Evidence Beyond

ABOLISH ARIZONA'S

"It is to be acknowledged that the law should grow and the doctrine of stare decisis should not require a slavish adherence to authority where new conditions require new rules of conduct."[1]

Few would quibble with such a truism. Yet on April 15, 2004, the Arizona Court of Appeals invoked an archaic common law doctrine to overturn Maria De Lourdes Nieves's conviction for murdering her infant daughter, Michelle.[2]

The court's sole reason for setting aside the jury's verdict of guilt was its application of the corpus delicti rule, which precludes criminal convictions based solely on confessions. The court reversed the conviction even though Nieves voluntarily confessed to smothering her daughter. The State filed a petition for review with the Arizona Supreme Court, asking it to reverse the court of appeals and abolish the corpus delicti rule. On Sept. 15, 2004, the Arizona Supreme Court denied the State's petition without comment.[3]

At its best, the corpus delicti rule is an anachronism, a nod to tradition adding nothing to the truth-seeking process of modern criminal prosecutions. At its worst, as on full display in *State v. Nieves,* the rule actively thwarts justice. New conditions require new rules of conduct. Arizona should abolish the corpus delicti rule.

State v. Nieves: JUSTICE DENIED

The death of Michelle Nieves was a tragedy that led to a missed opportunity for the Arizona Supreme Court.

She died at her home in Phoenix on Mar. 21, 2001, just shy of 10 months old.[4] Responding to the hospital where Michelle's tiny body was transported, a Phoenix Police detective identified himself to the baby's mother, Maria de Lourdes Nieves, who fainted. When Nieves came to, the detective told her an autopsy would be performed because Michelle's death was unexplained.

After speaking to the police at the hospital, Nieves reported to her minister that her baby died in her sleep. But two weeks after Michelle's funeral, Nieves confessed to the pastor that she killed Michelle by covering her nose and mouth with her hand. When the pastor asked her why she killed Michelle, Nieves said she had a fight with her husband and he threatened to divorce her and take the baby.

The pastor struggled with her new knowledge, finally relaying the confession to her husband, who called the police. That night at the church, two police detectives approached Nieves and asked her to accompany them to the station. Nieves said, "I did it out of frustration. I didn't mean to do it."

At Nieves's request, the detective permitted the pastor to be present during the videotaped interview at the station, where she repeated her confession of the killing. Nieves was arrested and ultimately charged with first-degree murder.

The doctor who performed the autopsy found no evidence of trauma, nasal blocking, infections or other abnormalities. He could find no organic reason for Michelle's death, saw no evidence of suffocation, and reported to the police that she was "probably a SIDS death." Two weeks after the autopsy, Nieves's confessions to killing Michelle were relayed to the doctor, who concluded that asphyxia due to smothering could not be ruled out as a cause of death.

At trial, the defense introduced testimony that the baby had repeatedly lost consciousness for short periods of time several days before she died. But the day before the baby died, Nieves never mentioned that fact to a pediatrician who examined Michelle. The defense introduced the testimony of a doctor who said the defendant was in an untreated psychotic state at the time she confessed, and the jury heard experts from both sides describe false confessions. Finally, Nieves told the jury she did not kill Michelle but found the baby with her nose and mouth covered.

The jury found Nieves guilty, and she was sentenced to life in prison with the possibility of parole after 35 years. On appeal, Nieves claimed, *inter alia*, that her conviction must be reversed because the prosecution had not satisfied the corpus delicti rule. Without her confessions, she argued, a natural cause for Michelle's death could not be ruled out. Seemingly uncomfortable with its own decision, the court of appeals agreed.[5]

THE ROOTS OF THE RULE

The historical origins of the corpus delicti rule are murky at best.[6] Many scholars believe the doctrine owes its genesis, at least in part, to a widely reported 17th-century English case in which three people were executed following a false confession to murder, only to have the erstwhile "victim" turn up alive.[7] Such a shock naturally called into question the competency of the criminal justice process, and com-

the Confession

CORPUS DELICTI RULE

BY B. DON TAYLOR III

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mentators began to recognize that confessions were potentially unreliable evidence of objective truth. To prove the confession was not the product of a fevered imagination, some courts began to require evidence of the crime independent of the confession.

In contrast to English courts, which never universally accepted the doctrine, characterizing it as "'a rule of judicial practice' rather than part of the law of evidence," and limiting its application to homicide cases,[8] 19th-century American courts applied the corpus delicti rule to all crimes. American commentators echoed the concerns of their English predecessors and noted an infamous 1812 Vermont case in which brothers Steven and Jesse Boorn were convicted of murdering their own brother-in-law, based in part on a false confession. Sentenced to hang, one of the brothers narrowly avoided execution when the "victim" was found in New Jersey, having intentionally disappeared because he was tired of his wife.[9] Every state ultimately developed its own confession corroboration rule.[10]

The widely varying confession corroboration rules found throughout the United States generally fall into two groups. Most states apply an orthodox formulation of the corpus delicti rule, requiring the prosecution to present sufficient evidence, independent of any extrajudicial[11] confession, to establish the *corpus delicti*[12] of the charged offense, i.e., that the crime charged was actually committed by someone.* Only then may the confession be considered in proving the defendant guilty beyond a reasonable doubt. Arizona's rule falls into this first group.

The federal courts and an increasing number of states address confession corroboration differently. In 1954, the United States Supreme Court rejected the corpus delicti rule in favor of an approach focusing directly on the reliability of the confession itself.[13] Under this competing rule, often called the "trustworthiness approach," the prosecution must present evidence bolstering the reliability of the confession, but is not required to present independent evidence establishing the *corpus delicti* of the offense.[14] Once the court is satisfied that the confession appears reliable, the confession may be considered as any other evidence.

The corpus delicti rule and the trustworthiness approach are "separate and contradictory."[15] The differences are significant. Courts and commentators have recognized that the infirmities at the heart of the corpus delicti rule are not present when the inquiry focuses on the reliability of the confession itself.[16] In contrast to the corpus delicti rule, the trustworthiness approach permits convictions of the admittedly guilty without establishing "technical obstruction[s] to the administration of justice."[17]

This explains the trend. In the last 50 years, at least 11 states and the District of Columbia have adopted the trustworthiness approach.[18] Recognizing the corpus delicti rule's capacity to do harm, the Utah Supreme Court joined the trend in 2003, abolishing the rule in favor of the trustworthiness approach.[19]

ARIZONA'S CORPUS DELICTI RULE

Despite popular misconceptions of the corpus delicti rule as ancient and indispensable, it did not appear in Arizona until *Reynolds v. State*[20] in 1916. There, in upholding a conviction for unlawfully importing liquor, the Arizona Supreme Court cited a Massachusetts case and a popular digest annotation and stated, "The great weight of authority is against the sufficiency of an uncorroborated extrajudicial confession to warrant a conviction."[21] Having implicitly adopted the corpus delicti rule without elaboration, the Court reviewed the circumstances attending the defendant's apprehension and found the crime was "reasonably established" even without the defendant's confession. Following this rather inauspicious beginning, the rule was raised unsuccessfully by appellants for the next 42 years. No reversal would come until *State v. Hernandez*[22] in 1958.

In *Hernandez*, the defendant's voluntary confession was admitted at trial, and he was convicted of being an accessory to kidnapping after the fact by harboring or concealing the kidnapper. On appeal, Hernandez argued that the evidence presented at trial, absent his confession, failed to establish the *corpus delicti* of the charge. Looking at the dearth of corroborating evidence admitted at trial, the Arizona Supreme Court agreed, noting the general rule that "before the state can use a confession or incriminating statements of a defendant there must be submitted other evidence outside the confession or statements tending to prove corpus delicti, i.e., that someone committed the crime with which the defendant is charged and which he has confessed or admitted."[23]

Though this formulation of the rule broke no new ground, the *Hernandez* Court also wrestled with the quantum of

* Throughout this article, *corpus delicti*, as used to delineate the constituent elements of the crime, is italicized. References to the corpus delicti rule are not. For more on the distinction, *see* endnote 12.

proof necessary to establish the *corpus delicti*. After noting the various approaches taken by other jurisdictions,[24] the Court held, "The foundational proof by independent evidence is adequate for the purpose of allowing the use of confessions or incriminating statements if it is sufficient, assuming it is true, to warrant a reasonable inference that the crime charged was actually committed by some person."[25]

The *Hernandez* formulation has defined Arizona's corpus delicti rule for 47 years, but several exceptions have been carved from its margins.[26] In addition, courts have struggled to define whether the rule is a creature governing the procedural admissibility of statements, or one substantively defining the sufficiency of the prosecution's evidence to convict.[27] Doctrinal difficulties aside, Arizona courts referenced the rule in more than 40 opinions between *Hernandez* and *Nieves,* only once reversing a conviction on that basis [28] and once affirming a trial court's order suppressing the defendant's statements.[29] Both cases involved relatively minor offenses.

In the 88 years since the rule first appeared in Arizona, courts have regularly applied it but never questioned its continued vitality.[30] The opinions have devoted only superficial attention to the historical development of the rule,[31] and still less to its critics.[32] As the first Arizonan with a murder conviction reversed by the corpus delicti rule, Maria de Lourdes Nieves has fundamentally altered that landscape.

A POSITIVE OBSTRUCTION TO JUSTICE

Most commentators believe the corpus delicti rule should be relegated to the jurisprudential dustbin.[33]

Learned Hand doubted the rule had "any substantial necessity in justice."[34] Wigmore found it "a positive obstruction to the course of justice."[35] Despite scholarly suspicion and a distinct trend toward rejection, the orthodox corpus delicti rule persists as the majority view. Although one authority noted, "When discussed, the rationale [for the rule] rarely is lucid,"[36] courts advance three justifications to defend the rule's legitimacy.[37] These are that the rule: (1) protects innocent persons from their own objectively false confessions, (2) protects against coerced confessions, and (3) promotes better law enforcement by discouraging techniques that rely too heavily on confessions. Measured against these justifications, however, the rule is wholly unnecessary and riddled with doctrinal inconsistencies.

Taking the three justifications in reverse order, discouraging police reliance on confessions is the least cited.[38] Indeed, no Arizona court has ever justified the rule citing a need to promote "better" law enforcement.[39] Moreover, the rationale describes questionable policy at best. As one authority has noted, "The notion that law enforcement can be made better by barring confessions ignores the fact that voluntary confessions are sometimes the product of good law enforcement."[40] In fact, the rationale betrays an unjustified suspicion of law enforcement motives and capabilities. We assume the police are competent to comply with modern constitutional requirements that discourage inappropriate techniques. Why would the law assume any additional incentive is needed to encourage the police to gather the best evidence required to sustain the prosecution's burden of proof? McCormick called this rationale "doubtful,"[41] and other commentators believe it has been disproved by the empirical evidence.[42]

If it was ever a compelling need, the rationale that the rule protects against coerced confessions has long since been rendered unnecessary. That false confessions occur cannot be denied.[43] But neither can one dispute that the corpus delicti rule predates the "prophylactic" protections of *Miranda v. Arizona*,[44] the right to counsel proclaimed in *Escobedo v. Illinois*,[45] and the current formulation of the constitutional voluntariness doctrine. Thus, any role the rule might once have played in discouraging police overreaching has been superseded by modern constitutional refinements. The rule cannot possibly do more to discourage coercion than the voluntariness doctrine itself.[46]

In fact, it does considerably less. Even confessions obtained by flagrant coercion are not excluded by the corpus delicti rule when the crime is real but was committed by someone other than the accused.[47] And this rationale cannot explain the rule's exclusion of confessions made to private parties in situations in which official coercion is impossible.

Because the rule cannot be legitimated by any ameliorative indirect effect on law enforcement, it is left to grasp for support in the need to protect innocent persons from being convicted of imaginary crimes. Indeed, this is the most commonly advanced rationale. Here, however, the rule comes at too high a price, "extracted in the form of reversed convictions of guilty persons, prosecutions abandoned or never begun … and tortured appellate reasoning to sustain convictions."[48]

The *sine qua non* of the corpus delicti rule, in any formulation, is a confession of guilt. Such confessions are either objectively true (real crimes committed by the accused) or objectively false (imaginary crimes or real crimes committed by someone other than the accused). When the rule excludes the former it undeniably subverts the truth-seeking process and results in admittedly guilty offenders escaping justice. Thus, the sole remaining rationale is valid only if the rule is indispensable in protecting the innocent from the latter. Yet the rule utterly fails to protect the overwhelming majority of false confessors: those who confess to real crimes committed by others.[49]

What remains is an exceedingly narrow category of cases in which the rule might claim to address any legitimate concern: cases involving un-coerced false confessions to imaginary crimes. One court facing this realization noted, "If that is all, it is not much."[50] But even for this tiny group of cases, the rule is wholly unnecessary unless we accept a rather offensive presumption: that juries cannot be trusted with confessions, either because they accept confessions uncritically[51] or because confessions are inherently more unreliable than other types of evidence.

Whether any such distrust of the jury is rational is in dispute. Some believe the suspicion to have been proved by empirical evidence, but others suggest the evidence shows juries are actually more critical of confessions than are judges.[52] Though the ongoing scholarly debate about false con-

fessions is beyond the scope of this article, one aspect of it is important. Even those most critical of jury evaluation of confessions do not advocate the retention of the corpus delicti rule as a solution. Rather, they suggest mandatory videotaping of interrogations and judicial scrutiny of confessions for reliability.[53] Such scrutiny is precisely what the trustworthiness approach accomplishes that the corpus delicti rule does not.

It also seems confessions are not inherently more unreliable than other forms of evidence. The experience of The Innocence Project at the Benjamin N. Cardozo School of Law shows that among the factors leading to wrongful convictions, false confessions rank below informant testimony, other false witness testimony, and faulty or fraudulent scientific evidence.[54] And all of these pale in comparison to "the major cause of wrongful convictions," mistaken eyewitness identifications.[55] Yet none of these types of evidence is subject to the corpus delicti rule.[56] Defendants may be convicted on evidence "at least as dubious as confessions [including] the testimony of minors, drunkards, felons, and physical evidence unsubstantiated by testimony" without regard to the "protections" offered by the corpus delicti rule.[57]

We trust juries daily to sort through conflicting evidence and ascertain the truth. In this regard, one outgrowth of the law's developing understanding of the causes of false confessions is that defendants are better able to present juries with credible expert testimony challenging the reliability of their own words.[58] For those who still question the jury's competence, some recent words of the Arizona Supreme Court are instructive:

> Our system provides even better tools to save us from junk scientists and charlatans. As the Supreme Court itself acknowledged, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." … For those who truly believe in the jury system, this, although imperfect, should be enough.[59]

To persist in believing such principles are appropriate to all forms of evidence except confessions is to ignore the reality of the corpus delicti rule's doctrinal inconsistencies, its demonstrated capacity for obstructing justice—and its especially pernicious effect in infanticide cases.

A RULE CONTRARY TO THE INTERESTS OF JUSTICE

It is not news that the most helpless among us can be smothered leaving virtually no physical evidence inconsistent with death by natural causes.[60] It is precisely this that makes the corpus delicti rule's application to infanticide cases so troubling, as commentators have warned for years.[61]

A decision like *State v. Nieves* was all but inevitable given Arizona's failure to face the rule's critics, but it did not have to be this way. Three weeks before Nieves's conviction was reversed, the Idaho Supreme Court affirmed a jury's verdict of guilt in a case involving virtually identical facts: an infant death initially diagnosed as SIDS, a mother's confession to smothering made to a therapist and then to the police, physical evidence that was consistent with smothering but did not independently establish smothering as the cause of death.[62] The disparate results are a function of different approaches. Idaho does not follow the corpus delicti rule.[63]

As a lens through which to focus on the inherent inadequacies of the corpus delicti rule, *State v. Nieves* is without peer. Nieves voluntarily chose to confess the murder to her pastor. She described exactly how she did it and why. Although minimal, the physical evidence was utterly consistent with Nieves's confessions. Nieves's videotaped confession to Detective Cisneros was constitutionally voluntary. And nothing suggests the police could have performed a better investigation.

Most important, a jury evaluated all the evidence. Twelve impartial Arizonans studied Nieves's confessions. They listened to experts describe Nieves's mental condition. They listened to expert opinion on false confessions. Having heard all the evidence, and having listened to Nieves herself, the jury believed Michelle was murdered. For those who truly believe in the jury system, such a finding is not set aside lightly.

OVERTURNED CONVICTIONS AND ABORTED PROSECUTIONS

State v. Nieves notwithstanding, the most significant harms wrought by Arizona's corpus delicti rule are not manifested in overturned convictions. Rather, they are measured in the daily operation of trial courts in which criminal defendants who voluntarily confess to real crimes can then hide behind the rule without ever alleging their confessions are false.

Prosecutors are hesitant to charge cases in which they cannot meet the strict requirements of the rule. Some charges are never filed, and some complaints issued by law enforcement officers are quickly dismissed. Other cases are dismissed at trial when witnesses fail to appear. Still others result in trial court suppression orders or acquittals on motions for directed verdicts.[64]

Although the abuse of the rule is certainly not confined to the limited jurisdiction courts, misdemeanor charges are particularly susceptible to its pernicious effects. For example, common domestic violence offenses involving non-injury assaults, threats or violations of orders of protection often produce no corroborating physical evidence. If prosecution witnesses fail to appear at trial—a common occurrence in these cases—the prosecutor's only evidence might be the admissions of the defendant. Given the inadmissible corroborating evidence, there is no real question in these cases but that the defendant has confessed to a real crime. Yet the prosecution is precluded from proceeding by the application of a rule that does not require even an allegation of falsity.

DUI charges involving single car accidents are regularly dismissed when there are no witnesses to the accident and the defendant's admission to driving is the prosecution's only evidence of that crucial element.[65] In the vast majority of such cases there is simply no doubt that the defendant's admission to driving was truthful.

To assert that such abuses should not be permitted to short-circuit prosecutions is not to suggest that all such cases will result in convictions. Indeed, lacking inde-

pendent evidence, these cases will be some of the prosecution's weakest. But the vestigial remains of an obsolete common law doctrine should no longer preclude prosecutions for real offenses simply because we illogically persist in believing it might protect against imaginary ones.

A CALL TO ACTION

At least one commentator would do away with corroboration rules entirely.[66] No state has yet been so bold. Those that have honestly acknowledged the corpus delicti rule's inherent limitations have opted to abolish it in favor of the trustworthiness approach favored by the U.S. Supreme Court. Even if its benefits are entirely salutary, at least the trustworthiness approach does not impede the truth-seeking process.

In a perfect world, the Arizona Supreme Court would have risen to the challenge squarely presented by the State's petition for review in *State v. Nieves* and abolished the corpus delicti rule.[67] The Court has been largely absent from the rule's development since *Hernandez*, and the time has come for the court to face the rule's critics. The rule is not a constitutional requirement.[68] It appears in no promulgated rule of procedure. Rather, it exists wholly as a common law decisional rule inconsistent with both state statute[69] and the *Arizona Rules of Evidence*.[70]

Because the Court has been unwilling to act on its own, other avenues should be explored. The Arizona Legislature could statutorily abolish the rule in favor of the trustworthiness approach. Alternatively, a proposition referred to the ballot would accomplish the same end. Finally, a formal rule of procedure could be promulgated. Because any person can petition the Arizona Supreme Court to amend rules of procedure,[71] any of these processes would allow the citizens of Arizona to engage the issue.

Legislative abrogation of the corpus delicti rule is not without precedent. In 1990, the Arizona Legislature adopted A.R.S. § 28-692(L)—now § 28-1388(G)—which statutorily proclaims the rule inapplicable to a DUI defendant's admission to driving in cases in which col-

lisions result in death or physical injury.[72] Maine has a similar statute applicable to all charges of driving under the influence and driving on a suspended license.[73] In 2000, the Florida Legislature abolished the corpus delicti rule for certain sex offenses.[74] California voters have limited the reach of the rule in certain situations.[75] Indeed, the corpus delicti rule is statutory in several states.[76] In at least one, it exists as a codified rule of procedure.[77]

How the change occurs is less important than *that* it occur. The political scientist Harold Laski once observed, "What we call necessary institutions are often no more than institutions to which we have become accustomed."[78] Legal doctrines are no different. If Arizona's corpus delicti rule were merely a quaint nod to tradition, procedurally irritating but doing no harm, its continued existence could be tolerated. It is not. The rule is the living embodiment of all the public loathes when pundits rant about criminals getting off on technicalities, and its continued existence undermines the very ideals it evolved to serve. "Bereft of legal or logical foundation, the only justification for the [corpus delicti] rule is to preclude conviction."[79] That is not a justification that Arizona should endorse. AZAT

endnotes

1. *Goldman v. Kautz*, 531 P.2d 1138, 1139 (Ariz. 1975).
2. *State v. Nieves*, 87 P.3d 851 (Ariz. Ct. App. 2004).
3. *State v. Nieves*, CR 04-0185 PR, Order dated Sept. 21, 2004.
4. Facts not appearing in the published opinion are taken from a review of the trial court record.
5. One passage in the opinion seems to be a call for the Arizona Supreme Court to consider whether the corpus delicti rule should be abolished. In *dicta*, the court noted that the continued viability of the rule was in question but the rule had been applied recently by the Arizona Supreme Court in a homicide case. *Nieves*, 87 P.3d at 857. Acknowledging that it lacked the authority to modify or disregard rulings of the Arizona Supreme Court, and noting that the State had not asked for reconsideration of the rule, the court felt compelled to overturn the jury's verdict. *Id.*
6. Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. Rev. 385, 399 (1993). Mullen's description of the rule's origins as "recent, humble, and confused" provides an interesting contrast to popular misconceptions of the rule as a doctrine with a venerable, ancient pedigree.
7. *Perry's Case*, 14 How. St. Tr. 1312 (1660). For a good description of this interesting case, *see* Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638 (1955) [hereinafter *Proof of the Corpus Delicti*]; *but see* Mullen, *supra* note 6, at 400, explaining that the application of the modern rule would not have altered the result in *Perry's Case*.
8. *Proof of the Corpus Delicti*, *supra* note 7, at 639 (quoting *Queen v. Unkles*, 8 Ir. R.C.L. 50 (1873)). The English rule also appears to have been applied to bigamy cases as an outgrowth of the "best evidence" principle. *Id.* at 640. In any event, it would appear that English courts never considered the rule anything more than a judicial rule of thumb. *See* Mullen, *supra* note 6, at 399.
9. *The Trial of Stephen and Jesse Boorn*, 9 Am St. Trials 73 (1916). A good description of the *Boorn* case can be found in Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 Va. L. Rev. 173 (1962).
10. In 1984, Massachusetts became the final state to adopt a corpus delicti rule. *Commonwealth v. Forde*, 466 N.E.2d 510 (Mass. 1984). Interestingly, however, the Massachusetts rule only requires independent proof of the first element of the *corpus delicti*, i.e., proof of loss. *Id.* at 513-14. *See infra* note 12. Thus, had Michelle Nieves been murdered in Massachusetts, the mere fact of her death would have been sufficient to permit her mother's confessions to be considered.
11. Extrajudicial confessions are those made out of court. Black's Law Dictionary 297 (6th ed. 1990). The rule has never been thought to apply to confessions made in open court. In addition, some states apply the rule only to full confessions (full acknowledgments of guilt) but not to admissions (acknowledgment of specific facts narrower in scope). Arizona applies the rule to both confessions and admissions. *State v. Romo*, 185 P.2d 757 (Ariz. 1947).
12. The term *corpus delicti* (literally the "body of the crime") generally refers to elements the prosecution must prove at trial to sustain a criminal conviction. It should not be confused with the corpus delicti rule, which regulates only whether a confession can be considered as part of the prosecution's case. Wigmore describes the constituent elements of the *corpus delicti* as: (1) proof of the injury or loss and (2) proof that the injury or loss resulted from criminal agency. 7 John H. Wigmore, Evidence in Trials at Common Law § 2072, at 524 (Chadbourne rev. 1978) [hereinafter Wigmore]. The prosecution also must prove the accused to be the criminal agent.
13. *Opper v. United States*, 348 U.S. 84 (1954). *See also Smith v. United States*, 348 U.S. 147 (1954). Though not technically companion cases, *Opper* and *Smith* must be viewed together. Considered in a vacuum, the language used in *Smith* has been misconstrued by courts as an application of the orthodox corpus delicti rule rather than the competing trustworthiness approach. To be fairly understood, *Smith* should be considered only in proper context, i.e., as a companion to *Opper*.
14. "It is sufficient if the corroboration merely fortifies the truth of the confession without independently establishing the crime charged." *Smith*, 348 U.S. at 156.
15. *Fontenot v. State*, 881 P.2d 69, 77 (Okla. Crim. App. 1994). In a murder case in 1994, the Oklahoma Court of Criminal Appeals realized that it had earlier applied both approaches together and that this had "obscured the proper method of resolving the issue." *Id.* Wholly abandoning the corpus delicti rule, the court proclaimed that the approach embraced by the federal courts since *Opper* was the only appropriate method.
16. Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121, 1151-53 (1984) (noting the trustworthiness approach better serves the policies behind a corroboration requirement than the corpus delicti rule, which "does not logically serve the policies"); *State v. Mauchley*, 67 P.3d 477 (Utah 2003).
17. *State v. Mauchley*, 67 P.3d at 485. *See also* Mullen, *supra* note 6, at 412 (noting the trustworthiness approach imposes fewer burdens on the prosecution than does the corpus delicti rule).
18. Even the rule's sole supporter acknowledges the trend. David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 Ohio St. L.J. 817, 832 (2003). *See also* Mullen, *supra* note 6, at 412; *State v. Mauchley*, 67 P.3d at 482-483 (recognizing a growing number of state courts abandoning the corpus delicti rule in favor of the trustworthiness approach).
19. *State v. Mauchley*, 67 P.3d 477. Mauchley lied about falling into an uncovered manhole and recovered a settlement from Salt Lake City's insurance carrier. Six months later, Mauchley

walked into the police station and confessed. Charged with insurance fraud and theft by deception, Mauchley pled guilty but challenged his conviction as precluded by Utah's corpus delicti rule. After analyzing the historical development of the rule, the Utah Supreme Court detailed the rule's many inherent weaknesses and concluded it was no longer necessary. Deciding that the rule from its conception was "erroneous because it inadequately protects the innocent, yet allows the guilty to go free," the court was persuaded that "more good than harm will come from abolishing the rule." *Id.* at 488.

20. *Reynolds v. State,* 161 P. 885 (Ariz. 1916). Several cases prior to *Reynolds* defined the *corpus delicti* of various offenses, but none of them applied any cognizable corpus delicti rule relating to the defendant's statements.
21. *Id.* at 888.
22. 320 P.2d 467 (Ariz. 1958).
23. *Id.* at 468.
24. Even today, this varies widely across the United States. In Virginia, the prosecution must establish the corpus delicti with "slight" evidence. *Watkins v. Commonwealth*, 385 S.E.2d 50, 54 (Va. 1989). New York requires "some proof, of whatever weight". *People v. Daniels*, 339 N.E.2d 139 (N.Y. 1975). At one point, Utah employed a "clear and convincing" standard. *State v. Weldon*, 314 P.2d 353, 357 (Utah 1957).
25. *Hernandez*, 320 P.2d at 469. This overruled two earlier cases holding the *corpus delicti* had to be established by clear and convincing evidence before the defendant's confession could be considered. *See Burrows v. State*, 297 P. 1029 (Ariz. 1931) (relying on cases from Texas and Connecticut), and *State v. Thorp*, 216 P.2d 415 (Ariz. 1950).
26. Thus, the rule does not apply to probation revocation proceedings, *State v. Lay*, 546 P.2d 41 (Ariz. Ct. App. 1976), to elements of the offense relating only to punishment, *State v. Cook*, 547 P.2d 50 (Ariz. Ct. App. 1976), to allegations of dangerousness, *State v. Bice*, 620 P.2d 227 (Ariz. Ct. App. 1980), to statements that themselves constitute the crime, *State v. Daugherty*, 845 P.2d 474 (Ariz. Ct. App. 1992), to statements made prior to the offense, *State v. Atwood*, 832 P.2d 593 (Ariz. 1992), to statements introduced at sentencing, *State v. Scott*, 865 P.2d 792 (Ariz. 1993), to elements that merely raise the offense to a higher degree, *State v. Villa*, 880 P.2d 706 (Ariz. Ct. App. 1994), or to preliminary hearings, *State v. Jones ex rel. County of Maricopa* (*Roche*, Real Party in Interest), 6 P.3d 323, 328 (Ariz. Ct. App. 2000). In addition, it is not error for the trial court to determine before trial whether the State can meet the requirements of the corpus delicti rule. *State v. Flores*, 42 P.3d 1186 (Ariz. Ct. App. 2002). Finally, *State v. Morgan*, 61 P.3d 460 (Ariz. Ct. App. 2002), essentially created a "closely related crimes" exception to the rule.
27. Although earlier opinions suggest the rule governs primarily admissibility, the court of appeals' most recent attempt to pigeonhole the rule proclaimed, "It is not so much a condition of admissibility, as it is a formulation of the required proof to take the evidence to the jury or to sustain the accused's guilt." *Jones*, 6 P.3d at 328 (citation omitted). The confusion is by no means limited to Arizona. Commentators have disagreed for years. *Cf. Ayling*, *supra* note 16, at 1136-1137 (asserting the rule governs the admissibility of evidence, not the ultimate sufficiency of the evidence to convict), *with* Note, *Developments in the Law— Confessions*, 79 HARV. L. REV. 935, 1082 (1966) [hereinafter *Developments*] (arguing the rule does not relate to admissibility but rather to sufficiency).
28. *State v. Villalobos Alvarez*, 745 P.2d 991 (Ariz. Ct. App. 1987) (overturning the defendant's conviction for possession of cocaine).
29. *State v. Flores*, 42 P.3d 1186 (Ariz. Ct. App. 2002) (affirming the trial court's application of the rule to suppress the statements of a defendant charged with possession of narcotic drugs for sale and transportation of narcotic drugs for sale).
30. The court of appeals came closest in *State v. Jones*, 6 P.3d at 323. Recognizing that several commentators believe the rule is unnecessary and should be abolished, the court opined that the rule "continues to play an essential part" because, although other doctrines and rules of evidence "protect the defendant from involuntary confessions, proof may be difficult to obtain, making this protection inadequate in certain cases." *Id.* at 327. As a defense of the corpus delicti rule, the opinion is strangely inapposite as it relies solely on the U.S. Supreme Court's opinion in *Smith v. United States*, 348 U.S. 147 (1954), to support this assertion. *Smith,* however, was defending the continued need for the *trustworthiness approach*, having just abandoned the orthodox corpus delicti rule in *Opper v. United States*, 348 U.S. 84 (1954).
31. Three courts have described the historical development of the rule. The most extensive treatments are found in *Jones*, 6 P.3d at 326, and *State ex rel. McDougal v. Superior Court* (*Plummer*, Real Party in Interest), 933 P.2d 1215, 1216-1217 (Ariz. Ct. App. 1996); *Daugherty*, 845 P.2d at 477, offers a briefer version.
32. On two occasions the court of appeals has acknowledged the rule's critics. In *Morgan*, 61 P.3d at 460, the court noted "the rule has been the subject of criticism claiming that other safeguards exist to prevent convictions based on coerced confessions and that the rule can impede the truth-finding process." *Id.* at 464 (citations omitted). The court then applied the rule without addressing the criticisms. *See also* note 30, describing *Jones,* 6 P.3d at 323.
33. Ayling, *supra* note 16, at 1202 (asserting the "illogical" corpus delicti version of the rule should be abandoned); Mullen, *supra* note 6, at 418 (noting the rationales advanced supporting the rule are poorly served and the rule applies where it is least needed); *Developments*, *supra* note 27, at 1084 (noting serious consideration should be given to elimination of the corpus delicti requirement); Maria Lisa Crisera, *Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8*, 78 CAL. L. REV. 1571, 1580 (1990) (stating the rule has "outlived its usefulness" and is an "ineffective safeguard"); J. Terry Schwarz, *California's Corpus Delicti Rule: The Case for Review and Clarification*, 20 UCLA L. REV. 1055, 1092 (1972-1973) (noting the rule no longer effectively accomplishes its purposes and has been superseded by modern principles and doctrines). Indeed, the rule appears to have only one outright defender. *See* Moran, *supra* note 18.
34. *Daeche v. United States*, 250 F. 566, 571 (2d Cir. 1918). Indeed, Judge Hand's opinion in *Daeche* is often credited with being the genesis of the trustworthiness approach later adopted in *Opper* and *Smith. See* Julian S. Millstein, *Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule*, 46 FORDHAM L. REV. 1205, 1217 (1977-1978).
35. WIGMORE, *supra* note 12, § 2070, at 395 (3d ed. 1940).
36. *Proof of the Corpus Delicti*, *supra* note 7, at 642.
37. Mullen, *supra* note 6, at 401. *See also* Crisera, *supra* note 33, at 1572-73; Schwarz, *supra* note 33, at 1087-90.
38. Ironically, this justification is most often traced to the U.S. Supreme Court's opinion in *Smith v. United States*, 348 U.S. 147 (1954), in which the Court was describing the need for the trustworthiness approach, having just rejected the corpus delicti rule in *Opper v. United States*, 348 U.S. 84 (1954).
39. In 1980, the court of appeals noted, "The reason for [the corpus delicti] rule is that no person should be convicted of a crime to which he confesses unless the state shows, by other testimony, that the confessed crime was in fact committed by someone. The contrary would authorize the return of conditions that existed in the days of the Inquisition." *State v. Bice*, 620 P.2d 227 (Ariz. Ct. App. 1980). The alarmist hyperbole aside, the quote is little more than a restatement of the rule itself serving as its own justification.
40. Mullen, *supra* note 6, at 406.
41. MCCORMICK ON EVIDENCE § 145 (5th ed. 1999).
42. Ayling, *supra* note 16, at 1193; *Developments*, *supra* note 27, at 1083.
43. *See* Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); Ayling, *supra* note 16. Indeed, in

rejecting the corpus delicti rule in favor of the trustworthiness standard, the U.S. Supreme Court noted, "The experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made." *Smith v. United States*, 348 U.S. 147 (1954).

44. 384 U.S. 436 (1966).
45. 378 U.S. 478 (1964).
46. If so, the voluntariness doctrine is a sham and should be fundamentally recast. And if this is true, the criminal justice system has a far greater problem than the (comparatively) minor injustices of the corpus delicti rule.
47. Of course, such confessions should be suppressed on voluntariness grounds, the corpus delicti rule having played no part. Modern defenders of the rule respond that the rule remains necessary because the voluntariness doctrine does not adequately discourage unreliable confessions. This argument misses the point. The voluntariness doctrine is not aimed at ensuring reliable confessions except indirectly and in the abstract because it is aimed directly at discouraging police overreaching. *See* Ayling, *supra* note 16, at 1127 (noting reliability concerns are collateral to the main purpose of the voluntariness doctrine). The *existence* of false confessions, even if they are rampant, does not justify the corpus delicti rule because it is also not directly concerned with reliability. The trustworthiness approach, which measures the reliability of the confession directly, solves this problem. *See* Gilbert G. Ackroyd, *Corroboration of Confessions in Federal and Military Trials*, 8 VILL. L. REV. 64, 71 (1963) (noting the confession's reliability should be tested directly, as the trustworthiness approach does, not "obliquely" as does the corpus delicti rule).
48. Mullen, *supra* note 6, at 386.
49. The delusional, or those seeking notoriety, are most likely to confess to actual, well-publicized crimes committed by others. *See* Mullen, *supra* note 6, at 403.
50. *People v. Rooks*, 243 N.Y.S.2d 301, 311 (N.Y. Sup. Ct. 1963).
51. The court of appeals' most elaborate discussion of the corpus delicti rule said precisely this. *Jones*, 6 P.3d at 327 (justifying the rule, in part, because juries are likely to accept confessions uncritically).
52. *See* Richard J. Ofshe & Richard A. Leo, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1997-1998) (arguing false confessions dominate all other case evidence); Ofshe & Leo, *supra* note 43, at 984 (arguing jurors are likely to treat confessions as more probative of guilt than any other evidence). *But cf.* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction From False Confessions*, 22 HARV. J. L. & PUB. POL. 523, 601 (1998-1999) (criticizing Ofshe &

Leo's conclusions and noting that "the case against jury evaluation of alleged false confessions has yet to be convincingly made"). *See also* Ayling, *supra* note 16, at 1180-1196 (noting the empirical literature disproves the traditional assumption that juries are more likely than judges to view confessions uncritically and that, on balance, juries are more critical of confessions than judges).

53. *See* Ofshe & Leo, *supra* note 43, at 1118 (advocating courts should evaluate the reliability of confessions to avoid admitting false confessions). *But see* Cassell, *supra* note 52, at 601 (arguing against routine judicial evaluation of confessions as unnecessary).
54. *See* The Innocence Project, Benjamin N. Cardozo School of Law, *Causes and Remedies of Wrongful Convictions*, <www.innocenceproject.org/causes/index.php>. The study appearing on the Web site categorizes the evidence implicated in the first 70 DNA exonerations of those wrongfully convicted. False confessions appeared in 15 cases. The testimony of informants or snitches was implicated in 16 cases. Seventeen cases involved false witness testimony. Defective or fraudulent science featured in 26 cases.
55. *Id.* Of the 70 exonerations, 61 involved mistaken eyewitness identifications. "Modern technology is proving what scientists, psychologists, and legal scholars have noted for years: eyewitness identification is often faulty *and is the major cause of wrongful convictions.*" *Id.* (emphasis added).
56. Out-of-court identification procedures employed by police may be challenged if they are too suggestive. This inquiry, however, focuses directly on the procedures themselves. *State v. Dessureault*, 453 P.2d 951 (Ariz. 1969); *Neil v. Biggers*, 409 U.S. 188 (1972). Accordingly, it is much more akin to the trustworthiness approach to confession corroboration than the corpus delicti rule.
57. Mullen, *supra* note 6, at 406-407.
58. *See* Paul G. Cassell, *Protecting the Innocent From False Confessions and Lost Confessions—and From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 526 (1997-1998) (arguing along with increased understanding of false confessions has come an improved ability to expose and prove such cases in court).
59. *State v. Logerquist*, 1 P.3d 113, 132-33 (Ariz. 2000) (reiterating Arizona's rejection of *Daubert/Kumho*). *See also* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 959-960 (1996-1997) (arguing that unless governmental misconduct has produced confession, due process should give the defendant only the right to present evidence of unreliability to the jury).
60. *See*, Catherine L. Goldenberg, *Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide*, 28 SW. U. L. REV. 599, 622 (1999) (noting it can be nearly impossible to distinguish natural death from suffocation in infants).
61. *Id.* (noting the unique problems SIDS presents in relation to the corpus delicti rule); *See also* Crisera, *supra* note 33, at 1587 (arguing the corpus delicti rule's application in infanticide cases "seems contrary to the interests of justice"), and *Developments*, supra note 27, at 1081 (recognizing difficulties with the rule in such cases because the little evidence on hand is often fully compatible with a non-criminal cause of death).
62. *State v. Tiffany*, 88 P.3d 728 (Idaho 2004).
63. *Id. See also State v. Urie*, 437 P.2d 24 (Idaho 1968) (holding slight corroboration will suffice and each element of the *corpus delicti* does not have to be established independent of the confession).
64. *See State v. Flores*, 42 P.3d 1186 (Ariz. Ct. App. 2002); Crisera, *supra* note 33, at 1583 (recognizing possibility that numerous trial courts have excluded statements).
65. For a good example of the monumental waste of resources attending the corpus delicti rule's problematic application to DUI cases, *see* R. Hawthorne Barrett, *Corpus Delicti in DUI Cases*, 49 S.C. L. REV. 1115 (1998). It is bad enough that trial courts struggle with the application of a rule providing no conceivable legitimate benefit to those accused of driving while impaired. That appellate courts struggle with tortuous analyses to sustain convictions adds insult to injury.
66. Mullen, *supra* note 6, at 418 (noting all forms of the corpus delicti rule should be abolished, including the corroboration requirement).
67. The Utah Supreme Court's recent decision to face the issue provides a matchless guide to any such judicial endeavor. *See State v. Mauchley*, 67 P.3d 477 (Utah 2003). The 17-page opinion details the historical development of the corpus delicti rule and its numerous inherent weaknesses, the developments in constitutional criminal law that make the rule unnecessary and the virtues of the trustworthiness approach. Included are practical considerations of applying the trustworthiness approach.
68. Millstein, *supra* note 34, at 1210 (citing *Aschmeller v. South Dakota*, 534 F.2d 830 (8th Cir. 1976)).
69. The language of the statute is not permissive. A.R.S. § 13-3988(A) provides,

    > In any criminal prosecution brought by the state, a confession *shall be admissible in evidence* if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it *shall be admitted in evidence* and the trial judge shall permit the jury to hear relevant evidence on the issue of the voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

    (italics added).
70. Rule 402, 17A.A.R.S. *Rules of Evidence*, makes all relevant evidence admissible. Rule 801(d)(2), 17A.A.R.S. *Rules of Evidence*, excludes admissions by party-opponents from the rule against hearsay.
71. Rule 28(A)(1), 17A.A.R.S. *Rules of the Supreme Court.*
72. The court of appeals recognized this abolition, in passing, in *State v. Daugherty*, 845 P.2d 474, 477 (Ariz. Ct. App. 1992). The vast majority of DUI cases, however, do not implicate A.R.S. § 28-1388(G) and are fully susceptible to the vicissitudes of the corpus delicti rule. It should be noted that the constitutionality of this statute has been challenged in a case now pending in the court of appeals. *State v. Werstler*, 1 CA CR-04-0380 (filed May 27, 2004).
73. ME. REV. STAT. ANN. Tit. 29, § 2431(4) (providing the statement may constitute sufficient proof by itself, without further proof of corpus delicti).
74. FLA. STAT. ANN. § 92.565. The statute adopts the trustworthiness approach for the admission of confessions for a limited number of offenses. Moreover, the trial court may consider all relevant evidence, including hearsay, in testing the trustworthiness of the confession. *See also State v. Dionne*, 814 So. 2d 1087 (Fla. 2002) (recognizing statutory abolition of the corpus delicti rule as a predicate to the admission of a confession). Where applicable, Florida's corpus delicti rule is strikingly similar to Arizona's. *Id.*
75. Indeed, as a consequence of adopting Proposition 8, a "Right to Truth-in-Evidence" provision of the California Constitution in 1982, the citizens of California abolished the rule completely as a predicate to confession admissibility. It remains a test of the sufficiency of evidence to sustain a conviction. *See People v. Alvarez*, 46 P.3d 372 (Cal. 2002) (also noting California's Penal Code § 190.41, approved by voters in 1990, provides that in capital cases, the *corpus delicti* of a felony-based special circumstance need not be proved independently of the defendant's extrajudicial confessions).
76. *See*, *e.g.*, ARK. CODE ANN. § 16-89-111(d) ("A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed"); GA. CODE ANN. § 24-3-53 ("A confession alone, uncorroborated by any other evidence, shall not justify a conviction"). Neither the Arkansas nor Georgia statutes apply to admissions. *See also* MINN. STAT. ANN. § 634.03, N.Y. CRIM. PROC. LAW § 60.50.
77. *See* Rule 20(4), Iowa R.CRIM.PROC.
78. HAROLD J. LASKI, AUTHORITY IN THE MODERN STATE (1919).
79. *People v. McMahan*, 548 N.W.2d 199, 205 (Mich. 1996) (Boyle, J., dissenting).