Note

The Case for Excluding the Criminal Confessions of the Mentally Ill

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"Villains!" I shrieked, "dissemble no more! I admit the deed! – tear up the planks! – here, here! – it is the beating of his hideous heart." [2]

I. INTRODUCTION

Edgar Allen Poe ends his thrilling story, "The Tell-Tale Heart," with a madman's confession, a plot device that provides the story with appropriate closure: the murderer is caught and justice can take place. At its endpoint, the story no longer holds secrets, for we can imagine the rest. The "dreadfully nervous" narrator will be tried in court for killing an old man because of the old man's "pale blue eye, with a film over it" (555). He had "loved" the old man (555), but the "vulture eye" had made the

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2. EDGAR ALLEN POE, *The Tell-Tale Heart*, *in* POETRY AND TALES 555-59 (Library of America, 1984). All subsequent parenthetical page citations are to this edition.

narrator "furious" and had "chilled the very marrow in [his] bones" (557). The confession and the dismembered body beneath the planks will provide the jury with incontrovertible proof of the narrator's guilt, and he will be sentenced to the gallows.

Yet, even in fiction, a confession is not as simple as it may appear. The downfall of Poe's narrator is a "tell-tale" heart, literally the heart of the old man, which continued to beat after death. But in addition to this supernatural explanation, two psychological phenomena could also explain how the narrator's "confidence" and "enthusiasm" as he chatted up the investigating policemen at the scene of the crime turned into unrelenting terror and ultimate confession (559). The first psychological explanation is insanity: the narrator suffered from an auditory hallucination. The second explanation is guilt: the "tell-tale" heart the narrator heard beating was his own guilty heart struggling to reveal the truth. Regardless of the explanation, the narrator's psychological state was aggravated by the presence of the police who, he felt, could hear the beating heart, and knew of his guilt, but chose to remain silent with "hypocritical smiles" (559). This "mockery" and "derision," and the beating heart getting louder, pushed the narrator over the edge and into confession (559). In the end, we can't know if the narrator confessed because of hallucination or guilt, nor can we know if without the police coming to him he would have gone to the police.

This ambiguity of the climatic confession of the "The Tell-Tale Heart" brings into sharp focus the complicated dynamics of criminal confessions by mentally ill suspects. This paper discusses confessions generally, the "tell-tale" hearts and minds which produce them, and the settings in which they take place. The purpose of this general inquiry is to answer the specific question of what the law's response should be to "tell-tale" hearts and minds afflicted by mental illness.

As observed earlier, a confession is a convenient plot device to provide a work of fiction with closure. In real life, too, a confession is often viewed as the end of a story – the end of a police investigation and the discovery of a criminal perpetrator. Justice can then take its course because a confession is the most convincing of evidence.[3] In courts, evidence of confession "is introduced with relentless regularity."[4] Studies suggest that jurors both value confessions as more probative of guilt than other evidence and are more likely to convict if a defendant has confessed.[5] While an eyewitness can misidentify the culprit of a crime, the

3. "The admission of a confession. . .strongly tips the balance against the defendant in the adversarial process." Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting). Confessions are "probably the most probative and damaging evidence that can be admitted." Bruton v. United States, 391 U.S. 123 (1968).

4. LAWRENCE S. WRIGHTMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 2 (1993).

5. While previously convictions based on erroneously admitted confession evidence were

same cannot be said of the culprit himself, who should know, beyond a shadow of a doubt, what he did or did not do.

We must remember, however, that life is not fiction. A confession in real life may not provide the expected closure, may not be the end of the story. Just a glance at some prominent headlines from recent years should make us question our steadfast belief in confessions: in several cases across the country DNA testing has demonstrated, beyond reasonable doubt, the innocence of convicts whose previous confessions had sealed their fates.[6] Some confessions for crimes in which DNA evidence is not available are also believed to be false.[7] Finally, entire police departments have histories of using interrogation techniques that elicit false confessions from suspects.[8]

Even before this rash of embarrassing revelations, the courts have for many years known that criminal confessions must be treated carefully.

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automatically overturned by appellate courts, in *Arizona v. Fulimnante*, 499 U.S. 279 (1991), the Supreme Court broke new ground by ruling that erroneously admitted confessions may constitute "harmless error." Saul M. Kassin finds that the Court's ruling was based on the assumptions that 1) jurors can correctly evaluate and, if necessary, attach zero weight to coerced confessions in their decision making, and 2) confessions should not have special status since they are no different from other potent types of evidence. Saul M. Kassin & Katherine Neuman, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*. 21 LAW AND HUMAN BEHAVIOR 469 (1997). Kassin and others designed two mock juror studies to test the Court's reasoning. Although limited by the fact that confessions were not tested against all types of evidence imaginable, the first study showed that jurors found confessions more incriminating than "other potent types of evidence." *Id.* at 481. The second study showed that a confession increased the conviction rate even when it was recognized "as coerced, even when it was ruled inadmissible, and even when participants claimed that it did not affect their verdicts." Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*. 21 LAW AND HUMAN BEHAVIOR 27, 44 (1997).

6. *See, e.g.*, Associated Press, *Retarded Man Freed on DNA Evidence*, N.Y. TIMES, June, 16, 2001, at A11 (Retarded man freed after 22 years in jail for six murders he confessed to but did not commit); Maurice Possley & Gary Washburn, *City to Settle with Man Forced to Confess*, CHICAGO TRIBUE, June 14, 2002, at 3 (Man policed coerced into falsely confessing to two murders acquitted by DNA evidence and offered $250,000 by city of Chicago to drop lawsuit); Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec 20, 2002, at A1 (Youth who confessed to attacking and raping a jogger in Central Park cleared thirteen years later because DNA evidence pointed to serial rapist Matias Reyes as the culprit); Sean Webby, *Palo Alto Youth Cleared in Rape Case is Guest Speaker at Law School Discussion of Evidence and Prosecution*, SAN JOSE MERCURY NEWS, Sept. 5, 2002, at 1 (DNA clears youth who had been tricked into confessing he raped a 94 year old woman); *and* Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1 (Mentally ill man freed 18 years after he confessed to a brutal murder he did not commit but admitted doing, in his mind, to help the police capture the real killer).

7. *See* Wanda J. DeMarzo, *Tim Brown's Fate Now Up to Judge; Hearing in the Behan Case Wraps Up*, MIAMI HERALD, Oct. 9, 2002, at 1 (Judge determines that no jury could have found convicted Tim Brown guilty of killing a police officer despite his confession) *and* John Wilkens & Mark Sauer, *Family free to grieve; Parents, Brother of Stephanie Crowe Say They Relieve Their Loss Every Day*, SAN DIEGO UNION TRIBUNE, May 20, 2002, at B1 (Sheriff and State Attorney General declare teenager innocent of killing his sister even though he and two friends had previously confessed to the crime).

8. *See* April Witt, *Police Bend, Suspend Rules; Pr. George's Officers Deny Suspect Lawyers, Observers Say*, WASH. POST, June 5, 2001, at A01. *See also* Paul McMahon and Ardy Friedberg, *Justice Can Elude Mentally Impaired; Validity of their Confessions Produces More Legal Challenges*, SOUTH FLORIDA SUN-SENTINEL, Mar. 24, 2002, at 1A (Discussing the history of the Broward County Sheriff's Office of eliciting false confessions from mentally retarded or mentally ill suspects).

Using as its foundation the Fifth Amendment's right against self-incrimination, the Supreme Court has developed a bright line rule, formulated in *Miranda v. Arizona*,[9] to determine whether a confession can be admitted into evidence. Nevertheless, some commentators do not think the present constitutional safeguards provide the criminal suspect enough protection.[10]

In *Troubling Confessions,* Peter Brooks goes beyond purely legal analysis into the realm of the literary and the philosophical to offer several reasons why the human condition makes the act of confessing problematic both morally and legally.[11] Brooks seems to suggest that confessions should not be used at all as evidence in criminal law.[12] Although a blanket exclusionary rule is both extreme and impracticable, there is a good argument to be made for such a rule with respect to discreet population groups. There are several such groups,[13] but the project of this paper is to create an exclusionary rule specifically for criminal suspects who are mentally ill.

The principal justification for this rule derives from the Supreme Court's own constitutional analysis. In its cases prior to *Miranda*, and in *Miranda* itself, the Supreme Court's strived to protect the physical and psychological integrity of a suspect; repeatedly the Court held that a confession should not be forced from a suspect by physical or psychological coercion.[14] To protect a suspect from such coercion he must know that he has a legal right not to cooperate – this is the essence of the *Miranda* warnings.[15] A suspect who suffers from mental illness, however, may not be adequately protected simply by issuing *Miranda* warnings. Confessions are a complicated speech act used in many different contexts in human life, most of which promise the speaker redemption. Criminal confessions, however, do not help the speaker acquire self-understanding, relief, forgiveness or comfort.[16] Within a friendship or within a marriage, in church or in therapy, confessions can help a confessant achieve a variety of purposes he or she might desire – solidarity, forgiveness, self-help, religious absolution, integration and perhaps even separation. Criminal confessions are the only context in which the confessant has little

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9. 384 U.S. 436 (1966).

10. *See e.g.* WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS 214-15 (2001) (Arguing that the Supreme Court's due process analysis of confessions should be refurbished to provide suspects with more protection and thus cut down on the phenomenon of false confessions).

11. PETER BROOKS, TROUBLING CONFESSIONS (2000).

12. *See* discussion *infra* at text corresponding to notes 157-62.

13. Low intelligence, youthful age and mental illness have been identified as qualities that make it more likely that a defendant will confess to something he did not do. WRIGTSMAN & KASSIN, *supra* note 3, at 86.

14. *See* discussion *infra* at text corresponding to notes 86-87.

15. *See* discussion *infra* at text corresponding to notes 101-04.

16. BROOKS, *supra* note 10, at 4-5.

to gain by confessing – possibly a reduced sentence – while the confessant stands to lose his freedom. This crucial change of context makes all the difference if the mentally ill suspect's cognitive impairment makes it impossible for him to understand, or alternatively makes him completely disregard, that his confessors are his enemies and are ready to use his words to hurt him rather than help him.[17]

The methodology of this paper is one of thick description. Although the ultimate focus of the paper is narrow, the criminal confessions of the mentally ill, to fully understand any type of confession we must go beyond one specific context and look at all aspects of confessions. Thus, Part II discusses how different disciplines view confessions and looks into the role confessions have played at different times and in different cultures. Of course, a full treatment of confessions is beyond the scope of this paper, so my goal will be to provide enough of a treatment so that the reader will have a rich backdrop against which to understand the criminal confessions of the mentally ill. After providing this backdrop, in Part III I discuss the law of confessions and then develop and justify an exclusionary rule for the mentally ill. Part IV tests how the proposed exclusionary rule would function by applying it to a recent tragedy, the Andrea Yates case, in which a mother suffering from post-partum depression and psychosis confessed, without any police coercion, to drowning her five children.

II. CONFESSIONS GENERALLY

The dictionary meanings of the word confession hint at its complexity. A confession is: 1) a statement of guilt or obligation; 2) (confessions) a usually written statement in which hidden or intimate matters are disclosed; 3) acknowledgement of sins or sinfulness (religious context); 4) acknowledgement of belief or profession of faith; 5) an acknowledgement of guilt by a party accused of a legal offense.[18] We should note that the legal meaning of confession is fifth on the list. Furthermore, the listed meanings of confession vary in important and subtle ways. It is a main

17. This justification could also apply to minor or mentally retarded suspects. For an argument to protect mentally retarded suspects in the realm of criminal confessions see Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions,* 81 VA. L. REV. 1471 (1995). In the comparative law realm, we should note that Britain has established protection for all suspects in the realm of criminal confessions, "the audio-taping of all police-suspect interviews," and protection specific to vulnerable suspects: "[a] juvenile or person who is mentally disordered or mentally handicapped must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult. . ." J. Pearse et al., *Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession,* 8 JOURNAL OF COMMUNITY & APPLIED SOCIAL PSYCHOLOGY 1, 1-2 (1998). However, there have been problems in implementing these safeguards because the primary identification of someone who is vulnerable is made by the police, and because in the statute "there is no operational definition of what exactly constitutes mental disorder" or explanation of how mental disorders "render suspects vulnerable." *Id.* at 3.

18. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 475 (1993).

contention of this paper that these meanings are in fact intertwined when a confessant confesses, and that therefore we cannot fairly isolate the legal aspect of a confession. In this general discussion of confessions, I aim to illuminate the many aspects of confession by drawing upon history, literature, anthropology and social science.

A. The Contexts of Confessions

History shows that confessions have served a variety of purposes for confessants at different times and in different places. Beginning in the 1480s, for example, confessions proliferated when the Spanish Inquisition strived to rid Spain of heresy, including Judaism. Intellectuals and converted Jews, especially, were aware that at any moment they might have to recount the most intimate details of their lives to an adversarial higher power.[19] The Inquisition customarily gathered data in a new district by proclaiming a period "during which Catholics were required to come forth and confess . . . to any heretical acts . . . they themselves might have committed, or acts which they had witnessed, or knew or suspected that others might have witnessed."[20] In the early years of the inquisition, before these confessions became more guarded, people's statements "were transparent windows through which the victim's terror and frantic maneuvering can be clearly seen."[21] These confessions exhibited three main strategies: 1) portray an appearance of verisimilitude; 2) highlight virtuous acts and omit incriminating acts while admitting enough sin to satisfy the inquisitors without whetting their appetite for more; and 3) shift the responsibility for negative acts onto disliked third parties or else onto loved ones who were safely dead or emigrated.[22] These three strategies comprised confessions that were verbal high-wire acts; one misstep could lead to burning at the stake. In trying to save their lives, confessants both admitted and minimized legal and religious guilt, professed religious faith and purported to reveal intimate secrets. For the confessors, determining the truth from this confluence of confessional meanings must have been an impossible task.[23]

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19. David Gitlitz, *Inquisition Confession and Lazarillo de Tormes*, 68 HISPANIC REVIEW 53 (2000).

20. *Id.* at 55.

21. *Id.*

22. *Id.* at 56.

23. Frantic confessions in a generally inquisitorial atmosphere are not a thing of the distant past or foreign countries. For example, during Hollywood's encounter with McCarthyism during the early 1950s, 110 actors, screenwriters and directors were subpoenaed by the House Committee on Un-American Activities (HUAC) to testify about their involvement with the Communist Party. RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 153-58 (1990). Forced to play a game of who will "name names," witnesses had "to steer between punishment and fingering co-workers." *Id.* at 154. In the committee's assessment, witnesses who invoked the Fifth Amendment were either guilty or else were lying about possible self-incrimination to protect their friends. *Id.* at 155. At this time, Communist sympathizers faced being blacklisted and suffering professional ruin. *Id.*

Another religious setting that prompted complicated confessions occurred in 17th century Suffolk, England. One hundred twenty-four individuals, mostly women, were accused of witchcraft in 1645 and confessions were "the clearest and most incontrovertible form of evidence" for judges and juries.[24] While many of these confessions resulted from mental and physical pressure, a significant number were freely given.[25] Louise Jackson argues that these freely given confessions were expressions of guilt for feelings that the confessants could not understand in language other than that of demonology.[26] One unhappily married woman who hated her husband felt such guilt at his death that she seemed to believe that her own evil thoughts had killed him. For her, being a "bad wife" made her assume that she was a witch when her husband died without obvious natural explanation.[27] Another confessant stated that the devil had tempted her, unsuccessfully, to kill her children to escape poverty.[28]

Today this woman's feelings of infanticide might be attributed solely to her desperate financial situation or perhaps to post-partum depression or psychosis, but at that time she could not understand her terrible feelings without resorting to demonic explanation. Jackson believes that the witch trials of this period were a way to keep women in their proper place, in their roles of good wives and good mothers.[29] The opposite qualities, being a bad mother or wife, were associated with witchery and the devil. The women who confessed freely to witchery accepted this social construction.[30] Instead of expressing guilt for hating their husbands or feeling that their children were a burden, these women confessed to the fictitious crimes of possessing magical powers and compacting with the devil.[31] The women's own self-image required such confessions.[32]

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at 156. Of course, I do not want to make too strong a comparison between what Hollywood suffered in the 1950s and the tragedy of the Spanish Inquisition, whose victims faced death, but there are notable parallels between the work confessions were forced to do in these two settings.

24. Louise Jackson, *Witches, Wives and Mothers: Witchcraft Persecution and Women's Confessions in Seventeenth-Century England*, 4 WOMEN'S HISTORY REVIEW 63, 69 (1995).

25. *Id.*

26. *Id.* at 64.

27. *Id.* at 74.

28. *Id.* at 75.

29. *Id.* at 63-64.

30. *Id.* at 80.

31. *Id.*

32. The psychological theory of dissonance is a modern way of understanding the women who confessed to witchery. Dissonance occurs when a person's self-image does not match with his or her actions, producing in the person a painful emotional distress. One study indicates that the negative feelings associated with dissonance, like guilt, can be alleviated by confessing to the "counter-attitudinal behavior." Eric Stice, *The Similarities Between Cognitive Dissonance and Guilt: Confession as a Relief of Dissonance*, 11 CURRENT PSYCHOLOGY 69 (1992). The feelings of the women who confessed in Suffolk didn't match society's expectations of them. If they saw themselves as good wives and mothers in the model put forth by society, these women would have experienced dissonance and a need to confess. The twist, of course, is that the women confessed their "counter-

Confessions don't always take place in adversarial, life or death settings. The literary version of confessions, a written statement in which hidden or intimate matters are disclosed (the second dictionary definition), has had a long, illustrious history in Western culture, from St. Augustine to Rousseau and beyond. These autobiographical writings are an affirmation of the self that require witnesses for validation. By employing confessions and revealing its intimate secrets, the self makes sense of its being and announces: "this is who I am." For St. Augustine, whose *Confessions* was written in the form of a prayer, the validating other was God.[33] Rousseau also invokes an almighty God in his *Confessions*, but for Rousseau the validating other is the reader, for whom he wished to make his "soul transparent."[34] Of course, we must always be suspect of whether confessions are truly transparent. Rousseau's Confessions has been called a "prototype for modern autobiography,"[35] and autobiography as genre goes beyond simply disclosing secrets; its purpose can range from self validation to self promotion to the instruction of others to simple story telling.[36] Autobiography cannot make the same claim to "the kind of honesty usually ascribed to confession."[37] In any case, the importance of literary confessions in the context of this paper is the insight that confessions can reflect a need for the assurance and validation of the self.

An abbreviated and popular–culture form of the literary tradition of confessions existed in Victorian times, when confession albums were used to facilitate social interaction. These albums contained a standard set of revealing questions, leaving space for written answers.[38] Answering the questions would leave behind a perhaps revealing self-portrait, which could play a role in courtship.[39] Albums could also play a less intimate role and were sometimes passed around at social gatherings for contributions and commentary.[40] Of course, as with all confessions, the confessants were not always forthright and, fearing judgment from others,

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attitudinal" feelings in allegorical fashion by referring to witchcraft.

33. "God acts as the guarantee to Augustine that he is the same person throughout, this being the prime condition for making any confession at all, since confession always folds back onto confessant an assurance of self, which is thus validated in the light of the other, here obviously, though perhaps always in effect, invested with an imaginary plenitude of self-consistent being." JEREMY TAMBLING, CONFESSION: SEXUALITY, SIN, THE SUBJECT 12 (1990).

34. *Id.* at 106

35. CATHERINE A. BEAUDRY, THE ROLE OF THE READER IN ROUSSEAU'S CONFESSIONS 31 (1991).

36. The word "confessions" is popular for the title of present day autobiographies, perhaps because it makes these works sound more titillating. Some examples include ORRIN HATCH, SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR (2002) and SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER (1981).

37. Tambling, *supra* note 33, at 103.

38. Samantha Matthews, *Psychological Crystal Palace? Late Victorian Confession Albums*, 3 BOOK HISTORY 125, 134 (2000)

39. *Id.* at 127.

40. *Id.* at 137.

some confessants' answers were jocular, cynical or guarded.[41] As time wore on, the confession album became cliché and by the 1890s they had lost their appeal in Victorian society.[42]

Confessions play important roles in non-western cultures as well. Anthropologist Corinne A. Kratz, for example, has intricately described ritualized confessions in the initiation ceremonies of Okiek girls in west-central Kenya.[43] Toward the end of a 24–hour ceremony, the teenage girl participants confess their pesenweek (social debts).[44] The pesenweek are incidents in which they quarreled with young adult men or women and refused to do their bidding.[45] The girls whisper these incidents, which are then repeated by a questioner/announcer for everyone at the ceremony to hear. This process reveals the grudges that the adults present may harbor against the initiates. When these grudges are "revealed and disarmed, the adult assembly then shows their benevolence toward the initiates; each person anoints and blesses them."[46] The role Okiek's ritual confession of Penseweek is not personal, legal nor religious, but rather social. Penseweek encompass the guilt of the teenage girl for causing a grudge, and the guilt of the young adult for holding a grudge, and the airing out of this communal guilt is a crucial part of the ritual welcoming the teenage girl to adulthood.

B. The Roles of Confessions in Contemporary Society

The previous section described confessions in places far off in time or geography; however, some of the confessional motifs of this previous section reappear when we look at confessions in contemporary society. The idea that confession is way to acquire forgiveness and integration, as in the Okie initiation ceremony, exists in western culture as well. In the Catholic tradition, confession is a precursor to the washing away of sin, to absolution.[47] Even in the secular world, a way for someone to gain his loved ones' forgiveness is to admit to having done something wrong.[48] Brooks posits that children are taught early on that confessing misdeeds paves the way for "reintegration into the community of parental affection."[49] He adds that "confession of wrongdoing . . . provides the

41. *Id.* at 139.

42. *Id.* at 146.

43. *Amusement and Absolution: Transforming Narratives During Confession of Social Debts*, 93 AMERICAN ANTHROPOLOGIST 826 (1991).

44. *Id.* at 828-29.

45. *Id.* at 829

46. *Id.*

47. In Catholicism, "sinful guilt is wiped clean through contrite confession." *Id.* at 830.

48. "Confess and you shall be forgiven is part of our lay knowledge." Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 BASIC AND APPLIED SOCIAL PSYCHOLOGY 291 (2000).

49. BROOKS, *supra* note 11, at 2.

basis for rehabilitation" and "reentry into . . . the human community."[50] At least one psychological study has backed up this point, finding that members of a group who transgress and do not confess are viewed more harshly than an outsider who commits the same transgression without confessing.[51]

The role of confession in acquiring forgiveness and reintegration seems applicable even on a very large scale. The American public would have preferred Bill Clinton admit early on that he did in fact have sex with "that woman." Later, public sentiment wanted him to admit to what everyone knew he had done, "lied."[52] However, Bill Clinton's confession was not completely effective, according to one study, because the American public saw it as lacking in remorse.[53] Similarly, in the marital context a confession of guilt may perhaps be the only way to start rebuilding a marriage. Conversely, such a confession of guilt, perhaps even fabrication of guilt, could be used by one of the parties to end the relationship. In either case, the confessant tenders the confession to achieve a result he desires.

Confession is also the tool for recovery in psychotherapy. As a patient reveals his innermost secrets, the therapist guides him along the road to self-discovery, understanding and healing. Interestingly, a traditional psychoanalyst must himself have gone through psychoanalysis, just as the priest in the Catholic Church must himself have a confessor.[54] As Kenji Yoshino notes in his analysis of Camus' *The Fall,* confessions beget confessions, and a confessant expects that his confessor will himself have something to confess, if not immediately then at least sometime in the future.[55] Perhaps this is why people tend to forgive confessants: we are all guilty of something, and we forgive others in the hopes that we ourselves will be forgiven. Confession also can produce intimacy and solidarity, even without the stylized ritual of a Victorian age confession album, as when, for example, two friends grow closer by sharing secrets with each other for which they feel ashamed.

C. The Complexity of Criminal Confessions

Given the rich variety of confessional purposes in society generally, it should come as no surprise that even within the much narrower scope of the contemporary criminal justice system confessions have different

50. *Id.*
51. Gold, *supra* note 48, at 297.
52. *Id.* at 1.
53. Gold, *supra* note 47, at 298.
54. Kenji Yoshino, *Miranda's Fall*, 98 MICH. L. REV. 1399, 1407 (2000).
55. *Id.* at 1401.

purposes.[56] A recent New Haven murder trial is case in point. During the trial, the State played a tape of the defendant telling his cellmate how he and three accomplices murdered a man and later dismembered the corpse and put the body parts in acid to destroy the evidence.[57] The law considers "a statement against penal interest" like this one sufficiently reliable to allow it into evidence, even if it is hearsay.[58] Contrary to such presumption of reliability, the defendant explained the tape as greatly exaggerated bravado on his part. Housed with violent criminals in prison, the defendant claimed, it was necessary to come across as a cold-blooded murderer to prevent the other prisoners from thinking he was weak and to prevent them from harassing and assaulting him.[59]

Thus, the defendant wanted the jury to believe that a statement which under other circumstances would be a damning confession in fact consisted of lies and exaggerations. The admission of a violent crime, the defendant claimed, has a different purpose in prison than in the outside world. The prosecutor in the case took the claim seriously enough to spend many hours in cross-examination trying to show that the taped statements were inconsistent with those of someone trying to come across as tougher than he was.[60] The jury agreed with the prosecutor,[61] and indeed the defendant's claim in this particular case seemed weak. Yet, as a general proposition, that a confession could play a different role in prison than someplace else does not seem improbable.[62]

One prisoner apparently made hundreds of confessions solely to garner attention from the authorities. Harry Lucas was first convicted of killing his mother, and after being released on parole was convicted of killing his girlfriend and an elderly acquaintance, for which he received a life sentence.[63] At this time, Mr. Lucas began making confessions in numerous other cases; some of these confessions the Texas Rangers found to be

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56. Even formally, descriptions abound regarding the types of confessions possible in the criminal context. One study identifies eleven different types of confessions in this context when taking into account variables such as retraction, voluntariness, and truthfulness. Joseph T. McCann, *A Conceptual Framework for Identifying Various Types of Confessions*, 16 BEHAV. SCI. LAW 441, 444 (1998).

57. Michelle Tuccito, *Man Guilty in Slaying, Dismemberment*, New Haven Register (Oct. 2 2003) *available at* http://www.newhavenregister.com/site/news.cfm?newsid=10255383&BRD=1281&PAG=461&dept_id=517515&rfi=8.

58. *See* FED. R. EVID. 804(b)(3) (establishing a hearsay exception for statements against interest).

59. Tuccito, *supra* note 56.

60. *Id.*

61. *Id.*

62. Courts and juries, however, do not seem sympathetic to this argument. *See e.g.* United States v. Hamilton, 19 F.3d 350 (7th Cir. 1994) (defendant argued unsuccessfully that statements made to a prison cellmate were nothing more than "jailhouse boasting). State v. Bintz, 257 Wis.2d 177 (Ct.App. 2002) (court found statements to prison cellmate reliable although defendant argued that these statements were only "attempts to impress other prisoners).

63. Gisli Gudjonsson, *The Making of a Serial False Confessor: The Confessions of Henry Lee Lucas*, 10 THE JOURNAL OF FORENSIC PSYCHIATRY 416, 417 (1999).

positively false.[64] Mr. Lucas himself estimates that he has made over 3,000 confessions.[65] He is currently on death row for the murder of a young woman based solely on his confession, for which there is no corroborating circumstantial or forensic evidence.[66] Indeed, in seeking federal habeas corpus relief Mr. Lucas presented alibi evidence that he was 1300 miles away on the day of the murder, and an expert witness testified that Mr. Lucas' confession was highly unreliable.[67] The federal district court denied relief, ignoring the expert witness testimony and dismissing the alibi because such defense had been available at the time of trial.[68]

Nevertheless, despite this result and his potential execution, Mr. Lucas does not regret his false confessions.[69] He had wanted to impress judges and other people in authority, and the incredible amount of attention he received from law enforcement once he began making his confessions enhanced his sense of self-importance.[70] He reasons "that prior to his arrest he was 'nobody'. . . . [H]e had no friends and nobody listened to him or took an interest in him." His false confessions have given him "celebrity status" and "many friends."[71] Like Rousseau and St. Augustine, Mr. Lucas sought validation of the self through confession. But unlike the philosopher who seeks existentialist validation at the highest levels of philosophy, religion or spirituality, Mr. Lucas was the epitome of pathetic banality, merely seeking someone who would listen, who would be his friend, who would think him important.

In *Troubling Confessions,* Peter Brooks discusses many different factors that may motivate a criminal confession. At times, he claims, the veracity of a confession "may be secondary to the need to confess."[72] For example, a confession might be motivated by a general sense of guilt; such confession, while faithful to the sense of guilt, may be completely false with respect to a specific crime.[73] We saw a vivid example of this above with the Suffolk witch cases in which guilty feelings about not being a "good" wife or mother resulted in women confessing to the supernatural crime of witchcraft.

Brooks also posits that a confession may be the product of a wish for "punishment or even self-annihilation, and hence inherently suspect

64. *Id.* at 421.
65. *Id.* at 419.
66. *Id.* at 418
67. *Id.*
68. *Id.*
69. *Id.* at 419.
70. *Id.* at 422.
71. *Id.* at 419.
72. BROOKS, *supra* note 10, at 21.
73. *Id.*

because in contradiction to the basic human instinct of self-preservation."[74] Another reason to "confess" might be to claim innocence, but such utterance may have the perverse result of inculpating the speaker.[75] This could be especially true in a context, such as in an interrogation room, in which silence is assumed to be an admission of guilt, and where therefore the suspect speaks, confesses to something, just to avoid the guilty implication of silence.[76] A confession may also constitute a diversion from a secret that the confessant considers even more shameful than the confession itself.[77] Finally, a confession can sometimes be a means to please one's interrogators without regard to the truth,[78] or a way to end the intolerable pressure of being interrogated, again without regard to the truth.[79]

The tight bond that forms between confessor and confessant further confuses the motivations that lie behind confessions. According to Brooks, the confessant holds a position of weakness to the confessor's strength.[80] The confessor assumes the confessant's guilt and makes it clear that the interrogation won't stop until the confessant admits this guilt.[81] Furthermore, the confessor holds himself out as someone who can help and make things go easier on him. This, of course, perpetuates the fraud that it is somehow in the suspect's best interest to talk.[82] While a priest could provide forgiveness, and a psychotherapist relief, the police usurp the trappings of these roles for the purpose of delivering punishment, imprisonment, even execution. In a police interrogation the confessant feels afraid and subjugated, utterly dependent on the confessor; he wishes

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74. *Id.*

75. Brooks gives the example of Danny Escobedo, in *Escobedo v. Illinois*, 378 U.S. 478, 483 (1964), who denied murder by stating "I didn't shoot Manuel, you did it," and thus placed himself at the scene of the crime. BROOKS, *supra* note 10, at 22.

76. *Id.*

77. *Id.* at 57.

78. Criminologist Richard Leo finds this phenomenon especially prevalent in persons of low intelligence. *See* Ian Demsky, *Expert: Impaired Often See Police As Friends*, MIAMI HERALD, July 26, 2002, at 3.

79. *See* Pekka Santilla et al., *False Confession to Robbery: The Roles of Suggestibility, Anxiety, Memory Disturbance and Withdrawal Symptoms*, 10 THE JOURNAL OF FORENSIC PSYCHIATRY 399, 411 (1999).

80. BROOKS, *supra* note 10, at 35, 41.

81. *Id.* at 39. Clinical studies have shown the corrosive effect such guilt assumption strategies have on the interrogator, the suspect and the judgment of neutral observers: "Interrogators with guilty expectations chose more guilt-presumptive questions, used more techniques in their interrogation (including the presentation of false evidence and promises of leniency), and were more likely to see suspects in incriminating terms. . . . The suspect's actual guilt or innocence had a paradoxical and particularly disturbing effect on interrogators, leading them to exert the most pressure on innocent suspects. In short, a presumption of guilt triggers aggressive interrogations, which constrained the behavior of suspects and led others to infer their guilt—thus confirming the initial presumption." Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW AND HUMAN BEHAVIOR 187, 199 (2003).

82. BROOKS, *supra* note 10, at 41-42.

to please and hopes for absolution.[83] In this state of dependency and abjection, the confessor finds it easy to get the confessant to say almost anything; and if the confessant's story is not exactly what the confessor is looking for, it can be changed by a collaboration of the two.[84]

D. The Law of Confessions

Thus far we've discussed the different meanings and uses of confession in non-legal contexts. Now we come to the fifth dictionary definition of confession, an admission of guilt in a legal setting. Human beings, however, are not perfectly compartmentalizing, and it is impossible to believe that confessions in legal settings will be completely stripped of the meanings it has in other contexts. This creates tension between the law and broader reality, for the law is reductionist in nature. To make clear rules, the law must reduce reality's complexity. In this section of the paper, I trace the history of how the law has struggled to reduce the complex nature of confessions into a clear constitutional rule of evidence that will allow judges to determine when confessions are admissible in a criminal trial.

Before 1936, the common law of trustworthiness made the admissibility of a confession turn solely on whether it was believable.[85] An inquiry into trustworthiness remained the proper assessment of a confession's admissibility until *Brown v. Mississippi*, 297 U.S. 278 (1936), when the Supreme Court announced a new constitutional rule: for a confession to be admissible it must have been voluntary.[86] This focus on voluntariness derives from the principle that a confession involuntarily obtained necessarily implies a Fourteenth Amendment due process violation of the suspect's right to be free of coercion, whether such coercion is physical or psychological.[87] In *Blackburn v. Alabama*, the Court stated that "there are considerations which transcend the question of guilt or innocence. . . . [I]mportant human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."[88] Interestingly enough, the

83. *Id.* at 35, 41-42.

84. *Id.* at 36, 40.

85. DAVID M. NISSAM ET AL., LAW OF CONFESSIONS 4 (1985).

86. In *Brown*, three black men were physically tortured until they confessed to the killing of a white farmer. Their convictions were appealed all the way up to the Supreme Court. Since the Court could not review the state courts' application of state common law, the defense did not again argue that confessions obtained through torture were inherently unreliable according to the trustworthiness doctrine. The defense chose instead to argue, successfully, a constitutional violation—obtaining a confession through torture violated the due process clause of the Fourteenth Amendment.

87. In *Chambers v. Florida*, 309 US 227 (1940), the Court ruled that psychological coercion by itself could constitute a violation of the Fourteenth Amendment due process clause. Previously, the Supreme Court had found due process violations only in cases that involved physical coercion.

88. 361 U.S. 199, 206-07 (1960).

trustworthiness doctrine already explicitly addressed issues of voluntariness. As early as the eighteenth century English courts rejected confessions "forced from the mind by the flattery of hope or by the torture of fear" as being inherently unreliable.[89] Nevertheless, eventually the test of voluntariness altogether banished its precursor, trustworthiness, as a consideration for admissibility.[90] The probative value of a confession is still considered under each jurisdiction's evidentiary rules, but it is no longer a constitutional consideration.[91] In addition, the defense can always question the veracity of a confession at trial, leaving the jury to make the final judgment regarding trustworthiness.[92]

Before 1986, the Court had determined that external coercion, physical or psychological, could violate due process by resulting in involuntary confessions. The Court did not address the more complicated issue of inordinate internal coercion until *Colorado v. Connelly*.[93] Respondent in the case, a schizophrenic named Francis Connelly, flew from Boston to Denver for the purpose of confessing to the murder of a young girl to the first policeman he saw. The day after his confession, Connelly "became visibly disoriented" and "was sent to a state hospital for observation."[94] At the hospital, he told a psychiatrist, Dr. Jeffrey Metzner, that the "voice of God" had commanded him "either to confess to the killing or to commit suicide."[95] At trial, Dr. Metzner testified that these "command hallucinations interfered with [Connelly's] ability to make free and rational choices."[96]

Dr. Metzner's testimony went to the heart of the voluntariness standard, which had always been premised on a suspect's ability to confess of his

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89. NISSMAN, *supra* note 7, at 4.

90. *See* Rogers v. Richmond, 365 U.S. 534, 543-44 (1961) (ruling that considering the probable truth or falsity of a confession resulted in an impermissible constitutional standard). Some scholars believe, however, that the Court's subsequent rulings belied *Rogers'* rejection of trustworthiness as a legal standard. These scholars argue that while the Court may refrain from considering the trustworthiness of a particular confession, the Court's due process jurisprudence has served to weed out interrogatory methods likely to produce false confessions. *See, e.g.*, WHITE, *supra* note 9, at 44-45. Moreover, at least one justice since *Miranda* has stated that reliability should be an explicit part of the due process analysis. Colorado v. Connelly, 479 U.S. 157, 183 (1986) (Brennan, J., dissenting) ("Minimum standards of due process should require that the trial find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence."). One commentator believes that confessional trustworthiness did not cease to exist as a constitutional inquiry until *Connelly*. Laurence A. Brenner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L. Q. 59, 142 (1988).

91. "A statement . . . might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum." *Connelly*, 479 U.S. at 167 (1986).

92. Unfortunately for defendants, a jury is very unlikely to believe that an innocent man will confess to something he did not do, and juries have convicted innocent men in alarming fashion on the basis of false confessions. *See* WHITE, *supra* note 9, at 185.

93. 479 U.S. 157 (1986).

94. 479 U.S. at 161.

95. *Id.*

96. *Id.*

own free will. The novelty for the Court was that in previous cases external forces, those of the police, interfered with a suspect's free will,[97] while in *Connelly* only mental illness, an internal force, interfered with the suspect's free will.[98] The Court solved the complication of the case by allowing inquiry into free will only with respect to the existence or non-existence of an external police force.[99] Thus, because coercive police activity did not interfere with Connelly's free will, his confession was "voluntary" for the purposes of due process and was allowed into evidence.[100]

Connelly is a strange case in that it turns on a Fourteenth Amendment due process voluntariness analysis. Such analysis became almost obsolete shortly after its highest expression in *Culombe v. Connecticut*.[101] Five years later, in *Miranda v. Arizona*,[102] the Court formulated the famous *Miranda* warnings, which inform a suspect taken into custody that he has the right to remain silent and the right to contact a lawyer.[103] These warnings stem from the Fifth Amendment right against self incrimination,[104] and they provide protection in addition to the previously existing Fourteenth Amendment due process protection. After *Miranda,* a Fourteenth Amendment analysis of the voluntariness of a confession cannot begin until the court first determines that the suspect was read his *Miranda* rights and that he "voluntarily, knowingly and intelligently" waived these rights.[105] The state must prove by the preponderance of the

97. In some of these previous cases, mental illness or deficiency had been present, but there had always been police coercion. In fact, the police in these cases had knowingly taken advantage of the suspect's weakened mental state. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960).

98. In his testimony, Dr. Mentzer addressed the possibility that Connelly did not actually hear voices, that the voices were in fact his interpretation of his own guilt. *Connelly,* 479 U.S. at 162. Dr. Mentzer admitted this possibility, "but explained that in his opinion, Connelly's psychosis motivated his confession." *Id.*

99. "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly,* 479 U.S. at 167.

100. At least one state high court has declined to follow *Connelly's* narrow definition of voluntariness. In applying state law, the Maine Supreme Judicial Court found that dementia made a suspect's statements involuntary despite the absence of police coercion. In arriving at this decision, the court rejected the state's argument that state precedent supporting this point should be overruled in light of *Connelly.* State v. Rees, 748 A.2d 976 (Maine 2000).

101. "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and capacity for self-determination critically impaired, the use of his confession offends due process." 367 U.S. 568, 602 (1961).

102. 384 U.S. 436 (1966).

103. "[The suspect] must be warned prior to any questioning that he has the right to remain silent; that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda,* 384 U.S. at 444.

104. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

105. *Miranda,* 384 U.S. at 444 ("The defendant may waive . . . these rights, provided the waiver is made voluntarily, knowingly and intelligently").

evidence that the defendant made a valid waiver before using his confession as evidence.[106] If the suspect was not told his rights or he did not waive them, then as a general rule his confession is inadmissible without further inquiry.

The *Miranda* rule provided lower courts and the police with clear guidelines. The due process analysis of an individual confession, on the other hand, was undertaken on a case by case basis and turned on the specific facts of each case, on the "totality of all the surrounding circumstances."[107] The due process test does not have one "single litmus-paper test."[108] *Miranda* provided the missing litmus test. The result of *Miranda's* procedural bright-line rule has been that once a defendant validly waives his rights, a court will be reluctant to find any subsequent confession involuntary and inadmissible.[109] Thus, the *Miranda* Fifth Amendment analysis, rather than the earlier Fourteenth Amendment due process analysis, has become the prevalent question of law with respect to confessions.

In *Connelly,* the Court felt it necessary to undertake both a *Miranda* analysis and a due process analysis. As discussed earlier, the Court determined that the confession was voluntary for the purposes of due process because there was no police coercion. The Court applied the same reasoning to the *Miranda* part of the case.[110] Connelly waived his rights without police coercion, and this was enough for the majority opinion to conclude that the waiver was voluntary and valid.

In his *Connelly* concurrence, Justice Stevens strongly objected to the majority opinion's *Miranda* analysis. Stevens accepted the defense argument that Connelly's mental illness prevented him from exercising free will and thus from making voluntary statements. Stevens was not bothered by this involuntariness of speech at the time Connelly first approached a police officer in the street and began confessing. The crucial moment for Stevens happened when the officer handcuffed Connelly and took him into custody:

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106. Before *Connelly*, the standard of proof for a valid *Miranda* waiver was unclear. The *Connelly* majority, over a vigorous dissent, ruled that the "preponderance of the evidence" standard was applicable to *Miranda* waivers. 479 U.S. at 168.

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

108. Culombe v. Connecticut, 367 U.S. 568, 601 (1961).

109. *See* White, *supra* note 9, at 121-22. This seems an unfortunate result, for the Fifth Amendment and the Fourteenth Amendment in this context should not be mutually exclusive. The knowledge of the right to remain silence and the right to counsel should, in theory, strengthen a suspect's resolve, making it more difficult for police to force an involuntary confession. But the Fifth Amendment is not a complete antidote to subsequent due process violations. A suspect could know his rights and still make involuntary statements if sufficiently coerced.

110. As one federal appellate court has noted, "*Connelly* [has] mandated a shift in the analysis of the voluntariness of a *Miranda* waiver. The relevant test no longer focuses on the defendant's free will, as it has in the past. Instead, the focus is on the presence or absence of police coercion." United States v. Raymer, 876 F.2d 383 (5th Cir. 1989).

Prior to that moment, the police had no duty to give respondent *Miranda* warnings and had every right to continue their exploratory conversation with him. Once the custodial relationship was established, however, the questioning assumed a presumptively coercive character. In my opinion the questioning could not thereafter go forward in the absence of a valid waiver of respondent's constitutional rights unless he was provided with counsel. Since it is undisputed that respondent was not competent to stand trial, I would also contend that he was not competent to waive his constitutional right to remain silent.[111]

For Stevens, then, once in custody a suspect has a right to silence that he can only waive if "competent."[112] This is a convenient stopping point in the history of the admissibility of confessions in a criminal trial. The *Connelly* case and the question of how, under *Miranda,* a suspect can validly waive his rights, provide the starting point for discussing how mental illness should affect the law's concept of a constitutionally valid confession.

III. FORMULATING AN EXCLUSIONARY RULE FOR THE MENTALLY ILL

A. Proposed Exclusionary Rule

In the climatic last scene of "The Tell-Tale Heart," the law, in the form of the policemen, encounters a confession motivated by madness and guilt. Such encounters occur in real life as well. But to complicate matters, in real life there won't always be a body beneath the planks, or else it won't always be clear who left the body there. This was the case with Francis Connelly, whose hallucinations rivaled those of the narrator in "The Tell-Tale Heart." Connelly's criminal confession and his subsequent encounter with constitutional law provide us with a case study in which to formulate an exclusionary rule for the mentally ill.

Connelly waived his *Miranda* rights voluntarily—in the sense that he did not suffer police coercion—and this was enough for the waiver to be valid in the eyes of the Court.[113] Yet the *Connelly* Court's reasoning

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111. *Connelly,* 479 U.S. at 172-73 (citation omitted).

112. Stevens argues that the majority opinion's contrary ruling ignores *Moran v. Burbine,* 475 U.S. 412, 421 (1986) ("[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice. . . ."). *See Connelly,* 479 U.S. at 172.

113. Judge Posner posits that, in fact, the *Connelly* Court did not make an inquiry into the voluntariness of Connelly's waiver of his *Miranda* rights because the "faculty of will approach . . . leads nowhere . . . would require the exclusion of virtually all fruits of custodial interrogation . . . and is not taken seriously." United States v. Rutledge, 900 F.2d 1127, 1129 (1990). Posner believes that *Connelly* implies "an alternative approach, which . . . may well describe the court's actual as distinct from articulated standard." *Id.* This approach "is to ask whether the government has made it impossible for the defendant to make a *rational* choice as to whether to confess." *Id.* (emphasis in original). Rather than discern the Court's unarticulated standards, in this paper I assume that the Court in *Connelly* did in fact base its decision on the voluntariness of Connelly's waiver and did not inquire

forgets the "knowingly and intelligently" requirement of a valid *Miranda* waiver.[114] Stevens' argument that Connelly was not "competent" to waive his rights "voluntarily" was not accepted by the *Connelly* Court's majority opinion. My argument is that Connelly was not capable of "intelligently" waiving his rights.[115] This is not an unheard of approach. In a case subsequent to *Connelly*, a circuit court remanded a case in which the confession of a schizophrenic was deemed voluntary because of a lack of police coercion so that the district court could determine "whether [the suspect] knowingly and intelligently waived his *Miranda* rights."[116]

As we have seen, confessions take place in a variety of contexts for a variety of purposes. The average criminal suspect is likely very aware of the fact that being questioned by the police is not the same as confessing to a priest, confiding a misdeed to a friend, or sharing a dark secret with a psychotherapist.[117] The average suspect realizes that the police do not have his best interests in mind, and he does not disregard this reality. With this keen awareness of the context in which he finds himself, the average suspect has the competence to "intelligently and knowingly" waive his *Miranda* rights.[118] We can assume that the average suspect's waiver of his constitutional rights meets the Court's requirement that it be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[119]

The mentally–ill criminal suspect, however, as a result of his illness, may not understand that the police context is very different from every other confessional context, including the context of psychotherapy with which he may be intimately familiar. Since such a person does not understand the context of his potential confession he cannot "knowingly" waive his rights. A striking example of such a suspect is Eddie Joe Lloyd,

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if this waiver was "knowingly and intelligently" made.

114. The last footnote of the majority's indicates that the *Connelly* Court was aware that voluntariness is not the end of an inquiry into the validity of a *Miranda* waiver. This last footnote, however, both clouds the issue and dismisses it without ever specifically mentioning "knowingly" or "intelligently." *See Connelly*, 479 U.S. at 171 n.4.

115. In his *Connelly* dissent, Brennan briefly articulated the strategy of separating out the prongs of a *Miranda* waiver to counteract the *Connelly* majority's ruling. 479 U.S. at 188. This strategy has subsequently been used by at least one appellate court. United States v. Bradshaw, 935 F.2d 295, 299 (D.C. Cir. 1991) ("We read *Connelly* ... as holding only that police coercion is a necessary prerequisite to a determination that a waiver was *involuntarily* and not as bearing on the separate question whether the waiver was knowing and intelligent. Connelly's claims ... were clearly directed only towards the voluntariness of his actions; the knowledge test was not involved in the case").

116. *Id.* at 303.

117. Brooks would probably not accept this statement. This statement must be accepted, however, if the law is at all to make use of confessions.

118. *Miranda* does not define "knowingly" and "intelligently." In this paper I will take these words to have regular dictionary meanings. To act "knowingly" means to act deliberately with understanding and awareness, being well-informed, comprehending the consequences of one's action. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1993). To act "intelligently" means to act judiciously, rationally, logically, to act in a clear-minded fashion. *See id.* at 1175.

119. Moran v. Burbine, 475 U.S. 412, 421 (1986).

who "confessed in horrific detail to the rape and murder of 16 year-old Michelle Jackson."[120] His confession, the sole evidence upon which he was convicted, was obtained while he was in a mental hospital diagnosed as a paranoid schizophrenic. After 18 years in prison, DNA evidence showed that Lloyd could not possibly have committed the crime. Lloyd claims that his confession was a plot between him and his police interrogator to flush out the real killer.[121] That Lloyd believed he and his interrogator were collaborators in crime detection shows that he had no knowledge of how confessions work in the context of criminal investigations. Thus, he could not have "knowingly" waived his *Miranda* rights.

I would hold that the adverbs "knowingly" and "intelligently" are not susceptible to the same legal analysis as the adverb "voluntarily." Taking into account the history of confessions in the annals of Supreme Court cases previous to *Connelly*, in which police action forced many involuntary confessions, it is understandable that the *Connelly* opinion defines voluntariness with respect to external force.[122] Knowledge and intelligence, however, are internal conditions not necessarily dependent on external forces. Having access to accurate information does not necessarily result in someone acquiring knowledge or making intelligent decisions, especially if that person is cognitively impaired.

Returning to Connelly, we must determine if he could have "knowingly" or "intelligently" waived his *Miranda* rights.[123] It is not clear from the U.S. reporter exactly what Connelly told the police officer he first approached on arriving to Denver, but the Court assumes that he understood his rights when he waived them. Perhaps Connelly knew exactly to what end the police would use his confession, and thus we can speculate that he "knowingly" waived his *Miranda* rights.

This leaves the adjective "intelligently" as the last hope for Connelly. Although a suspect could know and understand his rights in the context of a police interrogation, he may nevertheless be incapable of making a rational or clear-minded decision to forgo these rights. For example, even if Connelly knew his rights, he could not have made a clear-minded

120. Jodi Wilgoren, *Confession Had His Signature; DNA Did Not*, N.Y. TIMES, Aug. 26, 2002, at A1.

121. *Id.*

122. Before *Connelly*, "police overreaching ha[d] been an element of every confession case." *Connelly*, 479 U.S. at 177 (Brennan, J., dissenting).

123. With regard to *Colorado v. Connelly*, Michael R. Pace has come to the same conclusion as Brennan: Connelly could not have knowingly or intelligently waived his *Miranda* rights. Michael R. Pace, *Fifth and Fourteenth Amendments—Defining the Protections of the Fifth and Fourteenth Amendments Against Self-Incrimination for the Mentally Impaired*, 78 J. CRIM. L. & CRIMINOLOGY 877, 913 (1986). However, Pace's conclusion is as cursory as Brennan's. In this paper I hope to provide a more substantive discussion of the "knowing and intelligent" prongs of a valid *Miranda* waiver, specifically when it comes to the mentally ill.

decision to waive these rights when God himself was telling him to confess or commit suicide.[124] Simply stated, under the influences of completely irrational hallucinations, it is impossible for someone to waive his rights "intelligently."

Based on *Miranda's* two adjectives that the *Connelly* Court did not mention, "knowingly" and "intelligently" rather than "voluntarily," we can craft a two-part exclusionary rule for the mentally ill:[125]

1. If a suspect is so affected by mental illness that he does not understand what his criminal confession will be used for—does not understand that the context of a criminal confession is very different from other confessional contexts—then he cannot "knowingly" waive his *Miranda* rights.

2. If a suspect understands the police context in which he is confessing, but is suffering from a mental illness such that he completely disregards, or otherwise makes irrational decisions with respect to, this context, then he cannot "intelligently" waive his *Miranda* rights.

Apart from the threshold definition of mental illness,[126] this two-part rule does not depend on an attempt to determine the clinical extent of a

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124. At trial, Connelly's psychiatrist rejected the notion that Connelly's voices were simply an interpretation of his own guilt rather than psychosis. *See infra* note 18. In the case of Poe's narrator, for the purposes of this paper, I am assuming psychosis as the motivation for the narrator's hearing the beating heart of his dead victim. I admit, however, that this interpretation limits the literary richness of the story. The supernatural could also explain the beating heart, or perhaps the narrator simply hears his own guilt. Perhaps, in his guilty anxiety, the narrator mistakes the loud beating of his own heart for that of the old man's heart, and thus it is his own guilty heart that is the "tell-tale heart" of the title.

125. The threshold for the rule to apply is that the defendant be mentally ill. For this purpose, I believe it appropriate to use a definition of mental illness already existing in the federal code. **42 U.S.C.A. § 3796ii** of the United States Code provides for grants to be given to local governments for the purpose of treating and supervising first time non-violent offenders who are mentally ill. **42 U.S.C.A. § 3796ii-1** provides the following definition for the purposes of the grants:

(1) the term "mental illness" means a diagnosable mental, behavioral, or emotional disorder –

(A) of sufficient duration to meet diagnostic criteria within the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association; and

(B) that has resulted in functional impairment that substantially interferes with or limits 1 or more major life activities . . .

It is clear that this definition requires the testimony of an expert witness, a psychiatrist, who is capable of making a medical diagnosis. However, it is not enough for a person to have a mental illness as defined by the psychiatric profession. Part B of the definition provides an extra requirement that the illness have a significant impact on the person's life. This fits my purposes because I believe, for reasons explained subsequently, that my exclusionary rule should apply only to a limited group of people, i.e. people whose illness is severe enough to warrant them extra protection.

126. *See id.*

suspect's illness. Rather, as soon as mental illness prevents a suspect from "knowingly" or "intelligently" waiving his rights, his confession becomes inadmissible under *Miranda*.

This exclusionary rule would not have fully helped Francis Connelly. *Miranda* extended the Fifth Amendment right against self-incrimination to pre-trial custody, but no decision has extended this right to pre-custody conversation. Stevens would have admitted into evidence everything Connelly said before he was taken into custody because negative rights against the state cannot be asserted if the state has not acted. Once the state takes someone into custody, however, it has acted, and the *Miranda* rights come into effect. At this point, Connelly's confession would have been excluded under my rule.

The vexing part of Francis Connelly's psychotic confession is that nothing else tied him to the murder to which he confessed. It is unclear whether there was even a body.[127] Connelly's potentially false confession was motivated by auditory hallucination. Other false confessions have resulted from a mentally–ill suspect's misunderstanding of the police context: Eddie Joe Lloyd spent eighteen years in prison for his wish to trap Michelle Jackson's real rapist. Although no longer a constitutional issue, confessional trustworthiness should matter to anyone who cares about the criminal justice system. My exclusionary rule, in addition to protecting the constitutional rights of the mentally ill, could help eliminate false confessions.

Finally, although the focus in this paper is mental illness, my proposed exclusionary rule could also be used to protect other vulnerable groups. For example, criminologist Richard Leo believes that mentally retarded suspects are most likely to confess to crimes they did not commit because they see a police officer "as their friend[] . . . as someone to talk to, someone to look up to, someone they want to like them."[128] These suspects are eager to please and to tell the story they think their interrogators want to hear, whether the story is true or not.[129] In addition, they are embarrassed by their disability and try to hide it by not asking for explanations and by just answering affirmatively.[130] To make matters worse, they have poor attention spans and memories and therefore become confused easily.[131] Finally, low frustration thresholds may lead them to say things that are not true just to relieve the pressure of police

127. The Denver police had found an unidentified body of a young woman some months before Connelly's confession. But it could not be determined that this was the same body Connelly was referring to, especially since it was found at a different place than the one where he claimed to have committed the murder. *Connelly*, 479 U.S. at 183.

128. Demsky, *supra* note 77.

129. *Id.*

130. *Id.*

131. *Id.*

questioning.[132] Thinking of the police as friends rather than adversaries during interrogations, as well as poor attention spans and memories, would make it hard for some mentally retarded suspects, depending on the extent of their disability, to waive "knowingly" their *Miranda* rights. Therefore, it would make sense to consider an exclusionary rule for this group of suspects similar to the one I have proposed for mentally–ill suspects.

B. Non-Legal Justifications for the Proposed Exclusionary Rule

1. Peter Brooks Revisited

Thus far I have formulated and justified my exclusionary rule for some mentally ill suspects on the premise that their illness may render them incapable of understanding the context of a criminal confession or incapable of making a rational decision with regard to this context. In other words, such suspects cannot "knowingly" and/or "intelligently" waive their *Miranda* rights. This is a legal argument based on Supreme Court jurisprudence. There are more general, but related, reasons justifying an exclusionary rule for the mentally ill.

A mentally ill person's relationship to herself and to the outside world is much more vexing than is the case with an average person. Mental illness exacerbates all the conditions Brooks found problematic in the case of confessions generally. For example, mental illness makes people dependent to a very great extent on those around them to function in the everyday world. Brooks argues that the police, in interrogating suspects, often usurp the role of priests and psychotherapists and promise relief and absolution, but instead deliver punishment.[133] Such fraud is even more devastating to the mentally ill person already accustomed to depending on others and, most likely, being questioned on the therapist's couch.[134] Mental illness makes people suggestible and susceptible to the slightest forms of pressure; coercion can take place much more easily, and in situations that a "normal" person might not find coercive. The police can much more easily take advantage of the trust and dependence that develops between a confessor and confessant when questioning someone who is mentally ill. This trust and dependence on the part of a suspect will make it impossible for him to understand the true, adversarial context of

132. Leo believes that minors also share some of these qualities, but not to the same extent. *Id.*

133. Justice White, in his *Miranda* dissent, makes the point that confessing might provide relief and rehabilitation for a criminal suspect. 384 U.S. at 538. But it would be disingenuous to suggest that this is the primary purpose of a criminal confession. The primary purpose is, of course, for the police to obtain a conviction and close a case.

134. Even if it is not talk therapy, a psychiatrist still needs his patients to confess their suicidal tendencies or frightening delusions in order to prescribe the right medication.

his interrogation and possible confession.

We should also question the motivations behind the confessions of mentally ill suspects. Brooks worries that confessions may not be the result of a rational decision to confess but rather of abjection and self-hatred.[135] The problem of deeply-ingrained guilt is inherent in mental illness. People who are clinically depressed, for example, have an overabundance of guilt: everything is their fault; they are the worst people in the world.[136] The dynamic described by Brooks of guilt and confession actually creating the referent, the terrible confessed act, is an everyday occurrence for the clinically depressed.[137] For Connelly, psychosis, not depression, may have fabricated the confessed act. In Connelly's case, we will likely never know for sure if he in fact murdered a young girl.[138]

Peter Brooks often describes the state of confession as a state of abjection, not one of autonomy and dignity.[139] Therefore, Brooks suggests, if we value human autonomy and dignity, we should not take advantage of someone who is in a state of abjection. Brooks points out that "ancient Talmudic law barred confessions in a criminal case."[140] Confessions were distrusted because they were seen as "evidence of a sick soul, bent on self-destruction."[141] Brooks' description of confession as an act of abjection should particularly worry us when the person confessing suffers from mental illness. To see why, we must understand more about abjection.

2. Abjection and the Mentally Ill

Julia Kristeva, in her well-known work *Powers of Horror: An Essay on Abjection*, claims that the abject "disturbs identity, system, order [and] does not respect borders, position, rules. [It is] the in-between, the ambiguous, the composite."[142] A human corpse "is the utmost of abjection."[143] We can imagine, or even have seen, this now corpse as a living human being—now "it is death infecting life."[144] Another example of abjection, an "elementary and most archaic form," is "food loathing."[145] We taste a piece of food we hate and gag and "feel spasms in the

135. BROOKS, *supra* note 10, at 72.

136. A depressed person puts herself down by making comments such as "I'm such a failure; I wonder how you stay with me." J. RAYMOND DEPAULO, JR., & KEITH RUSSEL ABLOW, HOW TO COPE WITH DEPRESSION 16 (1989).

137. "A depressed person may also accept blame for problems that do not exist or are clearly not his or her fault." *Id.*

138. *See supra* note 125.

139. BROOKS, *supra* note 10, at 74.

140. *Id.*

141. *Id.*

142. JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION 4 (1982).

143. *Id.*

144. *Id.*

145. *Id.* at 2.

stomach."[146] We cannot assimilate it, cannot let it into our space.

Traditionally, the abject has been "filth, waste or dung,"[147] and society has controlled things thus termed by creating rules and taboos, by trying to exclude the abject from its borders. Abjection, however, becomes more problematic when it is internalized, when it is no longer seen as something contaminating the inside/outside border, but as something "permanent . . . within."[148] Kristeva finds this internalization taking place in the New Testament when Jesus states, "There is nothing from without a man, that entering him can defile him: but things which come out of him, those are they that defile the man."[149] At this point, man "is innerly divided and, precisely through speech, does not cease purging himself of [abjection]."[150] Once inside the self, abjection "lies quite close, but it cannot be assimilated."[151] Inside, abjection fascinates but also worries, sickens, causes both desire and rejection.[152]

Abjection results in a man divided, one who fights against himself, who finds within an infection that cannot be purged, even by ceaseless talking. The narrator of "The Tell-Tale Heart" is the epitome of abjection. His monologue is at war with itself, constantly questioning his own sanity. From the beginning the narrator asserts his sanity, yet these assertions repeatedly undermine themselves: "why will you say that I am mad? The disease had sharpened my senses – not destroyed – not dulled them" (555).[153] He adds, "I heard many things in hell. How, then, am I mad?" (555). The narrator tries to establish his sanity by "healthily" and "calmly" telling "the whole story," a story that is anything but healthy (555). He does not know why the idea of killing his landlord first entered his brain, "but once conceived it haunted [him] day and night" (555). The narrator has no motive for the murder; indeed he "loved" the old man who "had never wronged him" (555). But the narrator experiences horrified fascination with the old man's "vulture" eye and this is enough motivation for the murder (555). The narrator's contradictory nature dictates even the very moment of the murder when he "knew what the old man felt, and pitied him" (556). Then, in a moment of horrible incongruity, the narrator "chuckled at heart" (556). After the murder, the narrator dismembers the body, disposing of the blood, and hides it beneath the bedroom floor. He believes that such precautions in carrying out the crime prove his sanity, but we see only madness in his act. Abjection, the infectious blurring of

146. *Id.*
147. *Id.*
148. *Id.* at 113.
149. Mark 15.
150. KRISTEVA, *supra* note 140, at 113.
151. *Id.* at 1.
152. *Id.*
153. POE, *supra* note 1.

borders in madness claiming sanity, provides Poe's story with much of its horror. The narrator will find no relief from "purging" himself of abjection "through speech," as Kristeva puts it, except in that confession in this case leads to relief through self-destruction.

Brooks has already provided the idea that abjection and confession are intertwined. One leads to the other; they feed off each other and rob a person of autonomy and dignity. Brooks finds it problematic to take advantage of this dynamic. However, for the sake of crime solving, we overlook this problem. We might believe that when confessional abjection is the product of "normal" feelings of guilt and regret, there is nothing wrong with using such abjection as an integral part of our criminal justice system. What Poe's story adds to this discussion is an insight into mental illness. The narrator was abject before he confessed, before he even committed the murder. He was infected with an obsession of which he could not rid himself; "a pale blue eye, with a film over it," haunted him (555). Like the narrator's obsessions with the old man's pale blue eye, mental illness attacks a person within and attempts to take over the mind and soul. Someone who is mentally ill, and those around him, are in a fierce battle for the person's mind, for a return to normalcy. With or without his crime, Poe's narrator's futile struggle to assert his sanity is abject. The term seems tailor-made for a person who talks to himself or hears voices or has multiple personalities struggling for his body and mind. Abjection is the previously strong and successful individual whose self-worth has been so eaten away by depression that he can no longer get up from bed.

We might be willing to overlook the abjection that normally accompanies confession, but we should draw the line with respect to those mentally ill persons for whom the act of confessing further aggravates a previous condition of abjection. We may accept the partial reduction in autonomy and dignity that abjection causes in a typical confessant as necessary for the functioning of the justice system. But the confessions of the mentally ill may be the product of compounded abjection, and thus may be almost completely void of autonomy and dignity. In *Blackburne v. Alabama*, the Court felt that "important human values are sacrificed where an agency of the government [coerces] a confession."[154] The Court was willing to say that in some circumstances the dignity of the accused "transcend[s] the question of guilt or innocence."[155] The Court was referring specifically to forcing "a confession out of an accused against his will," but using an abject confession void of dignity and autonomy, a product of mental illness, seems just as contrary to "important human

154. 361 U.S. 199, 206-07 (1960).
155. *Id.*

values."[156]

My exclusionary rule would at least make inadmissible the confessions of those mentally ill persons whose abjection does not allow them to "intelligently" waive their *Miranda* rights. We've already seen the example of the abject Connelly, who heard voices urging self-destruction and whose waiver of *Miranda* rights would have been invalid under my exclusionary rule. Another example would be the clinically depressed person whose abject self-hatred leads him to confess to imaginary crimes or acts for which he is not responsible.[157] The depressed person may understand very well that the police use confessions to punish, and he may in fact wish for punishment. In this case, because of his clear understanding of the situation, he could "knowingly" waive his *Miranda* rights. Nevertheless, because his abject illness makes him irrationally wish for self-destruction, he could not "intelligently" waive his *Miranda* rights and his confessions would be inadmissible.

C. The Limited Nature of the Rule

In detailing the many vexing problems surrounding confessions, Brooks claims not to be in the business of suggesting criminal justice policy.[158] Yet several times he suggests that law enforcement should reduce its "dependency" on confessions "in crime detection."[159] He accuses our system of justice, and perhaps our society as a whole, of ignoring "the ambiguities of confession" because confessions are "too useful to give up."[160] Elsewhere he states that "perhaps the only truly probative way to detect and exclude the false confession would be insistence that the alleged crime be convincingly substantiated by other means."[161] He adds, "But taken to its logical conclusion, this would be tantamount to saying that we do not need to use confessions in criminal procedure."[162] Brooks concludes that law enforcement is too addicted to confessions to make such an admission.[163] In passages such as these, while not openly confessing to making a policy proposal, Brooks does suggest that we should altogether eliminate confessions from criminal procedure.

My exclusionary rule, however, only applies when mental illness, or perhaps some other handicap, prevents a suspect from "knowingly" or "intelligently" waiving his *Miranda* rights. A much broader exclusionary

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156. *Id.*

157. *See supra* notes 134-35.

158. "It is not my intention here to formulate policy recommendations in the field of criminal justice." Brooks, *supra* note 10, at 169.

159. *Id.* at 86.

160. *Id.* at 87.

161. *Id.* at 153.

162. *Id.* at 153-54.

163. *Id.* at 154.

rule, such as the one Brooks hints at, would be completely unacceptable to law enforcement and the public at large. One can imagine crimes in which there is not enough evidence to show guilt beyond reasonable doubt – perhaps the murder weapon lies irretrievably at the bottom of the ocean – in which the only way to complete the evidence is the murderer's confession. If such confession is un-coerced, would the public really want a murderer to go free in the name of the principle that confessions are too problematic to be used as evidence? In the end, arguments over exclusionary rules in criminal procedure often boil down to practical matters. For Justice Brennan, reliance on confessions leads to sloppy police work, and a system that is less reliable and more subject to abuse.[164] Chief Justice Rehnquist, however, believes that exclusionary rules limit the effectiveness of law enforcement.[165]

Peter Brooks claims that society does not want to know about the ambiguities of confessions. We are happy with *Miranda* warnings that give the process at least a gloss of fairness, and we hope that the courts will guard against the most abusive forms of police coercion. Certainly society could not accept the physical torture used to gain confessions in *Brown v. Mississippi*.[166] But we are not interested in the close examination Brooks undertakes, perhaps not even in the examination Frankfurter undertakes in *Culombe v. Connecticut*,[167] if it means substantial interference with the way criminals are brought to justice.

Law-abiding citizens may care about human dignity and the rights of criminals, but they also want the police to be effective in solving crime and catching criminals. As a practical matter, Brooks' arguments are not as convincing as would be an empirical study that showed that confessions lead to many false convictions and are generally not an effective investigative method. As long as citizens side with Rehnquist and perceive confessions to be necessary for crime solving, Brooks' arguments will not carry much practical weight.

In addition, there is a strong reverence for the individual in the American legal tradition; the State paternalism implicit in a no confession legal rule would be looked upon with suspicion. Imagine someone who understands his right to remain silent, is un-coerced, has not been subjected to extensive questioning, and who just wants to confess without consulting a lawyer; the law's response, and the average citizen's response, despite Brooks' arguments, would be, "by all means let him confess; what right does the state have to say that he cannot?" Because of our general suspicion of state paternalism, and society's need for effective

164. Connelly v. Colorado, 479 U.S. 157, 181 (1986) (dissenting).
165. *Connelly*, 479 U.S. at 166.
166. 297 U.S. 278 (1936).
167. 367 U.S. 568 (1961).

crime solving, my exclusionary rule is formulated so as to apply only to some mentally ill suspects and, perhaps, a few other vulnerable confessants.

IV. APPLYING THE EXCLUSIONARY RULE TO THE CASE OF ANDREA YATES

On the morning of June 20, 2001, Andrea Yates waited until her husband left home for work and then methodically drowned her five children, ages six months to seven years, in the bathtub. She then called 911, and when the police arrived she confessed to the murders in matter-of-fact fashion.[168] The aftermath of this shocking crime became one of the most closely watched cases involving mental illness in recent memory. In this study of mental illness and criminal confession, the tragic story of Andrea Yates's psychosis serves as a test case for the exclusionary rule proposed in this paper.

Andrea Yates had suffered from serious mental illness for several years before killing her children. She attempted suicide twice, suffered from depression and was diagnosed with postpartum psychosis after the birth of her fourth child. After the birth of her fifth child she again fell into depression and psychosis.[169] Two weeks before the murders, her doctor took her off the anti-psychotic drug Haldol.[170]

Since everyone agreed that Yates killed her children, the only matter left for the jury to decide at trial was if Yates was not guilty by reason of insanity. According to Texas criminal law, the defense had to prove that at the time of the murders Yates "did not know that [her] conduct was wrong."[171] The jury deliberated less than four hours, at one point asking to hear again Yates's taped confession, before finding her guilty.[172]

It is difficult to know how crucial the confession was in convincing the jury that Yates knew her actions were wrong. Even without the confession they would still have had access to her 911 call to the police, the police testimony of their observations at the crime scene, and her pre-custodial comments to the police, which *Miranda* does not cover.[173] Nevertheless, Yates's matter-of-fact admissions undoubtedly hurt her case. Indeed, the

168. Jim Yardley, *Trial Opens in Case of Drowned Children*, N.Y. TIMES, Feb. 19, 2002, at A12.

169. Jim Yardley, *Despair Plagued Mother Held in Children's Death*, N.Y. TIMES, Sept. 8, 2001, at A7.

170. Yardley, *supra* note 163.

171. "It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong." Tex. Penal Code § 8.01.

172. Jim Yardley, *Texas Jury Convicts Mother Who Drowned Her Children*, N.Y. TIMES, Mar. 12, 2002, at A23.

173. *See* previous discussion of Stevens's *Connelly* concurrence *supra* at text corresponding to note 110.

defense tried to suppress her confession on the grounds that her mental condition was such at the time that she could not have waived her *Miranda* rights.[174] The Judge rejected this argument. Would Yates's confession have been allowed into evidence under the exclusionary rule formulated in this paper? This depends on the facts surrounding the confession, which are not ascertainable from public media sources to the extent necessary to make a definitive determination. There is enough information available, however, to make the inquiry worthwhile.

Andrea Yates first came in contact with the police around 9 AM on the day of the murders when they arrived at her house. Her taped confession with Houston Police Sergeant Eric Mehl, which the jury later heard, was not recorded until 1:06 PM that afternoon. What happened in-between could be relevant to our inquiry, but for the purpose of the discussion let us assume that it is not. The transcript of Yates's confession begins with Sergeant Mehl asking identification questions and then giving her the *Miranda* warnings which she promptly waives.[175] Throughout the interview almost all of her responses are monosyllable, the word "yes" to be specific. It is, as Brooks might point out, more Mehl's confession than Yates's; she committed the crime, but he came up with the words of her confession.

Mehl, through his yes or no questions and Yates's monosyllable responses, draws out the reason for the murder. She was not mad at the children, but she had thought of killing them before because she was a bad mother and they were not developing correctly – they had behavioral and learning problems. At the end of the interview, Yates actually puts the reason for the murder into her own words: "I realized that it was time to be punished . . . for not being a good mother."[176] Mehl asks her if she expected punishment from the criminal justice system and she says, "Yes." This exchange was probably extremely damaging to Yates's defense because it showed the jury that, since she understood the criminal justice system would punish her, she knew her act was legally wrong.[177]

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174. Associated Press, *Judge allows woman's confession, 911 call* (Dec. 5, 2001), *available at* http://www.courttv.com/trials/news/1201/05_yates_ap.html.

175. Associated Press, *Transcript of Andrea Yates' Confession*, (Feb. 21, 2002), *available at* http://www.chron.com/cs/CDA/story.hts/special/drownings/1266294.

176. We have come full circle from the women of Suffolk who admitted practicing witchery, discussed earlier *infra* pp. 8-9, to Andrea Yates who could hear Satan. Like Yates, the "witches" of Suffolk were trapped in roles of "good" mother or wife, roles which they disliked or were ill-suited for. Like Yates, who felt she should be punished for being a "bad mother," the women of Suffolk blamed themselves for not living up to contemporary social constructions. The difference, of course, is that the women of Suffolk did not commit the crimes to which they confessed. Rather their confessions were the product of their inability to escape from the contemporary social constructions and popular language of demonology. Yates's crime was all too real, and her communication with Satan was the product of mental illness rather than popular superstition.

177. The Texas penal code does not instruct the jury if they should find that the defendant knew right from wrong in a legal sense, a moral sense, or both.

Perhaps the most damning aspect of the confession, at least from reading a transcript and not actually hearing Yates's words, is that she seems to understand the questions perfectly and answers them coherently. Most of her answers are simply the words "yes" but the few additional words she utters are chillingly matter-of-fact. She filled the bathtub "about three inches from the top" with the intent to "drown the children."[178] She began the murders with three year old Paul, whom she put "face down" and who struggled "a couple of minutes."[179] The older kids struggled longer, and through it all, the next to last victim, baby Mary, "was crying" right there in the bathroom.[180] The last to go was John who asked, "What happened to Mary?"[181] Yates states that she did not respond: "I just put him in."[182] John, being the oldest, was able to fight for air several times before succumbing.

Just these two paragraphs should be sufficient for the reader to understand why the jurors found Yates's confession so compelling that they needed to hear it again. Once the confession was allowed into evidence, the defense case was in all likelihood lost.[183] Ironically, Yates says almost nothing at all during this police interview. The grisly story is mostly told through Mehl's questions, to which Yates repeatedly responds with a simple "yes." In other words, Mehl provides the details about a crime he did not witness. Far away from a jury room, out of the spotlight and with a year's perspective, it seems that there is not enough in this confession to determine whether Andrea Yates knew that what she did was morally wrong. The transcript certainly does not provide enough information about her state of mind to say whether she "knowingly and intelligently" waived her *Miranda* rights although she certainly did so "voluntarily."

Testimony during trial indicates that Yates, during psychiatric care after the murders, believed that drowning her kids was the only way to save them "from eternal damnation."[184] Furthermore, an expert witness testified that in the past "Yates experienced voices and delusions" but was afraid to say anything because "Satan would hear her and harm her children."[185] "She also worried some of her doctors might be Satan or be influenced by

178. Associated Press, *Transcript of Andrea Yates' Confession*, (Feb. 21, 2002), *available at* http://www.chron.com/cs/CDA/story.hts/special/drownings/1266294.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Not only is this confession particularly compelling, but confessions in general are unduly persuasive and tend to result in guilty verdicts. *See* discussion *supra* notes 2-4.

184. Associated Press, *Doctor Says Mother Was "Driven by Delusions,"* N.Y. TIMES, Mar. 7, 2002, at A25.

185. *Id.*

Satan."[186] It would have helped Yates' defense if she had mentioned Satan or damnation in her taped confession; the jury could then have inferred that morally Yates thought she was doing the right thing by drowning her children and saving them from damnation. If she held delusions about Satan when she drowned her children and confessed to the police, then the exclusionary rule I've developed in this paper would be much easier to apply. Like Connelly, who heard the voice of God, Andrea Yates could not have made an "intelligent" decision to waive her *Miranda* rights if she believed Satan could hear her and influenced her doctors. Under *Connelly*, Yates voluntarily confessed, and she may have done so "knowingly" since she seemed to understand that the police would use her confession to punish her. But, again, if Satan haunted her thoughts, she could not have, under my exclusionary rule, met the "intelligent" requirement of a valid *Miranda* waiver.

Yates, however, did not mention Satan in her confession. Damnation only came up in the testimony of expert witnesses. Rusty Hardin, a prominent Houston criminal lawyer, believes that the jury's request for a tape recorder during deliberations indicated that the jurors concentrated on her confession rather than "voluminous psychiatric testimony presented to buttress her insanity plea."[187] The state needed to show that Yates confession was valid under *Miranda* only by a "preponderance of the evidence."[188] If the judge, like the jury, concentrated on the confession rather than the expert testimony, then it is not completely unreasonable that he concluded that the confession was valid, even when taking into account the "knowingly and intelligently" aspects of *Miranda*.

There are also non-legal reasons it was inappropriate for the jury to consider Andrea Yates's confession. According to Texas law, the jury had the impossibly difficult task of accurately determining if in her mind she knew that her actions were wrong. An inquiry into *mens rea* is routine in the law, but looking into someone's mind is difficult even when the person is completely sane and truthful. Small, but sometimes significant, pieces of information are always lost in the translation from someone's mind to his words to the perceptions of another person. The jury in the Andrea Yates case had absolutely no training, as far as we know, in mental illness generally or in how to interpret the words and actions of someone mentally ill specifically. To determine Andrea Yates's state of mind the jurors would have been much better off paying closer attention to each side's expert witnesses rather than Yates's confession.

I've argued in this paper that someone mentally ill may be disconnected from reality to the extent that he cannot accurately interpret the context of

186. *Id.*
187. Yardley, *supra* note 163.
188. *See supra* note 105.

his criminal confession. He cannot, in such a case, "knowingly" waive his *Miranda* rights. There is a similar reverse process. It is not possible for someone who is not familiar with mental illness to truly "know" the context of the words he hears from someone who is mentally ill. Very recently, a paranoid schizophrenic, James Colburn, was executed in Texas "for fatally stabbing a woman he was trying to rape."[189] No one denied that Colburn committed this act or that he was severely ill.[190] He may have committed the murder while hearing voices telling him to do it.[191] At trial, the prosecution showed a videotape of his confession which showed him "seemingly devoid of emotion, chewing a sandwich as he recounted the details of the killing."[192] Since the trial at least two jurors have expressed doubts about the death sentence: "One juror said Mr. Colburn's lack of emotion in the trial convinced her he was mean and lacked compassion, not insane.... [T]he jury did not realize that Mr. Colburn's demeanor could be explained by chronic schizophrenia."[193] If nothing else, this paper has been about the importance of context when dealing with the confessions of the mentally ill. Nothing proves this point more so than the jury's fateful misunderstanding of schizophrenia in the case of James Colburn.

VII. CONCLUSION

Because of the nature of confessions, the mentally ill are especially vulnerable either to giving false criminal confessions or to misunderstanding the context of their confessions, thus making statements against their own best interests that an average criminal suspect would not make. For this reason, this paper seeks to fashion an exclusionary rule that would, under certain circumstances, make the confessions of someone suffering from mental illness inadmissible in a criminal trial. This exclusionary rule is based on the controlling constitutional principles regarding criminal confessions as articulated in *Miranda* and its progeny. This is a line of cases that was recently reaffirmed in *Dickerson v. United States*.[194] According to *Miranda*, a suspect must relinquish his Fifth Amendment right to remain silent "knowingly and intelligently" if the waiver is to be valid.[195] Since a mentally ill suspect is often incapable of knowingly and intelligently waiving his rights, then the confession of such

189. Associated Press, *A Mentally Ill Killer Is Executed in Texas* (Mar. 27, 2003), *available at* http://www.nytimes.com/2003/03/27/national/27EXEC.html.

190. *Id.*

191. Jim Yardley, *Amid Doubts About Competency, Mentally Ill Man Faces Execution*, N.Y. TIMES, Nov. 4, 2002, at A1.

192. *Id.*

193. *Id.*

194. 530 U.S. 428, 443 (2000) (The Court did not find "justification for overruling *Miranda*").

195. *Miranda*, 384 U.S. at 479.

a suspect should be suppressed. The two-part exclusionary rule I state in Part III should prove a steady guide to when the confession of someone suffering from mental illness must be deemed inadmissible.