accuracy in the recollection of details is as likely from a guilty but coerced speaker, a guilty and uncoerced speaker, or an innocent and coerced speaker who was fed information by the police; so, if coercion and involuntariness are unacceptable because dignity and integrity are ends in addition to truth, then accuracy simply becomes irrelevant. In other words, accuracy in detail is incapable of helping to discriminate among those three possible explanations.

By sharp contrast, inaccuracy of a confession may be, and often is, relevant to involuntariness: the voluntary speaker who wishes to confess has no reason to give inaccurate details unless drugs, alcohol, or mental illness cloud his recollection or he hopes to mitigate his responsibility. The first cause he can explain; the second cause the police often are in a good position to assess. But the involuntary speaker who is attempting just to make the interrogation stop very well may spew inaccurate details, either because he is factually innocent and does not know what happened or because he is culpable but calculates his responses to please the interrogator, again so that he gets the earliest and fullest relief from the interrogation. Because lack of recall, false partial self-exculpation to reduce responsibility, or both, also are lively possibilities (and common realities) in explaining inaccuracies, those inaccuracies do not establish involuntariness by themselves. Instead, they simply are probative of involuntariness. In a given case, the government may carry its burden of proving voluntariness despite inaccuracies. In another case, though, it may not. The point is that inaccuracies rightly bear on the question of involuntariness.

Part VI concludes that *Rogers v. Richmond* is no bar to a proper asymmetry in the consideration of accuracy and inaccuracy—courts can and should consider inaccuracy in confessions when deciding whether they were voluntary or involuntary, but should not consider accuracy as evidence that the statements were voluntary. Understanding the case correctly, this has been true since the day the Court decided *Rogers*. Part VI also concludes that, from the perspective of the real world in which American courts must and do have ends other than pure truth-seeking, including but not limited to human dignity and institutional integrity, a rightful asymmetry in mechanics produces no asymmetry in outcomes or values at all.

II

Inaccurate details well may be relevant to involuntariness, although the former does not always establish the latter. If a statement is inaccurate, if the confessor has gotten basic details wrong, he possibly (but not certainly) spoke out of fear, pain, or hope of gain to end the questioning, not out of actual knowledge willingly disclosed. Or, he might have spoken voluntarily, but just lied. Either way, inaccuracies in a confession at least bear on the question of involuntariness.⁵⁵

Likewise, there is a relationship between accuracy and voluntariness, although, again, one does not establish the other. For example, a guilty woman may have told the truth, accurately, but not necessarily because she chose freely to do so. She might have spoken involuntarily, but given truthful details—either because she actually was guilty but coerced to speak, or because she was innocent and got accurate details from the police that she adopted as her own.⁵⁶ And of course, she might have spoken both accurately and voluntarily, to unburden her conscience, salve her religious views, or serve some other purpose.

If truth-seeking were the only goal of criminal justice, then, we still would have to consider voluntariness of confessions instrumentally. Why? Both voluntariness and involuntariness might bear on accuracy (or truth, in other words). Deciding the voluntariness question would be an essential means—one of many—to the end of truth-seeking. And consideration would be symmetrical, in a sense. If truth-seeking were the exclusive goal, we would want to explore whether accuracy suggested voluntariness in a given case, and also would want to assess whether inaccuracy suggested involuntariness. We would do both because it really would be accuracy and inaccuracy that we cared about alone in the end, not voluntariness for its own sake. Our conclusions on accuracy or inaccuracy then would determine our further efforts to find truth.

But because the criminal justice system has ends and values in addition to truth⁵⁷—whether those other ends are subordinate, coordinate, or even

⁵⁵ The Supreme Court has noted that “there may be a relationship between the involuntariness of a confession and its unreliability,” although it never has said that this relationship is the point of the doctrine of excluding coerced statements. *Lego v. Twomey*, 404 U.S. 477, 484 & n.12 (1972) (citing *Jackson v. Denno*, 378 U.S. 368, 385–86 (1964)).

⁵⁶ In the argot of police interview experts and psychologists, this is “contamination.” To cite one widely known example, contamination featured prominently in the interrogation of Brendan Dassey, the 16-year old boy in Netflix’s *Making A Murderer*, *supra* note 1.

⁵⁷ See, e.g., *United States v. Havens*, 446 U.S. 620, 626 (1980) (“There is no gainsaying that arriving at the truth is a fundamental goal of our legal system,” but implicitly acknowledging that it is not the only goal); *United States v. Nixon*, 418 U.S. 683, 708–10 (1974) (recognizing privileges that serve interests important enough to block truth-finding,

superordinate—the instruments change subtly. Indeed, voluntariness might become a corollary end in itself, not just a means or an instrument. If preserving individual human dignity and the integrity of human institutions also are ends of criminal justice, then voluntariness is essential.⁵⁸ An involuntary confession undermines both individual and institutional integrity and dignity, even if accurate. That is, the tormentor diminishes both the one tormented and himself; the manipulator, the same. Torment and manipulation rob self-determination, and both the thief who stole it and the person deprived of it are the less fully human for the loss. When the tormentor or manipulator next comes to court bearing his shameful gain, the judge becomes a fence: a receiver of stolen self-determination, who then peddles the hot goods to jurors, if they are buying. As an institution, the court itself loses integrity and with that, dignity.

If there is more to criminal justice than truth-seeking alone, then to avoid defeat of the additional goals of dignity and integrity, we have to reject even the accurate confession if involuntarily obtained.⁵⁹ Truth-seeking can co-exist with voluntariness, and can even retain primacy as an end, but the additional ends of dignity and integrity—if they are to survive with truth-seeking—require that we seek truth only by means other than involuntary confessions.

but observing that “these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth”); *Elkins v. United States*, 364 U.S. 206, 222 (1960) (defending the exclusionary rule and noting “the imperative of judicial integrity”); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land;” referring to Fourth and Fifth Amendment rights); see also *Stone v. Powell*, 482 U.S. 465, 488 (1976); *Walder v. United States*, 347 U.S. 62, 64–65 (1954) (both acknowledging the instrumental goals of the exclusionary rule, but weighing those against truth-seeking).

⁵⁸ To the truth-seeker, a perceived asymmetry in outcomes emerges unavoidably. Asymmetry in outcomes appears only from the perspective of the exclusive truth-seeker. For her, single-minded in her goal, now some accurate confessions will come into evidence (the voluntary ones) and some will not (the involuntary ones). For her, voluntariness is only a means to the end of accurate fact-finding, so she sees an asymmetry in outcomes. Whether it is an acceptable asymmetry on pragmatic grounds will depend on how commonly inaccurate she believes involuntary confessions are, if at all. As to the importance of judicial integrity, see, e.g., *Elkins*, 364 U.S. at 222.

⁵⁹ The justice system posits other values, too, like efficiency and cost-effectiveness. I do not intend to diminish these, but also do not rank them as values of first order, like truth-seeking, human and institutional integrity, and human and institutional dignity. Because efficiency, cost-effectiveness, and other ends are secondary or lower objectives—to my mind, at least—I leave them out. As secondary goals, they would not change my views on pursuing primary goals.

In fact, American courts admit that truth-seeking is not the exclusive goal of criminal justice, even if it remains paramount.⁶⁰ Integrity and dignity also matter, both of individual people and of the larger institutions in which they operate. Because integrity, human dignity, and truth-seeking all are systemic goals of first order,⁶¹ both accurate and inaccurate yet voluntary statements should be admitted at trial (compliance with other ends or goals here assumed). But involuntary statements should be excluded, whether accurate or inaccurate.

III

Again, the unreliable—inaccurate and outright false—confessions of Stephen Boorn, Louise Butler, and Dogskin Johnson all came before the United States Supreme Court barred coerced statements to the police from state criminal trials.⁶² Since 1892, in *Counselman v. Hitchcock*, the Supreme Court had barred from federal court all statements compelled by law, acknowledging the Fifth Amendment's self-incrimination clause.⁶³ But that rule touched neither state trials nor statements un compelled by law directly. It was another 44 years before the Supreme Court first ruled that statements coerced by law officers were inadmissible in state courts under the Fourteenth Amendment's due process clause, in *Brown v. Mississippi*.⁶⁴

Counselman and *Brown* addressed different problems. The first prohibited compulsion by law directly;⁶⁵ the second prohibited compulsion not by law directly (that is, not by statute or rule), but by law *officers*.⁶⁶ In

⁶⁰ See *supra* note 57 and accompanying text.

⁶¹ In addition to *Brown v. Mississippi*, 297 U.S. at 285–86, see, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 719–21 (1997) (listing specific fundamental freedoms that are essential to ordered liberty, and that substantive due process doctrine protects; among these are “bodily integrity” and other interests going to human dignity, like marriage, procreation, and marital privacy); *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926) (state action “shall be consistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions”); see also *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (noting of such interests “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed”), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

⁶² *Brown v. Mississippi*, 297 U.S. 278 (1936) was the first.

⁶³ 142 U.S. 547 (1892). As *Counselman* itself acknowledged, an earlier case, *Boyd v. United States*, 116 U.S. 616 (1886), had considered both the Fifth Amendment self-incrimination clause and the Fourth Amendment in striking down a tax statute that compelled production of incriminating private papers. *Counselman*, 142 U.S. at 580–82 (discussing *Boyd*, 116 U.S. at 631, 633).

⁶⁴ 297 U.S. 278 (1936).

⁶⁵ *Counselman*, 142 U.S. at 547.

⁶⁶ *Brown*, 297 U.S. at 278.

federal proceedings, the Fifth Amendment's self-incrimination clause forbade direct compulsion by law, either through statute or through judicial instrument, like a subpoena.⁶⁷ The *Counselman* principle was plain in the Fifth Amendment's text: the only tough interpretive question was how long before trial something became a "criminal case" under that amendment's express terms.⁶⁸

By contrast, *Brown* and the cases that followed did not address statutory requirements that abused the constitutional privilege of silence. Rather, they addressed unacceptable police conduct that abused the human body and will. The cases featured brutal third-degree tactics: repeatedly hoisting a suspect aloft by a rope around his neck;⁶⁹ beatings with a leather belt and heavy buckle across bare backs and buttocks;⁷⁰ other forms of physical abuse;⁷¹ and threats to abandon suspects to the deadly violence of gathered mobs, real or imaginary,⁷² just as Wisconsin officers threatened Dogskin Johnson.⁷³

⁶⁷ *Counselman*, 142 U.S. at 547.

⁶⁸ The answer was that the privilege against self-incrimination extended at least back to a grand jury appearance under subpoena. *Counselman*, 142 U.S. at 562 ("It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.").

⁶⁹ See *Brown*, 297 U.S. at 281.

⁷⁰ See *id.* at 282.

⁷¹ See *id.* at 281–82.

⁷² *Payne v. Arkansas*, 356 U.S. 560, 564–67 (1958). For a collection of state cases discussing fear of mob violence or threats to leave the accused to a mob, see, e.g., *State v. Hamilton*, 337 Mo. 460, 465–66, 85 S.W.2d 35, 37–38 (1935).

⁷³ See BORCHARD, *supra* note 2, at 115–16. In addition to *Brown*, early cases included: *Lynum v. Illinois*, 372 U.S. 528 (1963) (threats to mother of loss of child custody); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (also a juvenile case); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960) (eight or nine hours of sustained interrogation in small room rendered confession "most probably" involuntary where accused was mentally ill); *Spano v. New York*, 360 U.S. 315 (1959); *Payne*, 356 U.S. at 564–67; *Leyra v. Denno*, 347 U.S. 556 (1954) (state psychiatrist obtained confession by ruse after sustained police questioning); *Watts v. Indiana*, 338 U.S. 49 (1949); *Haley v. Ohio*, 332 U.S. 596 (1948) (the Court's first consideration of a coerced confession from a juvenile); *Malinski v. New York*, 324 U.S. 401 (1945); *Ashcraft v. Tennessee*, 322 U.S. 143, 149–54 (1944) (declining to resolve disputed details of the "secret inquisitorial practices" or even whether the accused actually confessed, but holding that 36 hours of incommunicado interrogation without sleep made the confession involuntary if there was one); *Chambers v. Florida*, 309 U.S. 227 (1940) (threats of mob violence). These are the principal Supreme Court cases of the 30-year era between *Brown* and *Miranda v. Arizona*, 384 U.S. 436 (1966), in which the Court held a confession involuntary. I do not list cases, like *Lisenba v. California*, 314 U.S. 219 (1941), and *Stroble v. California*, 343 U.S. 181 (1952), in which the Court rejected an involuntariness

Here a complication emerges. Before the age of the incorporation doctrine, when the Supreme Court began to consider explicitly which guaranties in the Bill of Rights the Fourteenth Amendment's due process clause was meant to include, the Court had applied the Fifth Amendment's self-incrimination clause—not its due process clause—to police conduct in federal proceedings.⁷⁴ Prior to the twentieth century, federal courts held that any inducement might render a confession involuntary and thus compelled. The Court explained that rule most famously in *Bram v. United States*.⁷⁵

Bram considered a triple murder on the high seas, with the chief mate later indicted, convicted, and sentenced to death in Boston federal court.⁷⁶ At trial, the government had introduced Bram's non-denial into evidence—his quibble with whether his accuser could have seen him commit one of the murders from the accuser's vantage point—and then his terse general denial.⁷⁷ Bram had made those statements after the officer questioning him had asserted a firm belief in Bram's guilt, and then added, "But . . . some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."⁷⁸ Bram was in custody at the time and had been forced to disrobe partially so that his clothes could be searched, but the case offered no other suggestions of coercion.⁷⁹

The *Bram* court discussed at length both English and American state precedents, laying out the exact coaxing words that courts in both countries

claim. Since *Miranda*, that prophylactic rule has gotten more attention from the Court than voluntariness itself.

For an expanded discussion of the problem generally, as courts and others perceived it at the time of *Brown* and later, see the so-called Wickersham Commission's report on police brutality and illegality. NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES (1931) (describing police abuses and misbehavior during prohibition era).

⁷⁴ Placing the start of the era when the Supreme Court repeatedly has considered incorporating specific aspects of the first eight amendments into the Fourteenth Amendment's due process guaranty is dicey. Depending on what clarity of signal one seeks, *Gitlow v. New York*, 268 U.S. 652 (1925), *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897), all are plausible points of origin of incorporation doctrine. In any event, the incorporation debate seems roughly a twentieth century process—although it has extended at least through *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment into the Fourteenth Amendment's due process clause).

⁷⁵ 168 U.S. 532 (1897).

⁷⁶ *Id.* at 537.

⁷⁷ *Id.* at 538–40.

⁷⁸ *Id.* at 539.

⁷⁹ *Id.* at 538–39, 564.

had found vitiated the voluntariness of a confession.⁸⁰ Then it concluded that Bram's statements "must necessarily have been the result of either hope or fear, or both, operating on the mind" of the prisoner.⁸¹ The statement was involuntary; it was not made "without compulsion or inducement of any sort."⁸² It was inadmissible, a violation of the principle of *nemo tenetur seipsum accusare* that the Fifth Amendment's self-incrimination clause enshrined.⁸³ In federal courts of the late nineteenth century, then, the self-incrimination clause barred statements gained by the compulsion of either the law itself or law officers.

But federal prosecutions were rarer than today, so those federal courts had comparatively few criminal cases and still fewer appeals dealing with involuntary statements in the aftermath of *Bram*. Because *Bram* came long before the Supreme Court applied the privilege against self-incrimination to the states through the Fourteenth Amendment's due process clause, the prohibition of involuntary confessions in state prosecutions never took root in the self-incrimination clause. Not until 1964 did the Supreme Court hold that the Fourteenth Amendment incorporated the Fifth Amendment's self-incrimination clause.⁸⁴ By then, *Brown*, not *Bram*, was the rule.

Brown set much less rigorous guidelines for state police officers and state cases than *Bram* had set for the rare federal prosecution. *Brown* and cases following it ignored *Bram*'s mark of involuntariness as a promise or inducement ever so slight. Instead, these courts asked whether a beating or coercion was so severe that it marked an involuntary confession.⁸⁵ From the standpoint of assuring that trials remain untainted by confessions that are unreliable because rooted in fear, pain, exhaustion, trickery, or induced hope of gain,⁸⁶ the doctrinal shift between *Bram* and *Brown*—with their different constitutional loci—stands as one of the tragic missed opportunities of

⁸⁰ *Id.* at 543–61.

⁸¹ *Id.* at 562. The discussion of prior English and American cases runs from pages 540–61.

⁸² *Id.* at 548 (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)). The most common encapsulation of *Bram*'s holding comes from its quotation of an English treatise near the beginning of the long discussion of earlier cases. "But 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 . . ." *Id.* at 542–43 (quoting 3 WILLIAM OLDNALL RUSSELL, TREATISE ON CRIMES AND MISDEMEANOURS 478 (6th ed. 1896) (emphasis omitted)).

⁸³ *Id.* at 544–45.

⁸⁴ *Malloy v. Hogan*, 378 U.S. 1, 4–11 (1964), *overruling* *Twining v. New Jersey*, 211 U.S. 78 (1908), which explicitly had refused to apply the self-incrimination clause to the states.

⁸⁵ *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

⁸⁶ *See Bram*, 168 U.S. at 542–43, 548.

American jurisprudence. Arguably, too, the descent of *Bram* before the slow ascent of *Brown* also created the vacuum in which “third-degree” tactics—harsh, physically abusive or grueling forms of interrogation—and incommunicado custody flourished in the first third of the twentieth century.⁸⁷

Still, the core principle that *Brown* and its progeny developed was dignity, with two facets. First, the dignity of the court itself was sullied if it admitted products of brutality into evidence. Second, the dignity of the human being was tarnished when courts allowed state actors to overcome the free will of suspects in eliciting coerced statements. For both reasons, states could not use statements that beatings, threats, or other coercion had produced. An involuntary statement offended both the dignity of the court, if the police deployed it in judicial proceedings, and the dignity of the human being who gave it only unwillingly.⁸⁸ Due process would not tolerate either. Instead, due process only tolerates confessions that are acts of free will. As the Supreme Court put it later, “a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary.”⁸⁹ Later still, the Court described the fundamental due process objection even more summarily. Coerced confessions are “offensive to a civilized system of justice.”⁹⁰

⁸⁷ See generally DEAN A. STRANG, *WORSE THAN THE DEVIL: ANARCHISTS, CLARENCE DARROW, AND JUSTICE IN A TIME OF TERROR 199–205* (rev. ed. 2016) (discussing third-degree interrogation tactics in appendix).

⁸⁸ Again, a coerced statement also degrades the dignity of the coercive police officer, but the Court has left that largely unstated.

⁸⁹ *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); see also *Brown*, 297 U.S. at 285–86. The Court did not articulate the twin dignity concerns explicitly in *Brown*, or the free-will standard. It spoke more broadly of extorting confessions by torture, trial by ordeal, and confessions that make the “whole [trial] proceeding” “but a mask.” *Id.* at 286. References to free will being overborne and to judicial dignity did not appear explicitly until *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (confessions must be “the expression of free choice” and suspect must not be “overborne”), and more clearly until ten years later in *Spano v. New York*, 360 U.S. 315, 323 (1959) (accused’s “will was overborne by official pressure, fatigue, and sympathy falsely aroused”). As to institutional integrity or dignity concerns, see also *id.* at 320–21 (“The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It 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.”).

I use dignity when I refer to the individual human being’s interest, but sometimes use integrity when I refer to institutional interests as I think it captures the idea better.

⁹⁰ *Miller v. Fenton*, 474 U.S. 104, 109 (1985).

Today, the federal rule holds that involuntariness always requires some official coercion or overreaching:⁹¹ a person's own intrinsic inability, by reason of mental illness or other weakness, to make a true volitional choice to speak never is enough to make his statement legally "involuntary."⁹² For example, a command hallucination, heard only by the delusional person, does not render his subsequent statement legally involuntary.⁹³ Instead, a police officer, or on rare occasion some other state actor, must do something affirmative to exploit the person's vulnerability.⁹⁴

The usual formulation of voluntariness that *Brown* spawned is that an accused's statements, to be usable in court, must be "the product of a rational intellect and a free will," or words to that effect.⁹⁵ Equivalently, the accused's statements are unusable if his "will was overborne."⁹⁶ There is no actual test, though: trial courts should consider the "totality" of circumstances in deciding the question of free will before admitting a confession.⁹⁷ At best, that is a method or an orientation, not a test, and at worst it may be no more than an exhortation. By whatever measure, the question of voluntariness is not for the jury alone; rather, the trial court must determine voluntariness before the state offers a confession.⁹⁸

Mechanically, the prosecution bears the burden of proving voluntariness.⁹⁹ In federal court, the standard of persuasion is a preponderance; states may require more from the prosecution, but not less.¹⁰⁰

⁹¹ *Colorado v. Connelly*, 479 U.S. 157 (1986).

⁹² *Id.* at 164, 165–66.

⁹³ *Id.* at 162, 167.

⁹⁴ *Id.* at 167. For one example of the atypical involuntariness case in which the state actor was not formally a law enforcement officer, see *United States v. D.F.*, 857 F. Supp. 1311 (E.D. Wis. 1994), *aff'd*, 63 F.3d 671 (7th Cir. 1995), *vacated and remanded*, 517 U.S. 1231 (1996), *aff'd after remand*, 115 F.3d 413 (7th Cir. 1997) (social worker in county mental hospital, acting in part to aid law enforcement, elicited involuntary confessions from a patient in her care).

⁹⁵ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Blackburn*, 361 U.S. at 208. The words vary, but the standard is always to this effect.

⁹⁶ *Townsend*, 372 U.S. at 307 (quoting *Reck v. Pate*, 367 U.S. 433, 440 (1961)); see also *Watts*, 338 U.S. at 53.

⁹⁷ *Greenwald v. Wisconsin*, 390 U.S. 519, 520–21 (1968) (quoting *Clewis v. Texas*, 386 U.S. 707, 708 (1967)); see also *Fikes v. Alabama*, 352 U.S. 191, 197 (1957).

⁹⁸ *Jackson v. Denno*, 378 U.S. 368, 391–96 (1964).

⁹⁹ *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

¹⁰⁰ *Id.* at 482–89. Many states set the burden there, too, although some require more of the prosecution—as *Lego* invited them to do. *Id.* at 489; see also Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 642 n.228 (2006) (providing a non-exhaustive list of state rules).

An involuntary confession may not be used at all in court: not in the prosecution's case-in-chief, not for impeachment, not in rebuttal.¹⁰¹ A mistakenly admitted involuntary confession once was, but no longer is, reason for automatic reversal. Now, a conviction can stand if the prosecution proves the constitutional error was harmless beyond a reasonable doubt.¹⁰²

The jury cannot screen a confession for voluntariness in the first instance—again, that is a judge's job before the state offers the confession. But the defense can insist that the jury determine the *reliability* of that confession in the end.¹⁰³

This is where the law of involuntary confessions stands today, then. Normative alternatives and a missed opportunity aside, the question is due process generally, not the privilege against self-incrimination specifically.¹⁰⁴ Indeed, the Supreme Court has jettisoned *Bram*. As even the more moderate plurality conceded in *Arizona v. Fulminante*, the *Bram* rule that a confession may not be obtained by promises or inducements, however slight, by 1991 did “not state the standard for determining the voluntariness of a confession.”¹⁰⁵ A pretrial hearing on admissibility will decide voluntariness, with the prosecution carrying a burden of at least a preponderance of the

¹⁰¹ *Oregon v. Elstad*, 470 U.S. 298, 306–08 (1985); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Mincey v. Arizona*, 437 U.S. 385, 398, 402 (1978); cf. *Oregon v. Hass*, 420 U.S. 714 (1975) (otherwise trustworthy statement taken in violation of *Miranda* may be used for impeachment, although not in the prosecution's case-in-chief).

¹⁰² *Arizona v. Fulminante*, 499 U.S. 279, 306–12 (1991) (Rehnquist, C.J., announcing the holding on this point) (applying *Chapman v. California*, 386 U.S. 18 (1967), harmless error doctrine to involuntary confessions for first time).

¹⁰³ *Crane v. Kentucky*, 476 U.S. 683 (1986).

¹⁰⁴ Some academic writers gamely have suggested reconsidering the normative framework and have proposed new regimens for considering voluntariness under the self-incrimination clause, the due process clause, or both. For a sampling, see Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465 (2005); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule*, 53 OHIO ST. L.J. 101 (1992); Samuel J. Levine, *Rethinking Self-Incrimination, Voluntariness, and Coercion, Through a Perspective of Jewish Law and Legal Theory*, 12 J. L. SOC'Y 72 (2010); Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015) (noting the deontological strand of voluntariness doctrine (odious police practices) and the consequentialist strand (concern over false confessions) and arguing that they should be disentangled and separated into different tests). In the courts so far, no takers.

¹⁰⁵ 499 U.S. at 285.

evidence. If the judge decides that the balance tips toward voluntariness, the jury may hear an otherwise admissible confession.¹⁰⁶

In making that determination, the totality-of-the-circumstances rhetoric amply cloaks a wide range of intellectual dishonesty by trial and appellate judges. They regularly wave through custodial confessions when police officers have lied to suspects about facts and evidence, fed facts, bullied, cajoled, promised leniency, and otherwise manipulated or intimidated suspects. They do so even when the suspects were young, inexperienced, obviously mentally ill, clearly unintelligent or cognitively disabled, drunk, high, exhausted or sleep-deprived, or some combination of these qualities.¹⁰⁷

IV

With all that the totality-of-the-circumstances phrase allows, and by its terms it proposes to allow everything, there is one striking exception: courts may not consider the accuracy or truthfulness of a confession in deciding its voluntariness. That bar rests on one Supreme Court decision now nearly six decades old, *Rogers v. Richmond*.¹⁰⁸ The prohibition is right, both as a matter of fidelity to *Rogers* and of logic: accuracy of a confession's details does not bear logically on its voluntariness or, therefore, on its admissibility. But is the inverse—that *inaccuracy* of a confession's details *does* bear on voluntariness—also foreclosed by *Rogers* and its logic, as most courts have assumed or ruled?¹⁰⁹ No.

A

One evening in November 1953, Dorothy Kennedy was working alone in the liquor store that she and her husband owned in West Haven,

¹⁰⁶ By "otherwise admissible," I mean simply that involuntariness is not the only possible reason for excluding a confession. There may be a *Miranda v. Arizona*, 384 U.S. 436 (1966), issue, or a *Bruton v. United States*, 391 U.S. 123 (1968), issue in a joint trial, or some other possible reason for keeping a confession from a jury.

¹⁰⁷ Marcus, *supra* note 100 (discussing a review of every reported state and federal voluntary confession appellate decision between 1985–2005 and documenting all of these common factors). For one more recent graphic example, consider the videotaped excerpts of Brendan Dassey's confession that *Making A Murderer* offered. As the full videotape confirms, Dassey was a mentally limited 16-year old. After haltingly adopting or conceding details often supplied by police interviewers and admitting, in that fashion, his direct involvement in the rape and murder of a young woman, Dassey asked if he could return to school because he had a project due in sixth period. *Making A Murderer*, *supra* note 1.

¹⁰⁸ 365 U.S. 534 (1961).

¹⁰⁹ See *infra* note 140.

Connecticut.¹¹⁰ At about 7:30 p.m., someone came in, robbed the cash register of \$60, and killed Dorothy with a gun.¹¹¹

More than six weeks later, in early January 1954, New Haven police sought Harold Rogers in connection with a separate break-in and theft at a hotel.¹¹² The police found Rogers sitting in his car with a .38 caliber revolver and arrested him.¹¹³ They learned soon that the gun had been reported stolen from Rogers's nephew the very day that Dorothy Kennedy was murdered.¹¹⁴ Later ballistics testing matched the gun to the bullets that killed her.¹¹⁵

Rogers eventually confessed twice to shooting Dorothy Kennedy and robbing her store.¹¹⁶ Convicted at trial of first-degree murder, he was sentenced to death.¹¹⁷ On appeal, he argued principally that his confessions were involuntary and should have been excluded.¹¹⁸ He claimed that jailers had refused to allow his lawyer into the jail and that a police officer had pretended, in his presence, to call other officers with directions that they bring his wife to police headquarters and take their foster children into detention.¹¹⁹ Only under this duress had he confessed, he said.¹²⁰ Then, he reasoned, his later confession to the coroner was but a product of the first.¹²¹

The Connecticut Supreme Court of Errors rejected his arguments and agreed with the trial court that his confessions were voluntary. "The question is whether, under these and other circumstances of the case, that [police] conduct induced the defendant to confess falsely that he had committed the crime being investigated," the state supreme court opined.¹²² Or, restated, "the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement."¹²³ No, that court answered.¹²⁴

¹¹⁰ *State v. Rogers*, 120 A.2d 409, 411 (Conn. 1956).

¹¹¹ *Rogers*, 120 A.2d at 411.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 410.

¹¹⁸ *Id.* at 412.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (citations omitted).

¹²⁴ *Id.*

After a complicated post-conviction history, Rogers eventually got to the United States Supreme Court on federal habeas review.¹²⁵ The basic issue there, again, was the voluntariness of his confessions. A factual dispute on exactly what the police had said to Rogers during the course of interrogation, and when or if he had requested a lawyer, presented a messy case.¹²⁶

The Supreme Court decided that it did not have to sift through the factual mess, though. Both the Connecticut trial court and state supreme court had applied the wrong standard for deciding the voluntariness of a confession.¹²⁷ They repeatedly had considered whether the police tactics might have produced false confessions, not whether those tactics produced involuntary ones:

To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.¹²⁸

The state courts had decided admissibility of the confessions “by reference to a legal standard which took into account the circumstance of probable truth or falsity.”¹²⁹ That was an impermissible standard under the Fourteenth Amendment.¹³⁰ Rogers was entitled to have the state courts consider anew whether he confessed voluntarily, under the proper standard.¹³¹

On remand, the state apparently offered Rogers a reduced charge of second-degree murder and a life sentence.¹³² He reportedly took the deal.¹³³

¹²⁵ *Rogers v. Richmond*, 365 U.S. 534, 537–40 (1961).

¹²⁶ *Id.* at 535–37.

¹²⁷ *Id.* at 540.

¹²⁸ *Id.* at 541.

¹²⁹ *Id.* at 543. Note that “truth or falsity” is a formulaic phrase, in the academic sense; what linguists once called automatic speech or embolalia. In other words, it is a stock expression, used often and uncritically, that has signification as a whole, independent of its strict lexical or grammatical meaning and construction, and not processed word-for-word by those competent in a given language.

¹³⁰ *Id.* at 543–44.

¹³¹ *Id.* at 543–44, 548–49.

¹³² Wilfred J. Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 209 n.33 (1962).

¹³³ *Id.*

Although the *Rogers* court made one reference to the impropriety of taking “into account the circumstance of probable truth *or falsity*,”¹³⁴ the decision rested on the fact that the Connecticut courts had asked whether anything the police or coroner did called into real question the accuracy of the confessions.¹³⁵ The state court decisions reflected an implicit assumption that Rogers had confessed truthfully and accurately. Given the facts that Rogers had his nephew’s gun at the time of his arrest, that the nephew had reported the gun stolen before the liquor store robbery and murder, and that ballistics testing linked the fatal bullets to the gun in Rogers’s possession,¹³⁶ the assumption that Rogers in fact was the murderer had support. Both state courts below clearly believed him guilty in fact, and the United States Supreme Court nowhere disputed that belief; his guilt and the truthfulness and accuracy of his confessions simply were beside the point. Even ignoring Rogers’s later guilty plea to a reduced charge, the case for his guilt was strong. A judicial focus on the accuracy—not the possible inaccuracy—of his confessions was unsurprising.

B

Rogers v. Richmond stands as solid support for the proposition that courts must not consider accuracy or probable accuracy of a confession as any proof of its voluntariness. The confession may be perfectly truthful and accurate. But if it was involuntary, its truth and accuracy will not save its admission—and indeed, accuracy does not matter to the due process question.

In the main, though, for almost six decades state and lower federal courts have read *Rogers* casually and more broadly. They often have assumed, uncritically, that just as accuracy has no role in deciding voluntariness, so too *inaccuracy* or *untruthfulness* of a confession must have no role in deciding its *involuntariness*.¹³⁷ Truth does not bear on voluntariness, yes; but courts have seized on and quoted the passing reference to “truth or falsity” in *Rogers*.¹³⁸ So implicitly, maybe falsity would not bear on involuntariness, either. Courts have assumed that the *Rogers* proposition bars the inverse of the proposition. On occasion, but less commonly, they

¹³⁴ *Rogers*, 365 U.S. at 543 (emphasis added).

¹³⁵ *State v. Rogers*, 120 A.2d 409, 413 (Conn. 1956); *see also Rogers*, 365 U.S. at 540–43.

¹³⁶ *State v. Rogers*, 120 A.2d at 411.

¹³⁷ *See, e.g., infra* note 140 and accompanying text.

¹³⁸ 365 U.S. at 543 (emphasis added).

have gone further and expressly held that the inverse is foreclosed, rejecting claims that confessions were both untrue and involuntary.¹³⁹

The vast majority of courts fall into the first group of casual or deliberately broad readers. Just a few examples will suffice here, but the assiduous or skeptical can find many more than the ten I choose for a round number.¹⁴⁰

At least one other court seemed not to understand *Rogers v. Richmond* at all, although this is rare. Thirty years after that case, the Virginia intermediate appellate court still seemed to equate involuntariness with unreliability.¹⁴¹

¹³⁹ See, e.g., *infra* note 140 and accompanying text.

¹⁴⁰ The reported appellate decisions run into the dozens, at least, and probably the hundreds. A sampling of these includes: *Moorer v. South Carolina*, 368 F.2d 458, 462 (4th Cir. 1966) (inculpatory statement never actually admitted, but the fact that defendant had said something to the police that the state wished to offer was presented to the jury, and defendant had no chance to have the jury consider voluntariness (this trial occurred before *Jackson v. Denno*, 378 U.S. 368 (1964)); *Hutcherson v. United States*, 351 F.2d 748 (D.C. Cir. 1965) (several references to ignoring “truth or falsity” in deciding voluntariness); *United States v. Pumpkin Seed*, No. CR 17-50017-JLV, 2018 WL 6567258, slip op. at *3-4 (D.S.D. December 13, 2018) (defendant in first percentile of full-scale IQ challenged voluntariness of confession and called psychiatrist on his susceptibility to giving false confession; court discounts that evidence on grounds that, “Whether he subsequently gave a false confession is a separate jury question” from whether the statement was voluntary, and then quoting “truth or falsity” formula); *State v. Sheppard*, 987 S.W.2d 677, 679–80 (Ark. 1999) (defendant disputed truthfulness of his confession, which a police investigator had written and he had signed; trial court excluded it as “not the statement of the defendant at all” and “inherently nontrustworthy;” reversed on state’s interlocutory appeal on express grounds that the trial judge should not have considered the untrustworthiness of the statement; one reference to truth or falsity); *In re Schlette*, 42 Cal. Rptr. 708, 712–14 (Cal. Dist. Ct. App. 1965) (defense argued at trial that confession was false; court of appeals decides voluntariness “without regard to the confession’s truth or falsity”); *State v. Staples*, 399 A.2d 1269, 1272, 1273 (Conn. 1978) (two references to ignoring “truth or falsity”); one reference to deciding voluntariness without regard for truth or falsity on remand); *People v. Weger*, 185 N.E.2d 183 (Ill. 1962) (several references to ignoring “truth or falsity” in deciding voluntariness); *Mulligan v. State*, 308 A.2d 418, 424–25 (Md. Ct. Spec. App. 1973) (defendant claimed involuntariness and falsity of confession; court makes two references to deciding voluntariness without regard to truth or falsity); *State v. Hayes*, 424 N.W.2d 624, 625–26 (Neb. 1988) (defendant, a high school dropout with below average reading and writing skills, claimed confession involuntary and testified at trial to a different version of fact; on appeal, voluntariness affirmed with reference to voluntariness not resting upon “probable truth or falsity”); *Davis v. State*, 499 S.W.2d 303, 304–05 (Tex. Crim. App. 1973) (defendant seems to have denied truth of his confession at trial and claimed it coerced; two references to deciding voluntariness without regard to truth or falsity).

¹⁴¹ *Neustadter v. Commonwealth*, 403 S.E.2d 391, 397 (Va. Ct. App. 1991). Implicitly, the court suggested more than once that only an unreliable confession could be involuntary.

Finally, once in a while, a court approaches indirectly and timidly the possibility that *Rogers v. Richmond* may not foreclose asking how a false confession bears on involuntariness, although it does foreclose asking how accuracy bears on voluntariness.¹⁴² Even that tiptoe approach to a basic question—*Rogers* clearly makes accuracy of a confession irrelevant to voluntariness, but is its inverse foreclosed? In other words, is inaccuracy of a confession relevant to voluntariness?—has been very rare.

V

Nothing in *Rogers v. Richmond's* factual background, in the Supreme Court's opinion itself, or in the Connecticut high court's opinion below, gives any real warrant—let alone a mandate—for reading the case as holding that the inverse proposition must be foreclosed, even if true. *Rogers* forecloses reliance on accuracy as any proof of voluntariness. Considered without the clutter of casual or unthinking readings, *Rogers* does not foreclose reliance on inaccuracies as some proof of involuntariness.¹⁴³

Again, Harold Rogers probably was guilty, at least on the facts that the Connecticut high court and the United States Supreme Court recited.¹⁴⁴ The point, then, was that accuracy and truthfulness of that man's admissions had no place in deciding whether he spoke voluntarily. But suppose another Rogers arrived in the Supreme Court with real questions about his innocence, in a case without the significant corroboration that the first Rogers's case

¹⁴² See, e.g., *United States v. Preston*, 751 F.3d 1008, 1018 & n.13 (9th Cir. 2014) (en banc). *Preston* is ambiguous. The body of the opinion predictably recites that “the voluntariness inquiry focuses not on the truth or falsity of the confession, but on the coercive nature of the interrogation—again, taking into account the particular circumstances of the suspect.” But the related lengthy footnote then does observe that, “Although probable truth does not demonstrate that a confession was voluntary, we note that there is abundant research that the intellectually disabled ‘are more likely to confess falsely for a variety of reasons.’” *Id.* at 1018 n.13 (citation omitted). It goes on to assert that, “Recognizing the heightened likelihood of false confessions by intellectually disabled suspects does not contravene *Rogers*’ directive that truth or falsity is not part of the voluntariness inquiry.” *Id.* Rather, “our observation regarding false confessions by the intellectually disabled . . . informs the importance of carefully taking into account the intellectual disability of the suspect—not the truth or falsity of the confession—as part of the totality-of-the-circumstances voluntariness inquiry.” *Id.* So, while even *Preston* in the end rejects direct consideration of falsity as a possible marker of legal involuntariness, it at least evinces an awareness of a factual connection and looks for a way indirectly to include falsity in the inquiry.

¹⁴³ I refer only to *Rogers v. Richmond* on this point. But *Jackson v. Denno* also says, “It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession.” 378 U.S. at 376 (1964). *Jackson* cites only *Rogers* there and adds nothing to *Rogers* on that point.

¹⁴⁴ See *supra* note 136 and accompanying text.

apparently had. Suppose this second Rogers could claim plausibly not just that he confessed involuntarily but that he confessed falsely. The Supreme Court's 1961 decision simply does not necessarily foreclose the possibility that factual inaccuracies in this next man's confessions properly might have helped to demonstrate their involuntariness.

American courts have read *Rogers* both carelessly and wrongly to bar inaccuracies from the assessment of voluntariness, just as the case bars accuracy.¹⁴⁵ The conditional proposition of *Rogers*, rightly read, is that if details of a confession are accurate, then that is irrelevant to voluntariness. The conditional proposition is true. As a matter of logic and experience, though, its inverse also may be true: if details of a confession are inaccurate, then that is not irrelevant to voluntariness. A case that stands clearly for the conditional proposition does not necessarily stand against its inverse. Rightly understood, the case allows the inverse, if true, just as the conditional proposition itself logically allows the inverse.¹⁴⁶

And the inverse is true. A prisoner who gives accurate details to his interrogators can be a guilty/coerced speaker, a guilty/uncoerced speaker, or an innocent/coerced speaker to whom the interrogators supplied details.¹⁴⁷ If coercion and involuntariness are unacceptable because dignity and integrity are ends, as every case over the quarter century between *Brown* and *Rogers* asserted, then accuracy simply is irrelevant. Accuracy in detail is incapable of helping to discriminate among those three possible explanations—incapable of divining whether those ends of dignity and integrity were satisfied or not. Courts must look instead to the means of obtaining the confession, not retrospectively to its accuracy.

By contrast, inaccuracy of a confession may be, and often is, probative of involuntariness. Unlike accuracy, inaccuracy may itself help retrospectively to determine the means by which police elicited the confession or understand their effects. The inaccuracies are probative of the involuntariness question, but not necessarily dispositive of it.

This distinction is important. A voluntary speaker who wishes to confess may give inaccurate details because intoxication or mental illness

¹⁴⁵ See *supra* note 140 and accompanying text.

¹⁴⁶ As a matter of the philosophy and mathematics of logic, the truth of a conditional proposition allows the truth of its inverse, too. If $P \rightarrow Q$ is true, $\sim P \rightarrow \sim Q$ also may be true. See, e.g., KARL J. SMITH, *THE NATURE OF MATHEMATICS* 89–95 (13th ed. 2016).

¹⁴⁷ Or, in theory, an innocent/uncoerced speaker who either is mentally ill or is taking a fall for someone, *and* in either case luckily guessed just right at factual details. The innocent who seeks to inculcate himself freely and who guesses correctly at details of a crime he did not commit will be more of a theoretical possibility than real-life presence in police precinct houses, though.

eroded her memory or she seeks to reduce her responsibility. But it also is true that the involuntary speaker who seeks just to stop the interrogation may offer inaccurate details. This might be either because she is innocent and does not know what happened or because she is guilty but assesses which responses will satisfy the interrogators and end the questioning most quickly. In all events, inaccuracies at very least are relevant to involuntariness. The judge has only to sift the types of inaccuracies in light of all other known circumstances—was the prisoner in fact drunk or deluded at the time of the crime; did the prisoner exaggerate or understate her culpability?—to assign proper weight to inaccuracies in the voluntariness query.

And because lack of memory, false partial evasion of responsibility, or both, are common factors in explaining inaccuracies, again those inaccuracies may not establish involuntariness by themselves. But they are probative.

In an evidentiary process that exalts the totality of circumstances, a case that serves one conditional proposition—if details are accurate, then that is irrelevant to voluntariness—never should have been read to ban its inverse conditional proposition. For both the proposition and its inverse may be true. Indeed, the inverse of *Rogers v. Richmond* is true: if details are inaccurate, then that is not irrelevant to voluntariness. The inaccuracies help a court to get closer to the truth not of a crime, but of the question whether the supplementary ends of dignity and integrity were honored. Since *Rogers*, courts never should have read the case to foreclose its inverse proposition. Logic and experience support both the *Rogers* proposition and its inverse.

VI

A

Again, before *Brown*, as a matter of federal law, when Stephen Boorn, Louise Butler, and Dogskin Johnson stood trial involuntariness did not make their confessions inadmissible in state courts; state law alone determined that. Given the slim record of those cases that we have now, the exact challenges to Boorn's written confession and to one of Butler's oral statements are unclear. It seems certain that Johnson, who pled guilty the same day, did not challenge the voluntariness of his confession.

All three of these people were convicted, though, in part on the basis of false confessions. Boorn was sentenced to hang;¹⁴⁸ Butler and Johnson, to

¹⁴⁸ BORCHARD, *supra* note 2, at 18.

life in prison.¹⁴⁹ They all escaped their fates only by luck, and for Johnson, luck waited ten years.¹⁵⁰

For our purposes, all of those confessions carried obvious indications of possible falsity even before two “murdered” people turned up healthy and, in Dogskin Johnson’s case, before the truth of a little girl’s death emerged a decade later. Each case also had features, teased from the dry summaries that Professor Borchard provided, that might have sharpened an involuntariness inquiry. Those features included relevant inaccuracies in all three cases.

Boorn was an outcast, a social misfit, who was interrogated repeatedly over months by authorities.¹⁵¹ His eventual confession did not match the admissions that his brother claimed Stephen had made.¹⁵² Beyond that, Boorn’s police confession lay greater claim to his own criminal responsibility than even his brother attributed to him.¹⁵³ The brother had implicated both Stephen and himself, but Boorn implicated only himself in his statement to the police.¹⁵⁴ Finally, the third “confession” that the state of Vermont offered at trial was his brother’s supposed statement to a jailhouse informer, who got a benefit of early freedom in exchange for his testimony against Boorn.¹⁵⁵ Overarching all of these three supposed confessions was one truth: no physical evidence or disinterested witness corroborated any version of a murder.

Butler was a black woman, apparently impoverished, in rural Alabama during the Jim Crow era.¹⁵⁶ She supposedly confessed to a male sheriff, surely white, and it seems she and the sheriff were the only two witnesses to the circumstances of her confession.¹⁵⁷ In questioning Butler, the sheriff (who later would describe Butler as “ignorant,” according to Borchard) had the benefit of a lurid version of a murder that a deputy obtained earlier from her young niece and daughter.¹⁵⁸ Butler eventually took credit for a gruesome murder, loosely similar in details to the versions that the girls gave and the sheriff could have supplied.¹⁵⁹ That murder unavoidably would have left blood and gore after its ax attack and dismemberment. But blood and gore

¹⁴⁹ *Id.* at 43, 115.

¹⁵⁰ *Id.* at 116.

¹⁵¹ *Id.* at 15.

¹⁵² *Id.* at 17, 18–19.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 18.

¹⁵⁶ *Id.* at 40.

¹⁵⁷ *Id.* at 42.

¹⁵⁸ *Id.* at 40–42, 45.

¹⁵⁹ *Id.* at 42.

were utterly absent from the scene, for all Borchard's account shows (and recall again, the murdered girl later turned up unhurt). For that matter, the state found no body that supposedly had been pitched into the river in a sack. The absence of a body perhaps river currents could explain, but the absence of *any* physical evidence at the supposed murder scene was not easily dismissed and nowhere explained.¹⁶⁰

By inference, Dogskin Johnson perhaps was, in today's parlance, cognitively impaired. He also abused alcohol and was an object of wide public derision; again, a social outcast.¹⁶¹ His confession came after hours of interrogation that even the buttoned-down Borchard depicted as harsh and a police trick that exploited deliberately this man's deep terror of mob violence, from watching a lynching sometime earlier.¹⁶² The confession failed utterly to explain, and could not be reconciled with, known physical facts: Johnson could not have entered the house through the tiny broken window pane; even the little girl could not have left the house that way; and neither the girl's brothers nor her dog, just feet away in the same room, were awakened by a breaking window or intruder anyway.¹⁶³ Lastly, there was no alternate explanation for how Johnson might have entered the family's house.¹⁶⁴

So, what if those three courts could have considered inaccuracy of details in these confessions in deciding whether the statements were voluntary? Wild inaccuracies logically might have helped to understand the months of intermittent interrogation that led to Boorn's statement. They reasonably might have shed light on what really passed between the sheriff and Louise Butler alone in his office and at the river's edge. They might have helped meaningfully to reveal why Dogskin Johnson fell apart and abandoned his repeated claims of innocence in the jail. At very least, what

¹⁶⁰ Throughout his book, Borchard treated white as the neutral color or race and mentioned ethnicity or race only as to non-whites; for example, he described Louise Butler as a "plump light-brown negress" and her paramour as "a lean colored gentleman." Borchard also quoted the sheriff (whose race and color he did not mention) later making a reference to "white-folks" in a context that included law enforcement, so almost surely—even apart from historical realities in the 1920s deep south—that the officers were white. *Id.* at 29.

¹⁶¹ *Id.* at 114.

¹⁶² *Id.* at 116–17.

¹⁶³ *Id.* at 116.

¹⁶⁴ Although Borchard did not describe physical violence by the police or say squarely that Johnson was held incommunicado, the terms he did use suggested that the police interviews may have employed "third-degree" tactics that were common in the early 1900s before *Brown*. *Id.* at 116; *see also* STRANG *supra* note 87 and accompanying text. Indeed, Borchard even described Johnson as "psychologically 'beaten' into a confession," and this is one of the few cases in which Borchard criticized police conduct overtly. BORCHARD, *supra* note 2, at 119.

if courts today could consider inaccuracies like these in deciding voluntariness, when the inevitable successors of Boorn, Butler, and Johnson come along again as they frequently do?

Together, these three old cases display several common vulnerabilities that can contribute to false confessions. Those include social ostracism or living on social margins, possible cognitive impairment, disadvantages of race and class, lack of sophistication, hope of benefit or leniency, youth (especially Butler's niece and daughter), drug or alcohol dependency, public outrage over a crime and pressure on the police to solve it, and the anchoring bias effect of a prior record on the police. The three cases also include several features of police conduct that can contribute to false confessions: prolonged questioning; intermittent questioning over weeks or months (in Boorn); multiple questioners; absence of a lawyer during interrogation, almost certainly; isolation; official trickery, manipulation, and deceit; sleep deprivation; and induced fear (certainly in Johnson). None of these points of vulnerability, none of these police stratagems, were new then; all persist now, although some (physical pain, questioning over weeks or months) are less common today.¹⁶⁵

A judge considering the confluence of some of these factors rightly might view the inaccuracy of details given in those circumstances as bearing on voluntariness. If the voluntariness of the confession is in doubt, might not inaccuracies bear logically on that question? Of course. And the more so where a lack of physical trace evidence is not just surprising, but inexplicable. Or where the inaccuracy seems to overstate the confessing prisoner's culpability, not understate it. Or where the prisoner's account is hopelessly at odds with objectively verifiable facts.

¹⁶⁵ For risk factors generally in false confessions, see, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 14–44, 145–77 (2011) (using real vignettes to set in broader context some factors involved in false confessions, and why they result in convictions); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1051–19 (2010) (focusing primarily on related problem of confession contamination); Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 BEHAV. & BRAIN SCI. 112 (2014); Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 332–43 (2009); 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 (1998). In offering this partial survey, I choose Professors Drizin, Leo, Ofshe, Kassin, and Garrett in part because they all have written much more than I cite here on the contributing risks to, and general phenomenon of, false confessions. Sometimes, two or three of them have written together or with still others.

B

Nothing in *Rogers v. Richmond* bars that consideration. The fact that the Court employed once a formulaic phrase—“truth or falsity”¹⁶⁶—does not foreclose the relevance of inaccuracy to involuntariness. In its entirety, *Rogers v. Richmond* rested for good reasons on the premise that the confession there was truthful.¹⁶⁷ Truth was the assumption; falsity was not the issue at all. Rather, the question was whether the police overbore the prisoner’s will—and with more lawyerly precision, that was the “question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.”¹⁶⁸

A quarter century after *Brown*, the Supreme Court still was struggling to impress upon American courts the importance of human and institutional dignity and integrity goals, apart from truth-seeking. Although grants of certiorari often are hard to explain confidently, especially at six decades’ distance, still try to imagine why the Court otherwise took this case: if not an effort to advance goals beyond narrow truth-seeking, then the Supreme Court’s work was mere error correction on behalf of a man almost surely guilty. Whatever the reasons for taking the case, though, *Rogers v. Richmond* unmistakably made the point that other goals matter, again. Ignoring the accuracy of a confession in deciding its voluntariness is entirely consistent with, indeed perhaps essential to, honoring those dignity and integrity goals.

But ignoring *inaccuracy* of a confession as bearing on its possible *involuntariness* is not essential to honoring those distinct goals. To the contrary, because identifying coerced or otherwise involuntary confessions is a central goal of these dignity and integrity concerns, anything that bears logically on the question of involuntariness should be available to a judge. Accuracy of details in a confession does not make it more likely that the confession was voluntary, for reasons outlined in Part II and explained in Part V. The guilty speaker can be coerced as readily as the innocent one, and either can be supplied facts by the police, through intentional or inadvertent contamination of the interview. But inaccuracy of details, although rarely dispositive alone, surely bears logically on possible involuntariness. Yes, the inaccurate speaker may be guilty but understating his culpability strategically or just unclear about details because of his mental state at the time. But he also may be giving inaccurate details because he is innocent, does not know

¹⁶⁶ *Rogers v. Richmond*, 365 U.S. 534, 543 (1961). This stock phrase, an automatic expression signaling neutrality, is what the Court repeated in *Jackson v. Denno*, again only once. 378 U.S. 368, 376 (1964); see also *supra* note 129.

¹⁶⁷ See *supra* note 136 and accompanying text.

¹⁶⁸ *Rogers*, 365 U.S. at 543.

the true details, and is trying to please an overbearing interrogator or to end a process in which he is an unhappy, involuntary participant. Whichever of these alternatives proves correct or probable, the inaccuracies are relevant; they help get logically to the answer.

For that matter, the types of inaccuracies are sorted easily. Understating or deflecting culpability more likely suggests an act of volition, although not surely; but overstating culpability, for obvious reasons, may signal involuntariness (if not mental illness or desire to protect a friend or family member). Peripheral inaccuracies that can be squared easily with physical evidence or known objective facts bear on involuntariness, although perhaps weakly in the absence of police contamination; but inaccuracies that defy reality or that are impossibilities (or near impossibilities) given other objective evidence again are strong signals of possible involuntariness.

In all events, acknowledging the probative value of inaccuracies in considering involuntariness is consistent with the factual and legal context of *Rogers v. Richmond*. That acknowledgment also presents no asymmetry in the supplemental systemic goals of dignity and integrity—of the individual accused, of law enforcement officers, and of courts and other criminal justice institutions themselves. Acknowledging this probative value, and admitting inaccuracies into the realm of the “totality,” serves dignity and integrity goals with the same logical consistency that continuing to exclude accuracy of confessions serves those supplemental systemic goals. The proposition that inaccuracy is relevant to voluntariness is just as true as the proposition that accuracy is not relevant to voluntariness. Both propositions serve essential dignity and integrity.

Not alone for pursuing truth do courts and law enforcement agencies exist, after all. Theoretically or ideally, these human institutions exist and work in assemblage to serve justice and liberty; to be a justice system, a name they immodestly claim. They exist to demonstrate to the governed that no governmental end is worth every possible means, let alone those means that debase the humanity of both the governed and the government itself. Precisely because they lay claim to the word justice, these institutions exist to advance the paradoxical quest that winds through the whole history of humankind: to advance norms of humanity and oust norms of inhumanity. Humanity has been, and continues to be, puzzlingly hard for humans.

In that quest, though, truth is not subordinate; it merely must coexist with other humane values also of first order.¹⁶⁹ But if cases of inaccurate,

¹⁶⁹ I am aware of nobody who ever has advocated sacrificing truth altogether to dignity and integrity. Even before the Supreme Court applied harmless error doctrine to admission of involuntary confessions in *Arizona v. Fulminante*, in the era of automatic reversal, it allowed retrial on untainted evidence. And in the first instance, a trial court that rules a confession

unreliable, or outright false confessions reveal nothing else, they unmask the reality that inaccurate confessions do not advance reliably the search for substantive truth. They are more likely to impede that search, sometimes with disastrously mistaken verdicts that convict the innocent.

Stephen Boorn, Louise Butler, and Dogskin Johnson press this point from the grave. Many more today and still to come depend upon police officers, lawyers, and courts to grasp the point. In the end, a better understanding of the rule in *Rogers v. Richmond* is symmetrical not just with supplemental systemic goals, but with truth-seeking itself.

involuntary does not dismiss charges. It only excludes the involuntary confession and, occasionally, its fruits. All other untainted evidence remains available for truth-seeking and trial. *See supra* notes 101 and 102 and accompanying text.