Notes

The Standard of Proof for Preliminary Questions of Fact Under the Fourth and Fifth Amendments

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In *Jackson v. Denno*,[1] the United States Supreme Court held that a defendant is entitled to an adequate evidentiary hearing concerning the voluntariness of his confession.[2] However, the *Jackson* Court failed to discuss the burden of proof that must be satisfied in the voluntariness hearing.[3] As a result, federal and state courts adopted a variety of conflicting standards in the years following *Jackson*.[4] In *Lego v. Twomey*,[5] the Court resolved the conflict among jurisdictions when it held that the prosecution must prove by a preponderence of the evidence that a confession was voluntary.[6]

In *Colorado v. Connelly*,[7] the Court expanded on its earlier holding in *Lego* by requiring that the state must similarly prove a waiver of *Miranda*[8] rights by only a preponderance of the evidence. Although the Court noted that the states are free to establish higher standards of proof under their own constitutions,[9] the effect of the Court's ruling in *Connelly* is that all preliminary questions of fact involving an alleged violation of fourth and fifth amendment rights under the federal constitution are determined by the preponderance standard.[10]

This Note will examine alternative standards of proof along with the

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1. 378 U.S. 368 (1964).
2. *Id.* at 394.
3. Justice Black criticized the majority's failure to address the burden of proof question. *Jackson*, 378 U.S. at 404-05 (Black, J., dissenting in part and concurring in part).
4. *See* Lego v. Twomey, 404 U.S. 477, 479 n.1 (1972).
5. 404 U.S. 477 (1972).
6. *Id.* at 489. *See infra* text accompanying notes 37-40.
7. 107 S. Ct. 515 (1986).
8. Miranda v. Arizona, 384 U.S. 436 (1966).
9. *Lego*, 404 U.S. at 489.
10. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court imposed a heavy burden on the state to prove a knowing and intelligent waiver of the fifth amendment right against self-incrimination and the sixth amendment right to counsel. *Id.* at 475. In Lego v. Twomey, 404 U.S. 477 (1972), the Court took the first step in reducing this burden when it required that proof of voluntariness of a confession must be by a preponderance of the evidence. *Id.* at 489. Thus, the *Connelly* decision

difficulty factfinders experience when attempting to distinguish between these standards. It will then look at the Supreme Court's gradual progression to a single standard and Justice Brennan's continued opposition to the erosion of constitutional protections resulting from the adoption of such a standard.

The discussion will then turn to a review of decisions of individual states that have adopted standards higher than required by the United States Constitution. Finally, this Note will discuss an alternative approach to the selection of standards, which balances the purpose of the exclusionary rule of evidence with the cost of raising the standard,[11] and will suggest a solution to the problems identified.

THE CHOICE AMONG ALTERNATIVE STANDARDS OF PROOF

There are three[12] different standards of proof that have been recognized by state and federal courts, each of which presents an increasingly difficult burden for the state to meet. In ascending order of difficulty, the three standards require the state to prove its case by a preponderance of the evidence,[13] by clear and convincing evidence,[14] and beyond a reasonable

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removed the final area under the fifth amendment where preliminary fact questions were subject to a higher standard.

The standard of proof imposed upon the state in fourth amendment search and seizure cases has not been explicitly decided by the Court. However, many commentators suggest, often based on inference from *Lego*, that the preponderance standard suffices for all fourth amendment issues except for consent to warrantless searches. *See, e.g.*, S. SINGER & M. J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK § 8.60, at 300 (1986); Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 296 (1975); J. HALL, JR., SEARCH AND SEIZURE § 26:28, at 708 (1982). In United States v. Matlock, 415 U.S. 164 (1974), the Court stated in a footnote that it saw no reason for requiring a standard higher than a preponderance in suppression hearings. *Id.* at 177 n.14. Many states require clear and convincing proof that consent was voluntary. J. HALL, JR., *supra* at § 4:22 n.2. *See infra* notes 90-92 and accompanying text.

Fourth amendment rights vary significantly from those granted under the fifth amendment. Under the fourth amendment, the defendant initially bears the burden of proving that the proffered evidence was seized illegally. Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980); *but see* MCCORMICK ON EVIDENCE § 180, at 523-24 (E. Cleary 3d ed. 1984)[hereinafter MCCORMICK ON EVIDENCE](The wide variety of issues raised by an exclusionary objection makes it difficult to establish uniform rules of allocation. "The lack of uniformity is undoubtedly due in part to uncertainty as to the most efficient and fair allocations of the burdens." *Id.* at 524).

Under the fourth amendment, the defendant must also prove he has standing to object to the evidence. This requires proof of a legitimate expectation of privacy in the property seized or the premises searched. *See, e.g.*, *Rawlings*, 448 U.S. at 104-05; Rakas v. Illinois, 439 U.S. 128, 133-34 (1978); United States v. Salvucci, 448 U.S. 83, 95 (1980).

Under the fourth amendment, once the defendant establishes that he has standing and that evidence was seized illegally, the prosecution bears the burden of proving the availability of an exception to the exclusionary rule. S. SINGER AND M.J. HARTMAN, *supra* at § 8.60, p. 300. If the prosecution relies on the independent source rule or the inevitable discovery doctrine, it must establish the admissibility of the evidence by a preponderance of the evidence. Nix v. Williams, 467 U.S. 431, 444 (1984).

11. Saltzburg, *supra* note 10, at 275. Professor Saltzburg argues that the present standards for determining the admissibility of evidence ignore the different goals that evidentiary rules are designed to accomplish. *See infra* text accompanying notes 100-13.

12. Some courts have identified a fourth standard. *See, e.g.*, Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966)("clear, unequivocal and convincing"); United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962)("clear and positive evidence"). These standards are variants of the clear and convincing standard. *See* MCCORMICK ON EVIDENCE, *supra* note 10, § 340, at 959.

13. *See, e.g.*, Lego v. Twomey, 404 U.S. 477 (1972).

14. *See, e.g.*, State v. Pacheco, 481 A.2d 1009 (R.I. 1984). The intermediate standard usually

doubt.[15] In addition to these standards, the *Miranda* Court imposed a "heavy" burden of proof of a waiver of fifth amendment protections against self-incrimination and the right to counsel.[16] The Supreme Court has not clearly defined the meaning of "heavy burden," but it is higher than a preponderance and lower than beyond a reasonable doubt.[17]

The standard of proof required to satisfy the ultimate burden of persuasion often varies depending upon the character of the case.[18] Criminal cases, for example, require proof of guilt beyond a reasonable doubt.[19] Civil cases, on the other hand, require the party who has the burden of persuasion to prove a fact by a preponderance of the evidence.[20]

The costs to society of an incorrect decision significantly affect the choice of the proper standard of proof.[21] The preponderance standard is sufficient for civil matters because society is indifferent as to which party succeeds, but is concerned, nonetheless, with reducing the likelihood of er-

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contains words such as "clear," "unequivocal," and "convincing." *See, e.g.*, Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 286 (1966).

15. *See, e.g.*, In re Winship, 397 U.S. 358 (1970).

16. *Miranda*, 384 U.S. at 475.

17. When applying the heavy burden standard, courts look to the totality of the circumstances to determine if the defendant made a knowing and voluntary waiver of his constitutional rights. *See, e.g.*, Deputy v. State, 500 A.2d 581, 590-91 (Del. 1985). In Colorado v. Connelly, the Supreme Court rejected the heavy burden requirement. *Connelly*, 107 S. Ct. at 522-23; *see also infra* notes 43-47 and accompanying text.

18. This Note discusses the standards of proof used in deciding preliminary questions of fact. This is distinct from the ultimate burden of persuasion in a case. However, a discussion of the ultimate burden of persuasion is necessary to show how the standards vary.

19. The United States Constitution requires proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). *See generally* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977)(Professor Underwood argues that the reasonable doubt standard serves two functions: 1) it reduces the likelihood of an erroneous conviction; and, 2) it singles out criminal convictions as a particularly serious adjudication by the courts. *Id.* at 1306-07).

20. Some civil matters require a more stringent standard of proof, usually the clear and convincing standard. Libel is a common example. *See* 9 WIGMORE ON EVIDENCE § 2498 (Chadbourne rev. 1970), and MCCORMICK ON EVIDENCE, *supra* note 10, §§ 339-40, at 956-61.

21. Justice Harlan observed that "the choice of the standard for a particular variety of adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations." In re Winship, 397 U.S. at 370 (Harlan, J., concurring). *See also* Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1073-74 (1968). Professor Kaplan describes these costs as "disutilities." He states that society views the disutility of convicting an innocent defendant as greater than the disutility of acquitting a guilty defendant. Further, he notes that, in civil cases, great detail is often given to juries regarding the burden of proof. This is not true in a criminal case, however. Professor Kaplan argues that the reasonable doubt standard is purposely not quantified because the disutilities vary with each case. Therefore, the relative disutilities determine the appropriate standard of proof. *Id.* at 1073-74.

For an argument against the use of probabilistic methods in the factfinding process see Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). Professor Tribe argues against the use of mathematics to facilitate the decisionmaking processes that occur during a trial. He states that there are inherent limitations in the use of mathematics in rulemaking and that its dangers far outweigh its benefits.

For an analysis of probabilistic approaches to burdens of persuasion see Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985). Professor Cohen criticizes earlier probabilistic theorists for failing to recognize that the probability estimate made by factfinders is based upon analysis of only a sample of the total available information. *Id.* at 398. He proposes a "probabilistic legal decisionmaking model" that requires factfinders to "determine that their best estimate of the probability in question exceeds the threshold level . . . based on the evidence presented, but they also must have a certain level of confidence that the true probability, based on all possible evidence, exceeds that threshold." *Id.* at 399.

rors.[22] The function of the standard of proof is to inform the factfinder of the degree of confidence our society thinks the factfinder should have in the correctness of factual conclusions in the particular case.[23] Thus, as Chief Justice Burger observed, the choice among standards is "more than an empty semantic exercise."[24]

While the significance of the choice of standards cannot be overstated, in practice the distinction between the standards is often lost. Numerous academic studies indicate that judges and juries apply inconsistent definitions to the standards.[25] These studies often require the decisionmaker to quantify each standard in terms of the degree of certainty necessary to satisfy the burden of persuasion.

The preponderance standard is the easiest to quantify. By definition, the preponderance standard requires that the trier-of-fact believe that the proposition is more probably true than not. Therefore, the probability of truth must be greater than fifty percent.[26]

Quantification of the other standards is more difficult. Consequently, the results are more varied. For example, a survey of federal judges in the Eastern District of New York[27] revealed a great disparity in the probabilities that the judges believe are required to satisfy the various burdens.[28]

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22. Addington v. Texas, 441 U.S. 418, 423 (1979).

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

24. *Addington*, 441 U.S. at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)(Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972)).

25. *See, e.g.,* H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 182-90 (1966)(The authors hypothesize that judges and juries have different thresholds of conviction which explains why, in their sample, juries did not vote for conviction as often as did judges); Simon, *Judges' Translations of Burdens of Proof into Statements of Probability,* 13 TRIAL LAWYER'S GUIDE 103 (1969)(Professor Simon's survey required judges to translate the beyond a reasonable doubt standard into probabilities. The subject judges were asked what the probability that the defendant committed the act would have to be in order for them to decide he was guilty. The probabilities required by the judges ranged from 50% to 100%. Based on her results and the evidence she found, Professor Simon concluded that judges are accurate assessors of their own behavior and that the current system which does not define the phrase "beyond a reasonable doubt" in precise terms should be retained); Simon and Mahan, *Quantifying Burdens of Proof,* 5 LAW & SOC'Y REV. 319 (1971)(The authors report that jurors do not apply the standards in the manner that judges believe they do); Winter, *The Jury and the Risk of Nonpersuasion,* 5 LAW & SOC'Y REV. 335 (1971)(Professor Winter examines possible reasons for the Simon and Mahan results. He suggests that jury instructions regarding the burden of proof be changed to appropriately reflect the role of the jury in civil and criminal cases); L.S.E. Jury Project, *Juries and the Rules of Evidence,* 1973 CRIM. L. REV. 208 (The study concludes that the standard of proof instruction may influence a juror's decision). *See also* McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?,* 35 VAND. L. REV. 1293 (1982), discussed *infra* at note 28. According to Chief Justice Burger, studies such as these may only be academic exercises and the ultimate truth may be unknowable because the factfinding process varies among individuals. Addington v. Texas, 441 U.S. at 424-25.

26. *See, e.g.,* United States v. Schipani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968), *aff'd,* 414 F.2d 1262 (2d Cir. 1969), *cert. denied,* 397 U.S. 922 (1970). *See also* 1 CALIFORNIA JURY INSTRUCTIONS—CIVIL, BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) 2.60 (7th ed. 1986)(" 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it.").

27. Judge Weinstein surveyed ten of his colleagues in the Eastern District of New York to illustrate the wide variation in opinion. He suggests that this variation justifies a "high probability requirement in criminal cases partly on the ground that some triers would tend to shave the barriers to a finding of guilt." United States v. Fatico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978).

28. *Id. See also* McCauliff, *supra* note 25. Professor McCauliff reports a similar disparity from the results of her survey of all federal district and appellate judges and justices of the United States Supreme Court. She concludes that decisionmakers must have a clearly prescribed level of certainty

Although each judge placed the standards in the same order on the continuum of available standards, the judges varied widely in their assessments of the relative probabilities for the different standards of proof.[29]

The variation in these probabilities suggests that courts may reach different conclusions when faced with identical fact patterns even if they are asked to apply the same standard of proof. It is apparent that the definition of each standard must be clarified in order to ensure that the proper standard is used in each case. Only then can the courts achieve the consistent results society expects from its judicial system.[30]

LEGO v. TWOMEY AND *COLORADO v. CONNELLY*: THE COURT ADOPTS A SINGLE STANDARD OF PROOF FOR PRELIMINARY FACT QUESTIONS UNDER THE FOURTH AND FIFTH AMENDMENTS

Preliminary fact questions that involve a claimed violation of constitutional rights frequently arise under the fourth and fifth amendments. The fundamental rationale that raises the preliminary fact question is vastly different in fifth amendment cases than in fourth amendment cases. If a question is raised regarding the voluntariness of a confession, the reliability of the evidence itself is suspect.[31] In a preliminary challenge under the fourth amendment, the method used to obtain the evidence is scrutinized. There is no question of the reliability of the evidence.[32] For some commentators, this difference, among others, justifies a higher standard in fifth amendment cases.[33] The Supreme Court, however, disagrees, and now requires the state to satisfy fourth and fifth amendment challenges by only a preponderance of the evidence.

Coerced Confessions

No class of evidence is more prejudicial than a confession.[34] As a result, courts established rigid prerequisites to the admission of a confession.[35]

and suggests that jury instructions that define the preponderance standard and the clear and convincing standard in terms of the other standards will prevent misapplication of the burden of proof. She states that greater precision in using the present standards will "contribute to better decision-making and greater respect for the integrity of the judicial system." *Id.* at 1335.

29. The judges were asked to assess probabilities for four different standards of proof. Their responses ranged as follows: preponderance, 50-51%; clear and convincing, 60-75%; clear, unequivocal and convincing, 65-90%; and, beyond a reasonable doubt, 76-95%. *Fatico*, 458 F. Supp. at 410. Although this survey evaluated four standards, the "clear, unequivocal and convincing" standard is only a variant of the "clear and convincing" standard. *See supra* note 12.

30. *See supra* notes 21-24 and accompanying text.

31. *See infra* notes 38 and 41 and accompanying text.

32. *Id.*

33. *See, e.g.*, Saltzburg, *supra* note 10, at 294-95.

34. *Connelly*, 107 S. Ct. at 530 (Brennan, J., dissenting).

35. *See* Jackson v. Denno, 378 U.S. 368 (1964). In *Jackson*, the Court held that the fourteenth amendment guarantees a defendant who timely alleges that a confession was involuntary "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." *Id.* at 380.

For an example of the procedures required for the admissibility of a confession, see Holmes v. State, 67 Md. App. 244, 507 A.2d 197 (1986): "1. *Must the Defendant Interpose an Objection?—Yes.* . . . 2. *Is a Bare Objection Enough?—Yes.* . . . 3. *Are a Hearing and a Judicial Ruling Required?—Yes.* . . . 4. *What is the Constitutional Test?—Voluntariness.* . . . 5. *What is the Burden of*

Because of the prejudicial potential of a confession its reliability is of great significance. For this reason, courts and commentators often argue that a strict standard of proof is required to protect the defendant's constitutional right against self-incrimination.[36]

In *Lego v. Twomey*,[37] the Court took the first step in lowering the standard of proof in cases involving allegedly coerced confessions. In *Lego*, the Court held that the prosecution must prove the voluntariness of a confession by a preponderance of the evidence.

The *Lego* Court rejected the defendant's argument that the "beyond a reasonable doubt" standard is required to adequately protect the values secured by the exclusionary rule.[38] While acknowledging that the defendant's argument was "straightforward and . . . appeal[ing]," the Court held that the Constitution does not compel the beyond a reasonable doubt standard.[39] In support of its holding, the Court cited a lack of evidence that constitutional rights had suffered from the use of a lower standard for determining admissibility. Finally, the *Lego* Court concluded that determining admissibility by a beyond a reasonable doubt standard would not increase the deterrent effect on unlawful police and prosecutorial conduct sufficiently to justify keeping probative evidence from the jury.[40]

Ever since the *Miranda* Court established that the prosecution bears a heavy burden to prove waiver of the constitutional rights against compelled self-incrimination, the Court has consistently viewed waivers of *Miranda* rights in a light much different from waivers of other constitutional rights.[41]

Proof?—A Preponderance of the Evidence. . . . 6. To Whom is the Burden Allocated?—The State." *Id.* at 248-49, 507 A.2d at 199 (citations omitted)(emphasis in original).

36. *See, e.g.,* Lego v. Twomey, 404 U.S. at 492 (Brennan, J., dissenting); Saltzburg, *supra* note 10 at 295.

37. 404 U.S. 477 (1972).

38. *Id.* at 487-88. In Elkins v. United States, 364 U.S. 206 (1960), the Supreme Court stated that there are two purposes of the fourth amendment exclusionary rule: the first "is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it," *Id.* at 217; the second reason is "the imperative of judicial integrity." *Id.* at 222.

The defendant in *Lego* also argued that he was not proven guilty beyond a reasonable doubt, as required by In re Winship, 397 U.S. 358 (1970), because his confession had been proven voluntary by only a preponderance of the evidence. *Lego*, 404 U.S. at 482. The Court found this argument to be without merit. The voluntariness hearing required by Jackson v. Denno, 378 U.S. 368 (1964), was designed to protect the individual's constitutional right against self-incrimination. *Lego*, 404 U.S. at 485. The procedure was designed to detect coerced confessions. All coerced confessions are inadmissible. Therefore, the procedure does not affect the jury's province or capacity to assess the truthfulness of a confession that is admitted into evidence. *Id.* The Court concluded that, because the voluntariness hearing does not affect the reliability of jury verdicts, judging the admissibility of a confession by a preponderance of the evidence is not contrary to the requirements of In re Winship. *Id.* at 486. *Winship* requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *Winship*, 397 U.S. at 364. In *Lego*, neither the confession nor its voluntariness were elements of the crime with which the defendant had been charged. Therefore, the Court concluded that the defendant's rights under *Winship* had not been violated. *Lego*, 404 U.S. at 487.

39. *Lego*, 404 U.S. at 488.

40. *Id.* at 489.

41. *See* D. NISSMAN, E. HAGEN & P. BROOKS, LAW OF CONFESSIONS § 11.3, at 150-51 (1985). "A waiver is ordinarily an intentional relinquishment . . . of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Prior to the *Miranda* decision, the prosecution had to show only that a custodial suspect had responded voluntarily given the totality of the circumstances. D. NISSMAN, E. HAGEN & P. BROOKS, *supra*, at § 6.3. In Schneckloth v. Bustamonte, 412 U.S. 218

Following *Miranda*, the Court reaffirmed the higher standard for waivers in *Tague v. Louisiana*.[42] In *Tague*, the Supreme Court reversed a state court which held that there is a presumption that the defendant understood his rights and that the defendant must overcome that presumption by proving he had not waived these rights. The Supreme Court noted that there is a presumption that a defendant did not waive his rights and, in the complete absence of evidence to the contrary, the defendant's confession must not be admitted.

In *Connelly*, the Court eliminated the distinction between a waiver of fifth amendment rights and the voluntariness determination.[43] The Court, using the rationale from *Lego v. Twomey*, held that the prosecution must prove a waiver of *Miranda* rights by only a preponderance of the evidence.[44] The Court reversed the decision of the Colorado Supreme Court, which held that, since custodial interrogation conducted in violation of *Miranda* creates a presumption of compulsion,[45] the prosecution must prove a waiver by clear and convincing evidence.[46]

After *Connelly*, the preponderance standard applies to all preliminary questions of fact under the fifth amendment unless the states adopt their own higher standards.[47]

Illegal Searches and Seizures

Fourth amendment exclusionary rules have consistently been governed by the preponderance standard.[48] The fourth amendment exclusionary rule is designed to serve two functions. First, it serves to deter unlawful police conduct by removing the incentive to disregard constitutional protections.[49] Second, the exclusionary rule is necessary because, without it, the judicial system would be placed in the awkward position of impliedly condoning unlawful police conduct whenever it would convict a defendant based upon illegally obtained evidence.[50] These purposes are less compelling than those preventing admission of a confession obtained through the use of custodial interrogation: evidence is kept from the jury for purposes unrelated to the reliability of verdicts.

(1973), the Court distinguished the waiver of rights under the fourth and fourteenth amendments from a waiver of both the sixth amendment right to counsel and the fifth amendment right against self-incrimination. *Id.* at 241-42. The Court noted that the fourth amendment guarantees against unreasonable searches and seizures and has "nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." *Id.* at 242. The Court concluded that a higher standard in fourth amendment cases would be contrary to the community's interest in encouraging consent to searches because these searches may lead to essential evidence. *Id.* at 243.

42. 444 U.S. 469 (1980)(per curiam).
43. *See supra* note 41.
44. *Connelly*, 107 S. Ct. at 523.
45. Oregon v. Elstad, 105 S. Ct. 1285 (1985).
46. People v. Connelly, 702 P.2d 722 (Colo. 1985).
47. Lego v. Twomey, 404 U.S. at 489. *See infra* notes 79-99 and accompanying text.
48. The Supreme Court has not explicitly stated that the preponderance standard applies in fourth amendment cases. In United States v. Matlock, 415 U.S. 164 (1974), the Court made a footnote reference to the *Lego* decision and stated that the preponderance standard applies at all suppression hearings. *Id.* at 177 n.14. *See also supra* note 10 and accompanying text.
49. Elkins v. United States, 364 U.S. 206, 217 (1960).
50. *Id.* at 222-23.

The Supreme Court recently extended the application of the preponderance standard to include evidence offered under the inevitable discovery exception to the exclusionary rule.[51] This doctrine allows the state to use evidence obtained as a result of illegal activity on the part of the government if the state can show by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.[52] The Court reasoned that exclusion of this type of evidence would not increase the deterrent effect of the exclusionary rule.[53]

In *Nix v. Williams*,[54] the Court rejected Williams' argument that requiring proof of inevitable discovery by only a preponderance is inconsistent with the Court's earlier holding requiring proof by clear and convincing evidence that an in-court identification was not tainted by an improper pre-trial identification.[55] The Court distinguished the two situations, noting the difficulties encountered in establishing that an in-court identification was the result of the witness' independent observation rather than a reinforcement of an observation during a pre-trial lineup. The inevitable discovery rule, the Court observed, focuses on demonstrated historical facts capable of ready verification or impeachment rather than on speculative elements.[56] Therefore, the Court was unwilling to adopt a standard of proof higher than that required in fourth amendment suppression hearings.

In dissent, Justice Brennan argued that the state must satisfy its burden of proof by clear and convincing evidence.[57] Justice Brennan distinguished the independent source rule from the inevitable discovery rule, noting that the independent source rule allows evidence to be admitted that was, in fact, obtained lawfully.[58] The inevitable discovery rule, by contrast, depends upon the "hypothetical finding" that the evidence would have been discovered by ongoing investigations. This difference was crucial to Justice Brennan.[59] A higher standard is necessary to "protect fully the fundamental rights served by the exclusionary rule."[60] Increasing the burden of proof also impresses the factfinder with the importance of the decision and reduces

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51. Nix v. Williams, 467 U.S. 431 (1984). Although Nix v. Williams was a sixth amendment case, the preponderance standard required by *Nix* is clearly applicable to cases arising under the fourth amendment. J. HALL, JR., *supra* note 10, at § 22.13 (Supp. 1987).

52. *Nix*, 467 U.S. at 444.

53. *Id.*

54. 467 U.S. 431 (1984).

55. *Id.* at 445 n.5. In United States v. Wade, 388 U.S. 218 (1967), Justice Brennan wrote the plurality opinion holding that, after an in-court identification is challenged, the government has an opportunity to show by clear and convincing evidence that a courtroom identification was not tainted by a pretrial identification made without the presence of the defendant's counsel. *Wade*, 388 U.S. at 240. The *Wade* opinion did not discuss why the clear and convincing standard was selected rather than the beyond a reasonable doubt standard.

56. *Nix*, 467 U.S. at 445 n.5.

57. *Nix*, 467 U.S. at 459 (Brennan, J., dissenting). Justice Brennan did not explain why he chose the clear and convincing standard rather than the beyond a reasonable doubt standard. It seems, however, that he is more troubled by the overwhelming impact of a confession on the ultimate verdict than he is by the violation of rights protected by the exclusionary rule. *See infra* note 64.

58. *Id.*

59. *Id.*

60. *Id.* at 459.

the risk that illegally obtained evidence will be admitted.[61]

JUSTICE BRENNAN'S CONSTITUTIONAL QUESTION APPROACH

One method of selecting the proper standard of proof is to vary the standard based on whether or not a constitutional question is involved.[62] Only Justices Brennan, Douglas, and Marshall have expressly adopted this approach.[63] Justice Brennan has expressly applied the constitutional question approach only to coerced confessions. However, in his dissent in *Nix v. Williams*, he implied that the exclusionary rule protects fundamental rights guaranteed by the fourth amendment. Thus, he was compelled to argue that proof of inevitable discovery by clear and convincing evidence is necessary to adequately protect these rights.[64]

In his *Lego* dissent, Justice Brennan stated that the reasons that underlie the requirement of proof of guilt beyond a reasonable doubt[65] also support using the higher standard to prevent the admission of involuntary confessions.[66] The preponderance standard necessarily allows more involuntary confessions into evidence. Therefore, Justice Brennan argued, the Court must be prepared to justify the view that it is no more serious to admit involuntary confessions than it is to exclude voluntary confessions.[67] Justice Brennan could not accept this view because of the fundamental belief in our society that the conviction of an innocent man is more egregious than the release of a guilty man.[68]

Justice Brennan repeated these arguments in his *Connelly* dissent.[69] He also rejected the *Connelly* majority's statement that the voluntariness determination is not designed to increase the reliability of jury verdicts.[70]

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61. *Id.* at 459-60.

62. *See generally* Saltzburg, *supra* note 10, at 285-87. Professor Saltzburg analyzes the three methods used to decide the standard of proof to be used in deciding preliminary fact questions: 1) the "traditional" approach, which views the preponderance standard as proper for all preliminary fact questions; 2) the criminal/civil approach, which raises the standard in criminal cases; and 3) the constitutional approach, which raises the standard if a constitutional issue is involved. He criticizes each method and proposes a balancing test that would allow a higher standard if the defendant can establish a need for added protection that exceeds the costs of raising the standard.

63. In Lego v. Twomey, 404 U.S. 477 (1972), Justices Douglas and Marshall joined Justice Brennan's dissent which advocated a beyond a reasonable doubt standard of proof in compelled self-incrimination cases. In Colorado v. Connelly, 107 S. Ct. 515 (1986), Justice Marshall again joined Justice Brennan's dissent which argued that allegedly involuntary confessions are never admissible without proof of voluntariness beyond a reasonable doubt.

64. *Nix*, 467 U.S. at 459 (Brennan, J., dissenting). *See also supra* text accompanying notes 57-61. The *Nix* dissent expanded Justice Brennan's earlier views on the exclusionary rule to the inevitable discovery context. In *United States v. Calandra*, 414 U.S. 338, 355-56 (1974) (Brennan, J., dissenting), Justice Brennan complained that exempting grand jury proceedings from the exclusionary rule downgrades the rule to a mere determination of its deterrent effect in a particular situation and ignored its many other significant functions. *Calandra*, 414 U.S. at 356 (Brennan, J., dissenting). Professor Saltzburg argued that Justice Brennan would apply the constitutional question approach to fourth amendment cases in addition to fifth amendment cases. Saltzburg, *supra* note 10, at 286 n.47.

65. *See supra* note 19 and accompanying text.

66. *Lego*, 404 U.S. at 493-95 (Brennan, J., dissenting).

67. *Lego*, 404 U.S. at 494 (Brennan, J., dissenting).

68. *Id. See also* Kaplan, *supra* note 21, at 1073-74.

69. 107 S. Ct. at 532 (Brennan, J., dissenting).

70. *Id.* The *Connelly* majority relied on the Court's analysis in Lego v. Twomey, 404 U.S. 477 (1972), for the proposition that the voluntariness determination is not related to the reliability of jury

In *Connelly*, the Court held that a confession is not involuntary unless it results from coercive police activity.[71] The defendant in *Connelly* claimed that his confession was not voluntary since it resulted from a chronic schizophrenia that destroyed his ability to make free and rational choices.[72] The Court, however, noted that there was a complete absence of the "essential link between coercive activity of the State . . . and a resulting confession . . . ."[73]

The *Connelly* Court also stated that the "sole concern" of the fifth amendment protections established in the *Miranda* decision is protecting against governmental coercion.[74] Thus, the Court reasoned, "[t]he voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word."[75]

Justice Brennan interpreted the Court's restricted definition of an involuntary confession to mandate a heightened standard of proof.[76] He also determined that the Court's redefinition of a voluntary confession ignored the traditional requirement that examined the totality of circumstances to determine voluntariness and that it made reliability of these confessions a central concern.[77] He stated that minimum standards of due process require the trial court to find substantial external evidence of the reliability of the confession before admitting a mentally ill person's confession into evidence.[78]

THE STATES' APPROACH

In *Lego v. Twomey*, the United States Supreme Court recognized that individual states are free to adopt a standard more strict than the preponderance standard.[79] Despite the rapid expansion of state constitutional jurisprudence,[80] few state courts have imposed the higher standard of proof urged by

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verdicts. 107 S. Ct. at 522. In *Lego*, the Court stated that the purpose of a voluntariness hearing is to protect the constitutional right of an individual not to be compelled to testify against himself. The voluntariness determination, according to the Court, has no impact on the jury's ability to determine the accuracy or weight of confessions admitted into evidence. *Lego*, 404 U.S. at 486.

71. *Connelly*, 107 S. Ct. at 522.

72. *Id.* at 519. The defendant approached an off-duty police officer and, after receiving the *Miranda* warnings, confessed that he had committed a murder ten months earlier. He described the event and took police officers to the scene. During a later interview he became disoriented and was taken to a state hospital for evaluation. At a preliminary hearing, a doctor testified that the defendant suffered from chronic schizophrenia and was in a psychotic state at the time he confessed. The doctor's interviews revealed that the defendant believed that the "voice of God" told him to go to Denver from Boston and confess to the murder. The doctor testified that the psychosis did not substantially affect the defendant's cognitive abilities. Thus, even though the defendant fully understood his *Miranda* rights, his psychosis interfered with his ability to make free and rational choices and directly motivated his confession. *Id.*

73. *Connelly*, 107 S. Ct. at 521.

74. *Id.* at 523.

75. *Id.*

76. *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting).

77. *Id.* at 529.

78. *Id.* at 530-31.

79. *Lego*, 404 U.S. at 489. The Court cited several cases that had addressed the standard to be applied in a *Jackson* voluntariness hearing. At the time of the *Lego* decision, the state and federal courts varied widely as to what standard they applied in a preliminary voluntariness hearing. Many courts required proof of voluntariness by a preponderance of the evidence; others required proof beyond a reasonable doubt. *Id.* at 479 n.1.

80. *See generally* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

Justice Brennan's dissents in *Lego*,[81] *Connelly*,[82] and *Nix*.[83]

Coerced Confessions

Of the forty-four states, including the District of Columbia, where courts have explicitly stated the standard used in a voluntariness hearing, only ten vary from the preponderance standard. Nine use the beyond a reasonable doubt standard.[84] One state, Rhode Island, applies the clear and convincing standard.[85]

In the waiver arena, even fewer states impose a higher burden than required under the federal constitution. Four states require proof of a waiver beyond a reasonable doubt.[86] Delaware retains the *Miranda* requirement that places a "heavy burden" on the state to prove a waiver.[87] Rhode Island requires proof of waiver by clear and convincing evidence.[88]

Illegal Searches and Seizures

Although the preponderance standard is the prevailing standard of proof for preliminary questions of fact under the fourth amendment,[89] many states require clear and convincing proof of consent in cases involving a warrantless search.[90] Justification for the higher standard for consent varies.

Constitutional Law, 63 TEX. L. REV. 1141 (1985)(The author examines the trends in state constitutional law and the different methods employed by the states to establish their own bodies of constitutional law. The author also discusses the different views of federal-state relationships used by state courts when they establish their own constitutional law). *See also* Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986)(Professors Collins and Galie report that, during 1985, there were at least nineteen cases in which state supreme courts provided constitutional protections that were unavailable under the federal constitution. The authors also note that the majority of state constitutional law during 1985 was merely reactive in the sense that many state decisions were prompted by federal decisions rather than by the state court's own desire to establish certain rights).

In *Michigan v. Long*, 463 U.S. 1032 (1983), the United States Supreme Court recognized the ad hoc method then used to determine jurisdiction over cases that may have been decided on an independent and adequate state ground. The Court adopted a hard-line rule under which the Court has jurisdiction unless the adequacy and independence of the state ground is obvious from the face of the state court opinion. *Long*, 467 U.S. at 1040-41.

81. *Lego*, 404 U.S. at 495 (Brennan, J., dissenting).

82. *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting).

83. *Nix*, 467 U.S. at 459 (Brennan, J., dissenting).

84. Coppock v. State, 480 N.E.2d 941 (Ind. 1985); State v. Seward, 509 So. 2d 413 (La. 1987); Commonwealth v. Fernette, 398 Mass. 658, 500 N.E.2d 1290 (1986); Jones v. State, 461 So. 2d 686 (Miss. 1984)(en banc); State v. Goddard, 122 N.H. 471, 446 A.2d 456 (1982); State v. Johnson, 218 N.J. Super. 290, 527 A.2d 892 (App. Div. 1987); People v. Todd, 134 Misc. 2d 988, 513 N.Y.S.2d 941 (Co. Ct. 1987); State v. Janis, 356 N.W.2d 916 (S.D. 1984); Hill v. State, 91 Wis. 2d 315, 283 N.W.2d 585 (1978).

85. State v. Pacheco, 481 A.2d 1009 (R.I. 1984).

86. Myers v. State, 510 N.E.2d 1360 (Ind. 1987); Commonwealth v. Benjamin, 399 Mass. 220, 503 N.E.2d 660 (1987); People v. Reyes, 133 Misc. 2d 174, 506 N.Y.S.2d 541 (Crim. Term 1986); State v. Gregg, 405 N.W.2d 49 (S.D. 1987).

87. Deputy v. State, 500 A.2d 581 (Del. 1985), *cert. denied*, 107 S. Ct. 1589 (1987).

88. State v. Baton, 488 A.2d 696 (R.I. 1985).

89. *See supra* note 10.

90. The following states require clear and convincing, or similarly expressed, proof of voluntary consent: Phillips v. State, 446 So. 2d 57 (Ala. Crim. App. 1983), *cert. denied*, 467 U.S. 1254 (1984); Rodriquez v. State, 262 Ark. 659, 559 S.W.2d 925 (1978) ("clear and positive"); People v. Carlson, 677 P.2d 310 (Colo. 1984); Wilson v. State, 470 So. 2d 1 (Fla. Dist. Ct. App. 1984); State v. Harwood, 94 Idaho 615, 495 P.2d 160 (1972); People v. Lucas, 88 Ill. App. 3d 942, 410 N.E.2d 1040 (1980) ("clear and positive testimony"); State v. King, 191 N.W.2d 650 (Iowa 1971), *cert. denied*,

Many states justify the higher standard because the consent acts as a waiver of the fourth amendment right against unreasonable searches and seizures.[91] Other states require the higher standard because consent overcomes any illegality that precedes it.[92]

Few states have addressed the standard of proof under the inevitable discovery doctrine. Of the states that have addressed the issue, the majority apply the preponderance standard.[93] A small number of states require clear and convincing proof.[94] The New Jersey Supreme Court justified this higher standard based on the inequities to the defendant if the preponderance standard is required.

In *State v. Sugar*,[95] the New Jersey Supreme Court held that the state must show by clear and convincing evidence that it would have "continued established investigatory procedures that would have inevitably resulted in the discovery of the controverted evidence, wholly apart from its unlawful acquisition."[96] The court reasoned that a higher standard was proper because the state "is responsible for the loss of the opportunity lawfully to obtain the evidence;"[97] the state created the uncertainty as to what may have happened had there been no illegal conduct; the state possesses all evidence relating to whether it legally obtained the evidence; and the defendant is at a disadvantage because his constitutional rights were violated and he has no independent evidence to show whether the evidence may have been obtained lawfully.[98] The New Jersey Supreme Court rejected the beyond a reasonable doubt standard because the issue of "inevitable discovery does not relate to an element of the crime."[99]

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406 U.S. 908 (1972); State v. Hoven, 269 N.W.2d 849 (Minn. 1978) ("manifestly voluntary"); Lightford v. State, 90 Nev. 136, 520 P.2d 955 (1974); State v. Mann, 103 N.M. 660, 712 P.2d 6 (Ct. App. 1985); People v. Tinneny, 99 Misc. 2d 962, 417 N.Y.S.2d 840 (Crim. Term 1979); State v. Phillips, 25 N.C. App. 5, 212 S.E.2d 172 (1975); Coon v. State, 587 P.2d 1373 (Okla. Crim. App. 1978); State v. Glenn, 83 Or. App. 650, 732 P.2d 946 (1987); State v. Cody, 293 N.W.2d 440 (S.D. 1980); Armstead v. State, 677 S.W.2d 266 (Tex. Ct. App. 1984); Hairston v. Commonwealth, 216 Va. 387, 219 S.E.2d 668 (1975), *cert. denied*, 425 U.S. 937 (1976); State v. Mathe, 35 Wash. App. 572, 668 P.2d 599 (1983). *See* J. HALL, *supra* note 10, at § 4:22 n.2.

Mississippi requires proof of the voluntariness of consent beyond a reasonable doubt. In Luton v. State, 287 So. 2d 269 (Miss. 1973), *cert. denied*, 417 U.S. 920 (1974), the court analogized the voluntariness of a consent to the voluntariness of a confession which requires, in Mississippi, proof of voluntariness beyond a reasonable doubt. *Luton*, 287 So. 2d at 272.

91. *See, e.g.*, Luton v. State, 287 So. 2d 269 (Miss. 1973), *cert. denied*, 417 U.S. 920 (1974); McCall v. People, 623 P.2d 397 (Colo. 1981).

92. *See, e.g.*, State v. Kennedy, 290 Or. 493, 502, 624 P.2d 99, 104 (1981).

93. *See, e.g.*, State v. McLaughlin, 454 So. 2d 617 (Fla. Dist. Ct. App. 1984); People v. Faysom, 131 Ill. App. 3d 517, 475 N.E.2d 945 (1985); Commonwealth v. Elliott, 714 S.W.2d 494 (Ky. Ct. App. 1986); State v. Bowling, 22 Ohio Misc. 2d 30, 489 N.E.2d 1076 (Ct. C.P. 1984); State v. Gourley, 680 S.W.2d 483 (Tenn. Ct. App. 1984).

94. *See, e.g.*, Fain v. State, 271 Ark. 874, 611 S.W.2d 508 (1981); State v. Sugar, 100 N.J. 214, 495 A.2d 90 (1985).

95. 100 N.J. 214, 495 A.2d 90 (1985).

96. *Sugar*, 100 N.J. at 240, 495 A.2d at 104.

97. *Id.* at 239, 495 A.2d at 103.

98. *Id.*

99. *Id.* at 238, 495 A.2d at 103.

AN ALTERNATIVE APPROACH: BALANCING THE PURPOSE SERVED BY THE EXCLUSION OF EVIDENCE AGAINST THE COST OF A HIGHER STANDARD

In an article published shortly after the *Lego* decision, Professor Stephen Saltzburg argued that approaches which attempt to apply a single standard of proof for all preliminary questions of fact are inherently flawed.[100] These methods, he noted, ignore the fact that the various rules of competency were designed to serve vastly different objectives.[101]

Professor Saltzburg proposed an alternative approach that considers three factors to determine if a higher standard is appropriate: (1) the underlying purpose of the rule of competency and "its relationship to the merits of the [case] and the standard of proof used to decide the merits; (2) the extent to which that purpose would be enhanced by [an increased] standard of proof; and (3) the cost . . . of raising the standard."[102] Under this approach, a heightened standard of proof is appropriate only if the evidence poses a great risk of unreliability and the cost of raising the standard sufficiently to enhance the reliability of the ultimate verdict is not too great.

Professor Saltzburg identified two types of preliminary fact questions.[103] Resolving the first type affects only the admissibility of the offered evidence. It has no direct bearing on the operative facts of the case. An example of the first type of preliminary fact question is a "motion . . . to suppress evidence allegedly obtained in violation of the fourth amendment."[104] The facts relevant to a determination of the preliminary fact question do not bear on whether the defendant committed the offense of which he is charged.

The second type, according to Professor Saltzburg, "may have a logical bearing . . . upon the legally operative facts."[105] For example, the facts surrounding an allegedly coerced confession may not only resolve the preliminary question of fact, but they may significantly impact on the outcome of the case as well.

Professor Saltzburg suggests that once the two types of preliminary fact questions are identified, the purpose of the underlying rule of competency that raises the preliminary question of fact is of key import.[106] Those rules of competency that do not serve to exclude unreliable evidence fall within the first category. Rules of privilege are a good example. The attorney-cli-

100. Saltzburg, *supra* note 10, at 275.

101. *Id.* A rule of competency is a rule of evidence that requires evidence to be excluded despite its relevance. *See* McCORMICK ON EVIDENCE, *supra* note 10, at § 53. A preliminary question relating to the competency of evidence is distinct from a preliminary question concerning its conditional relevancy. Federal Rule of Evidence 104(a) governs preliminary questions relating to the competency of evidence. These questions are decided by the judge. Federal Rule of Evidence 104(b) allows evidence to be admitted if its relevance depends upon the fulfillment of a condition of fact. Questions of conditional relevancy are decided by the jury unless, after the parties have introduced all evidence relating to the preliminary fact, the judge decides that the jury is unable to find the existence of the preliminary fact. *Id. See also* 1 WIGMORE ON EVIDENCE § 14.1 (Tillers rev. 1983).

102. Saltzburg, *supra* note 10, at 287.

103. *Id.* at 289.

104. *Id.*

105. *Id.*

106. *Id.*

ent privilege, for example, exists to encourage a client to consult with his legal advisor.[107] Exclusion of evidence by application of a rule of privilege does not relate to the reliability of the evidence. Other rules of competency, such as the hearsay rule and the best evidence rule, that serve to keep unreliable evidence from the jury fall within the second category.[108]

According to Professor Saltzburg, the standard of proof should vary depending on whether or not the purpose of the rule of competency that precludes the admission of the evidence relates to reliability.[109] If reliability of evidence is at issue, a greater risk of error in preliminary factfinding necessarily causes a greater risk of error in the final judgment by the jury.[110] However, Professor Saltzburg does not think that the increased risk of error in decisionmaking is, by itself, sufficient to raise the standard of proof. Instead, Professor Saltzburg balances the cost of raising the standard against the seriousness of the reliability problem.[111]

Under Professor Saltzburg's balancing approach few preliminary fact questions are subject to a standard higher than a preponderance of the evidence.[112] In essence, Professor Saltzburg advocates a higher standard only when the "probability of unreliability is great and the evidence is extremely prejudicial."[113]

CONCLUSION

The Supreme Court has adopted a single standard of proof for all preliminary fact questions under the fifth amendment. Fourth amendment preliminary questions are decided under the same standard. Using a single standard has its benefits. For one, the role of the ultimate factfinder becomes increasingly important, although perhaps much more difficult. Under the preponderance standard, significantly more arguably unreliable evidence will be admitted. The factfinder must be certain to give each evidentiary item its

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107. 8 WIGMORE ON EVIDENCE § 2291 (McNaughton rev. 1961).

108. Saltzburg, *supra* note 10, at 290. Some rules serve a dual purpose. The constitutional exclusion of coerced confessions, for example, prevents unreliable evidence from reaching the jury while also deterring unconstitutional actions by the police. These hybrid rules cannot be rigidly classified. *Id.* *See supra* note 38.

109. Saltzburg, *supra* note 10, at 290.

110. *Id.* at 291.

111. *Id.*

112. Professor Saltzburg cites six reasons why the preponderance standard suffices in most cases: 1) few cases present a situation where the preliminary fact and ultimate issues coincide; 2) resolving the preliminary fact question will seldom dispose of the ultimate issue; 3) many forms of unreliable evidence do not pose significant reliability problems; 4) in many reliability situations, there is little prejudicial impact; 5) since the defendant may admit arguably unreliable evidence upon satisfying the preponderance standard, it is unfair to impose a higher burden on the prosecution; 6) in most cases, there is no good reason why legislatures cannot limit the protection provided to a defendant by the exclusionary rules. *Id.* at 291-92.

113. *Id.* at 292. Professor Saltzburg argues that the beyond a reasonable doubt standard should apply to the voluntariness determination because there is little cost to pay to assure that individuals will not be subject to illegal police activity. He states that carefully designed procedures and prosecutorial controls on police conduct could virtually eliminate all doubt as to whether a confession is voluntary. *Id.* at 294.

There is little doubt that Professor Saltzburg would require the beyond a reasonable doubt standard for proof of a waiver of *Miranda* rights as well. Administrative and prosecutorial procedures could easily be designed to ensure that a waiver was voluntary. This would be a small price to pay for the enhanced protection of fifth and sixth amendment rights.

proper weight relative to other evidence. The factfinder must also make his own evaluation of reliability and voluntariness. This heightened role of the ultimate factfinder is appealing in a judicial system, such as ours, based on the adversarial process. The use of the preponderance standard as the single standard also allows the state to be certain of the level of persuasion it must satisfy. This is not always true under the other standards.[114]

Of course, benefits are seldom enjoyed without their costs. The exclusive use of the preponderance standard fails to allow for sufficient flexibility by the judge. This weakens the judge's function. Further, the preponderance standard, especially in the case of an allegedly involuntary confession, allows more arguably illegally obtained evidence to be admitted. Since confessions are the single most persuasive evidentiary item, a convincing argument that the lower standard does not adequately protect the accused is easily made.

Professor Saltzburg's balancing approach[115] is most appealing. However, his balancing test may lead to difficulties in application and inconsistency in decisionmaking. These problems are not insurmountable. Most often, the preponderance standard adequately protects the accused.[116] In those situations where the defendant establishes that he will be harmed by potentially unreliable evidence, especially in the case of coerced confessions, and where the costs to the state of excluding the evidence are minimal, the state should be required to establish the admissibility of the evidence beyond a reasonable doubt. In this way, the accused is provided maximum protection while the state remains able to use the evidence if it satisfies the higher standard of proof.

114. *See supra* notes 25-29 and accompanying text.

115. *See supra* text accompanying notes 100-113.

116. *See supra* notes 112-113 and accompanying text.