KATZ, J., dissenting. As expressed in my concurring opinion in *State* v. *James*, 237 Conn. 390, 439, 678 A.2d 1338 (1996) (concurring in result upon concluding that trial court determined that confession was voluntary beyond reasonable doubt), I remain convinced that article first, § 8, of the constitution of Connecticut[1] requires the state to prove beyond a reasonable doubt that a defendant's confession was voluntary before that confession may be admitted as evidence against the defendant at trial. Given the growing body of evidence that has come to light since *James* demonstrating the problem of erroneous convictions generally and false confessions specifically, I would use this opportunity to overrule this court's holding in *James* that "the preponderance standard provides a 'fair and workable test' . . . that strikes the appropriate balance . . . for the preliminary determination of voluntariness [of confessions]." (Citations omitted.) Id., 425–26. I believe that Connecticut should join the significant minority of states that have concluded that their state constitutions require that, in order to use a confession against a defendant, the state must prove beyond a reasonable doubt that the confession was "the product of an essentially free and unconstrained choice by its maker . . . ." *Culombe* v. *Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). Accordingly, I would reverse the judgment of the trial court and remand the case with direction to scrutinize the admissibility of the confession under a reasonable doubt standard.

I appreciate that the doctrine of stare decisis "cautions courts to tread lightly into the world of overruling precedent." *State* v. *Miranda*, 274 Conn. 727, 768, 878 A.2d 1118 (2005). This court has recognized that, "a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Internal quotation marks omitted.) *White* v. *Burns*, 213 Conn. 307, 335, 567 A.2d 1195 (1990). Nonetheless, "[t]he doctrine . . . is not . . . an inexorable command." *Lawrence* v. *Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); accord *Payne* v. *Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ("[s]tare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision" [internal quotation marks omitted]). This court has recognized that "[t]he value of adhering to precedent is not an end in and of itself . . . if the precedent reflects substantive injustice. Consistency must also serve a justice related end. B. Cardozo, The Nature of the Judicial Process (1921) p. 150 (favoring rejection of precedent when it 'has been found to be inconsistent with the sense of justice or with the social welfare')." *Conway* v. *Wilton*, 238 Conn. 653, 659, 680 A.2d 242 (1996).

Indeed, it is well recognized that, in a "case involv[ing] an interpretation of the Constitution . . . claims of stare decisis are at their weakest . . . where [the court's] mistakes cannot be corrected by Congress." *Vieth* v. *Jubelirer*, 541 U.S. 267, 305, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004); see also *Payne* v. *Tennessee*, supra, 501 U.S. 828; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406–10, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. *The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.* . . . The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. In the cases which now come before us there is seldom any dispute as to the interpretation of any provision. The controversy is usually over the application to existing conditions of some well-recognized constitutional limitation." [Citation omitted; emphasis added.]), overruled on other grounds by *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 387, 58 S. Ct. 623, 82 L. Ed. 907 (1938). "In short, consistency must not be the only reason for deciding a case in a particular way, if to do so would be unjust. Consistency obtains its value best when it promotes a just decision." *Conway* v. *Wilton*, supra, 238 Conn. 662. " 'It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations.' " *State* v. *Miranda*, supra, 274 Conn. 734, quoting *Barden* v. *Northern Pacific R. Co.*, 154 U.S. 288, 322, 14 S. Ct. 1030, 38 L. Ed. 992 (1894).

Recent studies demonstrating the significant role of admissions of involuntary and false confessions in wrongful convictions in this country provide compelling evidence that our conclusion in *James* as to the admissibility of confessions fails to promote just verdicts. Therefore, stare decisis should not control our decision in this case.

There is, for example, a considerable and growing body of anecdotal evidence regarding wrongful convictions that has been exposed through recent DNA exonerations. According to one authoritative source, as of April 12, 2007, 198 wrongfully convicted persons have been exonerated though the use of postconviction DNA testing in the United States. See http://innocenceproject.org/know (last visited April 12, 2007).[2] False confessions played a role in at least forty-one of those wrongful convictions. See R. Leo, S.

Drizin & P. Neufeld et al., "Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century," 2006 Wis. L. Rev. 479, 516. DNA exonerations, however, represent only a fraction of the actual number of wrongful convictions in this country.[3]

Indeed, in a survey attempting to analyze all exonerations in the United States between 1989 and 2003, researchers uncovered a total of 340 exonerations, in which 144 of those wrongly convicted persons were exonerated by DNA evidence and 196 were exonerated by other means. See S. Gross, K. Jacoby & D. Matheson et al., "Exonerations in the United States 1989 through 2003," 95 J. Crim. L. & Criminology 523, 524 (Winter 2005).[4] In 51 of those 340 exonerations, the defendants had confessed falsely to crimes they did not commit. Id., 544. In 28 of the 51 false confessions, police coercion was apparent from the record. Id., 554 n.47. Although in 18 of the cases the record is unclear as to the motivation for the false confession, in only 5 instances did the confessions appear to have been given freely and voluntarily. Id. False confessions are most common among the most vulnerable groups of defendants—juveniles and people with mental disabilities. Id., 545; see also R. Leo, S. Drizin & P. Neufeld et al., supra, 2006 Wis. L. Rev. 512 (concluding that DNA evidence has revealed that false confessions are leading cause of wrongful convictions, citing B. Scheck, P. Neufeld & J. Dwyer, Actual Innocence [2000] p. 92); R. Leo & R. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations," 88 J. Crim. L. & Criminology 429 (1998); P. Cassell, "The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions," 22 Harv. J. L. & Pub. Policy 523, 526 (1999) (criticizing Leo and Ofshe study, but admitting that "false confession problem is . . . concentrated among a narrow and vulnerable population: persons with mental disabilities").

In a 2003 study of wrongful homicide convictions in Illinois, which, like Connecticut, uses a preponderance voluntariness standard for admission of confessions, it was found that twenty-five out of forty-two wrongful murder convictions since 1970 were based on false confessions, fourteen of those cases involved confessions by the defendants themselves and eleven cases involved confessions principally by codefendants. R. Warden, "The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970," Center on Wrongful Convictions, at http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm
(last modified March 8, 2004). A 2004 study analyzed 125 "interrogation-induced false confessions that can be classified as 'proven'—that is, confessions that are indisputably false because at least one piece of dispositive evidence objectively establishes, beyond any doubt, that the confessor could not possibly have been the

perpetrator of the crime." S. Drizin & R. Leo, "The Problem of False Confessions in the Post-DNA World," 82 N.C. L. Rev. 891, 925 (2004).[5] Ten of these 125 people were arrested but never charged, seventy-one were unsuccessfully prosecuted, and forty-four were convicted of crimes they did not commit.[6] Id., 953.

Given this overwhelming evidence regarding the acute problem of false confessions, I believe that we must reexamine whether the Connecticut constitution requires the state to prove the voluntariness of a defendant's confession beyond a reasonable doubt.[7] It is settled that, under the federal constitution, the voluntariness of a confession is determined under the preponderance of the evidence standard. See *Lego* v. *Twomey*, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). In *State* v. *Geisler*, 222 Conn. 672, 684, 610 A.2d 1225 (1992), this court noted that, although "[w]e have frequently relied upon decisions of the United States Supreme Court interpreting the . . . United States constitution . . . to define the contours of the protections provided in the various sections of the declaration of rights contained in our state constitution . . . [w]e have also, however, determined in some instances that the protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court." (Internal quotation marks omitted.) Therefore, we decided, "[i]n order to construe the contours of our state constitution and reach reasoned and principled results, the following tools of analysis should be considered to the extent applicable: (1) the textual approach . . . (2) holdings and dicta of this court, and the Appellate Court . . . (3) federal precedent . . . (4) sister state decisions or sibling approach . . . (5) the historical approach, including the historical constitutional setting and the debates of the framers . . . and (6) economic/sociological considerations." (Citations omitted.) Id., 684–85.

I acknowledge that, strictly speaking, several of these factors weigh in favor of adhering to the federal constitutional standard. In my view, however, a reexamination of the factual and legal underpinnings of the federal precedent and this court's decision in *James*, read in light of the sixth *Geisler* factor, demands that we adopt the reasonable doubt standard under our state constitution. Accordingly, I begin with a discussion of the reasoning of the cases from which the preponderance standard eventually emerged.

In analyzing this issue, it is important to begin with the rationale underlying the utilization of the reasonable doubt standard. In *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), the Supreme Court underscored the well settled standard for the burden of proof in criminal cases: "Lest there remain any doubt

about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In his concurring opinion in *In re Winship*, Justice Harlan expounded on the basis for the distinction between the standards of proof in civil and criminal trials. "Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes [factually erroneous convictions and factually erroneous acquittals], the choice of the standard to be applied in a particular kind of litigation should . . . reflect an assessment of the comparative social disutility of each. When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for . . . it simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence. In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (Citation omitted; internal quotation marks omitted.) Id., 371–72 (Harlan, J., concurring). In light of the recent exposure of the systemic problem of wrongful convictions in our criminal justice system, the importance of protecting this "fundamental value determination" is stronger than ever.

In 1964, the United States Supreme Court declared: "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession . . . and even though there is ample evidence aside from the confession to support the conviction. . . . Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." (Citations omitted.) *Jackson* v. *Denno*, 378 U.S. 368, 376–77, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The court continued: "It is now inescapably clear that the Fourteenth Amendment

forbids the use of involuntary confessions *not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive*, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will . . . and because of the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 385–86. These moral judgments expressed in the *In re Winship* and *Jackson* opinions constitute the foundation of the constitutional right against self-incrimination as well as the right to due process of law.

In *Lego* v. *Twomey*, supra, 404 U.S. 477, the Supreme Court considered which burden of proof should be applied in the determination of the voluntariness of confessions.[8] Unlike the *Jackson* court, the *Lego* court rejected the notion that the purpose of a voluntariness hearing was to enhance the reliability of jury verdicts. Id., 486. Although the court noted that it had acknowledged in *Jackson* that "coerced confessions are forbidden in part because of their 'probable unreliability' "; id., 484 n.12; it remarked that the "sole issue in [a voluntariness] hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden." Id., 484–85 n.12. This is because "due process forbids the use of coerced confessions, whether or not reliable." Id., 485 n.13. Because it concluded that the purpose of excluding coerced confessions was unrelated to improving the reliability of jury verdicts,[9] the *Lego* court rejected the notion that admissibility of a confession proven voluntary by a preponderance of the evidence undermined the mandate in *In re Winship*, which, the court reasoned, requires proof beyond a reasonable doubt only of the essential elements of the charged crime. Id., 486.

The *Lego* court did not end its inquiry there. The court addressed a second contention, "that evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to those values that exclusionary rules are designed to serve." Id., 487. The court acknowledged its decisions in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (excluding confessions acquired though custodial interrogations unless adequate warnings were administered and waiver of rights obtained), *Weeks* v. *United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914) (rendering impermissible admission of evidence obtained in violation of defendant's fourth amendment rights), and *Mapp*

v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (extending fourth amendment protections to actions by state actors), and noted that in these cases evidence was kept from the jury, regardless of its probative value, for reasons other than ensuring the reliability of verdicts. *Lego* v. *Twomey*, supra, 404 U.S. 487–88. The court, however, rejected the petitioner's argument that the values underlying the exclusionary rule—protection of fundamental rights and deterrence of police misconduct—demanded a higher standard of proof in determining admissibility of confessions. Id., 488–89.

In rejecting this claim, the *Lego* court explained: "[F]rom our experience [with the exclusionary rule] . . . no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. [The] [p]etitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing *truthful and probative evidence* before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing *probative evidence* before juries for the purpose of arriving at truthful decisions about guilt or innocence." (Emphasis added.) Id. Thus, even while rejecting the idea that the admissibility test should in part be concerned with trustworthiness, the court noted the probative value of confession evidence at trial and assumed that admitted confessions were "truthful . . . ." Id., 489. Moreover, although the petitioner in *Lego* may not have been able to produce evidence that "admissibility rulings [had] been unreliable or otherwise wanting in quality"; id., 488; the flood of evidence collected by scholars and researchers regarding false confessions impacting wrongful convictions since *Lego* was decided demonstrably undermines the propriety of the preponderance standard. Notably, after concluding that preponderance of the evidence was the proper burden for the state to sustain in proving voluntariness, the court took the unusual step of adding, "[o]f course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." Id., 489.

The Supreme Court decided *Lego* in 1972, long before the use of DNA testing exposed the significant problem of wrongful conviction in the criminal justice system.

In light of the substantial evidence uncovered regarding the considerable role of false confessions in this alarming and widespread phenomenon, it is reasonable to imagine that the *Lego* court would come to a different conclusion today. At the very least, the court would have to acknowledge and reconcile the evidence that we currently confront. Certainly, there is a distinction to be made between involuntary confessions and false confessions. The *Lego* court explicated that distinction thoroughly in its decision. See id., 482–87. As the court also recognized, however, the two issues are closely related. If the primary purpose of the voluntariness determination is to evaluate whether a defendant confessed of his or her own volition and to exclude all confessions that are involuntary, both true and false involuntary confessions would be identified as inadmissible. All involuntary confessions are equally abhorrent to our criminal law. The anecdotal evidence of the significant role of false confessions in wrongful convictions necessarily implicates the voluntariness concern. While the strong-arm tactics that often led to false confessions before the Supreme Court's decision effectively abolishing that practice in *Miranda* v. *Arizona*, supra, 384 U.S. 436, may no longer be prevalent, anecdotal evidence shows that the deceptive interrogation techniques currently employed by police interrogators are equally capable of coercing innocent suspects into false confessions.[10]

As discussed previously in this dissent and reiterated by the majority in its opinion, this court has stated unequivocally that the constitutional standard in this state for determining the voluntariness of a confession is preponderance of the evidence. See *State* v. *James*, supra, 237 Conn. 425–26; see also p. 158 of the majority opinion. The majority remains steadfastly loyal to this court's reasoning in *James*. In light of the previous discussion of erroneous convictions based on false confessions, however, I cannot join in that unflinching adherence, and I instead utilize this opportunity to revisit some of the reasoning of the *James* decision in favor of the preponderance standard. Citing *State* v. *Staples*, 175 Conn. 398, 406, 399 A.2d 1269 (1978), the *James* court noted, "that there was not substantial evidence that voluntariness determinations governed by the preponderance standard were *unreliable* or would result in derogations of a criminal defendant's constitutional rights, [and] concluded that '[w]e have been given no valid reason why proof by [the preponderance] standard, with a judge making a positive finding on voluntariness, does not provide a fair and workable test which affords a criminal defendant those rights guaranteed him by both the United States and Connecticut constitution[s].' " (Emphasis added.) *State* v. *James*, supra, 413. Thus, even as the *James* court considered "unjustified" the assumption that the purpose of a voluntariness hearing was to "enhance the reliability of jury verdicts"; id.,

412; immediately thereafter, it claimed that there was no proof offered to show that determinations under the preponderance standard were unreliable, undermining its previous claim that admissibility of confessions was unrelated to reliability. Id., 412–13. The majority cites with approval the *James* court's iteration of the Supreme Court's conclusion in *Lego* that a voluntariness determination is not intended to ensure the ultimate reliability of a jury's verdict, but adds that "[w]ithout retreating from that position . . . we acknowledged [in *State* v. *James*, supra, 421–22] that, 'the concern that coercion provides a reason to confess falsely is, nevertheless, a long-standing ground for not receiving coerced confessions into evidence, which is reflected in our common law precedent. Thus, to the extent that there may be a correlation between involuntariness and falsity, this is a relevant consideration.' " See p. 166 of the majority opinion. This solipsistic reasoning seems to me a distinction without a difference. Either reliability is a concern in voluntariness determinations or it is not. It is irresponsible for this court to espouse a standard based on the rationale that a determination of voluntariness is divorced from any concern of coercion, and then in the next breath acknowledge, almost parenthetically, that "to the extent" they are related, this is, in fact, "a relevant consideration." *State* v. *James*, supra, 422.

In light of the copious evidence of wrongful convictions and admission of false confessions in this country, the claim that admission of confessions should be divorced from any consideration of reliability is, at a minimum, socially irresponsible. Undeniably, many unreliable confessions have been admitted for consideration by triers of fact. The majority's reiteration of the *James* court's affirmation of its "confidence in the ability of juries to discern the proper weight to be afforded to conflicting evidence" regarding whether to credit a confession "and if so, whether it is sufficient with other evidence to demonstrate guilt beyond a reasonable doubt]"; id., 424; see p. 169 of the majority opinion; plainly has been discredited by several scholarly studies conducted subsequent to that case. Statistics have shown not only that juries are unable to identify false confessions, but that they regularly base their verdicts on such confessions despite other evidence pointing to innocence.

One recent study demonstrated that in a sample of thirty proven false confession cases, 73 percent of the defendants were convicted even in the absence of any physical or other significant credible evidence to corroborate the confession. See R. Leo & R. Ofshe, supra, 88 J. Crim. L. & Criminology 481–82;[11] see also S. Drizin & R. Leo, supra, 82 N.C. L. Rev. 960 (in study of 125 proven false confession cases, 81 percent of those defendants who went to trial were convicted by juries even though their confessions were later proven false).

Mock jury studies have shown that confession evidence has greater impact than eyewitness testimony, character testimony and other forms of evidence. See S. Kassin & K. Neumann, "On the Power of Confession Evidence: An Experimental Test of the 'Fundamental Difference' Hypothesis," 21 Law & Hum. Behav. 469 (1997). These studies demonstrate that jurors are unable to detect false confessions because of the commonsense expectation of self-serving behavior in others and the accompanying disinclination to believe that a person would falsely confess. S. Kassin & G. Gudjonsson, "The Psychology of Confessions: A Review of the Literature and Issues," 5 Psychol. Sci. in Pub. Int. 33, 56 (November 2004); see also S. Kassin & H. Sukel, "Coerced Confessions and the Jury: An Experimental Test of the 'Harmless Error' Rule," 21 Law & Hum. Behav. 27, 44 (1997) (mock jury study demonstrated that false confession increased conviction rate even when jury recognized it as coerced, court ruled it inadmissible and jurors claimed it did not affect verdict).

In its focus on " 'any incremental gains to be realized from imposing the higher reasonable doubt standard,' " the majority states that it believes that, in " 'the trial court's resolution of conflicting testimony by police and the accused . . . it is only in rare cases that the trial court might be convinced by a preponderance of the evidence that a confession is voluntary but nevertheless harbor a reasonable doubt about the same.' " See p. 167 of the majority opinion, quoting *State* v. *James*, supra, 237 Conn. 423. Indeed, the facts of the present case would appear to exemplify a scenario in which the trial court very well might have been convinced that the confession by the defendant, David Lawrence, was more likely than not voluntary, and yet still have harbored a reasonable doubt as to its voluntariness. The defendant testified that, while he was being interrogated alone in his bedroom by Detective Michael Goggin of the Waterbury police department, Goggin threatened to have the department of children and families remove the defendant's children if he did not admit to possession of the drugs found in his home. Although other police officers testified that Goggin did not threaten the defendant, they were not in the room at the time of the interrogation, and it is not surprising that Goggin did not admit that he threatened the defendant when he testified at the probable cause hearing. While I make no assumptions about the internal deliberations of the trial court on this issue, it is far from inconceivable that the facts presented to the court regarding the voluntariness deliberation could have raised a reasonable doubt in the court's mind.

Justice Brennan was all too accurate when he stated that "[t]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous . . . ." (Internal quotation marks omit-

ted.) *Colorado* v. *Connelly*, 479 U.S. 157, 182, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (Brennan, J., dissenting). As the Supreme Court recognized in *Arizona* v. *Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), "[a] confession is like no other evidence." Thus, the *James* court's contention, reiterated with approval by the majority in its opinion, that the defendant is free "to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness"; (internal quotation marks omitted) *State* v. *James*, supra, 237 Conn. 425; see pp. 168–69 of the majority opinion; is unavailing. Although the jury must decide whether to credit a confession and must weigh whether the other evidence adduced at trial is in accordance with the confession or demands acquittal, as discussed previously, experience shows that a jury's ability to evaluate that evidence is biased dramatically by the introduction of a confession, no matter how incredible it appears in light of other evidence. Requiring the state to prove the voluntariness of a confession beyond a reasonable doubt before it is submitted to the jury increases the chances that, when a jury does consider a confession, that confession will be reliable and voluntary. There is simply no reason not to utilize every opportunity our legal system affords to ensure the accuracy of jury verdicts and avoid wrongful convictions.

This court has, on more than one occasion, decided that the Connecticut constitution provides greater protection of its citizens than that mandated by the United States constitution.[12] Our reasoning for doing so in *State* v. *Marsala*, 216 Conn. 150, 579 A.2d 58 (1990), is instructive. In *Marsala*, we rejected the good faith exception to the exclusionary rule adopted by the United States Supreme Court in *United States* v. *Leon*, 468 U.S. 897, 920–21, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981, 987–88, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). *State* v. *Marsala*, supra, 171. We determined that, "[a]lthough we recognize that the exclusionary rule exacts a certain 'cost' from society in the form of the suppression of relevant evidence in criminal trials, we conclude, nevertheless, that this 'cost' is not sufficiently 'substantial' to overcome the benefits to be gained by our disavowal of the *Leon* court's good faith exception to the exclusionary rule." Id., 165.

In the context of this case, the cost of the higher burden of proof does not outweigh the benefit to society. Although some voluntary and reliable confessions may be barred from introduction when there is doubt about their voluntariness, the overall effect will be to hold police officers and prosecutors to the highest standard when prosecuting their cases for the state. It is difficult to fathom the argument against assuring the protection of our citizens from unduly coercive police tactics in interrogation,[13] especially if we are concerned

with protecting the innocent from unwarranted prosecution. In that vein, we acknowledged in *Marsala* our "willingness in other areas of the law to uphold the exclusion of concededly reliable and relevant evidence on the basis of some greater benefit that will be realized by its suppression." Id. The present case presents an ideal opportunity to exercise that willingness to exclude for the greater benefit of ensuring the reliability of evidence before the jury.

Under the fourth prong of the *Geisler* analysis, we examine the approach of our sister states for guidance. While it is true that a majority of states follow the federal preponderance standard, a significant minority have chosen to require greater protection for criminal defendants under their state constitutions and utilize the reasonable doubt standard. In *Commonwealth* v. *Tavares*, 385 Mass. 140, 430 N.E.2d 1198, cert. denied, 457 U.S. 1137, 102 S. Ct. 2967, 73 L. Ed. 2d 1356 (1982), the Massachusetts Supreme Judicial Court explained its rationale for requiring a judge to find a confession voluntary beyond a reasonable doubt before submitting it to the jury for consideration. "Under our 'humane practice' the initial screening by the judge is the 'basic determination safeguarding the accused.' . . . [A] defendant's statement is usually 'the key item in the proof of guilt, and certainly one of overpowering weight with the jury.' " (Citations omitted.) Id., 152. Recently, the Supreme Judicial Court of Maine refused to overrule its long-standing policy requiring proof beyond a reasonable doubt of voluntariness, even though the court acknowledged that this standard went beyond what was required of it under the federal constitution, reaffirming that state public policy required the most stringent test. "[T]o confirm and preserve the value reflected in the constitutional privilege against self-incrimination we must minimize the risks of allowing legal effectiveness to non-voluntary, or involuntary, testimonial self-condemnation even at the expense of producing a loss of evidence which might have probative value; such was the price that our society had chosen to pay when it conferred constitutional protection upon the privilege against self-incrimination." (Internal quotation marks omitted.) *State* v. *Rees*, 748 A.2d 976, 979 (Me. 2000), quoting *State* v. *Collins*, 297 A.2d 620, 627 (Me. 1972). The New Hampshire Supreme Court also determined that the federal standard was not sufficiently protective of its citizens' rights. "The preponderance test does not provide a sufficient safeguard against [the] danger [of admitting involuntary confessions]. The adoption of the preponderance standard would amount to a determination that it is no more serious for an involuntary confession to be admitted than it is for a voluntary one to be excluded. . . . A confession is a special type of evidence. Its acceptance basically amounts to conviction. Confessions are usually obtained in the psychological atmosphere of police custody and in the greatest

secrecy in which the cards can be stacked against the accused. He has no means of combating the evidence produced by the police save by his own testimony. The stakes are too high and the risk of error too great to permit a determination of admissibility to be decided by a balance of probabilities." (Citations omitted.) *State* v. *Phinney*, 117 N.H. 145, 147, 370 A.2d 1153 (1977).

In addition, Indiana, Louisiana, Mississippi, New Jersey and New York all utilize the reasonable doubt standard of proof for voluntariness. See, e.g., *Pruitt* v. *State*, 834 N.E.2d 90, 114 (Ind. 2005); *State* v. *Vernon*, 385 So. 2d 200, 204 (La. 1980); *Moore* v. *State*, 858 So. 2d 190, 194 (Miss. App. 2003); *State* v. *Yough*, 49 N.J. 587, 595, 231 A.2d 598 (1967); *People* v. *Witherspoon*, 66 N.Y.2d 973, 974, 489 N.E.2d 758, 498 N.Y.S.2d 789 (1985). Maryland and South Carolina require a judge to make a pretrial finding of voluntariness by a preponderance of the evidence, but require the jury to find voluntariness beyond a reasonable doubt before considering it as evidence against the accused. See, e.g., *Baynor* v. *State*, 355 Md. 726, 729 n.1, 736 A.2d 325 (1999); *State* v. *Washington*, 296 S.C. 54, 56, 370 S.E.2d 611 (1988). These states all have determined that their state constitutions mandate proof of voluntariness by the highest legal standard before a confession may be used as evidence against an accused person.[14] Although they represent a minority, it is a significant minority consisting of a wide geographical and political range. Thus, any misgiving that the reasonable doubt standard is unworkable is refuted by the states that have been utilizing it for decades. Connecticut should seize this opportunity to afford its citizens this basic protection.

Although I am unaware of studies examining the connection between the admission of false confessions and the requisite burden of proof for admissibility, I believe it is safe to assume that raising the burden of proof decreases the chance of admitting both a coerced false confession and a coerced true confession, either of which, according to the United States Supreme Court and this court, is equally offensive to constitutional due process rights. As noted previously, studies have been conducted, however, examining the persuasive power of confessions, even when much if not all of the additional evidence points to the defendant's innocence. These studies show the vast disproportionate credence allotted to confessions by juries weighing evidence. Thus, it is inconceivable, given the demonstrated problem of wrongful convictions and the concomitant role of false confessions in that epidemic, that this court would refuse the opportunity it is offered to combat this constitutionally abhorrent scourge.

Accordingly, I respectfully dissent.

[1] Article first, § 8, of the constitution of Connecticut provides in relevant part: "In all criminal prosecutions . . . [n]o person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law . . . ."

[2] The Innocence Project is a national litigation and public policy organization that handles cases involving claims of actual innocence in which post-conviction DNA testing can yield conclusive proof of innocence or guilt and, through exposure of the causes of wrongful conviction, seeks to initiate criminal justice reform. See http://innocenceproject.org (last visited April 12, 2007).

[3] See, e.g., S. Drizin & R. Leo, "The Problem of False Confessions in the Post-DNA World," 82 N.C. L. Rev. 891, 955–56 (2004). According to the data collected to date by the Innocence Project; see footnote 2 of this opinion; Connecticut has had two wrongfully convicted persons exonerated through DNA testing, neither of whom falsely confessed. See http://innocenceproject.org/Content/240.php (Mark Reid case profile) and http://innocenceproject.org/Content/272.php (James Tillman case profile). According to another survey, two additional criminal defendants in Connecticut also were exonerated of the crimes for which they had been convicted: Rickey Hammond was exonerated through DNA evidence in 1992; and Lawrence J. Miller, Jr., was exonerated through other means in 1997. See S. Gross, K. Jacoby & D. Matheson et al., "Exonerations in the United States 1989 through 2003," 95 J. Crim. L. & Criminology 523, 555 (Winter 2005). Disparities in such statistics are not uncommon, however, due to the difficulty in collecting comprehensive data from the various criminal justice institutions in the United States.

[4] Although the survey is the most comprehensive available for that time period, the authors caution that it should not be considered exhaustive due to the fragmentation of the United States criminal justice system. S. Gross, K. Jacoby & D. Matheson et al., supra, 95 J. Crim. L. & Criminology 525.

[5] The authors explain that their study included confessions that were proven false in four dispositive situations: when a person confessed to a crime that did not occur; when it was proven that it was physically impossible for the suspect to commit the crime; when the true perpetrator was found and his or her guilt objectively established; and when scientific evidence, most commonly DNA evidence, established the false confessor's innocence. S. Drizin & R. Leo, supra, 82 N.C. L. Rev. 925–26.

[6] As compelling as the wrongful conviction statistic is, the authors of the 2004 survey note: "[V]irtually all false confessions result in some deprivation of the false confessor's liberty. Some scholars have focused only on false confession cases leading to wrongful conviction, but this neglects the amount of harm the system imposes on those who are not convicted. Individuals who are coerced into falsely confessing but ultimately not convicted may still lose their freedom for extended periods of time and suffer a number of other significant corollary harms as well: the stigma of criminal accusation (particularly if the person has falsely confessed to serious crimes such as murder or rape), the ongoing damage to their personal and professional reputation (even if charges are dropped or the innocent defendant is eventually acquitted), loss of income, savings, a job or career (sometimes resulting in bankruptcy), and the emotional strain of being apart from one's friends and family (which sometimes results in marital separation or divorce). To those innocents who suffer these unjust fates, the assertion by some scholars that only false confessions leading to wrongful convictions should count for scholarly inquiry or public policy reform or that only false confessions leading to wrongful convictions impose any meaningful harm is obviously misguided and myopic, if not downright cruel." S. Drizin & R. Leo, supra, 82 N.C. L. Rev. 949–50.

[7] This court would not be the first to increase protection of criminal defendants under its state constitution in light of recent evidence of wrongful convictions. The Wisconsin Supreme Court revised and sharpened its rule for admission of impermissibly suggestive out-of-court identifications in light of recent evidence it found "impossible . . . to ignore . . . strongly support[ing] the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States . . . ." *State* v. *Dubose*, 285 Wis. 2d 143, 162, 699 N.W.2d 582 (2005). The court recognized that its current approach to evaluating eyewitness identification had "significant flaws"; id., 163; chiefly because studies had shown that "it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." Id., 164.

[8] Although *Lego* was the first case in which the Supreme Court explicitly addressed the standard of proof necessary for admission of confessions, notably, in *Bram* v. *United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897), one of the first cases in which the court addressed the issue of admissibility of confessions, the court appeared to assume that reasonable doubt was the proper standard of proof of voluntariness: "In the case before us we find that an influence was exerted, and *as any doubt as to whether*

the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record." (Emphasis added.) Id., 565.

[9] Although this conclusion properly states the position of the Supreme Court today, it was not always so. The earliest decisions addressing admissibility of out-of-court confessions under the fifth amendment; *Bram* v. *United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897); and constitutional due process requirements; *Brown* v. *Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936); structured their rationales at least in part in terms of reliability. Accord *Spano* v. *New York*, 360 U.S. 315, 320–21, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."). Commentators have explained that, "[i]nitially, the dominant and preferred rationale was to promote reliability in the trial process by excluding confessions that were the product of police coercion or improper influence because they were likely to be false or untrustworthy. However, the 1930s and 1940s saw the ascendance of another idea—that courts should only admit confessions into evidence that were the product of a free and independent will. A third but subordinate rationale underlying the voluntariness test was that confessions elicited through fundamentally unfair police methods should be excluded so as to deter offensive police behavior, regardless of whether the suspect confessed involuntarily or his statements were likely to be trustworthy. These underlying purposes—reliability, protecting free will, and fundamental fairness—roughly correspond to the three goals of the adversary system: promoting truth-finding, protecting individual rights, and checking state power." R. Leo, S. Drizin & P. Neufeld et al., supra, 2006 Wis. L. Rev. 494; see generally id., 488–501 (thorough explanation of development of voluntariness doctrine).

[10] See M. Gohara, "A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques," 33 Fordham Urb. L. J. 791, 816 (March 2006) ("A number of critiques of the leading interrogation techniques . . . described the reasons that the use of deception and trickery during interrogations leads to false confessions. Most of these critiques describe the kinds of cost/benefit analyses suspects undertake before deciding to incriminate themselves, regardless of guilt or innocence. The critiques and related theories help illustrate the impact trickery and deception, particularly an exaggeration or misrepresentation of the existence or quantum of independent incriminating evidence, have on even innocent suspects."); R. Ofshe & R. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action," 74 Denv. U. L. Rev. 979, 985 (1997) ("Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making—people make optimizing choices given the alternatives they consider. Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike.").

[11] The majority cites an article in which one scholar criticizes the methodology of the study by Leo and Ofshe that formed the basis for this article. See P. Cassell, supra, 22 Harv. J. L. & Pub. Policy 526. Cassell's main criticism of Leo and Ofshe is their reliance on secondary sources for factual information underpinning the claims of innocence in some of their case studies. See id., 525, 580. In support of his claim that "[e]ven among the fifteen 'proven' cases of wrongful conviction from false confession [cited in the Leo and Ofshe article], many are disputed"; id., 581; however, Cassell cites the opinions of the prosecutors, district attorneys, and state police who worked on these cases that those people whom they helped to prosecute were in fact guilty, despite the fact that two of those people were officially exonerated by DNA evidence. Id., 581–82. Though there may be dispute about the accuracy of the media in reporting details of crimes, it hardly can be argued that those people with a personal stake in winning convictions are less biased than the members of the media. For example, Steven Linscott

had his conviction overturned twice before prosecutors submitted biological evidence to DNA testing that proved conclusively that he could not have been the source of the seminal fluid in the murder for which he was convicted, leading the prosecutors to decline to try him a third time. See http://www.innocenceproject.org/Content/200.php. Earl Washington, who has an I.Q. of approximately sixty-nine and was questioned by police for two days before producing "confessions" to five different crimes, four of which were dismissed by the commonwealth of Virginia as being unreliable, eventually conclusively was excluded as the source of the seminal fluid in the capital murder for which he was convicted (based on the fifth "confession"), and received an absolute pardon from the governor of Virginia. See http://innocenceproject.org/Content/282.php. It is, therefore, difficult to imagine how the belief of the prosecutors in those cases that these men are in fact guilty has *any* bearing on their actual innocence.

[12] See, e.g., *State* v. *Reynolds*, 264 Conn. 1, 47, 836 A.2d 224 (2003) (rejecting federal constitutional requirement that, for seizure to occur, there must be submission by defendant to assertion of authority or use of force by police), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Morales*, 232 Conn. 707, 726–27, 657 A.2d 585 (1995) (criminal defendant need not prove bad faith of police in failing to preserve potentially exculpatory evidence in order to prevail on due process claim); *State* v. *Linares*, 232 Conn. 345, 379–86, 655 A.2d 737 (1995) (rejecting federal forum test under state constitution and adopting compatibility test that affords greater speech protection); *State* v. *Miller*, 227 Conn. 363, 386–87, 630 A.2d 1315 (1993) (warrantless automobile search supported by probable cause but conducted after vehicle has been towed to impound lot violates state constitution); *State* v. *Oquendo*, 223 Conn. 635, 652, 613 A.2d 1300 (1992) (declining to follow Supreme Court and distinguish between common-law distinction of arrest and attempted arrest when determining whether defendant was seized for purposes of state constitution); *State* v. *Geisler*, supra, 222 Conn. 690 (declining to follow federal rule and deciding that evidence obtained from illegal entry into home must be excluded unless taint of illegality attenuated by passage of time or intervening circumstances); *State* v. *Stoddard*, 206 Conn. 157, 166–67, 537 A.2d 446 (1988) (adopting rule requiring police promptly to inform suspects of their attorneys' attempts to provide legal assistance during interrogation, despite Supreme Court's rejection of such rule); *State* v. *Kimbro*, 197 Conn. 219, 233, 496 A.2d 498 (1985) (state constitution provides greater substantive protection to citizens than fourth amendment in determining probable cause), overruled in part on other grounds by *State* v. *Barton*, 219 Conn. 529, 544, 594 A.2d 917 (1991).

[13] Indeed, legal scholars have argued against the efficacy and constitutionality of current police interrogation tactics, urging reform in this area. See generally M. Gohara, supra, 33 Fordham Urb. L.J. 791 (2006); R. Leo, S. Drizin & P. Neufeld et al., supra, 2006 Wis. L. Rev. 479.

[14] Rhode Island has determined that its state constitution requires a heightened proof, clear and convincing evidence. See, e.g., *State* v. *Forbes*, 900 A.2d 1114, 1118 (R.I. 2006).