

ValpoScholar

Valparaiso University Law Review

Volume 40
Number 3 Summer 2006

pp.601-644

Summer 2006

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Recommended Citation

Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601 (2006).

Available at: <https://scholar.valpo.edu/vulr/vol40/iss3/4>

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IT'S NOT JUST ABOUT MIRANDA: DETERMINING THE VOLUNTARINESS OF CONFESSIONS IN CRIMINAL PROSECUTIONS*

Paul Marcus[†]

In criminal law, confession evidence is a prosecutor's most potent weapon—so potent that . . . “the introduction of a confession makes the other aspects of a trial in court superfluous.”¹

I. INTRODUCTION

In 2002 in suburban Maryland, just outside of Washington, D.C., murder suspect Richard Gater was arrested and interrogated at the police station. The interviewing officer warned Gater “that if he did not tell police where to find the gun used in a killing several days earlier, heavily armed officers could raid the home of Gater's ailing mother and possibly slam her on the ground and handcuff her as they looked for the weapon.” Seen and heard on videotape, the officer's final comment before Gater confessed was: “You don't want to put your family through this.”²

A decade earlier, in Titusville, Florida, murder suspect Brian Kennedy was interrogated, and he asked what would happen to him if he told the police his story. The appeals court later stated: “The detective asked Kennedy if he had ever heard of immunity and then proceeded to explain immunity to him. The detective, immediately realizing that he had made a mistake by mentioning immunity, informed Kennedy that he, as a police officer, could not grant immunity, but that the state attorney could.” Kennedy confessed soon thereafter.³

* Paul Marcus, 2006.

[†] Haynes Professor of Law. A portion of this paper was delivered at the Valparaiso University School of Law, *A Consideration of Miranda: 40 Years*, as part of the Seegers Distinguished Lecture Series in January, 2005. With thanks to the students and law faculties of St. John's University, Valparaiso University, the University of Maryland, and the College of William and Mary for the many helpful comments made during presentations.

¹ Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221 (1997).

² Ruben Casteneda, *Interrogation Problems Caught on Video in Md.*, WASH. POST, Oct. 27, 2003, at B01, available at LEXIS, ALLNWS File.

³ *Kennedy v. State*, 641 So. 2d 135, 136 (Fla. Dist. Ct. App. 1994).

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Just last year, a federal circuit court reversed a trial court's finding of an inadmissible confession where the defendant appeared to have been promised that he would not be prosecuted if he confessed that his killing of the victim was "spontaneous."⁴ The majority relied heavily on the defendant's age (mid-fifties), his experience (military veteran, manager in a real estate office), and his academic background (college education, one year of law school). In essence, his confession could be viewed as voluntary because he is "an educated, sophisticated individual . . . [who] had past experience and dealings with . . . investigators."⁵

In these cases and in many others, whether the suspects received *Miranda* warnings was really not at issue in connection with the admissibility of their incriminating statements.⁶ In all three of these cases, the key question was whether under the circumstances the statements had been given voluntarily, consistent with the requirements of the Due Process Clause.⁷ To many readers, this focus on voluntariness

⁴ United States v. LeBrun, 363 F.3d 715 (8th Cir. 2004). The transcript from that portion of the interrogation states:

LeBrun: So, am I hearing that I won't be prosecuted?
I (interrogator): That's what you are hearing.
LeBrun: Is that what I am hearing?
I: That's what you are hearing.
I: If it's . . . spontaneous and that's the truth, you will not be prosecuted.
I: That's absolutely right.
LeBrun: I am here to tell you there was no premeditation.
I: All right.
LeBrun: It was spontaneous
I: Okay
I: So it was, let me get this clear. It was spontaneous?
LeBrun: Correct.

Id. at 725.

⁵ *Id.* at 723. The dissenting judges were vigorous in their disagreement with the majority, writing that in addition to making a false promise to the defendant the government agents "interrupted Mr. LeBrun in a bullying manner and demonstrated a threatening kind of impatience with him." *Id.* at 727.

⁶ See generally *LeBrun*, 363 F.3d 715; *Kennedy*, 641 So. 2d 135.

⁷ Gater's statement was excluded, with the judge ruling that the government "cannot threaten the family members of the defendant, you may not threaten the defendant and you can have no coercion, promises or threats." Without the incriminating statement, the jury acquitted Gater of first degree murder but convicted him of second degree murder. The judge strongly chastised the government, for the officer's conduct constituted a threat "directed against the defendant's loved ones under circumstances in which he is under arrest and unable to protect them." See *Casteneda*, *supra* note 2.

Kennedy's murder conviction was affirmed on appeal, with the majority acknowledging that while Kennedy had been "sold a bill of goods" as to immunity, he had not been coerced into confessing. The lone dissent sharply disagreed, stating that

in the confession process – apart from *Miranda* – may come as a surprise. The common assumption is often made that, however debatable *Miranda* may be, it has had a definitive impact and has essentially eliminated the need to consider the messy and ineffective rules regarding voluntariness in the interrogation process that were in play before 1966.⁸ However, the reality of voluntary interrogation is not nearly so simple or concrete.

The importance of *Miranda* cannot be overstated. It has had nothing short of a revolutionary impact on the way in which we look at the validity of interrogations in individual criminal prosecutions. While *Miranda* has had a great number of severe critics,⁹ when it is coupled with Sixth Amendment Right to Counsel¹⁰ and Fourth Amendment Search and Seizure considerations,¹¹ the United States is indeed quite

“Kennedy was induced to confess and even the slightest promise of a bargain is sufficient to invalidate a confession.” 641 So. 2d at 140.

⁸ Many have written of the major problems in this area prior to *Miranda*, and several thoughtful analysts come to mind. Lawrence Herman described the matter well:

It violates due process of law for the prosecution in a criminal case to use the defendant’s involuntary confession against him. Whether a confession is involuntary must be determined by considering the totality of the circumstances – the characteristics of the defendant and the environment and technique of interrogation. Under the “totality of the circumstances” approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign. The point is that the *Miranda* dissenters in 1966 and the Attorney General in 1985 were simply wrong in their claim that we got along well with the law that antedated *Miranda*.

Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987). Catherine Hancock was more succinct: “[T]he Court’s Due Process decisions . . . [speak] of ‘coercion’ and the ‘totality’ test as though they were unchanging anchors of thought.” Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2237 (1996). Yale Kamisar has been the foremost commentator in the area. He wrote bluntly of the problem in *Confessions, Search and Seizure, and the Rehnquist Court*, 34 TULSA L.J., 465, 471 (1999) (“The pre-*Miranda* voluntariness test was too mushy, subjective, and unruly to provide suspects with adequate protection.”); see also Yale Kamisar, *What is an “Involuntary” Confession?*, 17 RUTGERS L. REV. 728 (1963).

⁹ For an overview of the concerns as to *Miranda* being too broad or not broad enough, see, e.g., Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998); Paul Marcus, *A Return to the “Bright Line” Rule of Miranda*, 35 WM. & MARY L. REV. 93 (1993); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003); George C. Thomas, *Miranda’s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1093 (2003).

¹⁰ Under the counsel provision, police may not engage in questioning of a suspect – even one not under arrest or in custody – without notice to the suspect and her attorney. *Massiah v. United States*, 377 U.S. 201 (1964). However, this deceptively powerful rule applies in a relatively few number of cases, for the Sixth Amendment is in force only once the defendant has been formally charged. *Kirby v. Illinois*, 406 U.S. 682 (1972).

¹¹ A search issue is found when an action by the government that violates the Fourth Amendment results in an incriminating statement. The question then is whether that

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different from that which existed four decades ago. The question remains whether the voluntariness standard has become essentially irrelevant or of minimal importance as a result.¹²

This Article seeks to answer several key questions:¹³ Are the voluntariness rules still being broadly litigated? Do they have weight in many major cases, or are they of note simply in fringe areas? Finally, is the law regarding voluntariness any better than it was before *Miranda*, and is there now more certainty for law enforcement personnel, lawyers, and judges? This Article does not seek to extend the earlier, thoughtful proposals that had been made as to ways in which more definite standards and rules could be used.¹⁴ Also, this Article does not seek to determine whether current Fifth Amendment law results in serious consequences as to innocent parties confessing or the police being unduly handicapped in the investigative process.¹⁵ Rather, the purpose of this Article is to evaluate the law on voluntariness. To accomplish this, I have reviewed every reported state and federal appeals decision

statement is tainted by the earlier illegality. If so, the statement must be excluded as evidence. See, e.g., *United States v. Paradis*, 351 F.3d 21, 34 (1st Cir. 2003); *United States v. Reed*, 349 F.3d 457, 463–65 (7th Cir. 2003); *State v. Maraschiello*, 88 S.W.3d 586, 600 (Tenn. Ct. App. 2000); *Moss v. State*, 75 S.W.3d 132, 139 (Tex. Crim. App. 2002).

¹² One observer wrote that “[a]lthough *Miranda* has largely replaced the involuntary confession rule, the latter still exists; it was not overruled by *Miranda*.” Herman, *supra* note 8, at 752. The Supreme Court, in its tepid reaffirmation of *Miranda* in *Dickerson v. United States*, discussed the voluntariness principles. 530 U.S. 428 (2000). The Justices stated that the voluntariness test “is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.” For a highly critical view of the voluntariness test, see Mark Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005).

¹³ Juan Carlos Alarcon, Stacy Haney, Virginia Vile, Kristine Wolfe, and Laura Wright all provided outstanding research assistance.

¹⁴ The late Professor Welsh White of the University of Pittsburgh Law School laid out a number of careful proposals over the past twenty-five years. See Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979 (2003); Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998) [hereinafter White, *What is an Involuntary Confession*]; Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979) [hereinafter White, *Police Trickery*]. Deception in the questioning of suspects has been hotly debated. See Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833 (1997); Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigate Lies by the Police*, 76 OR. L. REV. 775 (1997); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996). The law regarding deception and voluntariness is discussed, *infra* Part III.A.

¹⁵ Compare the views taken in Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447 (2002), with Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168 (2001).

on voluntariness of the past twenty years. Tens of thousands of opinions dealing with confessions in criminal cases were examined, a good number of which mentioned voluntariness, but they did not truly explore the due process principles.¹⁶ Ultimately, I have read a few thousand opinions on point, dating from 1985 to present.¹⁷

The forthcoming Parts show that the key conclusions can be stated concisely. The voluntariness considerations remain a major matter in criminal prosecutions, and the substantive law in this area has not improved or become more definite over the past four decades. To that end, the analysis will begin with several major United States Supreme Court decisions and then look to the way in which state and federal judges continue to construe and apply those decisions.

II. THE UNITED STATES SUPREME COURT SPEAKS

The United States Supreme Court has contemplated issues regarding the admissibility of confessions in criminal cases under the voluntariness standard numerous times in the modern era. Most of these cases have focused on the application of the basic standard for consideration to particular fact patterns. However, in three opinions the Justices sought to give broader guidance.¹⁸

¹⁶ The problem often focused on whether a *Miranda* waiver was voluntary. While this point is related to the broad voluntariness issue and is often resolved in similar fashion, it involves a distinct and different analysis. See, e.g., *Hopkins v. Cockrell*, 325 F.3d 579, 584-85 (5th Cir. 2003); *State v. Mortley*, 532 N.W.2d 498, 502-03 (Iowa Ct. App. 1995).

¹⁷ The substantive state cases numbered well over 1500. The federal cases were more difficult to break out in terms of precise numbers, for the discussions often were bound up with habeas corpus procedures, application of *Miranda* to non-confession issues (such as the discovery of later evidence), ineffective assistance of counsel, fruit of the poisonous tree applications, etc. However, it is fair to conclude that there were many hundreds of federal decisions discussing voluntariness during this time period. At the United States Supreme Court level, the volume was not high, with much more emphasis being placed on the Fifth and Sixth Amendment issues in connection with confessions. Still, over the past twenty years, more than a dozen opinions have discussed, at least to a limited extent, voluntariness. Of course, even all of these figures do not fully lay out actual cases in which the voluntariness claim is raised. I only reviewed reported appellate decisions. Also, cases in which the defendant was acquitted, otherwise prevailed at or before trial, or did not bring up the question on appeal are not part of this process.

¹⁸ Which is not to suggest that numerous other opinions from the Court were not of consequence; they certainly mattered a great deal. See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda* with a notation that it provided greater certainty as a standard than did the voluntariness test); *Arizona v. Fulminante*, 499 U.S. 279 (1991) (allowing an involuntary confession into evidence could be viewed as harmless error); *Crane v. Kentucky*, 476 U.S. 683 (1986) (holding that the defense can offer evidence to the jury on whether admissible confession was "unworthy of belief"); *Lynnum v. Illinois*, 372

A. *Bram v. United States*¹⁹

More than a century ago, the Supreme Court expressed concern with the interrogation process and the Due Process Clause. In *Bram*, the Court sought “to guard against the inherently coercive atmosphere of a police interrogation and its effect on an accused’s exercise of his constitutional rights.”²⁰ The following language in *Bram* was frequently relied upon throughout the twentieth Century, especially prior to the 1980s, and it still gets quoted on occasion: “[A] confession, in order to be admissible, must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight.”²¹

The greatest reach of this notion would be to take it literally so that *any* degree of inducement would be sufficient to invalidate an otherwise permissible statement by the defendant. Not surprisingly, very few courts have ever followed such an interpretation.²² Instead, the modern view of the statement is that threats and promises are to be taken seriously but that these are rarely determinative on their own. If such evidence is present, the court must view that inducement along with other key factors in determining if the resulting statement was given

U.S. 528 (1963) (addressing a situation of undue pressure on a mother where police suggested that involvement with her children was at stake in the process); *Brown v. Mississippi*, 297 U.S. 278 (1936) (setting forth one of the earliest discussions of voluntariness regarding shocking torture and threats against suspect). Still, while these cases and many others remain significant, the three presented in the text appear to have had the greatest impact on the widest range of prosecutions throughout the nation.

¹⁹ 168 U.S. 532 (1897).

²⁰ *Taylor v. Singletery*, 148 F.3d 1276, 1282 (11th Cir. 1998).

²¹ 168 U.S. at 561.

²² To be sure, the United States Supreme Court itself has, from time to time, repeated the statement from *Bram*. See, e.g., *Hutto v. Ross*, 429 U.S. 28, 30 (1976). But see *Arizona v. Fulminante*, 360 U.S. 315 (1959). As explained in *People v. Vasila*:

The Attorney General urges us to conclude that . . . officers are permitted to induce a confession by making promises, so long as they keep them. This is not the law. . . . The California Supreme Court has never distinguished between promises of leniency based on whether the promises were kept. The issue is not whether a commitment was honored, but rather whether governmental agents have coerced a citizen to give testimony against himself. When the government does so, it deprives that citizen of a right assured to him by the Fifth Amendment. Whether the coercion is based on a promise kept or repudiated can only truly be tested in hindsight, but it constitutes coercion under either scenario.

45 Cal. Rptr. 2d 355, 360–61 (Cal. Ct. App. 1995). See generally *State v. Osborn*, 547 N.W.2d 139, 145–46 (Neb. 1996). For a critical view of *Bram*, see *Godsey*, *supra* note 12.

voluntarily.²³ As explained by one court, the key question is whether the inducement is “so attractive as to render a confession involuntary.”²⁴ Consequently, in most jurisdictions there is no true *per se* rule banning confessions that occur after a promise or threat is made. Rather, courts evaluate the inducement and the other “circumstances surrounding the confession [to determine if there are] indicia of voluntariness.”²⁵

B. *Spano v. New York*²⁶

The United States Supreme Court has consistently recognized the grave difficulties raised by issues of improper interrogation techniques, which arguably result in involuntary confessions in criminal prosecutions. The starting point is whether such a confession is “the product of an essentially free and unconstrained choice, made by the subject at a time when that person’s will was not overborne.”²⁷ However, the competing interest that the Court has repeatedly emphasized is that confessions are “essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.”²⁸

The most significant decision by the Supreme Court that clarified the importance of balancing these important considerations was written almost a half century ago in *Spano*.²⁹ Vincent Joseph Spano was an Italian immigrant convicted of murder in New York. The *Spano* decision is significant because it explored these two conflicting positions in great detail,³⁰ and contrary to other decisions, it did not involve a situation in which physical force or the threat of force was present.³¹

²³ See *infra* Part IV for a detailed discussion of the standard. See generally *Marquez v. State*, 890 P.2d 980, 986 (Okla. Crim. App. 1995).

²⁴ *United States v. Johnson*, 351 F.3d 254, 261 (6th Cir. 2003).

²⁵ *Rose v. Lee*, 252 F.3d 676, 686 (4th Cir. 2001). The Supreme Court has written that the “passage from *Bram* . . . does not state the standard for determining the voluntariness of a confession.” *Arizona v. Fulminante*, 499 U.S. 279, 285 (1991).

²⁶ 360 U.S. 315 (1959).

²⁷ As stated by the Iowa Supreme Court in *State v. Bowers*, 661 N.W.2d 536, 541 (Iowa 2003).

²⁸ *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

²⁹ 360 U.S. 315 (1959).

³⁰ “[W]e are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.” *Id.* at 315.

³¹ The Supreme Court has never wavered in its view that the use of violence or the threat of physical harm will virtually ensure that any resulting confession will be found to

As the Court noted, Spano was of foreign descent. He had no prior experience with the criminal justice system.³² A friend of Spano's, a police cadet, pretended to befriend him and then berated him when Spano was reluctant to confess.³³ The Court stated that Spano had a history of emotional instability, that he was held for an extended time, and that instead of making a narrative statement, he "was subject to the leading questions of a skillful prosecutor in a question and answer confession."³⁴ There was heavy pressure, certainly, but it fell far short of the physical force or threat seen in earlier cases. Recognizing that "the actions of police in obtaining confessions have come under scrutiny in a long series of cases,"³⁵ the Justices looked to all of these factors and decided that the resulting confession was involuntary because Spano's

be involuntary. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279 (1991); *Malinski v. New York*, 324 U.S. 401 (1944). As written in *Stein v. New York*:

[T]here is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

346 U.S. 156, 182 (1953). This strong view has been followed throughout the nation. *See, e.g., United States v. McCullah*, 76 F.3d 1087, 1101 (10th Cir. 1996); *Cooper v. Scroggy*, 845 F.2d 1385, 1391-92 (6th Cir. 1988); *Hinton v. Snyder*, 203 F. Supp. 2d 934, 941 (N.D. Ill. 2002); *People v. Woods*, 703 N.E.2d 35, 44 (Ill. 1998); *Haak v. State*, 695 N.E.2d 944, 948 (Ind. 1998); *Zuliani v. State*, 903 S.W.2d 812, 820-21 (Tex. Crim. App. 1995); *State v. Smith*, 410 S.E.2d 269, 272 (W. Va. 1991). Some courts note that if physical force is used, the officers must "back off before interrogating [the suspect]." *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993). Other courts write that in determining voluntariness "the need for . . . an individual calculus is obviated by the egregiousness of the custodian's conduct. Indeed, confessions accompanied by physical violence wrought by the police have been considered *per se* inadmissible." *United States v. Jenkins*, 938 F.2d 934, 938 (9th Cir. 1991).

While there are certainly opinions allowing for the use of force in the interrogation process, they are few in number and tend to be quite limited in scope. *See, e.g., Leon v. State*, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982). *Leon* involved officers that twisted the suspect's arm and choked him until he revealed where the victim was being held. The resulting statement was admissible because the purpose of the force was to find the victim, not to build the case against the suspect. *Id.* Overwhelmingly, the courts strongly condemn any use of coercion, whether or not physical in nature. *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960); *Leyra v. Denno*, 347 U.S. 556, 559 (1954); *Chambers v. Florida*, 309 U.S. 227, 237 (1940).

³² 360 U.S. 315, 321-22 (1959).

³³ Leading to the Chief Justice's remark that the defendant "was apparently unaware of John Gay's famous couplet: 'An open foe may prove a curse, But a pretended friend is worse.'" *Id.* at 323.

³⁴ *Id.* at 322.

³⁵ *Id.* at 321.

“will was overborne by official pressure, fatigue, and sympathy falsely aroused.”³⁶

The language of the *Spano* Court condemning the law enforcement actions is powerful indeed:

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.³⁷

C. *Colorado v. Connelly*³⁸

If the majority in *Spano* was highly critical of the government and its opinion potentially expansive in scope, both the tone and reach of judicial scrutiny was scaled back considerably in *Connelly*.³⁹ At the outset, it is important to note that the harsh language of Chief Justice Warren directed against law enforcement in the earlier opinion was certainly not present in the statement of Chief Justice Rehnquist in *Connelly*. The Court’s conclusion was that police action in such cases will be problematic only if the interrogation, taken as a whole, is “so offensive to a civilized system of justice that [it] must be condemned.”⁴⁰

However, it is important to note the unusual factual setting in *Connelly*. In *Connelly*, the defendant approached a police officer to talk about a murder. Although the officer advised the defendant of his *Miranda* rights, the defendant immediately confessed, and he provided details regarding the murder. These details helped prove a previously unsolved murder. Later, the defendant became disoriented and spoke of hearing voices that directed him to confess to the murder. Initially, the defendant was found incompetent to stand trial. Subsequently, he was allowed to stand trial even though a psychiatrist stated that Connelly was suffering from schizophrenia and was in a psychotic state the day he confessed. The state courts found that his confession was involuntary

³⁶ *Id.* at 323.

³⁷ *Id.* at 320–21.

³⁸ 479 U.S. 157 (1986).

³⁹ *See generally id.*

⁴⁰ *Id.* at 163.

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because it was “not the product of a rational intellect and a free will.”⁴¹ The judges were persuaded that the defendant’s mental illness disrupted his ability to make a free and rational choice.⁴²

At no point in the litigation did anyone allege that the police engaged in any coercive tactics directed against Connelly or that the officers’ action somehow caused Connelly to confess.⁴³ Moreover, when the suspect confessed, the officers were not aware that he was suffering from a serious mental disorder, and they did nothing to exploit that disorder.⁴⁴ Thus, the Supreme Court decided that the state court ruling of involuntariness was erroneous. The crucial missing connection was any improper action on the part of the government officers: “Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.”⁴⁵

The Supreme Court reasoned that the “police overreaching” requirement was the central feature of confession cases that it had decided for decades.⁴⁶ Moreover, without such a mandated causal link or connection, the majority reasoned that trial judges would face the impossible task of making “sweeping inquiries into the state of mind of a criminal defendant who has confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State.”⁴⁷

After *Connelly*, the causal connection became essential, even in cases in which the defendant had been subject to improper police investigatory action.⁴⁸ While some assert that this holding has delicately but

⁴¹ 702 P.2d 722, 728 (Colo. 1985).

⁴² For good discussions of this aspect of the case, see *State v. Bravo*, 762 P.2d 1318, 1324 (Ariz. 1988), and *Smetana v. State*, 991 S.W.2d 42, 48 (Tex. Crim. App. 1998).

⁴³ A point well made in White, *What is an Involuntary Confession*, *supra* note 14, at 2017.

⁴⁴ *Connelly*, 479 U.S. at 165.

⁴⁵ *Id.* at 164.

⁴⁶ *Id.* at 163.

⁴⁷ *Id.* at 167.

⁴⁸ Judges have been vigilant in following the Court’s ruling. See, e.g., *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004) (holding that the defendant “must demonstrate that [the confession] resulted from coercive police conduct and that there was a link between the coercive conduct of the police and his confession”); *United States v. Lugo*, 170 F.3d 996, 1004 (10th Cir. 1999) (“[A] confession is only involuntary when ‘the police use coercive activity to undermine the suspect’s ability to exercise his free will.’”); *United States v. Montgomery*, 14 F.3d 1189, 1195 (7th Cir. 1994) (“[T]here still must be some showing of official coercion.”); *People v. Valdez*, 969 P.2d 208, 212 (Colo. 1998) (“A necessary prerequisite to a conclusion of involuntariness is a finding that the police conduct in question was coercive.”); *State v. Fee*, 26 P.3d 40, 47 (Idaho Ct. App. 2001) (“[W]e will assess only police conduct causally related to the defendant’s confession.”); *Jackson v.*

powerfully shifted the crucial focus from an individual's voluntary state of mind and behavior to the government's improper action, this is the criteria used overwhelmingly throughout the nation. As a result, under the federal Constitution and most state constitutions, judges cannot seriously entertain a claim of involuntariness when considering a confession unless there is some evidence of official overreaching that actually caused the suspect to incriminate herself.⁴⁹

III. DETERMINING VOLUNTARINESS

There is currently little debate in the United States today on the standard used to determine the admissibility of confessions under the Due Process Clause. All agree that the voluntariness test was, and is likely to remain, the test to be used by trial judges. In applying the voluntariness test, several key factors have been emphasized over the past few decades. This Article will next examine those factors in order to determine whether the Supreme Court mandate has been faithfully followed within our courts.

A. *Deception*

1. The Rule

This Part is not intended to track the incredibly large number of cases in which interrogating officers have successfully used deceit to elicit an incriminating statement because other scholars have already

State, 735 N.E.2d 1146, 1153 (Ind. 2000) (requiring the defendant to allege some "violence, threats, promises, or other improper influences"); *Martin v. State*, 686 A.2d 1130, 1144 (Md. Ct. Spec. App. 1996) ("[T]he governmental conduct itself, no matter how outrageous, is of only indirect legal significance and matters only to the extent that it is determined to have been the catalytic agent that effectively produced the confession."); *State v. Sabinash*, 574 N.W.2d 827, 829 (N.D. 1998) ("Coercion, in and of itself, does not invalidate a confession."); *McGregor v. State*, 885 P.2d 1366, 1378 (Okla. Crim. App. 1994) ("Even if McGregor was insane, his confession is voluntary absent actual police coercion."); *State v. Hoppe*, 661 N.W.2d 407, 415 (Wis. 2003) ("[T]here must be police conduct causally related to the confession for the confession to be considered involuntary.").

⁴⁹ Consider the interesting thoughts of Judge Posner in *United States v. Rutledge*:
The [voluntariness, free will] formula is not taken seriously. *Connelly* may have driven the stake through its heart by holding that a confession which is not a product of the defendant's free choice—maybe he was so crazy, retarded, high on drugs, or intoxicated that he did not even know he was being interrogated—is admissible so long as whatever it was that destroyed the defendant's power of choice was not police conduct.

900 F.2d 1127, 1129 (7th Cir. 1990).

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done that.⁵⁰ Rather, this Part lays out an array of cases to provide a sense of the law that has arguably turned out to be extremely favorable to the government. The sole area of deception that has given judges some serious pause—lies about the legal system and the law—will also be explored.

One begins here with a central truth: Police are permitted to lie to suspects during the interrogation. This view is the basis for all discussion in the area.⁵¹ “[D]eceipt and subterfuge are within the ‘bag of tricks’ that police may use in interrogating suspects.”⁵² “[M]ere trickery alone will not necessarily invalidate a confession.”⁵³ Deception is “not alone sufficient to render a confession inadmissible.”⁵⁴ The United States Supreme Court has upheld this proposition, and virtually every state has supported the Supreme Court’s holding.⁵⁵

Indeed, it is rather stunning to see the enormous number of cases in which confessions were held to be valid. Yet, judges found that government officials lied to defendants about significant matters resulting in incriminating statements. Police have lied about matters such as the following: witnesses against the defendant,⁵⁶ earlier statements by a now-deceased victim,⁵⁷ an accomplice’s willingness to testify,⁵⁸ whether the victim had survived an assault,⁵⁹ “scientific”

⁵⁰ For an excellent overview, see Young, *supra* note 14; see also MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.4 cmt. at 353–58 (1975).

⁵¹ On this point there is hardly a dissenting view. For two courts that have expressed concern, see *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (“[M]isrepresenting a piece of the evidence . . . [is] reprehensible.”), and *State v. Register*, 476 S.E.2d 153, 158 (S.C. 1996) (“The misrepresentation of evidence by police is a deplorable practice.”). Still, in both cases the later confessions were allowed into evidence.

⁵² *State v. Schumacher*, 37 P.3d 6, 13–14 (Idaho Ct. App. 2001).

⁵³ *United States v. Bell*, 367 F.3d 452, 461 (5th Cir. 2004).

⁵⁴ *People v. McNeil*, 711 N.Y.S.2d 518, 520 (N.Y. App. Div. 2000). The court in *Sheriff v. Bessey* explained: “Cases throughout the country support the general rule that confessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement.” 914 P.2d 618, 620 (Nev. 1996).

⁵⁵ The most famous case is likely *Frazier v. Cupp*, 394 U.S. 731 (1969), where a confession was allowed even though the police lied in telling the defendant that his partner in the crime had already confessed to committing that crime. See generally White, *Police Trickery*, *supra* note 14.

⁵⁶ *United States v. Orso*, 266 F.3d 1030 (9th Cir. 2001); *Conner v. State*, 982 S.W.2d 655 (Ark. 1998).

⁵⁷ *Rodriguez v. State*, 934 S.W.2d 881 (Tex. Crim. App. 1996).

⁵⁸ *United States v. Ceballos*, 302 F.3d 679 (7th Cir. 2002); *State v. Simons*, 944 S.W.2d 165 (Mo. 1997).

⁵⁹ *People v. Fordan*, 597 N.Y.S.2d 807 (N.Y. App. Div. 1993).

evidence available,⁶⁰ including DNA⁶¹ and fingerprint evidence,⁶² and the degree to which the investigating officer identified and sympathized with the defendant.⁶³

For the Supreme Court Justices and judges throughout the nation, no matter the nature of the deception, with one major exception, the issue relates entirely to whether the lies “tend to produce inherently unreliable statements.”⁶⁴ Or, as another court stated, whether the “police misrepresentations . . . [are] sufficiently egregious to overcome a defendant’s will so as to render a confession involuntary.”⁶⁵ This point is made even in connection with the awkward use of polygraph examinations to elicit an incriminating response.

The awkward situations involving polygraph examinations normally involve government officers—seemingly independent of the police department itself—administering a “scientific” test, and then confronting the suspect with the supposed results of the test. One might consider telling a suspect that she has lied to be coercive.⁶⁶ Yet, the vast majority of courts that have reviewed this technique have allowed it, with most noting that while the technique should be viewed as a factor “in determining whether there was impermissible coercion,” it is not inherently coercive by itself.⁶⁷ This judgment is made even when the operator of the equipment advises the defendant that the machine is “infallible”⁶⁸ or engages in “moral urging” to assure a confession.⁶⁹

⁶⁰ State v. Bays, 716 N.E.2d 1126 (Ohio 1999).

⁶¹ Conde v. State, 860 So. 2d 930, 944 (Fla. 2003).

⁶² Lucero v. Kerby, 133 F.3d 1299 (10th Cir. 1998); State v. Davila, 908 P.2d 581 (Idaho Ct. App. 1995).

⁶³ Mason v. State, 116 S.W.3d 248, 260 (Tex. Crim. App. 2003) (dealing with a situation where the officer “misled appellant into believing [officer] was a pedophile”).

⁶⁴ Sheriff v. Bessey, 914 P.2d 618, 622 (Nev. 1996).

⁶⁵ State v. Buntin, 51 P.3d 37, 42 (Utah Ct. App. 2002); *see also* State v. Welker, 932 P.2d 928, 931 (Idaho 1997).

⁶⁶ A few courts have held that the resulting confessions violate due process. *See* Martinez v. State, 545 So. 2d 466, 467 (Fla. Dist. Ct. App. 1989) (“[T]he polygraphist exerted improper influence over Martinez by emphasizing that both the polygraph results and the state’s witnesses would contradict his story, and by telling him that he was going to wind up in a problem.”); State v. Craig, 864 P.2d 1240, 1242 (Mont. 1993) (“We . . . condemn the use of the results of polygraph examinations to elicit or coerce a confession from defendants.”).

⁶⁷ Smith v. State, 797 So. 2d 503, 525 (Ala. Crim. App. 2000) (quotation marks omitted); *see also* United States v. Haswood, 350 F.3d 1024, 1029 (9th Cir. 2003); People v. Cipriano, 429 N.W.2d 781, 795 (Mich. 1988); People v. Cannady, 663 N.Y.S.2d 244, 245 (N.Y. App. Div. 1997).

⁶⁸ People v. Henson, 692 N.Y.S.2d 778, 779 (N.Y. App. Div. 1999).

2. Physical Evidence

Some judges, while affirming the ability of the police to lie during the interrogation process, have resisted allowing the government to falsify physical evidence such as reports and videotapes. In *State v. Cayward*,⁷⁰ the leading case in this area, the police fabricated two scientific reports, including one from a DNA lab. Most recently, a New Jersey court struck down a confession when the police made an audiotape in which an officer posed as an eyewitness and appeared to give information in the interview that incriminated the defendant.⁷¹ Courts have viewed physical evidence as simply different from, and more coercive in nature than, lies during a conversation.⁷² As stated by the court in *Cayward*:

We think . . . that both the suspect's and the public's expectations concerning the built-in adversariness of police interrogations do not encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual. . . . [T]he manufacturing of false documents by police officials offends our traditional notions of due process. . . . [M]anufactured documents have the

⁶⁹ *Gomes v. State*, 9 S.W.3d 373, 378 (Tex. Crim. App. 1999). Other police practices can be especially telling, particularly when the court views them as having a cumulative impact on the suspect. *See, e.g., State v. Grey*, 907 P.2d 951 (Mont. 1995) (regarding lies about which people police would be interviewing, the extent of the theft problem, the value of property taken, and the use of a video camera). Generally, though, the multiple practices situation will be viewed as part of a "totality of circumstances" analysis. *See infra* Part IV.

⁷⁰ 552 So. 2d 971 (Fla. Dist. Ct. App. 1989).

⁷¹ *State v. Patton*, 826 A.2d 783 (N.J. Super. App. Div. 2003). In reality, the situation was more complicated. Here the tape was used to induce the confession, and it was also offered at trial to establish the context of the confession and demonstrate that it was voluntarily given. *Id.*

⁷² One court stated:

Understanding that law enforcement needs some latitude in fighting crime, this court should permit police to use verbal deception but prohibit their use of falsehoods or deception in written or other tangible form, such as falsified lab tests, witness statements, or doctored photographs. This strikes an appropriate balance between the necessity for the police to use some deception in developing evidence, while prohibiting the carrying of such deception or falsehoods to a truly unfair advantage over an accused.

Sheriff v. Bessey, 914 P.2d 618, 622 (Nev. 1996) (Rose, J., dissenting).

potential of indefinite life and the facial appearance of authenticity.⁷³

Still, many courts are reluctant to establish such a “bright-line test dictating that verbal lying in interrogation is allowed, but fabrication of documents is forbidden.”⁷⁴ For these courts, the question remains: With the falsified documents, is this considered action that would “have induced a false confession”?⁷⁵

3. Deceptions About the Legal Process

Understandably, courts historically have been concerned about officers lying to the suspect about the legal process during interrogation. If one were to accept such behavior, real concerns surface about sabotaging of the entire system. This appears to be the view of the Supreme Court in *Lynnum v. Illinois*.⁷⁶ In *Lynnum*, the officers misrepresented to the suspect several times that if she did not confess, government benefits would be withdrawn and the suspect might not be able to see her children. The suspect subsequently confessed; however, she later challenged the voluntariness finding made by the trial court:

“The only reason I had for admitting it to the police was the hope of saving myself from going to jail and being taken away from my children. The statement I made to the police after they promised that they would intercede for me, the statements admitting the crime, were

⁷³ *Cayward*, 552 So. 2d at 974. In *State v. Farley*, the court stated:

We do not believe that merely telling the defendant that he did not do well on a polygraph examination without further elaboration is likely to encourage an innocent person to confess. Had the police intentionally fabricated more *specific* false results to obtain a confession, our view may very well be different. This is particularly true if the police had reduced these fabrications to a written report and disclosed it to the defendant. We definitely draw a demarcating line between police deception generally, which does not render a confession involuntary *per se*, and the manufacturing of false documents by the police which “has no place in our criminal justice system.”

452 S.E.2d 50, 60 n.13 (W. Va. 1994).

⁷⁴ *Bessey*, 914 P.2d at 622.

⁷⁵ *Id.* In *Whittington v. State*, the court stated: “We reject [defendant’s] contention that police deception with regard to the use of bogus scientific procedures is inherently more coercive than other forms of deception.” 809 A.2d 721, 734 (Md. Ct. Spec. App. 2002); *see also* *State v. Von Dohlen*, 471 S.E.2d 689 (S.C. 1996); *Arthur v. Commonwealth*, 480 S.E.2d 749 (Va. Ct. App. 1997).

⁷⁶ 372 U.S. 528 (1963).

false. . . . My statement to the police officers that I sold the marijuana to Zeno was false. I lied to the police at that time. I lied because the police told me they were going to send me to jail for 10 years and take my children, and I would never see them again; so I agreed to say whatever they wanted me to say."⁷⁷

The Court's language was succinct but direct: "We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases."⁷⁸

Cases such as *Lynnum* have led some courts to attempt to develop a bright line rule concerning deceptions about the legal process during interrogation. The leading opinion is by the Hawaii Supreme Court, which distinguished between intrinsic and extrinsic falsehoods to demonstrate permissible action by the government:⁷⁹

[E]mployment by the police of deliberate falsehoods *intrinsic* to the facts of the alleged offense in question will be treated as one of the totality of circumstances surrounding the confession or statement to be considered in assessing its voluntariness; on the other hand, deliberate falsehoods *extrinsic* to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence the accused to make a confession regardless of guilt, will be regarded as coercive *per se*, thus obviating the need for a "totality of circumstances" analysis of voluntariness.⁸⁰

Examples of potentially permissible *intrinsic* falsehoods normally focus on the evidence assembled against the suspect, while impermissible *extrinsic* falsehoods typically look to the assurance of more favorable treatment or the consequences of a particular conviction or admission.⁸¹

The harshest judicial language is usually found in cases in which police officers tell suspects that if they confess they will be released

⁷⁷ *Id.* at 532.

⁷⁸ *Id.* at 534.

⁷⁹ *State v. Kelekolio*, 849 P.2d 58, 73 (Haw. 1993); *see also* *Cole v. State*, 923 P.2d 820, 830 (Alaska Ct. App. 1996).

⁸⁰ As explained in *Sheriff v. Bessey*, 914 P.2d 618, 620 (Nev. 1996) (quoting *Kelekolio*, 849 P.2d at 73).

⁸¹ *United States v. Salisbury*, 966 F. Supp. 1082, 1085 (N.D. Ala. 1997).

immediately or very soon. This situation often arises when the officer says that the interview is for informational purposes only and the police are not pursuing a criminal suspect,⁸² that if criminal action is found there would be no prosecution,⁸³ that the statement would actually benefit the individual,⁸⁴ or that the defendant would be released regardless of what was said.⁸⁵ Many cases also consider the statement made by officers that if the defendant were to confess she would be treated with more sympathy by the trial judge, who would possibly give her a lesser sentence.⁸⁶

Judges also may be persuaded by the defense in cases in which government officials lie about the crime with which the person will be charged. Normally, this is seen where the officer indicates—sometimes explicitly, often implicitly—that the crime at issue is not nearly as serious as it might appear to the suspect. Two cases clearly illustrate this point.

First, in *State v. Ritter*,⁸⁷ the defendant made a statement after being informed by police that the victim of his assault was still alive, actually recovering, “and suffering from nothing more than a bad headache.”⁸⁸ Second, just before he confessed, the defendant in *Mitchell v. State*⁸⁹ was told that the victim had died of a heart attack.⁹⁰ The courts in both cases condemned the interrogation deceptions and found the resulting

⁸² *Smith v. State*, 787 P.2d 1038, 1039 (Alaska Ct. App. 1990).

⁸³ *See, e.g., Albritton v. State*, 769 So. 2d 438, 442 (Fla. Dist. Ct. App. 2000) (“[P]romise . . . that if [defendant] confessed that she committed the offense as part of a religious ritual, she would be constitutionally protected and could not be prosecuted.”).

⁸⁴ *Foster v. State*, 374 S.E.2d 188, 194 (Ga. 1988) (citations omitted) (“An accused must be warned that anything he says can and will be used against him in court. Telling him that a confession is not going to hurt and, on the contrary, will benefit him as much as the police, is not consistent with the warnings required by *Miranda*.”).

⁸⁵ *Johnson v. State*, 721 So. 2d 650, 659 (Miss. Ct. App. 1998). The converse is seen in *State v. Edwards*, 338 S.E.2d 126, 127 (N.C. Ct. App. 1985), where the defendant’s employer was ready to post bond to insure his timely release; the officers told him that if he did not make a signed statement he could not get out of jail. *See infra* text accompanying notes 125–33.

⁸⁶ *See, e.g., State v. Burgess*, 329 S.E.2d 856, 857 (W. Va. 1985).

⁸⁷ 485 S.E.2d 492 (Ga. 1997).

⁸⁸ *Id.* at 495.

⁸⁹ 508 So. 2d 1196 (Ala. Crim. App. 1986).

⁹⁰ *Id.* at 1199. The court stated:

Officer Turner, who had known the appellant for a long time, testified at the suppression hearing that he specifically told the appellant “that the woman died of heart failure and that anything that had been done to this lady didn’t kill her and she wouldn’t have died unless her heart quit.”

Id. at 1199 (citations omitted).

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confessions involuntary, for in each case the defendant had been given “an implied promise that [he] could not be charged with murder if he gave a statement to the police.”⁹¹

The most difficult cases in this area involve deceptions by the government about the legal process, but these are lies that are not necessarily central to the prosecution against the defendant. That is, the police do not deceive the defendant about going to jail, being charged, or being convicted of a more serious crime. Instead, these falsehoods concern the supposedly limited, “confidential” use of confessions,⁹² which court would have jurisdiction over the defendant,⁹³ or the role of defense counsel in negotiating a fair result for the defendant.⁹⁴ However, even in these cases it should be noted that this principle tends not to be a *per se* rule. Rather, these deceptions are viewed as factors in the totality of circumstances/voluntariness analysis, often resulting in decisions that the incriminating statements were voluntarily made.⁹⁵

4. Judicial Tolerance for Police Lying⁹⁶

Judges certainly seem ambivalent about the use of deception in the interrogation process. There is little judicial encouragement of the practice; indeed, there is a fair amount of comment about the distasteful nature of lying.⁹⁷ However, surprisingly few cases in this area involve determinations that such lying invalidates resulting confessions, either as a *per se* matter or as applied in the totality of circumstances test. This is

⁹¹ *Mitchell*, 508 So. 2d at 1199; *State v. Ritter*, 485 S.E.2d 492, 495 (Ga. 1997).

⁹² *See Hopkins v. Cockrell*, 325 F.3d 579, 584–85 (5th Cir. 2003); *Jones v. State*, 65 P.3d 903, 906 (Alaska Ct. App. 2003); *State v. McConkie*, 755 A.2d 1075, 1078 (Me. 2000). Deceptions as to the process for the defendant communicating may lead to a different outcome. *See, e.g., Commonwealth v. Novo*, 812 N.E.2d 1169 (Mass. 2004). In this case, police told the defendant that if he did not confess at the interrogation session, the jurors in this trial could not later hear his explanation. The court found that the lie resulted in an involuntary confession. *Id.*

⁹³ *State v. Quintero*, 480 N.W.2d 560 (Iowa 1992).

⁹⁴ *United States v. Anderson*, 929 F.2d 96, 100 (2d Cir. 1991).

⁹⁵ *See, e.g., United States v. LeBrun*, 363 F.3d 715, 723 (8th Cir. 2004); *Johnson v. State*, 660 So. 2d 637, 642 (Fla. 1995) (deciding a case where the defendant assumed that statements during polygraph examination could not be used against him); *Pinckney v. State*, 576 S.E.2d 574, 577 (Ga. Ct. App. 2003) (addressing the police statement, “you’re not in any danger at this point”); *State v. Todd*, 549 S.E.2d 821, 823 (Ga. Ct. App. 2001) (considering the deception that the defendant might be released if he confessed). *See generally State v. Swanigan*, 106 P.3d 39 (Kan. 2005).

⁹⁶ This sub-title is taken from the thoughtful article by Professor Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 451 (1996).

⁹⁷ *Commonwealth v. DiGiambattista*, 794 N.E.2d 1229, 1232 (Mass. App. Ct. 2003) (citations omitted) (disapproving of the use of such deception as a tactical device).

true even in those cases where courts attempt to distance themselves from what they believe to be utterly inappropriate government behavior.⁹⁸ In short, the deception normally will not be determinative with the voluntariness test; rather, it will be one factor in the totality of circumstances to be considered by the courts.⁹⁹ Sadly, that means there is little reliable precedent. Virtually every case is very fact specific, which has led some commentators—but not judges—to call for a bright line rule that would simply eliminate deceptions during interrogations.¹⁰⁰

B. Threats

With nary a dissent, judges throughout the United States condemn threats by police officers made during the interrogation process. Indeed, the language seen in judicial opinions ranges from utter abhorrence¹⁰¹ to extreme skepticism.¹⁰² One can certainly locate a wealth of decisions that find confessions resulting from threats to be involuntary and thus inadmissible.¹⁰³ Even with a very brief look, one sees such decisions based on a variety of threats: physical harm directed against the defendant;¹⁰⁴ potential prosecution or arrest of friends and family;¹⁰⁵

⁹⁸ As in *DiGiambattista*, where the conviction was affirmed with the confession found to be voluntary, in spite of the language quoted above in a case in which the police misled “the defendant into believing the Commonwealth had evidence [phony video tape] against him it did not have.” *Id.* at 1232; see also *State v. Critt*, 554 N.W.2d 93, 95–96 (Minn. Ct. App. 1996) (quoting *State v. Thaggard*, 527 N.W.2d 804, 810 (Minn. 1995)). However, the court there did repeat the advice that “police that . . . proceed on thin ice and at their own risk when they use deception of the sort used in this case.” *Id.* But see *State v. Dalzell*, a recent North Carolina murder prosecution where the “[p]olice used a phony arrest warrant and a fake letter from the district attorney, saying he would seek the death penalty if Dalzell did not confess to the crime.” *Judge Throws Out Confession in Carboro Murder Case*, WRAL.com, Jan. 10, 2005, www.wral.com/print/4066340/detail.html. Calling the actions an “extreme deviation,” the trial court ordered the resulting confession suppressed. *Id.*

⁹⁹ For a good analysis of the test focusing not only on the police lies but on the individual characteristics of the defendant, see *Ex parte Hill*, 557 So. 2d 838, 841 (Ala. 1989) (providing that deception coupled with the defendant’s borderline mental retardation and schizophrenic personality caused the confession to be viewed as involuntary).

¹⁰⁰ See Young, *supra* note 14, at 477; White, *Police Trickery*, *supra* note 14, at 628–29.

¹⁰¹ “A confession is not admissible if it is obtained by any sort of threat or violence, however slight.” *Garcia v. State*, 829 S.W.2d 830, 835 (Tex. Crim. App. 1992) (Kaplan, J., dissenting).

¹⁰² “[T]hreat-induced confessions must now be considered ‘presumptively involuntary.’” *Beavers v. State*, 998 P.2d 1040, 1048 (Alaska 2000) (Bryner, Eastaugh, JJ., dissenting).

¹⁰³ See *infra* Part III.B.

¹⁰⁴ The United States Supreme Court, of course, has consistently spoken strongly as to force used, or threatened to be used, in order to elicit an incriminating response. See *Arizona v. Fulminante*, 499 U.S. 279, 287–88 (1991). The rule applies whether the force is to be used by the police, or by others, such as jail inmates. *Griffin v. Strong*, 983 F.2d 1540,

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greater terms of incarceration;¹⁰⁶ lack of protection against others who threaten the suspect;¹⁰⁷ use, or refusal to authorize use, of medical treatment;¹⁰⁸ loss of employment or education;¹⁰⁹ and forfeiture of drivers' licenses.¹¹⁰

Still, it is an overwhelming reality that even with threats—including some rather extreme ones—confessions are routinely found to be made voluntarily, and thus they are admissible. With few exceptions, courts do not establish any sort of *per se* inadmissibility rules, and generally the threat is evaluated in context.¹¹¹ Thus, it is stated: “[I]t is not enough to show that threats were made to induce a confession. It must also be shown in the totality of circumstances that the suspect’s will was overborne and that the overreaching police conduct was causally related to the confession.”¹¹²

1543 (10th Cir. 1993). The officer in *Griffin* allegedly told the suspect that if he did not confess, he would be placed back in the general jail population and “they’d come down and smash [plaintiff’s] guts all over the floor like [defendant] had seen before.” *Id.* See generally *Lam v. Kelchner*, 304 F.3d 256 (3d Cir. 2002); *Zuliani v. State*, 903 S.W.2d 812, 823 (Tex. Crim. App. 1995).

¹⁰⁵ *State v. Baker*, 521 S.E.2d 24, 26 (Ga. Ct. App. 1999); *People v. Keene*, 539 N.Y.S.2d 214 (N.Y. App. Div. 1989); *State v. Corns*, 426 S.E.2d 324, 327 (S.C. Ct. App. 1992); *Black v. State*, 820 P.2d 969, 972 (Wyo. 1991). A few courts take a different view, concluding that such threats are permissible if “the threat could have been lawfully executed. Whether the police could have lawfully arrested (defendant’s sister) in turn depends on whether the investigating officers had probable cause to suspect (the sister) of criminal involvement.” *United States v. Johnson*, 351 F.3d 254, 262 (6th Cir. 2003); see *Turner v. State*, 682 N.E.2d 491, 494 (Ind. 1997) (holding that this is true even if the defendant is told that he might face a capital sentence); *State v. Chapman*, 605 A.2d 1055, 1061 (N.H. 1992) (holding that this is also true even if the defendant is told he “could go to jail for a long time”). See generally *United States v. Santos-Garcia*, 313 F.3d 1073, 1078–79 (8th Cir. 2002); *United States v. Thomas*, 595 A.2d 980, 981 (D.C. 1991); *State v. Massey*, 535 So. 2d 1135, 1141 (La. Ct. App. 1988); *State v. Hunn*, 821 S.W.2d 866, 870 (Mo. Ct. App. 1991).

¹⁰⁶ This can be found with extended incarceration time, revocation of bond or probation status, imposition of a high bond requirement, or delayed release from custody. *United States v. Mashburn*, 406 F.3d 303, 305 (4th Cir. 2005); *State v. Strayhand*, 911 P.2d 577, 585 (Ariz. Ct. App. 1995); *People v. Thomas*, 839 P.2d 1174, 1178 (Colo. 1992); *People v. McIntyre*, 789 P.2d 1108, 1110 (Colo. 1990); *State v. Tuttle*, 650 N.W.2d 20, 28–29 (S.D. 2002).

¹⁰⁷ *State v. Pilcher*, 472 N.W.2d 327, 334 (Minn. 1991); *State v. Foster*, 729 P.2d 599, 604 (Or. Ct. App. 1986).

¹⁰⁸ *State v. Wright*, 587 N.E.2d 906, 910 (Ohio Ct. App. 1990); *State v. Phelps*, 456 N.W.2d 290, 294 (Neb. 1990).

¹⁰⁹ *State v. Chavarria*, 33 P.3d 922, 927 (N.M. Ct. App. 2001); *State v. Bowe*, 881 P.2d 538, 547 (Haw. 1994).

¹¹⁰ *Webb v. State*, 756 P.2d 293, 296 (Alaska 1988).

¹¹¹ See *State v. Tuttle*, 650 N.W.2d 20, 35 (S.D. 2002).

¹¹² *Id.* As stated in *United States v. Braxton*:

This showing is difficult to make.¹¹³ Confessions have been found to be voluntary even with stark threats such as the following: a refusal to offer protection though a credible danger of violence existed,¹¹⁴ a statement that the police will arrest the defendant's wife,¹¹⁵ a threat to incarcerate the suspect for an extended period of time,¹¹⁶ a threat to possibly cause harm to the defendant,¹¹⁷ or a comment about removing a child from the defendant's family.¹¹⁸

C. *Promises*

As noted earlier,¹¹⁹ most judges in the United States have rejected the early pronouncement of the United States Supreme Court on the impact of promises during interrogation.¹²⁰ The Court in the *Bram* case wrote that a confession could not be allowed if it resulted from "any direct or implied promises, however slight. . . ."¹²¹ Once the Supreme Court itself retreated from this broad view,¹²² courts throughout the country looked at promises made, but not necessarily as disqualifying factors. Rather, they were to be taken as matters to be evaluated in the totality of circumstances.¹²³ Most judges decided that "[p]romises of leniency, in

The mere existence of threats, violence, implied promises, improper influence, or other coercive police activity, however, does not automatically render a confession involuntary. . . . To determine whether a defendant's will has been overborne or his capacity for self-determination critically impaired, courts must consider "the 'totality of the circumstances,' including the characteristics of the defendant, the setting of the interview, and the details of the interrogation."

112 F.3d 777, 780-81 (4th Cir. 1997); see also *State v. Swanigan*, 106 P.3d 39, 44 (Kan. 2005).

¹¹³ However, this is not impossible, as in *Tuttle*, where the other circumstances allowed for a finding of coercion. There the defendant was in a cell, interrogated in the middle of the night, under the influence of alcohol, only eighteen years old, deceived about the evidence against him, and threatened with harsh (though not explicitly described) treatment by the government. *Tuttle*, 650 N.W.2d at 35.

¹¹⁴ *State v. Sanders*, 13 P.3d 460, 466 (N.M. 2000).

¹¹⁵ *State v. Schumacher*, 37 P.3d 6, 13 (Idaho Ct. App. 2001).

¹¹⁶ *Braxton*, 112 F.3d at 785-86.

¹¹⁷ *State v. Bays*, 716 N.E.2d 1126, 1137 (Ohio 1999). The decision in *Bays* is rather striking, for the officers there also misled the defendant as to the strength of the evidence against him, and the defendant showed that he had a very low I.Q. *Id.* at 1137.

¹¹⁸ Compare *State v. P.Z.*, 703 A.2d 901, 915-16 (N.J. 1997) (emphasizing that a statement was made not during a usual criminal justice interrogation, as in *Lynnum*, but during a child abuse investigation), with *People v. Medina*, 25 P.3d 1216 (Colo. 2001).

¹¹⁹ See *supra* text accompanying notes 19-25.

¹²⁰ For a good discussion of the basic point, see *United States v. Jacobs*, 431 F.3d 99, 109-11 (3d Cir. 2005).

¹²¹ 168 U.S. 532, 542-43 (1897).

¹²² *Arizona v. Fulminante*, 499 U.S. 279, 286 (1991).

¹²³ See generally *United States v. Brave Heart*, 397 F.3d 1035, 1041 (8th Cir. 2005) ("[A] promise . . . "does not render a confession involuntary per se." It is simply one factor to be

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and of themselves, do not necessarily render a confession involuntary."¹²⁴ While there are some dissenters from this view, there are not many.¹²⁵

To have a confession declared involuntary purely because of a government promise is an uncommon occurrence. Apart from the merits of the claim, courts will not consider applying the standard test unless the defendant can demonstrate a causal link between the promise and the confession. That is, she must show that she acted in reliance on the promise¹²⁶ and that she was "induced" to confess as a result of the promise.¹²⁷ Except in the most extraordinary of cases,¹²⁸ if the promise was kept, most courts appear to find the analysis at an end.¹²⁹ Thus,

considered in the totality of circumstances."); *Rose v. Lee*, 252 F.3d 676, 685 (4th Cir. 2001) ("[T]he existence of a promise in connection with a confession does not render a confession per se involuntary."); *United States v. Walton*, 10 F.3d 1024, 1028 (3d Cir. 1993) ("[I]t is clear that the voluntariness of a confession does not depend solely upon whether it was made in response to promises."); *Bays*, 716 N.E.2d at 1137 ("A promise of leniency, while relevant to the totality-of-the-circumstances analysis, does not require that the confession be automatically suppressed.").

¹²⁴ *State v. Luke*, 1 P.3d 795, 799 (Idaho 2000); see also *State v. Durost*, 497 A.2d 134, 137 (Me. 1985). This is the position taken by one prominent observer as well. Welsh S. White, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1119 (2003).

¹²⁵ See *Ex parte Williams*, 780 So. 2d 673, 676 (Ala. 2000) ("[A]ny hope engendered or encouraged that the prisoner's case will be lightened . . . if he will confess . . . is enough to exclude the confession."); *State v. Jennett*, 574 N.W.2d 361, 368 (Iowa App. 1997) (Sackett, J., concurring in part and dissenting in part) ("For a statement to be considered free and voluntary, it must not be obtained by any direct or implied promises, however slight."); *Harper v. State*, 722 So. 2d 1267, 1273 (Miss. Ct. App. 1998) ("[L]aw enforcement officers should refrain from giving such an impression, [of favor if defendant confesses], 'however slight.'"). Also, refer to the Official Code of Georgia: "To make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. . . . [But] [t]he fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it." GA. CODE ANN. §§ 24-3-50, -51 (2005).

¹²⁶ *State v. Trostle*, 951 P.2d 869, 879 (Ariz. 1997).

¹²⁷ *Mason v. State*, 116 S.W.3d 248, 260 (Tex. Crim. App. 2003).

¹²⁸ Of course, if a promise is made to the accused and not kept by the government, any resulting confession is more likely to be struck down. See *Pyles v. State*, 947 S.W.2d 754, 755-56 (Ark. 1997); *Satter v. Solem*, 458 N.W.2d 762, 769 (S.D. 1990).

¹²⁹ See *Conner v. State*, 982 S.W.2d 655, 663 (Ark. 1998) ("[A] statement should be suppressed only if the promise of leniency or reward was false. Here, the State honored the detective's promise to 'save Conner's life' by waiving the death penalty. There was no detrimental reliance."); see also *State v. Thomas*, 673 N.W.2d 897, 906-07 (Neb. 2004); *Harrison v. Commonwealth*, 349 S.E.2d 167, 170 (Va. Ct. App. 1986). As stated in *United States v. Rutledge*: "Government is not forbidden to 'buy' information with honest promises of consideration." 900 F.2d 1127, 1130 (7th Cir. 1990). But see *State v. Leonard*, 605 So. 2d 697, 700 (La. Ct. App. 1992).

there are many cases in which confessions are found to be voluntary based upon a variety of promises made, including vague guarantees that the defendant will receive better treatment if she confesses,¹³⁰ offers of more lenient punishment for the suspect,¹³¹ assurances of lesser charges being prosecuted if the individual confesses,¹³² and the receipt of medical treatment if she makes an incriminating statement.¹³³

The reader ought not to be misled here. There is little clarity in this area. To be sure, a number of cases are readily identifiable in which confessions based upon promises have been held to be involuntary. Such cases have led to considerable confusion as to the law and the application of constitutional principles, especially when they often come from the very same courts, which—in other prosecutions, as noted above—allowed the same or very similar promises to induce confessions. These cases included agreements not to charge or to bring lesser counts if a statement was made,¹³⁴ promises of leniency for friends or family

[T]here is no authority for the proposition that an induced statement is made voluntary and admissible by the fulfillment of the inducement. The proper inquiry is not whether the inducement has or has not been fulfilled, rather it is whether the statements made by the interrogating officer constitute such an inducement that the statements made are not voluntary.

Id.

¹³⁰ The court in *Rutledge* stated the principle forcefully: “The police are allowed to play on a suspect’s ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible.” *Rutledge*, 900 F.2d at 1130. See generally *United States v. Santiago*, 410 F.3d 193, 202–03 (8th Cir. 2005); *United States v. Stewart*, 388 F.3d 1079, 1086 (7th Cir. 2004); *McLeod v. State*, 718 So. 2d 727, 729–30 (Ala. 1998); *State v. Blakeley*, 65 P.3d 77, 84 (Ariz. 2003); *Evans v. State*, 545 S.E.2d 641, 643 (Ga. Ct. App. 2001); *State v. Bone*, 550 S.E.2d 482, 490 (N.C. 2001); *State v. Beland*, 645 A.2d 79, 81 (N.H. 1994); *State v. Johnson*, 765 S.W.2d 780, 782 (Tenn. Crim. App. 1989).

¹³¹ See *United States v. Otters*, 197 F.3d 316, 318 (8th Cir. 1999); *Sprosty v. Buchler*, 79 F.3d 635, 645–46 (7th Cir. 1996); *Knight v. State*, 971 S.W.2d 272, 274 (Ark. Ct. App. 1998); *People v. Wickham*, 53 P.3d 691 (Colo. Ct. App. 2001); *State v. Wilson*, 894 P.2d 159, 161 (Idaho Ct. App. 1995). But see *State v. Ray*, 531 S.E.2d 705, 707 (Ga. 2000) (applying state statutory requirements, as discussed above).

¹³² See, e.g., *Thompson v. State*, 768 P.2d 127, 131 (Alaska Ct. App. 1989).

¹³³ *State v. McColl*, 813 A.2d 107, 122 (Conn. App. Ct. 2003) (relating to drug treatment); *Commonwealth v. Felice*, 693 N.E.2d 713, 715 (Mass. App. Ct. 1998) (addressing psychiatric help); *People v. Pugh*, 607 N.Y.S.2d 761–62 (N.Y. App. Div. 1994) (pertaining to psychological assistance); *State v. Slowinski*, 450 N.W.2d 107, 112 (Minn. 1990) (discussing psychiatric care); *People v. Taber*, 495 N.Y.S.2d 529 (N.Y. App. Div. 1985) (analyzing medical help).

¹³⁴ *Williams v. Withrow*, 944 F.2d 284, 289 (6th Cir. 1991); *United States v. Rogers*, 906 F.2d 189, 191 (5th Cir. 1990); *Prince v. State*, 584 So. 2d 889, 892 (Ala. Crim. Ct. App. 1991); *Miller v. State*, 18 P.3d 696, 700 (Alaska Ct. App. 2001); *State v. Tamerius*, 449 N.W.2d 535, 537 (Neb. 1989); *People v. Hilliard*, 499 N.Y.S.2d 283 (N.Y. App. Div. 1986); *State v. Pickar*,

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members once a confession was given,¹³⁵ assurances of protection from threats of others as soon as the suspect spoke,¹³⁶ guarantees of treatment if the defendant cooperated,¹³⁷ exchange of lighter sentences for formal declarations by the individual,¹³⁸ and representations by the government that if a statement was made it would somehow remain confidential.¹³⁹

D. Duration of Interrogation

The timing of the confession, both as to when it occurs¹⁴⁰ and how long the process takes, is a perfect example of how little certainty exists within the due process analysis. The extreme situations, of course, are not difficult to identify and categorize. The leading decision comes from the United States Supreme Court and is now over sixty years old. In *Ashcraft v. Tennessee*,¹⁴¹ the defendant was held for thirty-six hours and cut off from all contact with others. Teams of investigators drilled the defendant with questions. During this period, the defendant went with virtually no break, which included no sleep or rest. The Justices had no trouble deciding that the resulting confession was coerced and could not be used as evidence against him. The language of Justice Black is striking:

453 N.W.2d 783, 787 (N.D. 1990); *Robinson v. State*, 855 S.W.2d 107, 108–09 (Tex. App. 1993).

¹³⁵ *State v. Harper*, 485 So. 2d 224, 227 (La. Ct. App. 1986); *Lowry v. State*, 729 P.2d 511, 513 (Okla. Crim. App. 1986); *Tovar v. State*, 709 S.W.2d 25, 28 (Tex. App. 1986).

¹³⁶ *Winder v. State*, 765 A.2d 97, 121 (Md. 2001).

¹³⁷ *State v. Phillips*, 30 S.W.3d 372, 375–76 (Tenn. Crim. App. 2000).

¹³⁸ *State v. Hankerson*, 604 So. 2d 1330, 1334 (La. Ct. App. 1992); *Commonwealth v. Distefano*, 782 A.2d 574, 581 (Pa. Super. Ct. 2001).

¹³⁹ *United States v. Walton*, 10 F.3d 1024, 1027 (3d Cir. 1993); *State v. Sheehan*, 515 So. 2d 670, 674 (La. Ct. App. 1987); *State v. McDermott*, 554 A.2d 1302, 1305 (N.H. 1989); *State v. Pillar*, 820 A.2d 1, 15 (N.J. Super. Ct. App. Div. 2003); *State v. Allen*, 432 S.E.2d 199, 202 (W. Va. 1993).

¹⁴⁰ This refers to the timing problem in which the authorities delay in taking the suspect to appear before a judicial officer, not necessarily the extended period for the interrogation. With the former, very specific rules govern the procedure so that the due process analysis does not often surface. In the federal courts, the Supreme Court's holdings in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), prompted Congress to adopt a statutory provision that gives officers a "six-hour 'safe harbor'" to question the suspect before being required to bring him to a judicial officer. *United States v. Mansoori*, 304 F.3d 635, 660 (7th Cir. 2002); see 18 U.S.C. § 3501(c) (2000). A delay of longer than the six-hour period allows—but does not require—a resulting confession to be deemed inadmissible. Many states have similar requirements. See, e.g., *Williams v. State*, 825 A.2d 1078, 1095 (Md. 2003) ("We hold that any deliberate and unnecessary delay in presenting an accused before a District Court Commissioner, in violation of [the rules] must be given very heavy weight in determining whether a resulting confession is voluntary.").

¹⁴¹ *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

Testimony of the officers shows that the reason they questioned Ashcraft “in relays” was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Ashcraft had no rest. One officer did say that he gave the suspect a single five minutes respite, but except for this five minutes the procedure consisted of one continuous stream of questions. . . . We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a “voluntary” confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room. The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.¹⁴²

While powerful in its language and holding, *Ashcraft* has carried relatively limited precedential value. There is rarely nonstop questioning conducted by teams of investigators over more than one full day in which a suspect is not given any time for rest. Once the prosecution at issue moves away from such an extreme situation, it becomes problematic for courts to determine the reach of the

¹⁴² *Id.* at 149-55.

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voluntariness test in terms of the duration of the questioning process.¹⁴³ Some courts conclude that a lengthy interrogation period, by itself, may be enough to cause the resulting confession to be invalid.¹⁴⁴ Other judges feel that time itself is not necessarily the determinative factor.¹⁴⁵ Instead, they look to other considerations to decide whether the confession is voluntary. Such considerations include the atmosphere surrounding the interrogation,¹⁴⁶ the number and duration of breaks during the process,¹⁴⁷ and the purpose for the questioning.¹⁴⁸

At the conclusion of a review of these cases, it is striking how little guidance lawyers, judges, and law enforcement officers have in terms of the allowable time for police questioning. The experience in one state over a one-year period illustrates the point. Within a period of thirteen months, three New York courts scrutinized extended interrogations and reached quite different results. In one case, the suspect was questioned

¹⁴³ In a case in which the defendant complained about an interrogation period of a little more than two hours, the court in *People v. DeLisle* discussed the necessary considerations:

In determining whether a statement is voluntary, the circumstances which must be considered include, but are not limited to, the length and conditions of the detention, the physical and mental state of the defendant, the age, mentality, and prior criminal experience of the defendant, the nature of any inducement offered, the conduct of the police, and the adequacy and frequency of the advice of rights.

455 N.W.2d 401, 403-04 (Mich. Ct. App. 1990). The confession was determined to be coerced, with the court focusing on the length of the interrogation, the defendant's emotional state, his lack of experience with the criminal justice system, and his limited education.

¹⁴⁴ See, e.g., *Pardue v. State*, 695 So. 2d 199, 205 (Ala. Crim. App. 1996) (addressing a series of interrogations that took place over a seventy-hour period); *Smith v. Duckworth*, 910 F.2d 1492, 1496 (7th Cir. 1990) (considering a situation where the total time of questioning was nine hours); *State v. Johnston*, 580 N.E.2d 1162, 1167 (Ohio Ct. App. 1990) (analyzing an interrogation that lasted eight and one-half hours).

¹⁴⁵ *William v. Nye*, 869 F. Supp. 867, 871 (D. Kan. 1994), *aff'd*, 83 F.3d 434 (10th Cir. 1996) (questioning of nineteen hours); *State v. Munoz*, 972 P.2d 847, 853 (N.M. 1998) (questioning less than two hours); *Smith v. State*, 779 S.W.2d 417, 428 (Tex. Crim. App. 1989) (interrogating for eight hours).

¹⁴⁶ See, e.g., *Gonzales v. State*, 807 S.W.2d 830, 833 (Tex. App. 1991) ("Although appellant's interview here lasted four and one-half hours, officers testified he was free to leave at anytime, had he asked for something they would have tried to oblige him, and he was not threatened in any way."). See generally *State v. Harris*, 105 P.3d 1258 (Kan. 2005).

¹⁴⁷ See, e.g., *People v. Hill*, 839 P.2d 984, 994 (Cal. 1992) ("The 12-hour period . . . was not one of continuous interrogation. The actual interrogation, which was divided into five sessions, comprised only about eight hours. The breaks between sessions were not of insignificant duration."). See generally *Conde v. State*, 860 So. 2d 930 (Fla. 2003); *State v. Blackman*, 875 S.W.2d 122, 135-36 (Mo. Ct. App. 1994).

¹⁴⁸ *Williams v. State*, 991 S.W.2d 565, 574 (Ark. 1999) (allowing a thirteen hour interrogation process, for the "focus of the officers was on finding [the victim], who at the time of the interview was still missing and presumed alive").

for ten hours. The court allowed the process, remarking that there “was no evidence that the police officers threatened or pressured the defendant. . . . At all times, he indicated his willingness to talk.”¹⁴⁹ A similar ruling was issued in a case in which the defendant was interviewed for nine hours and the court stated that the defendant had been given the *Miranda* warnings, “was not subjected to continuous interrogation, and he was not denied sleep or food when requested.”¹⁵⁰ If those two cases reflect the New York law on point, it is difficult to explain the third case, where the resulting confession was found to be coerced.¹⁵¹ The interrogation in the third case took place during a twenty-three hour incarceration, but there was no indication of how long the actual questioning took. For the court, it was “noteworthy that the defendant was not offered anything of substance to eat until eighteen hours after his arrest.”¹⁵² All three courts offered the somewhat less than helpful observation that the decision as to whether a confession has been coerced “is to be determined from the perspective of the defendant.”¹⁵³

E. The Individual Defendant

As noted in the previous section, courts look closely at the characteristics of the particular defendant to determine whether that person was truly coerced by the actions of the police. The courts evaluate a wide range of traits in order to fairly “focuses on the particular individual rather than on a hypothetical reasonable person.”¹⁵⁴ A number of the more significant factors are described below.

1. Age

There is no prohibition against the interrogation of minors. The confessions of even young teens have been routinely allowed.¹⁵⁵

¹⁴⁹ *People v. Smith*, 617 N.Y.S.2d 884, 885 (N.Y. App. Div. 1994).

¹⁵⁰ *People v. Hayes*, 633 N.Y.S.2d 565, 566 (N.Y. App. Div. 1995).

¹⁵¹ *People v. Johnson*, 636 N.Y.S.2d 540, 546 (N.Y. Sup. Ct. 1995).

¹⁵² *Id.*

¹⁵³ *Id.* at 545.

¹⁵⁴ *United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990); *see also State v. Pickar*, 453 N.W.2d 783, 787 (N.D. 1990) (“The proper inquiry is whether, given the characteristics and condition of the accused, the atmosphere surrounding the interrogation was coercive.”).

¹⁵⁵ *See, e.g., Martinez v. State*, 131 S.W.3d 22, 24 (Tex. App. 2003) (“Evidence of Martinez’s world experiences shows that he was more sophisticated than an average 15 year-old.”); *In re V.M.D.*, 974 S.W.2d 332, 346 (Tex. App. 1998) (holding that the confession of twelve-year-old in a capital case was voluntary); *Misskelley v. State*, 915 S.W.2d 702, 712 (Ark. 1996) (considering a fact pattern where the defendant was “just thirty-seven days away from his eighteenth birthday”); *Everetts v. United States*, 627 A.2d 981 (D.C. App. 1993) (holding that a sixteen-year-old teen was allowed to give statement).

Nevertheless, it is clear that such confessions will be scrutinized carefully to determine the ability of the youth to make a voluntary statement. The leading case is *Haley v. Ohio*,¹⁵⁶ where the United States Supreme Court appeared shocked at seeing a teenager questioned by teams of police officers for more than five hours. The Court wrote:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.¹⁵⁷

¹⁵⁶ 332 U.S. 596 (1948).

¹⁵⁷ *Id.* at 599–600; see also *Gallegos v. Colorado*, 370 U.S. 49 (1962). In *Gallegos*, the Court reasoned:

The fact that petitioner was only 14 years old puts this case on the same footing as *Haley v. Ohio*, *supra*. There was here no evidence of prolonged questioning. But the five-day detention—during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor—gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if

Fortunately, few modern cases approach reaching the egregious practices in *Haley*. Still, many judges express special concern when the accused is a minor.¹⁵⁸ In a federal case decided just last year, a sixteen-year-old was interrogated for three hours in the middle of the night without an adult advising him.¹⁵⁹ Although he had been arrested before, the court concentrated heavily on the defendant's "relative youth" in finding his confession to be involuntarily given.¹⁶⁰ Similarly, another opinion emphasized the youth of the defendant—eleven years old—in determining that the confession had not been freely given:

Every factor weighed in our analysis militates against the conclusion that LaCresha's statement was voluntary. At eleven years of age, . . . [s]he had no experience with the criminal justice system, had been held in the custody of the State for three days, was unaccompanied by any parent, guardian, attorney, or other friendly adult, and was found to have below-normal intelligence by the court-appointed psychiatrist prior to her criminal trial,¹⁶¹

2. The Defendant's Health

A defendant's health is not often viewed as a factor that indicates that the confession was voluntary. It is rare to see the reasoning that the confession was voluntary because the "defendant was in robust health," or "the accused was viewed as cured of his mental illness."¹⁶² Instead,

we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.

370 U.S. at 53–54.

¹⁵⁸ As they should, based on the empirical evidence that has been assembled. *See infra* note 184.

¹⁵⁹ *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004).

¹⁶⁰ *Id.* at 1015.

¹⁶¹ *Murray v. Earle*, 405 F.3d 278, 288 (5th Cir. 2005); *see also* *State v. Ellvanger*, 453 N.W.2d 810 (N.D. 1990). In *Ellvanger*, the court stated:

An intoxicated fifteen-year-old boy who may or may not have been given his *Miranda* warnings was repeatedly interrogated by officers in early morning hours; he had had little sleep in the preceding 24 hours; he was experiencing the shock of the death of a friend and the wounding of his father; he was not represented by a parent, guardian, or custodian; he was denied his right to counsel

453 N.W.2d at 815.

¹⁶² *But see* *State v. Troyer*, 910 P.2d 1182, 1188 (Utah 1995) (emphasizing that the defendant "was both physically and mentally fit").

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the matter arises—with some regularity—when serious questions are raised as to concerns about the defendant's physical or mental health in connection with the interrogation process. The questions normally occur in three factual settings.

The first setting is the situation in which the defendant is physically ailing and is either hospitalized or bedridden. In such cases, the courts may allow the confession, but the conditions will be rigorously scrutinized.¹⁶³ The second setting involves evidence that the defendant made an incriminating statement at a time when she was under the influence of alcohol or drugs. Judges appear to have little tolerance in this setting and regularly allow confessions even when the suspect was substantially under the influence.¹⁶⁴ It will likely take an unusual situation before judges are willing to find a confession in such a case to be involuntary.¹⁶⁵

The third setting is the most problematic because it involves defendants who suffer from serious mental illness. Here, mere allegations of such illness will not suffice. Instead, courts demand that the defendant show that he suffers from such a disorder and demonstrate that the disease affected the defendant's ability to understand the rights explained to him and to voluntarily give a statement. As explained recently by the Court of Criminal Appeals of Texas, evidence of a mental disorder is relevant in the voluntariness analysis. The relevance of the disorder depends on the fulfillment of two criteria:

¹⁶³ In *State v. Vincik*, 398 N.W.2d 788, 792 (Iowa 1987), the confession was invalidated with the court looking carefully at the defendant's condition. "We cannot divorce Vincik's infirm mental and physical condition from the police officers' actions here. Vincik did not walk up to these two officers and offer to talk about a crime; he was arrested at the hospital and hauled to the . . . police station for interrogation." *Id.*

¹⁶⁴ See *State v. Rivera*, 733 P.2d 1090, 1096 (Ariz. 1987) ("The fact that defendant may still have been intoxicated at the time of his confession does not necessarily make the statement involuntary and thus inadmissible."); *State v. Barczak*, 562 A.2d 140, 145 (Me. 1989) ("[The issue is whether] despite the degree of intoxication he is aware and capable of comprehending and communicating with coherence and rationality." (quoting *State v. Finson*, 447 A.2d 788, 792 (N.J. 1982))); *Coon v. Weber*, 644 N.W.2d 638, 645 (S.D. 2002) ("[T]he test for undue influence is whether the defendant can still relate the events of the time in question and his role in them."). *But see Allan v. State*, 38 P.3d 175, 178 (Nev. 2002) (rejecting the confession of the defendant—under the influence of methamphetamine—who was subject to police questioning using "forms of psychological pressure"). *Contra Floyd v. State*, 42 P.3d 249, 260 (Nev. 2002) (accepting the argument that the defendant was not in any sort of physical discomfort, and was only "somewhat intoxicated").

¹⁶⁵ See generally *State v. Young*, 469 So. 2d 1014 (La. App. 1985).

The first concerns the existence of proof . . . illustrating that the mental condition . . . was reasonably capable of having such an affect on appellant's mind so as to render the confession involuntary. . . . The second concerns the existence of proof illustrating that the condition impaired the accused at the time he confessed.¹⁶⁶

The actual number of reported decisions in which a confession is found to be involuntary because of the suspect's mental illness is small.¹⁶⁷ Such decisions are made, but they are relatively rare.¹⁶⁸

3. Intelligence Quotient ("I.Q.")

The impact of low I.Q. scores on the voluntariness test is especially troubling.¹⁶⁹ It is disturbing because such scores may signal an inability of the suspect to understand the proceedings or lead to an individual being easily swayed into responding to what might otherwise appear to be non-coercive law enforcement practices. Yet, the courts are clear that a low score alone is not sufficient to find a confession to be involuntary:

[D]iminished mental or intellectual capacity does not of itself vitiate the ability to make a knowing and

¹⁶⁶ *Darnes v. State*, 118 S.W.3d 916, 921 (Tex. App. 2003). For an interesting discussion of the need for expert testimony when a defendant argues that someone with a particular "psychological profile sometimes makes statements that appear to be voluntary but that are in fact the product of suggestion," see *State v. Romero*, 81 P.3d 714, 723 (Or. Ct. App. 2003). See generally Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243 (2004).

¹⁶⁷ See *Young*, 469 So. 2d at 1014; *Darnes*, 118 S.W.3d 916. See generally *State v. Blank*, 804 So. 2d 132, 140 (La. App. 2001) (addressing diminished mental capacity); *State v. Halcomb*, 510 N.W.2d 344, 350 (Neb. App. 1993) (considering multiple personality disorder).

¹⁶⁸ *Wilson v. Lawrence Country*, 260 F.3d 946, 952 (8th Cir. 2001), provides a good illustration of the unusual prosecution. There the criminal defendant appeared to have serious mental problems, and some authorities thought "he had difficulty distinguishing between fantasy and reality." *Id.* at 952. The police intensely interrogated him and he made incriminating comments. *Id.* The Government argued that the confession was voluntary because the deceptive techniques utilized were no different from what had been affirmed in earlier cases (lies about evidence against him, threats as to imminent arrest, etc.). *Id.* at 953. The court categorically rejected this position, for here the "confessor . . . was mentally handicapped." *Id.* Moreover, the fact that the defendant was advised of his rights did not move the court for he was "unlikely to understand them because of his low intelligence." *Id.* at 953.

¹⁶⁹ Michael J. O'Connell, *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 L. & HUM. BEHAVIOR 359, 359-69 (2005).

intelligent waiver of constitutional rights and a free and voluntary confession.¹⁷⁰

[A] subnormal mental capacity . . . does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made.¹⁷¹

[M]ental deficiencies of a defendant, by themselves, are not sufficient to render a confession involuntary. To establish that his confession was involuntary, petitioner must also establish police coercion.¹⁷²

One factor that is often used to “balance out” the low intellectual ability of the accused is her experience with the criminal justice system. Such experience is thought to establish “some degree of familiarity with the criminal justice system.”¹⁷³ Also, it may indicate that the individual is “better able to communicate in this field than most others,”¹⁷⁴ and “would have aided him in understanding *Miranda* warnings.”¹⁷⁵ Thus, it is not at all surprising that many courts have admitted confessions even in cases in which defendants possessed extremely low intelligence as indicated by sub-normal I.Q. scores. The key for these courts is a conclusion that the experienced defendant—in spite of low intelligence—is able to understand the proceedings, rationally consider the rights discussed, and freely choose to speak.¹⁷⁶ This conclusion is especially significant if coupled with police tactics that are less than extreme.¹⁷⁷

¹⁷⁰ *State v. Lavalais*, 685 So. 2d 1048, 1054 (La. 1996) (allowing a statement where the defendant’s I.Q. score was seventy-seven).

¹⁷¹ *State v. Mahatha*, 578 S.E.2d 617, 624 (N.C. App. 2003) (quoting *State v. Fincher*, 305 S.E.2d 685, 690 (N.C. 1983) (finding a confession voluntary despite an I.Q. score of sixty-two)).

¹⁷² *Moore v. Dugger*, 856 F.2d 129, 131–32 (11th Cir. 1988) (allowing incriminating comments where the defendant’s I.Q. score was sixty-two). The judges relied heavily on *Colorado v. Connelly* in finding that no improper police action took place. See *supra* text accompanying notes 38–49. See generally *Rogers v. Commonwealth*, 86 S.W.3d 29, 36 (Ky. 2002).

¹⁷³ *Rankin v. State*, 1 S.W.3d 14, 18 (Ark. 1999).

¹⁷⁴ *People v. Travis*, 525 N.E.2d 1137, 1144 (Ill. App. 1988).

¹⁷⁵ *Commonwealth v. St. Peter*, 722 N.E.2d 1002, 1007 (Mass. App. 2000).

¹⁷⁶ See, e.g., *State v. Cook*, 67 S.W.3d 718 (Mo. App. 2002); *Briones v. State*, No. 13-01-152-CR, 2003 Tex. App. LEXIS 7305 (Tex. App. Aug. 27, 2003); *Franks v. State*, 90 S.W.3d 771 (Tex. App. 2002). See generally *Roberts v. State*, 102 S.W.3d 482 (Ark. 2003); *State v. Camacho*, 561 N.W.2d 160 (Minn. 1997).

¹⁷⁷ See, e.g., *People v. Melock*, 599 N.E.2d 941, 953 (Ill. 1992); *State v. Lynch*, 787 N.E.2d 1185, 1199 (Ohio 2003).

Again, unfortunately there exists a glaring lack of consistency in this area. Many courts oppose admitting statements of individuals with sub-normal intelligence. Three cases from across the country illustrate this point. A defendant's murder conviction was reversed in *State v. Rettenberger*.¹⁷⁸ The Utah Supreme Court found that because of the defendant's "below-average I.Q. . . . he 'was more susceptible to stress and coercion than the average person.'"¹⁷⁹ The West Virginia Supreme Court, in *State v. Lopez*,¹⁸⁰ set aside a conviction for felony-murder when the evidence showed that the accused had difficulty with the English language and "had the mental capacity of a five-year old, that he had borderline mental functioning, and that he thought only in concrete terms . . . [and] was unable to understand abstract concepts such as the right to silence."¹⁸¹ The Wisconsin Court of Appeals reached a similar result in *State v. Cumber*.¹⁸² The Wisconsin court laid out the evidence dealing with defendant's capabilities:

The officer acknowledged that Cumber had difficulty keeping his mind on a particular subject for any length of time. He testified that Cumber was confused and upset, crying and contradicting himself several times during the interrogation and asking for help. . . . Cumber's own testimony . . . revealed pronounced difficulty in reading. His several attempts to read from his statement while on the stand uniformly lapsed into extreme confusion and nonsensical sentences.¹⁸³

It is not surprising that the courts are not in full agreement about the application of the voluntariness test to this fact pattern involving sub-normal intelligence. However, what is extremely problematic is that there is considerable relevant empirical evidence that should impact the decision making process, but such evidence is essentially ignored by many judges on both sides of the debate.¹⁸⁴

¹⁷⁸ 984 P.2d 1009 (Utah 1999).

¹⁷⁹ *Id.* at 1019.

¹⁸⁰ 476 S.E.2d 227 (W. Va. 1996).

¹⁸¹ *Id.* at 235.

¹⁸² 387 N.W.2d 291 (Wis. App. 1986).

¹⁸³ *Id.* at 294.

¹⁸⁴ As noted in one recent article: "Studies and surveys have found that both minors and the mentally impaired are more likely to make false confessions, in part because they are more vulnerable to suggestion." Maura Dolan & Evelyn Larrubia, *Telling Police What They Want to Hear, Even if It's False*, L.A. TIMES, Oct. 30, 2004, at 1, available at <http://www.latimes.com/news/local/la-me-confess30oct30,0,7515039,print.story?coll=la->

I do not argue that judges are incapable of carefully reviewing such information; after all, that is precisely what the United States Supreme Court did in determining that mentally retarded defendants cannot be sentenced to death.¹⁸⁵ The Supreme Court's analysis was thoughtful and respectful of the relevant scientific research in the field.¹⁸⁶ Rather, one is struck by how little weight is placed on the empirical evidence that discusses the ability of persons with sub-average intelligence to understand the proceedings¹⁸⁷ or resist heavy police activity and freely choose to make a statement.¹⁸⁸ While several commentators have attempted to come to grips with such work,¹⁸⁹ judges do not often make the effort. Instead, even in cases of defendants with very low I.Q. scores, judicial opinions spend little time on such scores and make mere references to the fact that the defendant was advised of his rights¹⁹⁰ or that the person had the ability to understand the rights and to confess voluntarily.¹⁹¹

¹⁸⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁸⁶ See also *Smith v. Texas*, 543 U.S. 37 (2004); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) (looking to low I.Q. scores as being the basis for jurors to decline to sentence a convicted capital defendant to the death penalty); *In re Hawthorne*, 105 P.3d 352 (Cal. 2005) (California Supreme Court refused to identify any I.Q. score as indicating mental retardation in the capital sentencing context).

¹⁸⁷ Researchers in England:

[F]ound that many people with learning disabilities did not understand that they had a right to legal advice and/or a right to have someone informed of the whereabouts, even when the Notice [of rights, similar to *Miranda* warnings] was read out to them . . . [and even after the Notice was simplified] 68% of the sentences were fully understood by people in the normal range for ability, while people with intellectual disabilities understood only 11% of sentences.

G. Murphy & I.C. Clare, *People with Learning Disabilities as Offenders or Alleged Offenders in the UK Criminal Justice System*, 91 J. ROYAL SOC. MED. 178, 180 (1998). The U.S. studies are similar. See Solomon M. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudent Therapy Perspective*, 28 L. & PSYCHOL. REV. 53 (2004).

¹⁸⁸ "People of limited intelligence are generally more suggestible than those of superior cognitive abilities." Gisli Gudjonsson, *Theoretical and Empirical Aspects of Interrogative Suggestibility in SUGGESTION AND SUGGESTIBILITY* 141 (Gheorghiu et al. eds., 1989); see also Fulero & Everington, *supra* note 187. This finding is also made with young suspects. Fulero & Everington, *supra* note 187.

¹⁸⁹ The leading piece is an excellent analysis. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002).

¹⁹⁰ The court in *White v. State* recognized that the defendant, with an I.Q. score of sixty-four, was mildly retarded, but allowed his statement for he was advised of his rights and he never requested an attorney. 465 S.E.2d 277 (Ga. 1996).

¹⁹¹ See, e.g., *Commonwealth v. Wallen*, 619 N.E.2d 365, 367 (Mass. App. 1993), where the confession was found to be voluntary. The judges explained their decision:

4. Impact of Videotaping

In the past decade, many police departments throughout the United States have begun to videotape the interrogation process and resulting confessions of suspects in custody.¹⁹² Some do it as a matter of policy; others are directed to do so by judicial opinions.¹⁹³ Also, just two years ago, Illinois became the first state in the nation to enact a statute requiring videotaping.¹⁹⁴ Because these developments are so recent, the impact of this new procedure in reported decisions and conviction appeals are only now available.

Nothing appears from the record to indicate that the defendant was unable to understand any of the procedures. While the judge found that the defendant has an I.Q. between sixty and seventy, attained only third or fourth grade reading and writing levels, and is able to recognize few words of more than three syllables, he also found he could read newspapers and write letters.

Id.

¹⁹² The United Kingdom has mandated such videotaping for a number of years. See John Baldwin, *Police Interview Techniques: Establishing Truth or Proof*, 33 BRIT. J. CRIM. 325 (1993) (discussing the practices there and in Australia); Slobogin, *supra* note 9 (arguing in favor of a constitutional requirement of taping in the United States); Wayne Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493 (1998). Concerns as to the impact of videotaped statements are laid out in G. Daniel Lassiter et al., *Accountability and the Camera Perspective Bias in Videotaped Confessions*, in ANALYSES OF SOCIAL ISSUES AND PUBLIC POLICY 53-70 (2001).

¹⁹³ See, e.g., *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (requiring recording under the state constitution); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (mandating taping under its supervisory power). In *Commonwealth v. DiGiambattista*, the Massachusetts Supreme Judicial Court—looking to its supervisory power regarding evidence at trials—decided that if a confession was not videotaped, the jury could be instructed that the statement was to be evaluated with “particular caution.” 813 N.E.2d 5 (Mass. 2004). A similar result was reached in *State v. Jerrell*, 699 N.W.2d 110 (Wis. 2005), but it was limited to juveniles.

¹⁹⁴ 725 ILL. COMP. STAT. ANN. 5/103-2.2 provides:

(b) An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed to be inadmissible as evidence against the accused in any criminal proceeding . . . unless:

- (1) an electronic recording is made of the custodial interrogation; and
- (2) the recording is substantially accurate and not intentionally altered.

(c) Every electronic recording required under this Section must be preserved until such time as . . . all . . . appeals are exhausted . . .

(d) If the court finds, by a preponderance of the evidence, that the defendant was subjected to a custodial interrogation in violation of this Section, then any statements made by the defendant during or following that non-recorded custodial interrogation. . . are presumed to be inadmissible in any criminal proceeding against the defendant except for the purposes of impeachment.

Id.

The impact looks as if it will be substantial in two principal ways. First, it will give judges a good look at the process to determine whether improper techniques were employed during questioning. Judges can determine for themselves that the process was not harsh and involved no mistreatment¹⁹⁵ or that inappropriate assurances or promises were made to the suspect during the custodial period.¹⁹⁶ Viewing a videotaped interrogation is also quite helpful in determining the individual suspect's condition. Thus, judges are more able to conclude with some degree of certainty that the accused either understood her rights and freely spoke¹⁹⁷ or was coerced into talking with the police.¹⁹⁸ At this point the number of reported cases exploring the role of videotaped interrogations is limited, but that number is very likely to increase substantially over the next several years.

5. *Miranda* Warnings

Many commentators have asserted that *Miranda* is not the law enforcement straightjacket that its critics claim.¹⁹⁹ Indeed, this Article and others have made the argument that the *Miranda* requirements are an extremely important and positive tool for the police. That is, if officers who are interrogating suspects in their custody carefully follow the mandate of *Miranda* and clearly advise the suspects of their rights to silence and a lawyer, few Fifth Amendment problems will follow in admitting confessions.

The point extends even further. The same notion is true with respect to the impact of the warnings in cases in which the defense's claim of inadmissibility rests on due process rather than privilege against self-incrimination. Courts have consistently found that the giving of *Miranda* warnings is a relevant and significant factor in the totality-of-circumstances analysis under the Due Process Clause.²⁰⁰ Additionally, in

¹⁹⁵ State v. Getsy, 702 N.E.2d 866 (Ohio 1998).

¹⁹⁶ State v. Baston, 928 P.2d 79 (Kan. 1996).

¹⁹⁷ See Villa v. State, 721 N.E.2d 1272, 1275 (Ind. App. 1999); State v. Lamark, 584 So. 2d 686 (La. App. 1991); People v. Haywood, 530 N.W.2d 497 (Mich. App. 1995).

¹⁹⁸ One of the most publicized cases involved Maryland defendant Richard Gater. The basic facts of the case are laid out in the introductory section above. See Casteneda, *supra* note 2.

¹⁹⁹ See, e.g., Cloud et al., *supra* note 189; Steven D. Clymer, *Are Police Free to Discard Miranda*, 112 YALE L.J. 447 (2002); Paul Marcus, *A Return to the 'Bright Line' Rule of Miranda*, 35 WM. & MARY L.J. 93 (1993). For an excellent overview of the area, see WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (Univ. of Mich. Press 2001).

²⁰⁰ See, e.g., Lyons v. Luebbbers, 403 F.3d 585, 596-97 (8th Cir. 2005); Roman v. State, 475 So. 2d 1228, 1232 (Fla. 1985); State v. Taillon, 470 N.W.2d 226, 229 (N.D. 1991); Jackson v.

that analysis, the *Miranda* warnings are given heavy weight. Many cases can be found throughout the nation—both federal and state—in which confessions are held to be voluntary, with courts relying strongly on the fact that the suspects were given *Miranda* warnings and appeared to understand their constitutional rights.²⁰¹

Once again, consistent statements of the law cannot be expected. Just as some courts look to the *Miranda* warnings to find voluntary statements, other courts discuss the warnings to conclude that improper coercion took place. This conclusion is usually reached where either the warnings were not given²⁰² or the warnings were given and then the officers disregarded the wishes of the suspect that she be given a lawyer or not be interrogated.²⁰³ In the latter situation, the courts are rather unforgiving of continual police questioning and will often find a confession to be involuntary, wholly apart from any Fifth Amendment considerations.²⁰⁴

Commonwealth, 590 S.E.2d 520 (Va. 2004). Of course, the giving of the warnings is no guarantee that a later statement will be found to be voluntary, as we shall see, for the “police [may then still use] fear, coercion, hope of reward, or some other improper inducement.” *State v. Cooper*, 949 P.2d 660, 665 (N.M. 1997); *see also Taillon*, 470 N.W.2d 226.

²⁰¹ The cases here are voluminous. *See United States v. Gillaum*, 355 F.3d 982, 990 (7th Cir. 2004); *Lucero v. Kerby*, 133 F.3d 1299, 1310-11 (10th Cir. 1998); *United States v. Jones*, 32 F.3d 1512, 1517 (11th Cir. 1994); *Bisbee v. State*, 17 S.W.3d 477, 480 (Ark. 2000); *People v. Mays*, 531 N.E.2d 1113, 1119 (Ill. App. 1988); *State v. Franklin*, 803 So. 2d 1057, 1067 (La. App. 2001); *Alexander v. State*, 610 So. 2d 320, 327 (Miss. 1992); *Licon v. State*, 99 S.W.3d 918, 925 (Tex. App. 2003).

²⁰² One court explained:

[T]he officers’ failure to administer *Miranda* warnings weighs against a finding of voluntariness. As both parties point out, “[v]oluntariness and *Miranda* are two separate inquiries.” This does not, however, make a *Miranda* violation irrelevant to the issue of voluntariness. To the contrary, in considering whether a person’s will was overborne sufficiently to render a confession involuntary, the court should consider whether the accused was advised of his or her constitutional rights. Although a failure to give *Miranda* warnings is not determinative of voluntariness, the lack of warnings gives “added weight” to other circumstances that make a confession involuntary.

State v. Pettit, 979 P.2d 5, 9 (Ariz. App. 1998). For a heated exchange on the significance of the warnings, compare the majority and dissenting opinions in *State v. Hoppe*, 661 N.W.2d 407 (Wis. 2003).

²⁰³ *See, e.g., Johnson v. United States*, 609 A.2d 1112 (D.C. App. 1992); *Allan v. State*, 38 P.3d 175, 178 (Nev. 2002).

²⁰⁴ The language of the court in *People v. Neal*, 72 P.3d 280, 291 (Cal. 2003), is particularly harsh, for the justices there spoke of the police officer’s “misconduct . . . as ‘blatant disregard’ of *Miranda* [which] is to understate its blameworthiness . . .” *Id.*

IV. APPLYING THE VOLUNTARINESS PRINCIPLE

The test today for voluntariness remains what it has been for more than half a century: Judges “look at the totality of the circumstances of the case in determining whether the confession was voluntary.”²⁰⁵ The question in each case is whether the police action during the interrogation “overb[ore] a suspect’s will.”²⁰⁶ Thus, one must ask whether “the confessor did not make the decision to confess of his own free will.”²⁰⁷ The determination is remarkably fact specific, with courts looking at many factors in resolving claims under the Due Process Clause.²⁰⁸ In order for the reader to have a full appreciation of how difficult it would be to predict the result in a particular case²⁰⁹ and to see the extremely limited precedential value of any judicial opinion in this area,²¹⁰ Part IV.A examines several illustrative cases.

A. *The Voluntary Confession*

The rule as applied in practice certainly is far from clear. For instance, in one case the defendant was beaten by the police at the station and he confessed.²¹¹ His testimony—not contradicted on the record—

²⁰⁵ State v. Barden, 572 S.E.2d 108, 124 (N.C. 2002). See generally Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); Abela v. Martin, 380 F.3d 915, 928–29 (6th Cir. 2004).

²⁰⁶ Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988).

²⁰⁷ Hinton v. Snyder, 203 F. Supp. 2d 934, 941 (N.D. Ill. 2002).

²⁰⁸ The national record for the number of factors to be considered appears to go to the Michigan state courts, which may, in one prosecution, rely upon fifteen to twenty such items. See, e.g., People v. Wells, 605 N.W.2d 374, 377 (Mich. Ct. App. 1999) (mentioning the following: the age, education, and intelligence of the accused; his previous experience with the police; the repeated nature and duration of the interrogation; the giving of *Miranda* warnings; any unnecessary delay in bringing the accused before a magistrate; whether the defendant was injured, intoxicated, or drugged; whether he was in ill health; whether the accused was given food, sleep, or necessary medical attention; and whether he was abused or threatened with abuse). Other noteworthy contenders include *Taylor v. Maddox*, 366 F.3d 992, 1015–16 (9th Cir. 2004) (eight factors); *United States v. Garot*, 801 F.2d 1241, 1245 (10th Cir. 1986) (seven factors); *State v. Davis*, 446 N.W.2d 785, 789 (Iowa 1989) (twelve factors); and *State v. Barden*, 572 S.E.2d at 124–25 (N.C. 2002) (nine factors). See generally *United States v. Jones*, 359 F.3d 921, 923–24 (7th Cir. 2004); *United States v. Haswood*, 350 F.3d 1024, 1027–28 (9th Cir. 2003).

²⁰⁹ The one real exception here, as noted earlier, is the use of force by officers against the suspect. See *United States v. Jenkins*, 938 F.2d 934, 938 (9th Cir. 1991) (“[C]onfessions accompanied by physical violence wrought by the police have been considered *per se* inadmissible.”); *United States ex rel Hinton v. Snyder*, 203 F. Supp. 2d 934, 941 (W.D. Ill. 2002) (“It is axiomatic that a confession extracted with violence or the threat of violence is involuntary.”).

²¹⁰ As the judges in *Haswood* properly wrote: “The totality of circumstances contains no ‘talismanic definition’ of voluntariness. Courts instead often consider [many] factors . . .” 350 F.3d at 1027.

²¹¹ *Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992).

was that the officers “kicked, hit, and knocked [him] to the ground, punched and beat[] [him] with a nightstick, raised [him] off the floor by elevating his handcuffed arms behind him, and [pulled] his hair.”²¹² Thereafter, he was moved to a second police station where he confessed again. The issue in the case was whether the second statement was voluntary. The evidence showed that the defendant had remained in custody throughout the process, did not speak with a lawyer, and did not initiate the conversation that led to the later confession. Nevertheless, the court found the second statement to be voluntary because the second group of officers had not mistreated the accused, six hours had passed between the two confessions, and the later interrogation was conducted by different officers in a different police station. As the court stated: “Any threat of physical mistreatment had faded considerably in the interim; [defendant] must have recognized the difference between [the two police stations] in terms of atmosphere and the treatment accorded him by his interrogators.”²¹³

In other cases, voluntariness is found with courts relying heavily on the “fortitude” of the defendant in demanding her rights. In one case, the demand was to see a search warrant,²¹⁴ and in another case it was a refusal to sign a written confession after an oral statement had been made.²¹⁵ In such instances, the judges looked at a variety of circumstances in reaching their conclusions.²¹⁶ For many judges,

²¹² *Id.* at 1047.

²¹³ *Id.* at 1051. The court took into account the defendant’s “personal characteristics, including his age, education, intelligence and prior experience with the police, in determining whether he voluntarily tendered the [second] confession.” *Id.* at 1052. Also, see *State v. Hall*, 369 S.E.2d 701, 704 (W. Va. 1988), where the confession was allowed even though the defendant had, at the start, been beaten or kicked by the officers. The key for the judges in that case was that thirteen days had passed between the beating and the confession. This lag was viewed as “sufficient to dissipate the taint of coercion.” *Id.* at 705.

²¹⁴ *United States v. Rith*, 164 F.3d 1323, 1333 (10th Cir. 1999).

²¹⁵ *People v. Williams*, 627 N.Y.S.2d 781, 782 (N.Y. App. Div. 1995).

²¹⁶ The factors are so specific to the particular prosecution that it is difficult to generalize as to what will influence judges. *United States v. Ceballos*, 302 F.3d 679, 694 (7th Cir. 2002) (analyzing a situation where a troubled defendant was twenty-four years old and there was no evidence of a diminished mental capacity); *McCall v. Dutton*, 863 F.2d 454, 458 (6th Cir. 1988) (considering that weapons were shown but not pointed at the suspect); *Lukehart v. State*, 776 So. 2d 906, 920 (Fla. 2000) (holding that sympathy elicited based on the defendant’s religious beliefs did not “directly result” in the confession); *State v. Timmendequas*, 737 A.2d 55, 110 (N.J. 1999) (allowing a statement where the suspect slept only a few hours, but questioning was not “around the clock or continuous” and he was allowed to go home briefly before being questioned again); *State v. Terrazas*, 4 S.W.3d 720, 726 (Tex. Crim. App. 1999) (considering a case where the accused was told by police “‘what had to be’ in her statement,” which was not the sort of action viewed as inherently coercive).

deciding factors can be the defendant's background,²¹⁷ the fact that she was alert and not sleep deprived,²¹⁸ or that nothing about the accused's "age, sex, race, education, or physical or mental condition made him susceptible to coercion."²¹⁹

B. The Involuntary Confession

Similar to the voluntary confessions, the legal principles applicable to an involuntary confession are far from certain. In one case, the court looked to an astonishingly large number of factors in finding the confession coerced.²²⁰ The interrogation took sixteen hours, was conducted by a "serial team," the accused was not given a break, the questions were "unabashedly leading," the suspect was not permitted to rest despite his requests, the officers refused to honor his requests under *Miranda*, and the officers spoke to him about his history of blackouts as casting doubt on his story.²²¹ With such a rich assortment of considerations, it appears impossible to suggest just what rule the case stands for under the Due Process Clause.

Another recent case is similar. In *State v. Marshall*,²²² a Minnesota court struck down a confession, considering factors such as the failure to advise the suspect of her *Miranda* rights; the fact that she was confronted in her home by two officers, one of whom was armed; the officers' discouraging of contact between the mother and her daughter; the suspect becoming so emotionally wrought during the interrogation that she stated that her "head [was] swimming"; the officers exploitation of her religious beliefs;²²³ and the defendant not being allowed to eat.²²⁴

²¹⁷ *State v. Smith*, 512 A.2d 189, 197 (Conn. 1986).

²¹⁸ *People v. Roybal*, 55 P.3d 144, 147 (Colo. Ct. App. 2001).

²¹⁹ *State v. Sabinash*, 574 N.W.2d 827, 829 (N.D. 1998). In *State v. Harris*, the defendant was held for seven hours while he was shackled to the floor and prevented from using the telephone. 105 P.3d 1258 (Kan. 2005). The court found the later confession to be voluntary based upon a totality of circumstances analysis, especially focusing on the fact that the defendant was twenty-four years old and had other juvenile felony convictions. *Id.* at 1264.

²²⁰ *State v. Sawyer*, 561 So. 2d 278 (Fla. 1990).

²²¹ *Id.* at 290-91.

²²² 642 N.W.2d 48 (Minn. Ct. App. 2002).

²²³ For two Mississippi prosecutions using this religious reliance, see *Carley v. State*, 739 So. 2d 1046, 1053 (Miss. Ct. App. 1999) ("We are particularly troubled by the invocation of the deity, discussion of Heaven and Hell, and the promise that 'the truth sets you free' to induce a confession."), and *Abram v. State*, 606 So. 2d 1015, 1033 (Miss. 1992). See also *Lukehart v. State*, 776 So. 2d 906, 920 (Fla. 2000).

²²⁴ *Marshall*, 642 N.W.2d at 56. The court was sympathetic with the needs of the police, but still found a due process violation:

Such decisions defy any sort of ready formula for determining the voluntariness of a confession. There are simply too many factors with too narrow analyses to allow for any reasonable reliance by law enforcement officers, judges, and lawyers. Also, of course, they are joined by many other cases that consider a wide assortment of factors in attempting to determine if a confession was improperly coerced.²²⁵ In short, commentators who have cast doubt on the jurisprudence in this important area appear correct. As one thoughtful observer gently and generously put it:

Because the totality-of-the-circumstances test permits the courts to weigh several factors together, it is not always possible to determine which factors caused a court to exclude or admit a confession, and courts rarely indicate the relative importance of the factors that they use.²²⁶

This statement is unquestionably correct. The problem, of course, is that the analysis is ultimately subjective, one which is fact specific to the particular prosecution and defendant, recognizing "that the amount of police pressure that is constitutional is not the same for each defendant."²²⁷

Police investigators face substantial obstacles in resolving an investigation of a death that occurred almost twenty years ago; confessions are one of the limited avenues available to them. But incriminating statements produced by coercion are inherently untrustworthy and undermine fundamental concepts of due process.

Id. at 56.

²²⁵ Judges have emphasized several factors in this analysis. See *United States v. Perdue*, 8 F.3d 1455, 1466 (10th Cir. 1993) (discussing force, either used or threatened); *State v. Coombs*, 704 A.2d 387, 392 (Me. 1998) (addressing lack of breaks during interrogation); *State v. Mayes*, 825 P.2d 1196, 1207 (Mont. 1992) (considering no sleep for the accused); *Passama v. State*, 735 P.2d 321, 323 (Nev. 1987) (analyzing prolonged questioning of the suspect); *Marquez v. State*, 890 P.2d 980, 986 (Okla. Crim. App. 1995) (applying promises of a deal to the analysis); *State v. Cochran*, 696 P.2d 1114, 1121 (Or. Ct. App. 1985) (using trickery as to the meaning of *Miranda* warnings); *State v. Rettenberger*, 984 P.2d 1009, 1019 (Utah 1999) (addressing the low I.Q. of the defendant). However, even in these cases, several other significant factors were expressly relied upon by the courts.

²²⁶ *Cloud et al.*, *supra* note 189, at 528.

²²⁷ *State v. Hoppe*, 661 N.W.2d 407, 415 (Wis. 2003). In *Taylor v. Maddox*, the confession was found to be involuntary, with the court writing:

[The defendant's] relative youth, the time of night when he was questioned, the length of the interrogation, the absence of an attorney or parent, the fact that he "was given no food, offered no rest break, and may or many not have been given any water," and the denial of his requests to speak with his mother. . . .

V. CONCLUSION

The rule regarding voluntariness remains a vital and perplexing feature of the criminal justice system in the United States when considering the admissibility of confessions. To be sure, the privilege against self-incrimination in *Miranda* applies to many cases and disposes of a good number of them. However, literally thousands of prosecutions can be found throughout the country where serious due process challenges are raised so that the government has to offer substantial evidence to rebut the claim of constitutional violations.²²⁸ The legal test truly does not vary much between jurisdictions. Prosecutors everywhere must show that in making the confession, the criminal defendant made a “free and unconstrained choice”²²⁹ and that the confession was “the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant’s free will.”²³⁰

366 F.3d 992, 1015 (9th Cir. 2004). See generally *United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006); *Edwards v. State*, 842 P.2d 1281, 1284 (Alaska Ct. App. 1992); *Lam v. Kelchner*, 304 F.3d 256, 267 (3d Cir. 2002); *Martin v. State*, 686 A.2d 1130, 1143 (Md. Ct. Spec. App. 1996); *State v. Knight*, 849 A.2d 209, 219 (N.J. Sup. Ct. App. Div. 2004).

²²⁸ The federal courts use a preponderance of the evidence standard as set forth by the Supreme Court in *Lego v. Twomey*, 404 U.S. 477 (1972). Many states follow this standard. See *State v. Lacy*, 929 P.2d 1288 (Ariz. 1996); *Slincy v. State*, 699 So. 2d 662 (Fla. 1997); *Aguilar v. State*, 751 P.2d 178 (N.M. 1988); *State v. Hoehne*, 989 P.2d 469 (Or. Ct. App. 1999); *Hernandez v. State*, 952 S.W.2d 59 (Tex. Crim. App. 1997); *State v. Aten*, 927 P.2d 210 (Wash. 1996); *State v. Wilson*, 439 S.E.2d 448 (W. Va. 1993); *Edwards v. State*, 973 P.2d 41 (Wyo. 1999). Other states use a reasonable doubt test. See *Henry v. State*, 738 N.E.2d 663 (Ind. 2000); *State v. Leonard*, 605 So. 2d 697 (La. App. 1992); *State v. McCarthy*, 819 A.2d 335 (Me. 2003); *Commonwealth v. Judge*, 650 N.E.2d 1242 (Mass. 1995); *Moody v. State*, 841 So. 2d 1067 (Miss. 2003); *State v. Hammond*, 742 A.2d 532 (N.H. 1999); *People v. Williamson*, 667 N.Y.S.2d 114 (N.Y. App. Div. 1997); *State v. Corder*, 460 N.W.2d 733 (S.D. 1990). Rhode Island appears to require the prosecution to make the showing of voluntariness by clear and convincing evidence. *State v. Apalakis*, 797 A.2d 440, 447 (R.I. 2002).

²²⁹ *State v. Bowers*, 661 N.W.2d 536, 541 (Iowa 2003); see also *Steese v. State*, 960 P.2d 321, 327 (Nev. 1998).

²³⁰ *United States v. Abdullah*, 294 F.3d 830, 836 (7th Cir. 2002). For a less than wholly convinced view of this standard in practice, see Judge Posner’s opinion for the court in *United States v. Rutledge*:

The courts in such cases retreat to the proposition that a confession, to be admissible, must be the product of a free choice . . . [but this] leads nowhere. Taken seriously it would require the exclusion of virtually all fruits of custodial interrogation, since few choices to confess can be thought truly “free” when made by a person who is incarcerated and is being questioned by armed officers without the presence of counsel or anyone else to give him moral support. The formula is not taken seriously.

Yet, the clarity of the test as stated is in sharp contrast to its application in practice. The reality is that few criteria stand out as especially significant, and even fewer appellate decisions can be viewed as establishing noteworthy precedents. The due process test offers almost no guidance for lawyers and judges.²³¹

This Article has considered thousands of opinions on confessions from the past two decades. One necessarily comes away with a feeling of being unclean and tainted by government activities that are not honorable even given the environment needed for interrogations. Many judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects. While judges write that they do not condone such conduct²³² and find such practices repugnant,²³³ reprehensible,²³⁴ or deplorable,²³⁵ some of those same judges have upheld the admission of such confessions that result from those practices after applying the totality of circumstances test.²³⁶

900 F.2d 1127, 1129 (7th Cir. 1996).

²³¹ This critical view is shared by other commentators. Professor Welsh White wrote that "the due process test provides few safeguards against the admission of untrustworthy confessions." Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C. R.-C. L. L. REV. 105, 117 (1997). He explained further:

Interrogators are not permitted to use overtly coercive tactics such as insisting on an answer after the suspect has indicated a desire to remain silent; moreover, they may not use direct or indirect threats of violence, nor interrogate suspects continuously for thirty-six hours. Interrogators are not prohibited, however, from questioning suspects for a considerable period and employing a wide array of interrogation tactics, including trickery, to induce a confession.

Id.; see also Sherry F. Colb, *Why the Supreme Court Should Overrule the Massiah Doctrine and Permit Miranda Alone to Govern Interrogations* (2001), <http://writ.corporate.findlaw.com/colb/20010509.html>. In Colb's article, she stated:

"[V]oluntariness" was the original standard for deciding whether a confession had been exacted in violation of the Fifth Amendment. But it was an amorphous standard. Courts found themselves bogged down in factual determinations about suspects' free will in each case. It was difficult to predict in advance which confessions would become evidence, and which would be suppressed.

Id.

²³² *Luckhart v. State* 736 N.E.2d 227, 231 (Ind. 2000).

²³³ *Ex parte Hill*, 557 So. 2d 838, 842 (Ala. 1989).

²³⁴ *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001).

²³⁵ *State v. Register*, 476 S.E.2d 153, 158 (S.C. 1996).

²³⁶ Two recent cases illustrate the point well. In *United States v. LeBrun*, the interrogating officers "interrupted [the defendant] in a bullying manner and demonstrated a threatening kind of impatience with him" and seemingly promised him he would not be prosecuted if

I began by asking two questions: (1) How important are the due process rules today now that we have lived for almost forty years with *Miranda*?, and (2) Have these principles improved at all in practice from the muddled mess found prior to the Chief Justice's opinion there? The strong belief I have formed is that the rules are most important and are widely applied in the twenty-first century, they are just as poorly and inconsistently applied as they were in the 1950s and 1960s. In comparison, the imprecisely bright line rules of *Miranda* look very good.

he confessed to spontaneously killing the victim. 363 F.3d 715, 727 (8th Cir. 2004) (Arnold, J., dissenting). The confession was allowed into evidence. The confession was also permitted in *Knight v. State*, though the officer gave the suspect "the impression that probation was a possibility, and that [the officer] could make things either difficult or easy for him by recommending bond." 971 S.W.2d 272 (Ark. App. 1998) (Rogers, J., dissenting). In both cases, the majority looked to a multitude of factors in determining that no due process violation had occurred. Cf. *Commonwealth v. DiGiambattista*, 813 A.2d 516 (Mass. 2004) (disallowing a confession because the interrogating officers seemed to sympathize with the suspect, telling him that the crime was understandable and perhaps even justifiable). The court reasoned that "[r]esearch suggests that such 'minimization' of the crime by an interrogator implies leniency if the suspect will adopt that minimized version of the crime, and that leniency can thereby be implicitly offered even if it is not expressly stated as a quid pro quo for the confession." *Id.* at 526.