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POLICE TRICKERY IN INDUCING CONFESSIONS

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I. INTRODUCTION: SCOPE OF THE PROBLEM

Use of trickery or deceit in the questioning of criminal suspects is a staple of current police interrogation practices. The prevalence of this technique is attested to not only by its frequent appearance in reported cases,[1] but also, and perhaps more signifi-

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[1] In three of the most recent Supreme Court cases dealing with the admissibility of confessions, it appears that the confessions were obtained at least in part by police trickery. *See* Brewer v. Williams, 430 U.S. 387 (1977) (confession obtained after deeply religious murder suspect heard "Christian burial" speech); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (confession obtained after police falsely told suspect that his fingerprints had been found at the scene of the crime); Michigan v. Mosley, 423 U.S. 96 (1975) (confession obtained after police falsely told suspect that another suspect had named him as the gunman). In *Williams*, the police trickery was not discussed because the Court found a violation of the suspect's sixth amendment right to counsel. 430 U.S. at 397-98. In *Mathiason* and *Mosley*, the Court noted that the validity of the police conduct was not within the scope of its review. 429 U.S. at 495-96; 423 U.S. at 99. For recent lower court cases in which it appears that police trickery was utilized to obtain confessions, see, for example, United States *ex rel.* Galloway v. Fogg, 403 F. Supp. 248 (S.D.N.Y. 1975) (police misrepresented to the suspect the extent to which other persons had implicated him); Moore v. Hopper, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd mem.*, 523 F.2d 1053 (5th Cir. 1975) (police falsely told murder suspect that murder weapon had been recovered); State v. Cobb, 115 Ariz. 484, 566 P.2d 285 (1977) (police falsely told robbery suspect that his fingerprints were found at the scene of the crime); People v. Groleau, 44 Ill. App. 3d 807, 358 N.E.2d 1192 (1976) (police falsely told murder suspect that victim was still alive).

cantly, by the central importance it is given in police interrogation manuals.[2] For example, Inbau and Reid's widely-read manual, *Criminal Interrogation and Confessions*,[3] outlines twenty-six specific techniques to be used in interrogating a suspect;[4] most of these techniques will inevitably involve some form of deception because they require an officer to make statements that he knows are untrue or to play a role that is inconsistent with his actual feelings.[5] The effectiveness of these techniques is amply documented by the authors as they recount case after case in which a strategic lie or a timely false show of sympathy was instrumental in leading a suspect to confess.[6]

A conscientious police officer (or one with an unusually high degree of legal sensitivity) might wonder, however, exactly what, if any, limit the Constitution places upon the admission of confessions obtained by deceitful interrogation techniques. If this officer attempted to discover the answer in the opinions of the United States Supreme Court, he would encounter grave difficulties. Dictum in *Miranda v. Arizona*[7] indicates that police are precluded from using trickery to induce a waiver of a suspect's fifth and sixth amendment rights.[8] Moreover, in applying the established rule that only voluntary statements can be admitted into evidence at a criminal trial, the Court has excluded confessions obtained through deception[9] and expressed judicial distaste for certain deceptive practices.[10]

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[2] *See* CRIMINAL INVESTIGATION AND INTERROGATION (rev. ed. S. Gerber & O. Schroeder 1972); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (4th ed. 1978); F. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973). For an indication of the extent to which these tactics are in fact used, see Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 41-43, 52-57 (1965).

[3] F. INBAU & J. REID, *supra* note 2.

[4] *Id.* 26-108.

[5] For an excellent general discussion of the definition of deception and lying, see S. BOK, LYING: MORAL CHOICE IN PUBLIC LIFE (1978).

[6] *See* F. INBAU & J. REID, *supra* note 2, at 42, 49.

[7] 384 U.S. 436 (1966).

[8] *Id.* 476.

[9] Massiah v. United States, 377 U.S. 201 (1964) (tape of incriminating statements made to confederate who was acting under cover for prosecution held inadmissible as interrogation violative of fifth and sixth amendments); Spano v. New York, 360 U.S. 315 (1959) (lies by police officer who was suspect's childhood friend were one element in finding that confession was obtained by means violative of due process); Leyra v. Denno, 347 U.S. 556 (1954) (confession induced by psychiatrist who was introduced to the suspect as the medical doctor whom he had requested held inadmissible as involuntary).

[10] *See* Miranda v. Arizona, 384 U.S. 436, 449-55 (1966); Spano v. New York, 360 U.S. 315, 323 (1959).

Nevertheless, the conscientious officer would find that the Court has neither held nor even indicated that any particular type of police trickery would, in and of itself, render a resulting confession inadmissible.

In the absence of definitive guidance from the Supreme Court, the conscientious police officer might naturally refer to the principles that are lucidly expressed in the Inbau and Reid police manual. The benchmark to be used in judging the permissibility of deceptive practices is simply stated: "Although both 'fair' and 'unfair' interrogation practices are permissible, nothing shall be done or said to the subject that will be apt to make an innocent person confess." [11] Although Inbau and Reid offer no catalogue of prohibited practices,[12] the test does provide a clear and direct focus. At first blush, the test acts as a substantial safeguard for the innocent suspect; in addition, it is supported by plausible moral and pragmatic justifications,[13] as well as by considerable state court authority.[14]

Unfortunately, however, the Inbau-Reid test is not wholly consistent with Supreme Court doctrine. First, the Court's voluntariness standard does not focus solely on the reliability of a particular confession; rather, it also requires a determination that the means of obtaining the confession were consistent with our accusatorial system of criminal justice.[15] Even the guilty person has the right to demand that his guilt be demonstrated by the State. Therefore, examination of the "totality of the circumstances" must reveal that a suspect's statement was "the product of his free and rational choice." [16] In order to protect more fully the suspect's freedom of choice, the Court has held that certain coercive interrogation techniques result in an "involuntary" confession as a matter of law, irrespective of the likelihood that they did or could produce a *false*

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[11] F. INBAU & J. REID, *supra* note 2, at 218.

[12] Leaving aside any quibbles one might have with the standard of certainty provided by the term "apt," neither the test as stated nor the remainder of the manual informs an interrogating officer of the types of interrogation techniques that are "apt" (or likely) to induce a false confession.

[13] F. INBAU & J. REID, *supra* note 2, at 217-18.

[14] *See, e.g.*, Canada v. State, 56 Ala. App. 722, 725, 325 So. 2d 513, 515 (Crim. App.), *cert. denied*, 295 Ala. 395, 325 So. 2d 516 (1976) (tricks acceptable unless "likely" to produce false confessions); R.W. v. State, 135 Ga. App. 668, 671, 218 S.E.2d 674, 676 (1975) ("test in determining voluntariness is whether an inducement, if any, was sufficient, by possibility, to elicit an untrue acknowledgment of guilt"); Commonwealth v. Baity, 428 Pa. 306, 315, 237 A.2d 172, 177 (1968) (trick permissible as long as it has "no tendency to produce a false confession").

[15] *See* notes 83-104 *infra* & accompanying text.

[16] Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (per curiam).

confession and irrespective of their effect on the actual defendant before the court. Thus, in *Ashcraft v. Tennessee*,[17] Justice Black, speaking for the Court, found that an unbroken thirty-six hour interrogation was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom." [18]

In addition to the concern for freedom of choice, the modern voluntariness standard has a fairness component. In *Spano v. New York*,[19] for example, the Court expressed concern not only with excluding confessions obtained by potentially coercive methods but also with insuring that the police "obey the law while enforcing the law." [20] The Court's disapproval of the police tactics employed in *Spano* and a number of other cases [21] indicates that in deciding when the police are "obeying the law," the Court will measure the police conduct against certain basic standards of fairness that are fundamental to our system of justice.[22] Consequently, even reliable confessions should be inadmissible when they are induced by modes of police trickery that are inconsistent with basic notions of fairness.

Moreover, the impact of the fifth and sixth amendments on police interrogation practices must be considered. *Malloy v. Hogan* [23] held that the fifth amendment privilege against self-incrimination is applicable to the states, and *Miranda v. Arizona* [24] established that it applies at the stationhouse. *Miranda* holds that suspects subjected to custodial interrogation have an absolute right to remain silent,[25] that the police must give them certain warnings to insure protection of this right,[26] and that a suspect must be

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[17] 322 U.S. 143 (1944).

[18] *Id.* 154.

[19] 360 U.S. 315 (1959).

[20] *Id.* 320.

[21] Watts v. Indiana, 338 U.S. 49, 55 (1949) (plurality opinion) (Frankfurter, J.) ("Protracted, systematic and uncontrolled subjection of an accused to police interrogation . . . is subversive of the accusatorial system."); Malinski v. New York, 324 U.S. 401, 418 (1945) (Frankfurter, J., concurring) (despite prosecutor's justification of the police procedures as necessary, delaying arraignment and questioning suspect while he was naked was "so below the standards by which the criminal law . . . should be enforced as to fall short of due process of law").

[22] *See generally* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 431 (1954).

[23] 378 U.S. 1 (1964).

[24] 384 U.S. 436 (1966).

[25] *Id.* 444. Of course, in view of the post-*Miranda* cases, it is by no means clear that the privilege applies at the station house in all situations. *See* text accompanying notes 53-62 *infra*.

[26] 384 U.S. at 444.

given a "continuous opportunity" to exercise these rights.[27] In short, *Miranda* holds that for reasons drawn from the fifth amendment privilege, suspects subjected to custodial interrogation must be afforded the protection provided by the warnings not only at the beginning of the interrogation, but also throughout the interrogation process.[28] In addition, the Court's recent holding in *Brewer v. Williams*[29] indicates that, quite aside from the protections provided by *Miranda,* some suspects subjected to police interrogation have an independent sixth amendment right to an attorney.[30] Accordingly, any police practice that undermines the protections provided by either *Miranda* or the sixth amendment right to an attorney should be constitutionally impermissible.

To summarize, then, an officer who wants to comply with the constitutional limits on the use of trickery in inducing confessions must be concerned with more than simply avoiding tricks that are likely to induce false statements. In addition, he must curb the use of trickery that has the effect of rendering the resulting confession involuntary or that negates the effect of protections provided by the fifth and sixth amendments.

These general principles, however, do not provide the concrete guidance needed to determine the legitimacy of particular police practices. Regrettably, other authoritative sources do not provide much additional assistance. The draftsmen of the American Law Institute's Model Code of Pre-Arraignment Procedure considered the problem of trickery in police interrogation,[31] but failed to issue any definitive guidelines. The model code currently offers only general restatements of the existing law,[32] and two somewhat cryptic

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[27] *Id.*

[28] The Court was adamant that the suspect be afforded an opportunity to reassert his rights even though he had initially waived them. *See* text accompanying notes 44-47 *infra.* In order to safeguard the suspect's "continuous opportunity" to change an initial decision not to assert his rights, one state supreme court held that the warnings must be repeated if the nature of the interrogation process has caused a dissipation of their effect. *See* Commonwealth v. Wideman, 460 Pa. 699, 334 A.2d 594 (1975). However, several courts have held that even a break in the interrogation process of two or three days did not mandate restatement of the warnings. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 578 (4th ed. 1974).

[29] 430 U.S. 387 (1977).

[30] *Id.* 397-98.

[31] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §§ 140.2, 140.4, 140.6, 150.2 (Proposed Official Draft, 1975).

[32] *Id.* §§ 140.2 ("No law enforcement officer shall attempt to induce an arrested person to make a statement by indicating that such person is legally obligated to do so.") & 140.6 ("No law enforcement officer shall take any action which is designed to, or which under the circumstances creates a significant risk that it will, result in an untrue incriminating statement by an arrested person.").

statements suggesting that statements obtained through the use of "unfair" police trickery should be inadmissible.[33]

This cautious approach is certainly understandable. The effect of police trickery cannot be considered in a vacuum. Trickery that is relatively innocent in one context might have a devastating effect on certain suspects when employed in a different setting. The multiplicity of available interrogation practices renders the articulation of clear rules extremely difficult. The fact that suspects possess varying degrees of sensitivity and resistance to deceptive tactics inevitably hampers the development of a comprehensive approach to the problem. Finally, the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication pose a formidable factfinding task for the Court. These and other problems support the conclusion that it is inappropriate to attempt to promulgate comprehensive guidelines relating to the permissible limits on police trickery in inducing confessions.[34]

Nevertheless, there is a need to provide more meaningful guidance to the police and lower courts. The thesis of this Article is that it is possible to identify certain interrogation tactics that are likely to create an unacceptable risk of depriving the suspect of his constitutional rights. The Article will first examine in detail the constitutional limitations on the admissibility of confessions, and will introduce a per se approach that strikes a tolerable balance between the competing interests of predictability and flexibility. The Article will then demonstrate that several widely-used interrogation tactics should be prohibited on such a per se basis.

The context in which these categories of deception are considered will be primarily one in which the suspect's fifth or sixth amendment rights, or both, are applicable, but have been validly

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[33] No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by . . . (b) any other method which, in light of the person's age, intelligence and mental and physical condition, unfairly undermines this ability to make a choice whether to make a statement or otherwise cooperate.

Id. § 140.4

If a law enforcement officer induces an arrested person to make a statement in the absence of counsel which deals with matters that are so complex or confusing that, in light of such person's age, intelligence, and mental and physical condition, there is a substantial risk that such statement may be misleading or unreliable or its use may be unfair, such statement shall not be admitted in evidence against such person in a criminal proceeding.

Id. § 150.2(9)

[34] For an elaboration of the reasons in support of this conclusion, see Bator & Vorenberg, *Arrest, Detention, Interrogation and Rights to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73-74 (1966).

waived.[35] There are two reasons for focusing the analysis in this manner. First, although the Supreme Court has indicated that an effective waiver of the *Miranda* and *Brewer v. Williams*[36] rights cannot be achieved through police trickery,[37] the restrictions on police deception in the post-waiver situation are less than clear.[38] Second, the police manuals advise law enforcement officials to obtain a waiver before employing any of the suggested interrogation tactics.[39] The lack of clear constitutional standards and the apparent police belief that deception is appropriate in this context suggest the need for a detailed examination of the legitimacy of police trickery in this area.

II. Constitutional Limitations on Police Trickery

A. *The Current Status of Miranda*

As has already been noted,[40] the *Miranda* requirements are calculated to insure adequate fifth amendment protection for suspects subjected to custodial interrogation. Custodial interrogation was defined as questioning by police officers "after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way."[41] The Supreme Court provided that, at the beginning of such interrogation, in the absence of "other procedures which are at least as effective in apprising accused per-

[35] That is, the suspect has been given his *Miranda* warnings or has been informed of his right to an attorney and soon thereafter has made statements or taken action that under existing law would constitute a valid waiver of his rights. As will be demonstrated more fully below, the fifth and sixth amendments and the voluntariness requirement provide continuing protection to the suspect, even after an initial waiver.

[36] 430 U.S. 387 (1977).

[37] The *Miranda* majority stated: "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda v. Arizona, 384 U.S. 436, 476 (1966). In *Brewer v. Williams*, the Court explicitly stated that the stringent waiver standard first formulated in *Johnson v. Zerbst* applied to waiver of the right to counsel. Brewer v. Williams, 430 U.S. 387, 404 (1977) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See* notes 78-80 *infra* & accompanying text. Accordingly, the *Miranda* prohibition on trickery in inducing a waiver would appear to apply with equal force in the *Williams* context.

[38] Professors Kamisar, LaFave, and Israel have pointed to the uncertainty in this area of the law. Y. Kamisar, W. LaFave, & J. Israel, *supra* note 28, at 589-90.

[39] According to one widely used manual, "all but a very few of the interrogation tactics and techniques presented in our earlier [pre-*Escobedo*, pre-*Miranda*] publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel." F. Inbau & J. Reid, *supra* note 2, at 1, *quoted in* Y. Kamisar, W. LaFave, & J. Israel, *supra* note 28, at 589.

[40] *See* text accompanying notes 26-28 *supra*.

[41] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

sons of their right of silence and in assuring a continuous opportunity to exercise it," [42] the interrogating officer must advise the suspect that he has a right to remain silent, that anything he says can be used against him, and that he has a right to have retained or appointed counsel present at the interrogation.[43] Moreover, the Court stated that a suspect may waive these rights, "provided the waiver is made voluntarily, knowingly, and intelligently." [44] As noted above,[45] the Court emphasized that even after an initial waiver, the suspect has a continuing opportunity to assert the right to remain silent or the right to an attorney at any point prior to the completion of the interrogation.[46]

The Burger Court has limited *Miranda* in important respects.[47] For present purposes, two limitations are particularly significant. First, by its decisions in *Beckwith v. United States* [48] and *Oregon v. Mathiason*,[49] the Court appears to have restricted its definition of "custodial interrogation" to situations that involve "coercive environments" similar to those considered by the Court in *Miranda* itself.[50] Thus, unless a suspect is actually subjected to the coercive pressures generated by involuntary restraints and interrogation in a police station-like atmosphere,[51] *Miranda* seems to be inapplicable.

Second, the Court concluded in *Michigan v. Tucker* [52] that the use in a criminal trial of statements obtained in violation of *Miranda*

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[42] *Id.* 467.

[43] *Id.* 444.

[44] *Id.*

[45] *See* text accompanying notes 27 & 28 *supra.*

[46] Miranda v. Arizona, 384 U.S. 436, 445 (1966).

[47] For an excellent critical analysis of the post-*Miranda* cases, see Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

[48] 425 U.S. 341 (1976) (questioning of suspect in private house held not to require *Miranda* warnings).

[49] 429 U.S. 492 (1977) (per curiam) (private questioning of a suspect, who came to police station "voluntarily" at officer's request, held not to require *Miranda* warnings).

[50] As Professor Stone has noted, "Mathiason was questioned in a police station behind closed doors, he was on parole, and he was informed, not just that he was being investigated, but that the police already believed him to be guilty." Stone, *supra* note 47, at 154. Despite the similarity between the coercive pressures confronting Mathiason and those confronting the *Miranda* defendants, the Supreme Court summarily concluded that *Miranda* did not apply because *Miranda* was concerned with custodial interrogation and "[i]t was *that* sort of coercive environment to which Miranda by its terms was made applicable, and *to which it is limited.*" 429 U.S. 492, 495 (1977) (latter emphasis added).

[51] In Orozco v. Texas, 394 U.S. 324 (1969), the Court held that *Miranda* applied when the defendant was arrested at his home. However, in light of *Beckwith* and *Mathiason*, the current vitality of *Orozco* is questionable.

[52] 417 U.S. 433 (1974). For an incisive analysis of *Tucker*, see Stone, *supra* note 47, at 115-25.

does not, in itself, violate the fifth amendment privilege. The Court perceived the *Miranda* warnings as a prophylactic rule devised to insure that statements are voluntarily made.[53] Under *Tucker,* statements obtained in violation of *Miranda* will generally be inadmissible,[54] but their use by the prosecution will not violate the fifth amendment unless there is a violation of the traditional voluntariness test.[55] *Tucker,* in effect, equates the privilege against self-incrimination with voluntariness, a test that was not designed to insure the suspect's awareness of his constitutional rights.[56] In short, it can be inferred from this decision that the Court has rejected interpreting *Miranda* to provide a constitutionally mandated guarantee that suspects will be afforded the opportunity for intelligent exercise of the right to remain silent at each point in the interrogation.[57] Nevertheless, although the *Tucker* Court viewed the *Miranda* warnings as a prophylactic device, rather than as a constitutionally mandated procedure, the scope of the protection afforded by the *Miranda* warnings was not altered.

In order to comprehend fully the limitations that *Miranda* imposes on police interrogation tactics in the post-waiver context, it is necessary to examine more precisely the requirement that the suspect be permitted to reassert the right to silence and the right to counsel. It should first be recalled that the purpose of the warnings is to reduce the possibility of coercion throughout the inter-

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[53] Michigan v. Tucker, 417 U.S. 433, 444 (1974): "The Court recognized [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the privilege against compulsory self-incrimination was protected."

[54] *But see* Harris v. New York, 401 U.S. 222 (1971) (holding that statements obtained in violation of *Miranda* may be admissible for the purpose of impeaching the defendant's credibility).

[55] [Respondent's] statements could hardly be termed involuntary as that term has been defined in the decisions of this Court. . . . [T]he police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standard laid down by this court in *Miranda* to safeguard that privilege.

Michigan v. Tucker, 417 U.S. 433, 445-46 (1974).

[56] In determining the issue of a confession's "voluntariness," the Court has indicated that police failure to advise the suspect of his right to remain silent or his right to counsel will be afforded significant, but not decisive, weight. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) ("voluntariness is a question of fact to be determined from all the circumstances, and while the suspect's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.").

[57] For an argument favoring this interpretation of *Miranda,* see Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions,* 1975 WASH. U. L.Q. 275, 331-36.

rogation process. If the *Miranda* warnings are to serve this necessary prophylactic function effectively, police trickery that distorts their meaning or vitiates their effect should render a resulting confession inadmissible. No one would argue that a specific verbal denial of the possibility of reassertion is a permissible interrogation tactic. However, as will be demonstrated below,[58] certain types of police misconduct achieve the same result without explicit misrepresentation of the law. If the reassertion right is to have any real content, the police should be required to desist from any trickery that significantly distorts the meaning and effect of the *Miranda* warnings.

B. *The Independent Right to an Attorney*

The aforementioned narrowing of the situations in which the *Miranda* warnings are required definitely enhances the significance of the interrogated suspect's independent right to an attorney that was enunciated in *Brewer v. Williams*.[59] In *Williams,* the Court found it unnecessary to reach a claim that the pretrial police interrogation of the defendant violated *Miranda*.[60] Rather, the Court held that the defendant was "deprived of a different constitutional right—the right to the assistance of counsel." [61] Reaffirming *Massiah v. United States,*[62] the Court held that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." [63]

As a result of the *Williams* decision, suspects subjected to police interrogation may assert violations of either *Miranda* or the separate sixth amendment right. A detailed examination of the interrelationship between the fifth and sixth amendment rights is beyond the scope of this Article.[64] *Williams,* however, leaves unanswered two questions that are particularly significant in determining the right to counsel doctrine's applicability to police trickery in inducing confessions. First, when does the right to counsel attach? And

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[58] *See* notes 150-88 *infra* & accompanying text.

[59] 430 U.S. 387 (1977).

[60] *Id.* 397-98. The Court also found it unnecessary to reach defendant's claim that his confession was involuntary. *Id.*

[61] *Id.*

[62] 377 U.S. 201 (1964).

[63] 430 U.S. at 398.

[64] For an extraordinarily perceptive analysis of this interrelationship, see Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does It Matter?,* 67 GEO. L.J. 1 (1978).

second, to what extent does the existence of the right depend upon the suspect's assertion of it?

Williams establishes that the right to counsel attaches *at least* at the formal beginning of the adversary process. Of course, unless the right attaches at an earlier point, *Williams* would exert no influence on the vast amount of police interrogation that occurs before the suspect is formally arraigned. For that reason, interpretation of the "at least" language is crucial to an understanding of the constitutional limitations on police trickery. Earlier cases, including not only *Escobedo v. Illinois*,[65] which arguably has little precedential value,[66] but also *United States v. Hoffa*,[67] have apparently operated on the assumption that in this context the suspect's sixth amendment right comes into effect at the point of arrest.[68] More recent cases, such as *Brewer v. Williams*,[69] *United States v. Mandujano*,[70] and *Kirby v. Illinois*,[71] may indicate that the Court is now leaning toward a rule under which the sixth amendment right to counsel will never come into effect prior to the formal initiation of criminal charges;[72] however, at least with respect to police interrogation, the question remains open.

In the context of police interrogation, the *Hoffa* and *Escobedo* approach appears to be correct. At the point of formal arrest, the police are likely to be as committed to prosecution as they will be when charges are formally brought. Because the police objectives and tactics are likely to be identical at the arrest and post-

[65] Escobedo v. Illinois, 378 U.S. 478 (1964). *Escobedo* held that the suspect's sixth amendment right to an attorney comes into effect as soon as he becomes the "focus" of the police investigation. *Id.* 490-91.

[66] *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (Stewart, J.) ("The Court has limited the holding of *Escobedo* to its own facts . . . .").

[67] 385 U.S. 293 (1966).

[68] In *Hoffa*, the Court appeared to base its conclusion that the surreptitious governmental interrogation did not violate the suspect's sixth amendment right to counsel upon the fact that the defendant had not yet been arrested. *Id.* 310.

[69] 430 U.S. at 398-99 (dictum). In justifying its decision, the Court particularly emphasized that judicial proceedings were initiated against the defendant at the time of the interrogation. Moreover, the Court's prominent citation of *Kirby v. Illinois* may be significant in view of *Kirby*'s holding that in the context of a pre-indictment show-up defendant's right to counsel did not attach until judicial proceedings had been initiated against him.

[70] 425 U.S. 564, 581 (1976) (plurality opinion) (Burger, C.J., joined by White, J., Powell, J., and Rehnquist, J.) (finding on the basis of *Kirby* that a grand jury target being questioned by the grand jury has no right to the presence of counsel because "[n]o criminal proceedings had been instituted against [him], hence the Sixth Amendment right to counsel had not come into play.").

[71] 406 U.S. 682 (1972) (holding that the right to counsel did not apply to a pre-indictment show-up).

[72] *See generally* Kamisar, *supra* note 64, at 83.

arraignment stages, interrogation following arrest should be viewed as a part of the adversary process and therefore as the event that triggers the suspect's sixth amendment rights. *Kirby*'s holding that the sixth amendment right to counsel at a pretrial confrontation commences only after the initiation of formal proceedings is distinguishable because, unlike the situation in *Kirby,* pretrial interrogation may involve the privilege against self-incrimination. Even when it takes place in a non-custodial setting, pretrial interrogation has the potential effect of forcing an individual "to be made the deluded instrument of his own conviction" [73] in violation of the fifth amendment privilege. Because of this critical interplay between the fifth and sixth amendments,[74] insofar as police interrogation is concerned, the suspect's sixth amendment right to an attorney should attach at the point of formal arrest.

In considering the extent to which the existence of the suspect's independent right to counsel depends upon his assertion of it, three different situations should be analyzed: (1) when, as in *Williams,* the suspect has asserted the right and is represented by counsel; (2) when the right has attached and the suspect has not had the opportunity to assert or waive it; [75] and (3) when there has been an initial waiver of the right.[76]

On its facts, the holding in *Williams* extends only to the first situation—at the time of the interrogation, the defendant was represented by counsel. Significantly, however, the Court attached no importance to the fact that Williams had already asserted his right to an attorney. Rather, the Court emphasized that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." [77] In fact, the Court explicitly stated that "the right to counsel does not

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[73] 2 W. HAWKINS, A TREATISE OF PLEAS OF THE CROWN 595 (8th ed. J. Curwood London 1824) (1st ed. London 1716-21), *quoted in* Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (plurality opinion) (Frankfurter, J.). Although Frankfurter quoted Hawkins with the avowed purpose of identifying one of the principles imbedded in due process (or fundamental justice), it is apparent that the privilege against self-incrimination protects the same interest. It is worth noting that *Culombe* antedated Malloy v. Hogan, 378 U.S. 1 (1964), which held that the fifth amendment applies to the states.

[74] *See* United States v. Mandujano, 425 U.S. 564, 602-03 (1976) (Brennan, J., concurring).

[75] *See, e.g.,* United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976) (statement of accused held inadmissible when prosecution failed to meet the "heavy burden" of showing a knowing waiver of the right to counsel although the accused had not requested an attorney).

[76] *See, e.g.,* United States v. Putnam, 557 F.2d 1181 (5th Cir. 1977).

[77] Brewer v. Williams, 430 U.S. 387, 401 (1977).

depend on a request by the defendant." [78] Thus, the second situation appears to be within the reasoning of *Williams*.

The third case—when the suspect has specifically declined to exercise his right to counsel—is undoubtedly the most difficult one. In *Williams*, the Court made it clear that a suspect may waive his right to an attorney, provided that waiver meets the standards of intentionality and awareness promulgated in *Johnson v. Zerbst*.[79] The real question is whether the suspect's initial waiver precludes him from reasserting the right. In the *Miranda* context, an initial waiver does not have this effect.[80] Although distinctions might be drawn between the *Miranda* protections and the independent right to counsel,[81] there is good reason to require that both rights be capable of reassertion. Whether the suspect changes his mind about the need for an attorney in order to protect his right against self-incrimination (in which case *Miranda* rights are applicable) or to protect his chances at the forthcoming trial (as in the *Williams-Massiah* situations), he should be allowed a continuous opportunity to assert his right. The right to a fair trial is no less fundamental than the fifth amendment privilege, and the right to have counsel present during the interrogation protects both constitutional interests with equal force. As with *Miranda* rights, the sixth amendment right to have counsel present at post-arrest interrogation should be continuously available to the suspect.[82]

C. *The Current Definition of an Involuntary Confession*

As Justice Harlan noted in his *Miranda* dissent, the Court has infused the concept of voluntariness "with a number of different values." [83] Justice Harlan focused on the three paramount concerns that have shaped the test of admissibility: first, an abhorrence

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[78] *Id.* 404.

[79] "[I]t was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[80] *See* note 28 *supra* & accompanying text.

[81] Unlike the independent sixth amendment right, the *Miranda* protections are needed to shield the suspect from police coercion. Because the coercive influences of the custodial setting may quickly operate to overcome an individual's will, affording the individual subjected to these influences a continuous opportunity to assert his rights may be particularly important.

[82] With respect to a defendant's right to an attorney at trial, lower court cases have indicated that an initial waiver of the right will not preclude a subsequent assertion of it unless the assertion will "disrupt orderly procedure." *See* Arnold v. United States, 414 F.2d 1056, 1059 n.1 (9th Cir. 1969) (dictum), *cert. denied*, 396 U.S. 1021 (1970). *Accord*, Fields v. State, 507 S.W.2d 39 (Mo. App. 1974).

[83] Miranda v. Arizona, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting).

of convictions based upon unreliable confessions; [84] second, a feeling that police practices utilized to obtain confessions should not impose an intolerable degree of pressure upon the will of individual suspects; [85] third, a belief that such practices should not be contrary to the standards of fairness that are fundamental in our system of justice.[86] A quick review of the court's development of these three strands of voluntariness is helpful for an understanding of the relevance to the problem of police trickery.[87]

Early state court cases tended to focus almost exclusively on the reliability interest.[88] This emphasis was probably attributable to the shocking factual settings of the early Supreme Court confession cases.[89] Writing for a unanimous Court in *Ward v. Texas*,[90] Justice Byrnes poignantly inveighed against the police practices that left the defendant in that case "willing to make any statement that the officers wanted him to make." [91] In addition, Justice Brynes pointed to previous cases in which the Court had invalidated convictions obtained under circumstances that raised severe questions about their reliability.[92]

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[84] *See* text accompanying notes 88-95 *infra.*

[85] *See* text accompanying notes 96-101 *infra.*

[86] *See* text accompanying notes 19-22 *supra.*

[87] The history and development of the "voluntariness" standard have been recounted in greater detail elsewhere. *See generally* O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT (1973); Bator & Vorenberg, *supra* note 34; Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Kamisar, *What is an Involuntary Confession?* 17 RUTGERS L. REV. 728 (1963) [hereinafter cited as *Involuntary Confessions*]; Paulsen, *supra* note 22; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

[88] *See generally Developments in the Law, supra* note 87, at 964-69.

[89] In a 1963 article, Professor Kamisar drew the following conclusions about the role that the reliability interest has played in voluntariness doctrine:

> Although what the court is *prepared* to do cannot adequately be explained in this manner, *on their facts*, the *decided* cases can be viewed as an application of two "reliability" standards: First, taking into account the personal characteristics of the defendant and his particular powers of resistance, did the police methods create too substantial a danger of falsity? Second, without regard to the particular defendant, are the interrogation methods utilized in this case . . . sufficiently likely to cause a significant number of innocent persons to falsely confess, that the police should not be permitted to proceed in this manner?

Involuntary Confessions, supra note 87, at 755 (emphasis in original).

[90] 316 U.S. 547 (1942).

[91] *Id.* 555.

[92] Justice Byrnes stated:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel,

In *Rogers v. Richmond*,[93] however, the Court considered the relationship between reliability and "voluntariness," and sharply distinguished between the two concepts. The Court held that the probable truth of a confession, *i.e.* its reliability, could not be used to support a finding of voluntariness.[94] Justice Frankfurter, writing for the majority, emphasized that the voluntariness standard protects interests other than reliability; in particular, he noted, it forbids the use of coerced confessions to convict a defendant.[95] Thus, although the test is not framed in terms of reliability, it provides some assurance that a confession admitted into evidence is the product of the suspect's perception of the event and not the result of police coercion.

The second strand of the voluntariness test conditions admissibility on a finding that the confession was a product of the suspect's free and rational choice.[96] Because of the case-by-case nature of the inquiry, it is impossible to do more than delineate the various factors that the Court has weighed in determining whether a particular confession was the product of impermissible coercion.[97] As Justice Goldberg recognized in *Haynes v. Washington*,[98] the test requires that the Court assess the effect of police practices upon the "mind and will of an accused," [99] and determine the point at which the pressures created are so great that the accused's will may be properly considered to be "overborne." [100] As will be discussed below,[101] the unpredictability of the voluntariness test greatly limits

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or who have been taken at night to lonely and isolated places for questioning.

Id. (citing Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); Wan v. United States, 266 U.S. 1 (1924)).

[93] 365 U.S. 534 (1961).

[94] *Id.* 543-45.

[95] *Id.* 540-41.

[96] *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion) (Frankfurter, J.); United States v. Mitchell, 322 U.S. 65, 68 (1944). *See generally Developments in the Law, supra* note 87, at 973-84.

[97] *See generally Developments in the Law, supra* note 87, at 973-83.

[98] 373 U.S. 503 (1963).

[99] *Id.* 515.

[100] *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("We have said that the question in each case is whether the defendant's will was overborne . . . ."); Spano v. New York, 360 U.S. 315, 323 (1959) ("We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts . . . ."). *See generally Developments in the Law, supra* note 87, at 973.

[101] *See* text accompanying notes 107-14 *infra*.

its usefulness as a legal standard for the control of police trickery in interrogation.

A third important component of the "involuntariness" test relates to the Court's assessment of the fairness or legitimacy of the police tactics employed.[102] In view of the applicable line of authority,[103] a determination of voluntariness may not be based merely on a judgment that the suspect retained some minimal capacity to resist police efforts to induce a confession. Rather, as Justice Harlan's *Miranda* dissent noted, the police must be barred from exerting "a degree of pressure [on] an individual which unfairly impairs his capacity to make a rational choice."[104]

D. *The Need for Per se Rules*

In fashioning a constitutional doctrine concerning the admissibility of suspects' confessions, a court must inevitably do more than merely decide the extent to which police trickery may be tolerated in a free society. In addition, a court must structure the resulting legal rules in a manner that recognizes the institutional realities of the criminal justice system. In particular, a court must take into account the infinite variety of suspects' personality patterns and police interrogation practices. On one level, because criminal suspects do not possess uniform personality characteristics, a court must decide the extent to which the appropriate tests will be tailored to accommodate the individual responses to police pressure by particular criminal suspects. In other words, should a court apply a subjective or objective test, or something in between? A distinct but closely related problem concerns the extent to which a court should prohibit particular interrogation techniques through the promulgation of per se rules (*i.e.*, prohibiting a certain tactic or category of tactics). As will be demonstrated below, the extent to which a per se approach is adopted will have important consequences on police behavior and judicial review.

The pertinent question in the objective-subjective controversy can be rephrased: Should the courts focus primarily upon the police conduct itself and attempt to measure its likely effect upon a typical person who is in the suspect's position or should the courts focus exclusively on the *actual* impact of the police conduct upon the

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[102] *See* text accompanying notes 19-22 *supra.*

[103] *See* Spano v. New York, 360 U.S. 315 (1959), and cases cited in note 21 *supra.*

[104] Miranda v. Arizona, 384 U.S. 436, 507 n.4 (1966) (Harlan, J., dissenting) (quoting Bator & Vorenberg, *supra* note 34, at 73).

particular suspect who is before the court? An objective approach clearly generates more meaningful guidance for the police and lower courts than its subjective counterpart. Under the latter approach, when the legitimacy of an interrogation tactic varies with the strengths and weaknesses of a particular suspect, an interrogating officer cannot predict the judicial response to the use of a given tactic with any degree of precision. When the dimensions of constitutional standards are so ill-defined, the danger must increase that the police will conduct their interrogations without regard for the constitutional rights of the suspect. Similarly, the subjective approach provides little guidance to the courts. If the question in every case is the effect on a particular suspect, precedent is likely to be of little importance. To the extent possible, therefore, both from the perspectives of law enforcement and judicial administration, courts should develop legal rules that limit interrogation tactics by objective standards.

In fact, although Supreme Court opinions often purport to engage in a subjective inquiry, Professor Kamisar's 1963 study demonstrates that "much more often than not, if not always, when the Court considers the peculiar, individual characteristics of the person confessing, it is only applying a rule of *inadmissibility*. 'Strong' personal characteristics rarely, if ever, 'cure' forbidden police methods; but 'weak' ones may invalidate what are generally permissible methods." [105] Determination of whether the standard was met was based in part upon the Court's evaluation of the effect that the police tactics employed would have upon a typical person in the position of the suspect subjected to the interrogation and in part upon its assessment of the fairness of the tactics employed.[106]

The second question—the extent to which the courts should prohibit particular interrogation tactics through per se rules as opposed to engaging in a consideration of the totality of the circumstances—has not been resolved in a way that provides satisfactory guidance for courts and law enforcement officials. In assessing the legality of police interrogation tactics, the pre-*Escobedo* cases generally did not rely on per se rules. Recognizing that the impact of police practices upon an individual may not be considered in a vacuum, the Court considered the impact of the pressures generated by police tactics in light of their probable cumulative effect.[107] In

[105] *Involuntary Confessions, supra* note 87, at 758 (emphasis in original).

[106] *See generally id.*

[107] *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961); Spano v. New York, 360 U.S. 315, 321, 323 (1959).

a few extraordinary situations, the Court indicated that utilization of a particular police practice would be sufficient in itself to render a resulting confession involuntary.[108] However, for the most part, the Court insisted upon determining voluntariness through a meticulous examination of the "totality of circumstances." [109]

By the early sixties, however, experience had demonstrated that the "totality of circumstances" test was an ineffective means of preventing unacceptable police pressures. The inadequacy of the test is partially attributable to the imperfection of the applicable factfinding procedure.[110] As Professor Kamisar has recently demonstrated, in most cases the traditional litigation process is simply inadequate to determine either the extent or the quality of police pressure applied to individual criminal suspects.[111] Beyond that, however, the "totality of circumstances" test's fatal flaw is its failure to generate precedents that can serve as guidelines for the police and the lower courts.

The failure to formulate rules that apply beyond limited factual settings has had important consequences. Police are most likely to view as legitimate effective interrogation tactics that have not been expressly prohibited.[112] Moreover, in analyzing the myriad circumstances surrounding an interrogation, trial judges unfortunately are tempted to defer to the judgment of the police.[113]

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[108] In Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944), the Court held that 36 hours of continuous interrogation was "inherently coercive." The strong implication was that when questioning of that duration occurs, the effect of other factors need not be considered. Moreover, even the *Ashcraft* dissent recognized that "violence *per se* is, an outlaw," 322 U.S. at 160 (Jackson, J., dissenting), thus implying that any statement induced by violence or threat of violence would be automatically inadmissible. *Accord,* Payne v. Arkansas, 356 U.S. 560, 567 (1958); Ward v. Texas, 316 U.S. 547, 555 (1942); Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[109] *See generally Developments in the Law, supra* note 87, at 973-84.

[110] *See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785, 806-09 (1970).

[111] *See* Kamisar, *Foreword:* Brewer v. Williams—*A Hard Look at a Discomfiting Record,* 66 GEO. L.J. 209, 234-35 (1977).

[112] Despite the *Miranda* opinion's evident distaste for a number of the tactics contained in the Inbau and Reid manual, *see* 384 U.S. at 449-55, the revised edition (published one year after *Miranda*) advised the police to continue employing the same tactics. *See* F. INBAU & J. REID, *supra* note 2, at 1. Obviously, the authors reasoned that tactics not specifically prohibited could continue to be employed. This perhaps illustrates the validity of Justice Jackson's observation, made in the fourth amendment context, to the effect that "officers interpret and apply themselves and will push to the limit" constitutional doctrines expounded by the Supreme Court. *See* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

[113] One of the most striking recent examples of this appears in State v. Reilly, No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated,* 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976). *See* text accompanying notes 175 & 176 *infra.* In addition to employing the psychological techniques described below, the police held the immature 18 year old suspect incommunicado, allowed him at most a few hours

Finally, appellate courts may quite legitimately defer to lower court findings of "voluntariness," particularly because they are at least partially factual and, due to the innumerable circumstances that generally are involved, it is unlikely that any given case will be controlled by a prior Supreme Court decision.[114] The net result is that in many cases the courts effectively defer to the police and make their judgment of the legitimacy of interrogation tactics the decisive one.

Per se rules, prohibiting certain categories of police tactics, obviously provide better guidance for the police and increased protection for suspects. Accordingly, the framing of the constitutionally mandated rules limiting police trickery should be undertaken with awareness of these realities. The inquiry envisioned by this Article requires that a court take an additional conceptual step after determining that a given interrogation tactic vitiates the *Miranda* or *Williams* guarantees or results in a coerced confession: whenever possible, the court should identify the objectionable characteristic that emerges from its scrutiny of the facts surrounding an invalid interrogation. If that infirmity creates an unacceptable risk of infringing the typical suspect's constitutional rights, the court should hold that such police conduct is illegal per se. Although the objectionable police conduct may conceivably occur in myriad forms and in various settings, a per se rule would require that police officers design their interrogation techniques to avoid the proscribed conduct in all situations. Although it is impossible to develop prospectively a complete catalogue of prohibited tactics, this Article will utilize the suggested objective approach and conceptual framework to identify several police tactics that create an unacceptable risk of infringing the typical suspect's constitutional rights. Before beginning this task, however, it is necessary to define the standard of probability implicit in the phrase "unacceptable risk" and to specify the degree of subjectivity envisaged in this approach.

The per se rules should prohibit police conduct that is *likely to render* a resulting confession involuntary or to undermine the

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sleep and no hot food, and interrogated him for virtually 26 continuous hours in order to obtain his confession. Based on a plethora of Supreme Court cases, the confession would appear to be clearly inadmissible. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944), *discussed at* note 108, *supra*. Nevertheless, the lower court admitted it.

[114] For an illustration of the highly deferential attitude that may plausibly be adopted by an appellate court, see Mincey v. Arizona, 98 S. Ct. 2408, 2422-23 (1978) (Rehnquist, J., concurring in part and dissenting in part). *See also* Ashcraft v. Tennessee, 322 U.S. 143, 156-58, 170-73 (1944) (Jackson, J., dissenting).

effect of required *Miranda* warnings or a suspect's independent right to an attorney. Although law enforcement interests rule out a lesser burden of proof (*e.g.*, "possibly render"), the fundamental nature of the suspect's constitutional rights mandates a sensible allocation of the risk of error. This standard of probability (*i.e.*, likely to render) is preferable to requiring a demonstration that the conduct in question invariably or nearly always results in violations. Police should not engage in conduct that is likely to induce a coerced confession or negate constitutional protections (even though it may not invariably do so) because obviously a high risk exists that significant harm (in terms of unlawfully obtained confessions or improper coercion) will ensue. Therefore, prophylactic rules designed to deter the police from engaging in conduct with such a probable effect are appropriate.

In formulating per se rules of this type, a court should not consider police conduct in a vacuum. The likelihood that particular conduct will coerce confessions or undermine fifth or sixth amendment protections depends not only upon the content of the conduct but also upon its probable effect upon a specific suspect. Particularly in the case of psychologically oriented interrogation techniques, conduct that might be totally innocuous when employed in an ordinary interrogation situation may, under certain special circumstances, be likely to have a devastating psychological impact on a suspect. Therefore, the per se rules should be formulated not in terms of prohibiting specific police conduct as such, but as prohibiting police conduct that is likely to produce certain types of effects upon suspects.[115]

For example, if it is determined that the tactic of challenging a suspect's dignity should be prohibited,[116] in deciding whether this per se rule applies a court will have to consider whether a person in the suspect's position (given the individual characteristics of the suspect known to the police)[117] would feel that the police con-

[115] It should be emphasized, however, that the Court's assessment of the officer's intent or good faith should not affect the application of a per se rule. If it is determined that the officer's conduct was in fact likely to have the proscribed effect upon the suspect, the absence of conscious wrongdoing on the officer's part should be constitutionally irrelevant.

[116] *See* notes 245-48 *infra* & accompanying text.

[117] This factor must be taken into account because the guidelines are ultimately designed to regulate police conduct. If the police engage in conduct that from their perspective would appear innocuous, but in fact is likely to have a devastating effect on the suspect, the conduct should not become the subject of a per se rule. However, when innocent conduct induces a confession that is "involuntary" under traditional doctrine, the confession must of course be excluded. *See* Townsend v. Sain, 372 U.S. 293, 308-09 (1963) (benign purpose of interrogating officer does not

duct was a challenge to his dignity.[118] If it is found that the police tactic induces such a feeling, operation of the per se rule will render any resulting confession automatically inadmissible. However, if the court finds that, when viewed from the perspective of a reasonable person in the position of the interrogating officer, the tactic does not constitute a challenge to the suspect's dignity, the per se rule will be inapplicable. Thus, the per se rules will of necessity be phrased in terms of conduct and its likely effect, the latter of which introduces a limited degree of subjectivity into the test.

Obviously, the development and application of per se rules will involve the court in difficult judgments. In determining whether police conduct will be likely to have a particular impact on the typical suspect, the court may have to perform the difficult task of placing itself in the shoes of the suspect as viewed by the interrogating officer. However, given the complexity of the interests at stake, any principled approach in this area inevitably will involve difficult judgments. When compared to the more subjective version of the "totality of circumstances" test, the proposed approach will provide increased clarity in that the police and courts will at least be informed of specific danger zones; that is, they will have notice that tactics that have certain predictable effects are forbidden. The proposed approach has the virtue of allowing the courts to take account of the complex interrelationship between police conduct and its effect on individual suspects while at the same time enabling them to decide cases in a way that will provide concrete guidance for the future.

III. Evaluation of Certain Police Interrogation Tactics

This section of the Article will describe certain categories of interrogation tactics that can validly be subjected to per se prohibitions. No attempt will be made to discuss every widely employed tactic or to develop a general theory that would be applicable to every technique. In order to achieve organizational clarity, the

validate a confession that is in fact involuntary). A confession should also be held invalid, although not on a per se basis, if it is obtained by innocent police conduct that impermissibly vitiates the effect of *Miranda* warnings or the independent right to counsel. Such a result could be obtained under the traditional methodology.

118 For example, in Brewer v. Williams, 430 U.S. 387 (1977), the interrogating detective's "Christian burial" speech and his use of the word "Reverend" in addressing the suspect would be likely to challenge the dignity of a deeply religious person, but would have little effect on the dignity of an ordinary person. Because the detective was aware of the suspect's deep religious convictions, 430 U.S. at 392, the speech could properly be characterized as a challenge to the suspect's dignity.

section will begin by discussing tactics that create problems primarily because of their potential negation of the *Miranda* protections (or the independent right to counsel) and continue with a discussion of those that should be prohibited because of their coercive effects.

A. *Deception About Whether an Interrogation Is Taking Place*

A form of deception that totally undermines the fifth or sixth amendment protections available to an individual occurs when the police deceive a suspect about whether an interrogation is taking place.[119] A classic example of this type of deception occurred in *Massiah v. United States*.[120] In *Massiah*, the defendant and his confederate Colson were arrested and indicted for possession of narcotics aboard a United States vessel. After both were released on bail, Colson, without defendant's knowledge, agreed to cooperate with the government in their efforts to obtain further information relating to the offense.[121] Equipped with a transmitter that broadcasted conversations held in his automobile to another government agent, Colson engaged in a lengthy conversation with defendant; at defendant's trial, incriminating statements made by him during the course of this conversation were introduced into evidence. The Court held the statements inadmissible on the ground that they were obtained in violation of the protections afforded the defendant by his sixth amendment right to counsel.[122]

Of course, the deception utilized in *Massiah* did not deprive the defendant of his right to an attorney in any ordinary sense. As

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[119] Actually, in light of the post-*Miranda* narrowing of *Miranda*'s applicability, *see* notes 47-57 *supra* & accompanying text, it is likely that the suspect has no fifth amendment protection when this form of deception occurs. Because the suspect is unaware that interrogation is taking place, it is likely that the "custodial interrogation" element of *Miranda* would not be met. *See* text accompanying notes 47-57 *supra*. Therefore, the point at which the sixth amendment right attaches assumes critical importance. This Article has argued that the sixth amendment right should be triggered at the point of formal arrest. *See* notes 64-74 *supra* & accompanying text. However, if the right does not come into effect until after a suspect is formally charged, the police may use undercover agents or private citizens to obtain statements from suspects who are in police custody and who have asserted their *Miranda* rights but have not yet been formally charged. For lower court cases dealing with this issue, see, for example, Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968) (statements inadmissible when police engaged defendant's parents to elicit incriminating statements from him while he was in the hospital); State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976) (statements inadmissible when police placed undercover policeman in defendant's cell shortly after his arrest and defendant had already refused to talk to police before seeing an attorney).

[120] 377 U.S. 201 (1964).

[121] *Id.* 202.

[122] *Id.* 205-06.

Professors Enker and Elsen have pointed out, "so far as the record in *Massiah* reveals, [the defendant] may very well have consulted with his counsel before talking to Colson." [123] Indeed, nothing indicates that the government did anything to prevent him from having his attorney present when he met with Colson in the car.[124] What the government did was not to deprive the defendant of his right to counsel, but rather to render that right useless by not disclosing that the conversation with Colson was, in effect, a part of an adversary process in which an attorney's presence was necessary. Thus, as the Court implicitly recognized, the key to the violation in *Massiah* was the fact that, due to the governmental deception, at the time the defendant made his incriminating statements to Colson he "did not even know that he was under interrogation by a government agent." [125] Due to this deception, the sixth amendment protection that should have been available to defendant was effectively defeated. A practice that makes the suspect unaware that the police are interrogating him, and therefore is likely to remove from his consideration the question whether he should have counsel present, clearly creates an unacceptable risk of infringement of the suspect's constitutional rights. This interrogation technique, therefore, should be the subject of a per se prohibition.

The per se prohibition against deception that defeats the suspect's sixth amendment right by deceiving him about whether an interrogation is taking place should not be limited to post-indictment interrogation (which is the extent of the holding of *Massiah),* but should also be extended to similar conduct that occurs after formal arrest.[126] This stratagem is as likely to be effective in the period *between* arrest and indictment as it is afterward. Further, the per se proscription should apply whether or not the suspect has initially waived his right to an attorney. As was noted previously,[127] the government must afford the suspect a continuous opportunity to assert his right to an attorney throughout the interrogation process. Deception about whether an interrogation is taking place, however, negates this opportunity. When a suspect is deceived about whether the government is seeking to elicit incriminating evidence from

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123 Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 56 n.32 (1964).

124 *Id.*

125 377 U.S. at 206.

126 This Article has argued that the sixth amendment right should be triggered at the point of formal arrest. *See* notes 64-74 *supra* & accompanying text.

127 *See* notes 79-81 *supra* & accompanying text.

him,[128] he obviously has little basis upon which to assess or reassess the question whether he needs the assistance of counsel during this phase of the adversary process. Therefore, even if the suspect has initially waived his right to an attorney, police deception about whether an interrogation is currently taking place should also be impermissible per se.

Even if the Court holds that the suspect's right to an attorney is not triggered at the point of arrest,[129] admissions obtained as a result of post-arrest deception about whether an interrogation is taking place should be held inadmissible on the ground that the use of this tactic is inherently unfair. Close examination of the relative strengths of the suspect and the police in this context demonstrates the desirability of extending the fairness strand of voluntariness doctrine to prohibit this practice.[130]

In order to understand the suspect's perspective, it must be noted that he is invariably confined in some manner when this deception is perpetrated.[131] Professor Dix has pointed out that surreptitious attempts to elicit incriminating disclosures place considerable pressure to confess upon any confined suspect. As Dix states, "Mere confinement might increase a suspect's anxiety, and he is

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128 This would appear to be the appropriate definition of interrogation in the *Massiah-Williams* context, as opposed to the definition of custodial interrogation within the meaning of *Miranda*. One recent circuit court case has held that in view of *Williams'* language relating to the meaning of interrogation, *Massiah's* proscription only applies when the undercover agent engages in direct questions or inquiries and not when he engages the defendant in conversation with a purpose to elicit incriminating responses. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), *petitions for rehearing and rehearing en banc denied*, 590 F.2d 408 (2d Cir. 1979). As Professor Kamisar's recent article demonstrates, this is an improper interpretation of *Williams*. Kamisar, *supra* note 64, at 5-44 & *passim*. *Accord*, Henry v. United States, No. 77-2338 (4th Cir. Dec. 26, 1978).

129 Professor Kamisar has predicted that *Williams* will not be extended to interrogation that occurs before the initiation of formal adversary proceedings. *See* Kamisar, *supra* note 64, at 83.

130 For a brief discussion of this aspect of voluntariness doctrine, see notes 19-22 *supra* & accompanying text.

131 Under ordinary circumstances, before an arrested suspect can be released, the charges against him must be dropped or he must be brought before a judicial officer for the commencement of formal adversary proceedings. If the charges are dropped, and the suspect is released, the sixth amendment right to counsel probably does not apply to subsequent police interrogation. Although this Article has argued that the right should attach at the point of arrest, it is likely that the dropping of the charge would negate the effect of the prior arrest for purposes of applying *Williams*. Even though the police may continue to focus upon the suspect as a target of their investigation the Court has held that the police are not required to arrest a suspect, and thereby possibly trigger the suspect's sixth amendment rights, even though they have sufficient evidence to take that step. Hoffa v. United States, 385 U.S. 293, 310 (1966). Accordingly, in cases in which the suspect is not confined, he would not be protected by the sixth amendment, even though deception about whether he is being interrogated may in fact occur.

likely to seek discourse with others to relieve this anxiety. That search, of course, may make him more susceptible to an undercover investigator seeking information about the offense for which the suspect has been arrested." [132] Confinement of the suspect increases the power of the police in an important respect. Because the suspect's ability to select people with whom he can confide is completely within their control,[133] the police have a unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent. In view of the government's control over the suspect's channels of communication, it is blatantly unfair to allow the government to exploit the suspect's vulnerability by trickery of this type.

Indeed, in one respect the deception in the "jail plant" situation is more invidious than that involved in *Spano v. New York*,[134] the seminal case dealing with the fairness strand of voluntariness doctrine.[135] In *Spano*, the defendant adamantly resisted police efforts to obtain a statement until he was confronted by Bruno, a fledgling officer who was also defendant's childhood friend, and who by telephone had persuaded Spano to surrender to the police. Pursuant to instruction from his superiors, Bruno falsely told the defendant that his "telephone call had gotten him [Bruno] into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child." [136] After assuming this role four times within the period of an hour, Bruno's deception successfully elicited a confession.

Although the Court held that the confession was involuntary based on the totality of the circumstances,[137] the majority opinion's

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[132] Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 230 (1975). Professor Dix suggests that a *Miranda*-type barrier should preclude use of the "jail plant" tactic. *Id.* Professor Kamisar has argued cogently to the contrary. *See* Kamisar, *supra* note 64, at 61-69.

[133] Justice Marshall's dissenting opinion in Miller v. California, 392 U.S. 616, 616 (1968), noted this aspect of confinement. In *Miller*, an undercover police agent testified at defendant's trial about conversations they had engaged in while they shared a cell prior to the defendant's arraignment. In a per curiam opinion, the Court dismissed the writ of certiorari as improvidently granted. Justice Marshall, and the three Justices who joined in his opinion, would have extended *Massiah* to exclude the agent's testimony. Justice Marshall argued that "[i]ndeed, in one respect at least, this is a clearer case than *Massiah*: unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions." *Id.* 624.

[134] 360 U.S. 315 (1959).

[135] *See* notes 19-22 *supra* & accompanying text.

[136] 360 U.S. at 323.

[137] *Id.* 321.

marked distaste for Bruno's conduct indicated that the use of such a stratagem might in itself invalidate the resulting confession. To be sure, the deception employed in *Spano* can be distinguished from that of the typical "jail plant" situation. First, it is significant that Bruno was a long-time friend of the defendant, as opposed to a previously unknown cellmate. Second, in contrast to the typical "jail plant" situation, the defendant in *Spano* was explicitly and persistently urged to confess in order to avert dire consequences for his friend.[138] The presence of these additionally coercive elements in *Spano* undoubtedly intensified the pressure placed upon the defendant to make an incriminating statement.

However, the broader "illegal methods" [139] language in *Spano* suggests that the Court was concerned more with deception than coercion. When the potential for deception is the focus of comparison, the conventional "jail plant" ploy emerges as the more objectionable interrogation tactic. In *Spano,* the defendant at least knew that his "friend" was a police officer and that his goal was to obtain a confession. By contrast, the suspect exposed to the "jail plant" is deceived completely about his cellmate's identity and purpose. The deception perpetrated in *Spano* unfairly weakened the suspect's ability to resist the police efforts to obtain a confession; the trickery of the "jail plant" ploy affords the suspect no opportunity to apply his powers of resistance because the peril of speaking is hidden from him. Accordingly, the "fairness" aspect of *Spano* should be expanded to prohibit this practice.

Once a general category of trickery has been deemed prohibited per se, a similar technique (especially one arguably within the same category) can be analyzed by comparing it to the tactic already proscribed. To be successful, such a comparison will involve the difficult definitional problems inherent in framing or applying legal rules. In the context of this type of deception, the analysis may be expected to involve distinguishing between impermissible deception about whether an interrogation is taking place and a permissible failure to disclose relevant information. Many of the tactics utilized in the course of an ordinary interrogation may have the effect of making a suspect forget that the police are seeking to elicit incriminating evidence.[140] Presumably, however,

138 The coercive nature of this tactic can be explained by the fact that it takes on the character of a threat. For a discussion of the legitimacy of the use of threats and promises during interrogation, see notes 189-217 *infra* & accompanying text.

139 360 U.S. at 320-21.

140 For example, it is said that in order to establish a rapport that will encourage the disclosure of incriminating information, it is desirable to "[e]stablish confidence

when a suspect has been informed of the police officer's intention to interrogate him and has consented, the police will not be required to preface every attempt to elicit incriminating statements [141] with a reminder to the suspect that they are continuing to interrogate him. On the other hand, the government obviously should not be permitted to argue that no deception occurred in *Massiah* because the defendant never happened to ask Colson whether he was acting as an undercover agent for the government. In between these two extremes, this analysis will involve close comparisons: the adoption of a per se rule will not eliminate the necessity of difficult line-drawing.

People v. Ketchel,[142] which involved an interrogation tactic analogous to deception about whether interrogation is taking place, provides an opportunity to demonstrate the suggested approach. In *Ketchel,* three defendants were arrested for robbery and murder. After talking with them for twenty minutes about the crimes, the police left the three suspects together in a room, after telling them that they were " 'free' to talk." [143] The room had in fact been wired to record the conversation. During the conversation, two of the defendants expressed the possibility that the room might be bugged.[144] Nevertheless, all three of them proceeded to make incriminating statements. In holding that these statements were properly admissible at the defendants' trials, the court applied the traditional voluntariness test [145] and found that "[t]he prior police statements as to the free use of the room could not have been such 'as to overbear [defendants'] will to resist and bring about confessions not freely self-determined' . . . because [defendants] themselves suspected their conversations *were* overheard." [146] Thus, the court implied that police trickery with respect to whether an interrogation is taking place will not be impermissible so long as the

and friendliness by talking for a period about everyday subjects. In other words, 'have a friendly visit.' " *See* F. ROYAL & S. SCHUTT, *supra* note 2, at 61-62. Obviously, the purpose of the "friendly visit" is to distract the suspect from the reality that an interrogation is taking place. *See generally* Kamisar, *supra* note 111.

141 The Court apparently adopted this definition of "interrogation" in Brewer v. Williams, 430 U.S. 387, 399-400 (1977). *See* note 128 *supra.*

142 59 Cal. 2d 503, 381 P.2d 394, 30 Cal. Rptr. 538 (1963), *rev'd en banc,* 63 Cal. 2d 859, 409 P.2d 694, 48 Cal. Rptr. 614 (1966). After retrial on the penalty issue, the Supreme Court of California voided the confessions on the authority of Escobedo v. Illinois, 378 U.S. 478 (1964). People v. Ketchel, 63 Cal. 2d 859, 868, 409 P.2d 694, 699, 48 Cal. Rptr. 614, 619 (1966).

143 59 Cal. 2d at 521, 381 P.2d at 402, 30 Cal. Rptr. at 546.

144 *Id.,* 381 P.2d at 403, 30 Cal. Rptr. at 547.

145 The case was originally decided before *Massiah* or *Miranda.*

146 59 Cal. 2d at 521, 381 P.2d at 403, 30 Cal. Rptr. at 547 (emphasis in original).

suspect subjected to such trickery is aware of the *possibility* that such trickery is being employed.

This approach is misdirected and should not be incorporated into an analysis of a suspect's sixth amendment rights. As noted above, a subjective approach that focuses on the effect of police practices on a particular defendant does not provide effective guidance to the police and courts.[147] Moreover, even if a totally objective approach is not adopted, as long as a defendant is actually deceived, it should not matter whether he was totally deceived, or partially deceived in that he recognized the possibility of deception. After all, anyone who considers the matter will know that there is *always* some possibility of governmental deception. A suspect's constitutional rights should not turn upon the degree of cynicism he expresses.[148]

If it has first been established that deception about whether an interrogation is taking place is impermissible per se,[149] under the suggested approach the question in a case like *Ketchel* should be whether the failure to disclose the fact that the room was bugged can be equated with that deception. In light of *Massiah,* impermissible deception can obviously take place without any overt misstatement. Deception in this context would appear to occur whenever the government fails to disclose to the suspect that it has changed the situation to make it contrary to an ordinary person's reasonable expectations about interrogation. An ordinary person in Massiah's position would not reasonably expect that his friend was acting as a government agent; similarly, an ordinary person occupying the position of the defendants in *Ketchel* would not reasonably expect that the room in which they were conversing was bugged. Because governmental deception of this nature is likely to lead an arrested suspect to believe that no interrogation is taking place, incriminating statements obtained by failing to disclose that the room was bugged should likewise be inadmissible per se.

B. *Deception That Distorts the Meaning of the* Miranda *Warnings*

When the *Miranda* protections are applicable, deception that defeats them definitely occurs when police trickery leads the suspect to believe that the *Miranda* warnings are totally inapplicable. For

147 *See* notes 99-106 *supra* & accompanying text.

148 *Cf.* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 384 (1974) ("[N]either *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.").

149 *See* text accompanying notes 119-27 *supra.*

example, if in the course of an interrogation following a valid waiver, the suspect is questioned by a new officer who tells him that he no longer has a right to remain silent or that statements he makes cannot be used against him, statements made by the suspect in response would clearly be inadmissible.[150]

If *Miranda* is more than an empty formality, statements or tricks that significantly distort the meaning of the warnings should similarly be barred. For example, if a suspect who has initially waived his rights is told that statements he makes to the officers will actually benefit him in a reduction of the charge,[151] this advice appears to conflict with the meaning of the first two *Miranda* warnings. The suspect might naturally infer that although he may have some technical right to remain silent, the right is not a meaningful one in that in reality it is in his best interest to talk. At the same time, he may feel that although his statement can be used against him, that is not nearly as important as the fact that it can be used in his favor. Direct distortion of this magnitude obviously vitiates the effect of the *Miranda* warnings,[152] thus resulting in a violation of the principle that requires that the warnings remain in effect (or at least not be negated by police conduct) throughout the interrogation.

At least some degree of distortion of the *Miranda* warnings occurs whenever the police make a misstatement that relates to the legal effect of the suspect's exercise of his right to remain silent. For example, if after warning the suspect of his rights and obtaining a valid waiver, the police tell the suspect that one of his confederates is going to make an accusatory statement in his presence, and this

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[150] *Cf.* Commonwealth v. Dunstin, 78 Mass. Adv. Sh. 2302, 368 N.E.2d 1388 (1977), *cert. denied*, 435 U.S. 943 (1978) (incriminating statements held inadmissible when guard told defendant that only statements made under oath at trial could be used against him); Commonwealth v. Hale, 467 Pa. 293, 356 A.2d 756 (1976) (results of tests by police psychiatrist held inadmissible when psychiatrist told accused before testing that the test results would be used only at sentencing).

[151] *Cf.* Fillinger v. State, 349 So. 2d 714 (Fla. App. 1977) (confession held involuntary because defendant was told that if she cooperated, the state attorney would be so informed before establishing the amount of the bond upon which she was to be held); State v. Biron, 266 Minn. 272, 123 N.W.2d 392 (1963) (confession held inadmissible when given after suspect was told that his confession might lead to a juvenile court trial instead of one in criminal court). The contents of the tape recording made of the six-hour Biron interrogation are discussed below. *See* text accompanying notes 199-201 & 217 *infra*.

[152] *Cf.* Commonwealth v. Singleton, 439 Pa. 185, 189-90, 266 A.2d 753, 754-55 (1970) (holding that delivering the second *Miranda* warning by telling suspect that "any statement he gave could be used *'for*, or against him' at trial" is impermissible because it "vitiates the intended impact of the warning" (emphasis added) (footnote omitted)).

statement can be used against him unless he denies it,[153] this incorrect statement of law [154] adds an important caveat to the *Miranda* warnings. In effect, the suspect is told, "You have a right to remain silent, but in the context of your particular situation, exercise of that right will produce damaging evidence that will be used against you." This addition to the *Miranda* warnings so distorts their meaning that it significantly undermines their effect. A substantial likelihood exists that, during the remainder of the interrogation, the suspect, confronted with this information, will base his decision whether or not to assert his constitutional right to remain silent upon the mistaken premise that his silence can be used against him. The interrogator's distortion of the *Miranda* warnings creates an unacceptable risk that the ordinary suspect will be deprived of the protection afforded by the warnings. Therefore, statements obtained as a result of these types of misstatements should be inadmissible per se.

Of course, the police may indirectly achieve distortion of the *Miranda* warnings' meaning without making any misstatements of the law. This may occur when the police verbally impress upon the suspect that it is really in his own best interest for him to talk and tell the truth. For example, the Inbau-Reid manual recommends that the interrogator should inform "the suspect that even if he were your own brother (or father, sister, etc.), you would still advise him to speak the truth." [155]

The validity of practices that indirectly distort the *Miranda* warnings may be tested by comparing their likely effect to the results of direct distortion of the *Miranda* warnings, already the subject of a per se proscription under the suggested analysis. Statements of this type undercut the effect of *Miranda* warnings just as effectively as direct distortions of the warnings' legal scope. After all, the typical criminal suspect is not interested in abstract propositions of law; he wants to know what the score is. He may well believe that because the police are the ones who gave him the *Miranda* warnings, they can be expected to know the warnings' value. If the police advise him that it is really in his best interest to make a

[153] *Cf.* State v. Braun, 82 Wash. 2d 157, 509 P.2d 742 (1973) (police told accused that codefendant's confession would be admissible against him if repeated in his presence). Of course, the police may convey the same message to the suspect tacitly without misinforming him of the effect of his failure to deny. *Cf.* text accompanying note 155 *infra.*

[154] The Court has made it clear that once the *Miranda* warnings have been given, the defendant's silence may not be used against him under any circumstances. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

[155] F. INBAU & J. REID, *supra* note 2, at 60.

full disclosure, the suspect is likely to believe them, and, as a result, the effect of the *Miranda* warnings will be essentially negated. Although the inherent limitations of a system that initially entrusts the protection of the suspect's constitutional rights to the police must be acknowledged, a minimal circumscription of the police's adversarial role is necessary if *Miranda* is to have any content. If we are to attribute constitutional significance to verbal warnings by the police, it is only logical that we attach equal weight to police statements that predictably vitiate the warnings' desired effect. Thus, consistent with the policy against directly undermining the effect of the *Miranda* warnings, their indirect distortion, such as by advice to the suspect that it is in his own best interest to make a full disclosure, should also be prohibited per se.

C. *Deception That Distorts the Seriousness of the Matter Under Investigation*

A slightly different form of trickery occurs when, after having given the suspect his *Miranda* warnings, the police misrepresent the seriousness of the offense. A typical example of this occurs when an interrogating officer falsely informs a murder suspect that the victim is still alive.[156] In analyzing whether this type of trickery impermissibly undermines the effect of the *Miranda* warnings, it is first necessary to determine whether the suspect must be informed of the nature of the charges about which he is being questioned before he may validly waive his *Miranda* rights.

Lower courts generally have held that the interrogating officer need not inform the suspect of the specific nature of the charges involved in order to obtain a valid waiver.[157] The Supreme Court's present view on this issue, however, is not clear. In the landmark case of *Johnson v. Zerbst*,[158] the Court equated waiver of a constitutional right with "an intentional relinquishment or abandonment of a known right or privilege."[159] In cases involving the waiver of

[156] *See, e.g.*, People v. Groleau, 44 Ill. App. 3d 807, 358 N.E.2d 1192 (1976); State v. Cooper, 217 N.W.2d 589 (Iowa 1974). *See also* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 28, at 571.

[157] *See, e.g.*, United States v. Anderson, 533 F.2d 1210, 1212 n.3 (D.C. Cir. 1976); Collins v. Brierly, 492 F.2d 735 (3d Cir.), *cert. denied*, 419 U.S. 877 (1974); United States v. Campbell, 431 F.2d 97 (9th Cir. 1970); People v. Prude, 66 Ill. 2d 470, 363 N.E.2d 371, *cert. denied*, 434 U.S. 930 (1977); People v. Pereira, 26 N.Y.2d 265, 258 N.E.2d 194, 309 N.Y.S.2d 901 (1970). *Contra*, Schenk v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968). *Cf.* Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553 (1977) (suspect must be informed of the "transaction" that gave rise to his detention and interrogation).

[158] 304 U.S. 458 (1938).

[159] *Id.* 464.

trial counsel or of the right to trial, this standard has been held to mean that there can be no valid waiver unless the defendant has fairly full information relating to the consequences of the waiver.[160] Thus, when waiver of these rights is at issue, precise information relating to the nature of the charges against the defendant is clearly required.[161]

In *Schneckloth v. Bustamonte*,[162] a recent case involving waiver of fourth amendment rights, the Court noted in passing that when the suspect's fifth amendment privilege is in effect at the station house, the "standards of *Johnson* were . . . found to be a necessary prerequisite to a finding of a valid waiver." [163] In view of the development that *Johnson* has undergone in the right to trial and right to counsel contexts, this language can easily be relied upon to require that a suspect be informed of the precise nature of the charges about which he is being questioned as a prerequisite to waiver of his *Miranda* rights.

Other elements of the Court's recent analysis of the concept of waiver, however, could be used to support an opposite result. In *Schneckloth*, the Court indicated that two considerations are of particular importance in determining the applicable standard of waiver: first, the extent to which the right at stake bears upon the integrity of the factfinding process; [164] second, the degree of structure that inheres in the context in which the waiver is sought.[165] Either of these considerations could be utilized to dilute the applicable standard of waiver in the *Miranda* context. Compared to the courtroom environment in which the rights to counsel and jury trial are waived, the custodial interrogation setting is relatively un-

160 *See* Boykin v. Alabama, 395 U.S. 238 (1969) (right to trial); Minor v. United States, 375 F.2d 170 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967) (waiver of trial counsel).

161 In the case of waiver of the right to trial, it has been held that the defendant must demonstrate a clear understanding of the charges against him. Henderson v. Morgan, 426 U.S. 637 (1976). In addition, the defendant must have a "full understanding of what the plea connotes and of its consequence." Boykin v. Alabama, 395 U.S. 238, 244 (1969). When the defendant waives his right to counsel, he must understand not only the charges and statutory offenses against him, but also the possible punishments, defenses, and mitigating circumstances, and any facts "essential to a broad understanding of the whole matter." Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality opinion) (Black, J.). *See generally* Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1141-45 (1965).

162 412 U.S. 218 (1973).

163 *Id.* 240.

164 *Id.* 242.

165 *Id.* 243-45. For a critical examination of this aspect of *Schneckloth*, see Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 477-80 (1978).

structured. In light of its analysis in *Schneckloth,* the Court may find that it is "unrealistic" to impose additional requirements beyond delivery of the *Miranda* warnings.[166] Moreover, although *Schneckloth* properly recognized that the *Miranda* rights do have a bearing upon the determination of guilt or innocence,[167] other post-*Miranda* decisions evince a perception on the part of the Court that statements obtained in violation of *Miranda* may be introduced into evidence without jeopardizing the integrity of the factfinding process.[168] Therefore, in keeping with the doctrine of variable waiver articulated in *Schneckloth,*[169] the Court might be expected to hold that a suspect may validly waive his rights under *Miranda* even though he was not informed of the precise nature of the charges forming the subject matter of the interrogation.

Even if the Supreme Court ultimately holds that disclosure of the charge is not a prerequisite to a valid waiver of *Miranda* rights, however, this will not mean that after obtaining a valid waiver without such disclosure, police officers may then misrepresent the seriousness of the charge in order to eliminate any remaining resistance in the suspect. Because the *Miranda* rights must be capable of reassertion at any point in the interrogation process,[170] the mere existence of a waiver does not immunize subsequent police misrepresentation. On the contrary, misrepresentation of the seriousness of the charge cripples the suspect's capacity to reassess the desirability of asserting the rights outlined in the warnings. The presence of inaccurate information about the legal consequences that will accompany ill-considered speech achieves as pernicious an effect as direct distortion of the *Miranda* warnings. Although many doubtlessly constitutional methods of police trickery distort the suspect's perception of his predicament, it is sophistry to make rigid distinctions between the suspect's abstract understanding of his legal rights and his concrete ability to make effective use of them. Prin-

[166] In most cases, of course, it would not be any more difficult for the police to inform the suspect of the charges they are investigating than it is for them to deliver the warnings required by *Miranda.* There might be some cases, however, in which defining the precise nature of the charges under investigation would be difficult. *See, e.g.,* Commonwealth v. Tatro, 76 Mass. App. Ct. Adv. Sh. 568, 346 N.E.2d 724 (Mass. App. Ct. 1976) (homicide charges not contemplated at time accused was questioned about robbery because cause of victim's death had not yet been determined).

[167] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973): "The [*Miranda*] Court made it clear that the basis for decision was the need to protect the fairness of the trial itself . . . ."

[168] *See, e.g.,* Hass v. Oregon, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[169] *See* text accompanying notes 164 & 165 *supra.*

[170] *See* note 28 *supra* & accompanying text.

cipled resolution of this problem requires some analysis of the significance of the particular factual distortion in terms of the suspect's ability to exercise the *Miranda* rights.

Whatever balance a court would strike in other areas, the effect of misrepresentation of the charge cannot be overestimated. If suspects ever engage in the type of rational deliberation implicit in a system that depends on warnings, it is a virtual certainty that their perception of the potential punishment will assume critical importance in deciding whether or not to confess. Indeed, with the exception of deception about whether interrogation is taking place,[171] it is difficult to imagine trickery that exerts a more devastating effect on the suspect's ability to utilize his constitutional rights meaningfully. By distorting the suspect's understanding of his legal predicament, police misrepresentation of the charge is very likely to dissipate the effect of the *Miranda* warnings substantially. It therefore creates an unacceptable risk that the suspect will not be able to exercise his constitutional rights effectively. Accordingly, trickery of this type should be impermissible per se.

D. *"A Pretended Friend Is Worse":*[172] *The Assumption of Non-Adversary Roles by Interrogating Officers*

According to Royal and Schutt's treatise on police interrogation, "[r]esistance to the disclosure of [incriminating] information is considerably increased . . . if something is not done to establish a friendly and trusting attitude on the part of the subject."[173] Accordingly, the interrogating officer will often assume a non-adversarial role in which the suspect will perceive him not as an officer who is attempting to elicit incriminating information, but rather

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[171] *See* notes 119-49 *supra* & accompanying text.

[172] Spano v. New York, 360 U.S. 315, 323 (1959). Both *Spano* and Leyra v. Denno, 347 U.S. 556 (1954), lend some preliminary support to the conclusion advanced in this section. In both cases the Court invalidated confessions obtained by police interrogators who purported to speak to the defendants in a non-adversarial capacity. In *Leyra,* the police psychiatrist who obtained the confession told the defendant he was a doctor who was going to help him with his headaches. 347 U.S. at 559. In *Spano,* a police officer told defendant (who had been his childhood friend) that his job would be in jeopardy if the defendant did not confess, and that loss of his job would be disastrous to his three children, his wife, and his unborn child. 360 U.S. at 323. Although the Court clearly expressed its disapproval of the deceptive practice employed, *id.,* it considered the use of the childhood friend as just "another factor which deserves mention in the totality of the situation," *id.,* and held that this practice combined with other factors in the case to overbear defendant's will, *id.* Thus, the Court did not go so far as to indicate that the deceptive practice alone was sufficient to invalidate the confession.

[173] F. ROYAL & S. SCHUTT, *supra* note 2, at 61-62, *quoted in* Kamisar, *supra* note 111, at 209.

as a friend or counsellor who is truely concerned with the suspect's welfare.[174] For example, in *State v. Reilly*,[175] the chief interrogating officer manipulated the situation so that the eighteen year old suspect would view the officer almost as a father figure.[176] In *State v. Biron*,[177] one of the interrogating officers assumed the role of religious counsellor by speaking to the suspect as a fellow Catholic and enlightening him about the values of confession.[178] Similar

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[174] This tactic is closely related to deception about whether an interrogation is taking place. *See* notes 119-50 *supra* & accompanying text. Although the assumption of a non-adversarial role may not totally negate the suspect's awareness that he is the subject of a police interrogation, the effective employment of this stratagem will substantially diminish his perception that particular questions are in fact part of the interrogation.

[175] No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976). *See* J. BARTHEL, A DEATH IN CANAAN (1976). This excellent account of the murder case in which Peter Reilly was convicted of manslaughter but eventually exonerated contains substantial portions of the tape-recorded police interrogation of Reilly. *See id.* 39-130.

[176] *See, e.g., id.* 85:

> S: [interrogator]: Have you ever felt close enough to someone that you could really trust them?
>
> . . . .
>
> P: [suspect]: Nope . . . yes, excuse me. I do have someone that I could speak to like that. That would be Aldo Beligni.
>
> S: Let's you and I try something. You try to feel about me . . .
>
> P: Like a father?
>
> S: Like somebody who's really interested in you, and then . . .
>
> P: Well, I do already. That's why I come out with all this.

[177] 266 Minn. 272, 123 N.W.2d 392 (1963). A six-hour tape recording of the interrogation conducted in *Biron* is on file in the libraries of the University of Michigan and University of Minnesota Schools of Law [hereinafter referred to as *Biron* Tapes]. The case is discussed in Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & C. 182, 184, 185 nn.19 & 20 (1977). The author expresses his gratitude to Professor Kamisar for making portions of the tapes available to the University of Pittsburgh School of Law.

[178] Actually, it might be more accurate to say that the officer attempted to assume the role of a priest-figure. Excerpts from the tape disclose that after the suspect asked to see a priest, Hawkinson, an interrogator who had previously exhibited courtesy and restraint in his dealings with the suspect, entered and the interrogation proceeded as follows:

> H: Mike was telling me that you'd like to see a priest. Is that true?
>
> S: Yes.
>
> H: I'm Catholic, too. I can appreciate that. Any particular one that you'd like to see?
>
> S: No.
>
> H: I think you realize you'll feel a lot better—
>
> S: Yeah, that's true.
>
> H: If you did do it, and you tell about it. I think you know that. It's just like when you go to confession, if you make a good clean confession, well, you feel good, received the next morning. My name is Hawkinson but I am a Catholic, a convert many years ago. In fact this Sunday night, I'm going out to King's house on a retreat for two days.

examples of a role switch appear, or are at least hinted at[179] in many other cases.[180]

In some cases, the suspect's perception of the officer as a friendly figure will create extreme pressures to confess. In the *Reilly* case, for example, it is apparent that the suspect's inordinate desire to gain the acceptance of the interrogator whom he perceived as a father figure[181] compelled him not only to make a statement, but also to try with pathetic eagerness to confess to those details that he sensed the police were seeking.[182] In light of this example,[183] it may be concluded that when the interrogator's shift to a non-adversary role is highly effective or when the suspect is

179 In cases such as *Reilly*, *Biron*, and State v. Miller, 76 N.J. 392, 388 A.2d 218 (1978), *see* note 180 *infra*, in which the interrogation is actually recorded, examples of an interrogating officer's switch to a non-adversary role are much more apparent than in non-recorded cases. This tends to support Professor Kamisar's argument that our traditional litigational tools are simply not calculated to elicit all of the constitutionally relevant facts of secret police interrogation. *See* Kamisar, *supra* note 111.

180 *See* Davis v. North Carolina, 384 U.S. 737, 750-51 (1966) (defendant confessed immediately after officer who was friend of family said a short prayer on his behalf); Spano v. New York, 360 U.S. 315 (1959) (defendant urged to confess by officer who had in fact been a boyhood friend); State v. Miller, 76 N.J. 392, 388 A.2d 218 (1978) (officer told defendant that the murderer was not a criminal who deserved punishment, but a person in need of medical care, and that he would do all he could to help if the defendant spoke about the incident). *Cf.* State v. Thompson, 287 N.C. 303, 214 S.E.2d 742 (1975), *modified*, 428 U.S. 908 (1976) (defendant's father, who was a police sergeant, urged defendant to cooperate with sheriff during interrogation on murder charges).

181 The extent of Reilly's feeling of dependence was fully revealed when he twice inquired of the interrogator if there was a possibility that he might come to live with the officer and his family, J. BARTHEL, *supra* note 175, at 98, 117-18, 127.

182 *See, e.g.*, *id.* 83, 91:

> S: What about a knife, Pete? Remember using a knife?
>
> P: I don't, but a straight razor thing registers.
>
> S: And a knife, Pete.
>
> P: Maybe. Could you give me the details? . . .
>
> . . . .
>
> I mean, was there a knife mark?
>
> S: Pete, you know very well why I won't answer that question. 'Cause you're not being honest . . . . You're trying to maneuver me and trick me into telling you facts that you already know. I know the facts.
>
> P: Well, if you would give me some hints . . . .

183 The after-discovered evidence that led to the ultimate dismissal of Reilly's case appears to establish conclusively that his confession was false. *See* Reilly v. State, 32 Conn. Supp. 349, —, 355 A.2d 324, 333-39 (Super. Ct. 1976), *vacating* No. 5285 (Conn. Super. Ct. April 12, 1974). Moreover, during the course of the interrogation, Reilly said that he must have raped his mother, *id.* 119, a statement that was patently false because no rape was alleged to have occurred.

extraordinarily sensitive to such tactics, a real danger exists that the shift will induce a false confession.[184]

The more pervasive danger, however, is that the interrogator's assumption of a non-adversary role will negate the effect of the second *Miranda* warning. The point of telling the suspect that anything he says can be used against him is to sharpen the suspect's awareness of his position. As the *Miranda* majority stated: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." [185] As Royal and Schutt suggest,[186] when the police effectively assume a non-adversarial role, the essential awareness is likely to be dissipated. The suspect's belief that he is talking to a friend or counsellor who has his best interests at heart will cause the suspect to forget that he is involved in an adversary interrogation in which his constitutional protections are of vital importance.[187] Accordingly, in order to avoid this negation of the protection provided by the second *Miranda* warning, the device of seeking to elicit incriminating information through the assumption of a non-adversarial role should be barred.[188]

E. *Tricks That Take on the Character of Threats or Promises*

In an early interpretation of the fifth amendment privilege, the Court concluded that one category of police tactics will automatically render a resulting confession involuntary. In 1897, the Supreme Court in *Bram v. United States* [189] laid down the rule that in order to be free and voluntary within the meaning of the fifth amendment privilege, a confession must be one that was "not . . . extracted by any sort of threats or violence, nor obtained by any

184 Under Professor Kamisar's analysis, such a danger should in itself operate to render "involuntary" all confessions induced as a result of this particular stratagem. *See Involuntary Confessions, supra* note 87, at 753-55.

185 384 U.S. at 469.

186 *See* text accompanying notes 172 & 173 *supra.*

187 *Id.* 467-69.

188 If it is determined that the suspect (given his characteristics that are known to the police) would be likely to view the interrogating officer as a friend, father-figure, religious counselor, or any other non-adversarial figure, this per se rule would be violated. The fact that the officer was actually manifesting his true concern for the suspect would, of course, be constitutionally irrelevant because the officer's bona fides would not mitigate the potential destruction of the protections afforded by *Miranda. See* note 115 *supra.*

189 168 U.S. 532 (1897).

direct or implied promises, however slight." [190] Although the *Bram* rule originally applied only to the federal government,[191] the Supreme Court explicitly noted in *Brady v. United States* [192] that *Malloy v. Hogan's* [193] incorporation of the fifth amendment privilege made it fully applicable to the states.[194]

The *Bram* doctrine's impact on deceptive police practices depends, of course, upon the interpretation given to the terms "threats" and "promises." Under a broad interpretation of these terms, many police interrogation tactics might be held to constitute implicit threats or promises in the sense that their objective is to make the suspect believe that his situation will be improved in some way if he does confess, or that it will become worse if he does not. On the other hand, some lower courts have been quite adept at interpreting *Bram* in a narrow way that virtually strips the doctrine of its vitality.[195] In view of the Court's reaffirmation of *Bram* in *Brady v. United States*,[196] principled application of the doctrine is necessary.

Interpretation of the *Bram* doctrine depends upon two interrelated and particularly difficult questions. The first concerns the extent to which the terms of a promise or threat must be articulated; the second involves specification of the type of detriments or benefits that legitimately may be offered to a suspect. Both problems present themselves in a variety of contexts. For example, the *Miranda* opinion describes a deceptive practice recommended by the O'Hara manual: "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [197] In this

[190] *Id.* 542-43.

[191] In state cases, post-*Bram* confessions that were clearly given in exchange for direct promises of leniency by the police were found not to be in violation of the fourteenth amendment. *See, e.g.*, Stein v. New York, 346 U.S. 156 (1953) (confession held voluntary when given in exchange for promise that accused's father would be released from jail and brother would not be disciplined for parole violation).

[192] 397 U.S. 742 (1970).

[193] 378 U.S. 1 (1964).

[194] Brady v. United States, 397 U.S. 742, 753 (1970).

[195] *See, e.g.*, United States v. Ferrara, 377 F.2d 16 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (confession voluntary when obtained after federal agent told accused that he would probably be released on reduced bail if he cooperated).

[196] 397 U.S. at 754. *See* text accompanying notes 213 & 214 *infra.*

[197] C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 105-06 (1956), *quoted in* Miranda v. Arizona, 384 U.S. 436, 453 (1966).

situation, because the police make no statement of any kind to the suspect, one could argue that no express or implied threat has been made. Nevertheless, the purpose of the charade is clear. In effect, the police say to the suspect, "Confess to the crime you are charged with, or you will find yourself being prosecuted for crimes that you did not commit." [198]

The interrogation of John Biron [199] included a number of instances in which the benefits of confessing (or detriments of not confessing) were suggested but not clearly delineated. Biron was an eighteen year old youth who was accused of participating in a felony murder with one or two other teenagers. At one point, one of the interrogating officers said to him: "The thing you want to remember is that there's two of you involved and you're both to blame. But if you don't tell the truth, and the other one does, it puts more blame on your part." [200] Another officer employed a metaphor to make essentially the same point:

> Right up to your ears you're implicated. That hole is getting bigger, you're digging it deeper. You're the fellow who's going to determine how long you're going to be buried. . . . You're the one guy who's got the shovel; you're the one fellow who's digging the hole. You just figure out how deep you want to dig that hole, how far down you want to bury yourself; and you just keep right on digging. Of course, if you would start telling the truth, we could throw a little of that dirt back in, and make it a little shallower.[201]

Although neither officer referred specifically to the suspect's legal liability, it appears that the first officer's reference to "blame" was not limited to moral culpability, and the significance of the second officer's metaphor is obvious. The impression created by these officers was that the suspect would maximize his time of incarceration if he did not confess, but might obtain a reduced sentence if he did.

In other situations, the police may attempt to induce a confession by offering the possibility of benefits that do not involve reduc-

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198 A study of interrogation practices in New Haven indicated that the police have conveyed this same type of message to suspects in post-*Miranda* cases. *Interrogation in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1546 (1967) [hereinafter cited as *Interrogations in New Haven*].

199 *See* notes 177-80 *supra* & accompanying text.

200 *Biron* Tapes, *supra* note 177.

201 *Id.*

tion of legal liability. The benefits offered the suspect may be tangible, such as an opportunity to talk with one's spouse [202] or a chance to receive medical treatment,[203] or intangible, such as an assuagement of guilt feelings or a promise of greater respect from the interrogating officer. In the *Biron* interrogation, for example, one officer continually urged the suspect to "get it off [his] chest" in order to "feel better." [204] The same officer repeatedly told the youth, first by implication, and then explicitly, that the officer would "respect [the suspect] a lot more" if he "told the truth." [205]

In determining the appropriate scope of the *Bram* doctrine, the doctrine's underlying rationale must be explored. As Justice White implied in *Brady v. United States* [206] and as Justice Harlan noted in his dissent in *Miranda v. Arizona*,[207] *Bram* reflects a judgment that certain types of threats or promises are likely to "apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." [208] In the case of threats or promises of the type involved in *Bram* (*i.e.*, those that relate to the suspect's status in the criminal justice system),[209] the basis for this judgment is not difficult to perceive—it is simply improper for the police to place a price tag on the right to remain silent in a context in which the bargain offered to the suspect is likely to prove illu-

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[202] Haynes v. Washington, 373 U.S. 503 (1963) (confession held involuntary when suspect was held incommunicado for 16 hours, and police refused to allow him to talk to his wife unless he confessed).

[203] *See* United States *ex rel.* Collins v. Maroney, 287 F. Supp. 420, 422 (E.D. Pa. 1968) (statement by narcotics addict in withdrawal held involuntary when given after promise of treatment by physician).

[204] *Biron* Tapes, *supra* note 177.

[205] *Id.* Remarks of this type may be improper because they tend to place the officer in a non-adversarial role, *see* text accompanying notes 172-88 *supra*, or because they are implicit attacks on the suspect's dignity, *see* text accompanying notes 243-48 *infra*.

[206] 397 U.S. 742, 754 (1970).

[207] 384 U.S. 436, 507 (1966) (Harlan, J., dissenting).

[208] *Id.* 507 & n.4 (quoting Bator & Vorenberg, *supra* note 34, at 73).

[209] In *Bram*, the accused was told by a detective that another crewman had seen him commit the murder, 168 U.S. 532, 562 (1897), and that he should tell the detective if he had an accomplice in order to avoid "[having] the blame of this horrible crime on your own shoulders." *Id.* 564. The Court interpreted the first of these statements as a threat, and the second as an offer of a benefit. *See* Dix, *supra* note 57, at 288-89.

It is not always impermissible for the government to offer a legal benefit in exchange for a decision not to exercise a constitutional right. For instance, the court's legitimization of plea bargaining allows this type of bargain to be struck when a defendant's right to trial is at issue. *See* Brady v. United States, 397 U.S. 742, 753-54 (1970). *See generally* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

sory.[210] Moreover, this type of pressure is likely to exert substantial influence upon the suspect's will. Although the bargain may in fact be illusory, the stress engendered by the custodial interrogation setting is likely to diminish significantly the suspect's ability to evaluate its worth. In some cases, this kind of pressure could very easily cause an innocent person to confess,[211] and in any case, such tactics materially increase the likelihood that an ensuing decision to confess will be a result of this outside pressure rather than a consequence of a rational decision stemming from the suspect's own inner motives.

Because of these considerations, the *Bram* doctrine should apply whether or not the threat or promise is explicitly articulated, as long as the police suggestion is likely to induce a suspect to believe that his legal position (in terms of potential charges, periods of incarceration, or collateral consequences pertaining to his relationship with the criminal justice system)[212] will improve if he confesses or deteriorate if he remains silent. A police statement to the suspect that by "telling the truth" he can "throw a little dirt back in the hole and make it shallower" distorts the suspect's decisionmaking process no less than a direct statement that he will spend less time in prison if he confesses. In fact, the former type of statement may have greater impact. The sinister implications of the suggestive metaphor may infuse the suspect's situation with added terror and further decrease the probability of a rational determination of whether he wants to make a particular statement.

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[210] Promises made in the context of custodial interrogation are likely to prove illusory because an unaided suspect lacks the capacity to evaluate the actual value of any express or implied commitment made by the police. Thus, in *Brady*, the Court distinguished plea bargaining from the *Bram* doctrine on the ground that, in the former case, the defendant is represented by an attorney who can fully advise him of the value of any bargain offered. *See* note 196 *supra*. It should be noted that, based on this rationale, the *Bram* doctrine might not apply to a situation in which a suspect subjected to custodial interrogation is in fact represented by counsel.

[211] This is especially true when, as is often the case, the implied promise of leniency is combined with police assurance that the suspect has little chance of escaping conviction if he goes to trial. For example, in the *Biron* case, the police repeatedly told the suspect not only that they knew he was guilty, *see* text accompanying notes 217 & 218 *infra*, but also that he would be found guilty (because he would be unable to convince a judge and jury of his innocence!), and then suggested to him that he might be able to escape trial as an adult if he confessed. *See Biron* Tapes, *supra* note 177. Confronted with this choice of alternatives, an innocent suspect might very reasonably decide that it would be in his best interest to confess.

[212] *E.g.*, a promise that the suspect's bail will be set at a lower figure in the event he makes an incriminating statement. *See* United States v. Ferrara, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (distinguishing *Bram*, court held confession obtained after a promise of reduced bail voluntary under all the circumstances). Empirical evidence indicates that this type of inducement is offered to suspects quite frequently. *See Interrogations in New Haven, supra* note 198, at 1545.

The extent to which the *Bram* rule should be extended to prohibit threats or promises that do not touch upon the suspect's legal status is problematic. Even when the inducement has little or no bearing on the suspect's relationship to the criminal justice system, pressures of coercive magnitude may be created. It is indisputable, however, that not all threats and promises carry the same risk of constitutional infirmity. Police tactics that take on the character of threats or promises obviously occur in a multiplicity of forms. In addition, the impact of the tactics varies widely with the sensitivity of the suspect and the strength of the particular inducement. In view of these factors, and because the suggested per se approach calls for a delineation of relatively specific practices that create an unacceptable risk of constitutional deprivation, one might argue that a literal reading of the *Bram* rule is inappropriate.

The rejection of a per se rule for this type of deception can only be justified, however, if the alternative—the totality of the circumstances test—offers meaningful protection against impermissibly coercive threats and promises. Justice White's majority opinion in *Brady v. United States* suggests that the *Bram* rule reflects a judgment that the totality of the circumstances test is unworkable in this context. In *Brady,* the Court upheld the validity of a guilty plea in a situation in which exercise of the right to trial would have subjected the defendant to the possibility of the death penalty. Distinguishing *Bram,* the Court emphasized that the presence of counsel could dissipate "the possibly coercive impact of a promise of leniency." [213] The majority explicitly endorsed the *Bram* rationale, however, in language that bordered on describing it as a per se rule:

> *Bram* is not inconsistent with our holding. . . . *Bram* dealt with a confession given by a suspect in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.[214]

Although Justice White's reference to "leniency" might imply that he was limiting his analysis to promises that relate to the suspect's status within the criminal justice system, his conclusion con-

[213] Brady v. United States, 397 U.S. 742, 754 (1970).

[214] *Id.*

cerning the unworkability of the totality of the circumstances test cannot be limited to promises of that character. Promises and threats involving tangible benefit and detriment obviously vary in terms of coercive effect, as do promises of leniency. Although many promises and threats are less coercive than "even a mild promise of leniency," the difficulty of assessing the effect on the suspect subjected to the interrogation suggests that with respect to this issue the totality of the circumstances test does not provide effective protection for the suspect's constitutional rights.

In addition to the concerns expressed by Justice White in *Brady,* no apparent societal interest supporting the use of threats and promises during interrogation is sufficiently compelling to justify the painstaking effort required by the totality of the circumstances test. It is by no means clear that the employment of such tactics achieves law enforcement gains that outweigh the coercive effects that are engendered. In the context of a type of deception that has a variable likely effect, unless some significant societal interest in such police conduct exists, the suspect's constitutional privilege against self-incrimination is better protected by a per se rule. In summary, although threats and promises of tangible benefits made by police during interrogation in order to elicit a confession vary significantly in terms of coercive effect, they are properly the subject of a per se proscription.

When the police merely suggest to the suspect that a confession will make him feel better or cause them to respect him more, there is no reason to exclude the confession as involuntary. Indeed, the Supreme Court in *Bram* indicated that a confession probably would not be invalidated if the benefit that induced it "was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment." [215] This judgment is proper. Within our constitutional framework, confessions that stem from inner pressures such as a desire to relieve one's conscience or a desire to be respected are clearly voluntary.[216] The fact that police trickery may play a part in magnifying these pressures is not in itself sufficient basis to conclude that such tactics should be forbidden on a per se basis. In such cases, it is preferable to employ traditional voluntariness methodology to exclude the relatively rare confessions that are the result of impermissible coercion.

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[215] 168 U.S. at 564.

[216] *Cf.* Culombe v. Connecticut, 367 U.S. 568, 576 (1961) (plurality opinion) (Frankfurter, J.): "However, a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation."

F. *Repeated Assurances That the Suspect Is Known To Be Guilty*

In the *Biron* interrogation, one of the interrogators prefaced his questioning by saying, "I suppose they've told you what you're suspected of doing: *What we already know that you've done.*" [217] The device of impressing the suspect with the interrogators' certainty of his guilt was continually employed throughout the interrogation.[218] In view of the recommendations contained in the police manuals, this is hardly surprising. One of the principal directives in the Inbau-Reid manual is that the interrogator should "Display an Air of Confidence in the Subject's Guilt." [219] In elaborating, the authors note that "[a]t various times during the interrogation the subject should be reminded that the investigation has established the fact that he committed the offense; that there is no doubt about it; and that, moreover, his general behavior plainly shows that he is not now telling the truth." [220]

In justifying this technique, the authors state that it is "not apt to induce a confession of guilt from an innocent subject." [221] However, Professor Driver's examination of social psychological data casts doubt upon this assertion. The evidence indicates that "when an individual finds himself disagreeing with the unanimous judgment of others regarding an unambiguous stimulus, he may yield to the majority even though this requires misreporting what he sees or believes." [222] The psychological pressures of custodial interrogation undoubtedly weaken the defenses of many criminal suspects.[223] A significant danger exists that, confronted with positive assurances of their guilt from authority figures [224] who appear to have a full knowledge of the facts,[225] they will not only "yield to the majority judgment," but adopt the facts that are suggested to them.[226]

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[217] *Biron* Tapes, *supra* note 177 (emphasis added).

[218] *Id.*

[219] F. INBAU & J. REID, *supra* note 2, at 26-31.

[220] *Id.* 28.

[221] *Id.* 29.

[222] Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 51-52 (1968).

[223] *See id.* 60.

[224] The police manuals advise the interrogating officers to try to appear to the suspects as figures who command respect. *See, e.g.*, F. INBAU & J. REID, *supra* note 2, at 18.

[225] *Id.* 13-17.

[226] *See* Driver, *supra* note 222, at 51-53. State v. Reilly, No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct.

Moreover, the repeated assurances of the suspect's guilt are expressly designed to impress upon him the futility of resistance.[227] In effect, the suspect is being told, "We know you are guilty; so why not admit it?" In identifying the coercive attributes of the interrogation techniques employed in *Culombe v. Connecticut*,[228] Justice Frankfurter particularly emphasized the fact that the interrogating officers continually impressed upon the defendant that their sole purpose was to obtain a confession of guilt,[229] thus indicating a judgment that this type of pressure is likely to have a particularly debilitating effect on the suspect. The cumulative pressures of custodial interrogation and repeated assurances of the suspect's guilt are of sufficient magnitude to justify the conclusion that they create an unacceptable risk of an involuntary confession. Accordingly, the use of this tactic should be forbidden per se.

G. *The "Mutt and Jeff" Routine*

One of the classic deceptive practices recommended in the police manuals is the so-called "Mutt and Jeff" routine. Although this routine has many variations, its basic elements are simple. Jeff, the friendly interrogator, begins the questioning. After Jeff employs a friendly, sympathetic approach for a period of time, Mutt (the unfriendly interrogator) appears and "berate[s] the subject." [230] Jeff then resumes his sympathetic approach.[231] The act may be developed in various ways: the two interrogators may stage an argument in front of the suspect; [232] the suggestion may be made that the suspect will be left with Mutt if he does not cooperate with Jeff; [233] or the same interrogator may assume both roles.[234] One important element common to all the variations, however, is that Mutt will display hostility towards the suspect and make demeaning comments about him. In one variation, the Mutt character may

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1976), provides a striking example of this phenomenon. After the police repeatedly told him they knew he did it, *see, e.g.*, J. BARTHEL, *supra* note 175, at 84, he at one point unequivocally adopted the details that they suggested to him. *Id.* 124.

227 F. INBAU & J. REID, *supra* note 2, at 30.

228 367 U.S. 568 (1961).

229 *Id.* 631 (plurality opinion) (Frankfurter, J.). The same factor was identified as potentially coercive in earlier cases. *See* Spano v. New York, 360 U.S. 315, 323-24 (1959); Malinski v. New York, 324 U.S. 401, 407 (1945).

230 F. INBAU & J. REID, *supra* note 2, at 62.

231 *Id.* 63.

232 *Id.* 62.

233 *See* C. O'HARA, *supra* note 197, at 104, *quoted in* Miranda v. Arizona, 384 U.S. 436, 452 (1966).

234 F. INBAU & J. REID, *supra* note 2, at 62.

refer to the suspect "as a rather despicable character." [235] Alternatively, if the same interrogator acts out both roles, he may "get up from his chair" and address the suspect as follows: "Joe, I thought that there was something basically decent and honorable in you but apparently there isn't. The hell with it, if that's the way you want to leave it; I don't give a damn." [236]

By labelling one variant of the Mutt and Jeff routine as an interrogation "ploy," [237] and then condemning the use of "patent psychological ploys," [238] the *Miranda* majority implied that the use of this strategy may be inherently coercive. Such a judgment could stem from the implications of Mutt's hostility.[239] After Jeff, his only ally, deserts him, a real risk arises that Mutt's angry statements will be perceived by the suspect as a threat of physical mistreatment.[240] In evaluating the significance of this risk, the context in which the hostility is exhibited must be considered. A suspect who has already spent some time in the debilitating atmosphere of the police station growing increasingly anxious about his fate, is confronted by an authority figure who with obvious hostility conveys to him the message that he is "no good." What visions might this raise in the mind of the already frightened suspect? The suspect does not know that the police will not mistreat him. He does know that he is within their absolute control and that they have the capacity to hurt him in many ways. When he hears an apparently angry officer voice the opinion that he is worthless, it requires little imagination for him to conclude that the officer will treat him in accordance with this estimation. Inbau and Reid assert that Mutt's beration of the suspect helps induce a confession because Jeff's sympathetic treatment becomes more effective.[241] The increased effectiveness of Jeff's treatment, however, can be attributed to the suspect's desire to avoid any further dealings with Mutt and the

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235 *Id.*

236 *Id.* 63.

237 384 U.S. at 452 (1966).

238 *Id.* 457.

239 Before describing the practice, the Court noted that it involves "a show of some hostility." *Id.* 452.

240 Inbau and Reid take pains to note that "the second (unfriendly) interrogator should resort only to verbal condemnation of the subject; under no circumstances should he ever employ physical abuse or threats of abuse or other mistreatment." F. INBAU & J. REID, *supra* note 2, at 63. However, the authors' inclusion of this warning at this point is in itself significant—it reveals a recognition that when a police officer verbally abuses a suspect, there is a substantial danger that to the suspect the abuse may take on the attributes of a threat.

241 F. INBAU & J. REID, *supra* note 2, at 63.

threat that his manner portends.[242] In short, the risk that the suspect will perceive a threat of mistreatment in Mutt's display of hostility is simply too great to tolerate.

A second reason exists for prohibiting the use of this tactic. The intimidating potential of the Mutt and Jeff routine is magnified by the demeaning message that it conveys to the suspect: "You are no good unless you confess." Significantly, Inbau and Reid conclude that the most effective variation on the Mutt and Jeff theme occurs when the same officer enacts both roles.[243] When an officer who has offered friendship and support to the suspect suddenly changes his mind, and tells him that he is not a decent person, the impact on the suspect's ability to resist police efforts to induce a confession is likely to be significant.

Empirical evidence supports this conclusion. Professor Driver's survey of the psychological evidence indicates that the procedures of arrest and detention can temporarily induce shame and humiliation in nearly anyone,[244] and will create strong pressure to assuage those feelings.[245] If this is true, interrogation practices that exacerbate those feelings, and suggest that only confession can alleviate them, undoubtedly exert extreme pressure on the suspect's decisionmaking process. When the demeaning message is conveyed with the potent force of the Mutt and Jeff technique, a significant likelihood exists that an involuntary confession will be the result. Given the implicit threat of force and the potentially coercive challenge to dignity that the Mutt and and Jeff routine fosters, it is reasonable to conclude that it should be the subject of a per se proscription.

Although the Mutt and Jeff routine is a particularly coercive interrogation tactic and not all challenges to the suspect's honor or dignity will result in the same level of coercion, the use by law enforcement officers of any tactic that challenges a sus-

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242 The *Reilly* case contains an example of the "Mutt and Jeff" routine with the chief interrogating officer acting out both roles. After Reilly stated that he was really not sure of the facts he was admitting, the interrogator, who was previously friendly and supportive, *see, e.g.*, note 176 *supra*, said to Reilly:

> O.K. I don't want you to play any more headgames with us. And if you want to play this way, we'll take you and lock you up and treat you like an animal . . . . And I think it's about time that you sat up in that chair and you faced us like a man and you realize that trying to talk to two state policemen like they're two goddamn idiots, it's not gonna work.

J. BARTHEL, *supra* note 175, at 109.

243 *See* F. INBAU & J. REID, *supra* note 2, at 63.

244 *See* Driver, *supra* note 222, at 58.

245 *Id.* 58-59.

pect's honor or dignity raises a fundamental question for our system of criminal justice. Despite the rudimentary development of a fairness component in voluntariness doctrine,[246] the Supreme Court has never explicitly endorsed the very basic proposition that criminal suspects have a right to be treated in a manner that reflects a concern for their dignity as human beings. It appears, however, that a basic postulate of the fifth amendment is a concern for protecting the dignity of the individual.[247] Interrogation tactics that are calculated to make the suspect feel that he is not a decent or honorable person unless he confesses constitute direct assaults upon that dignity. More than thirty years ago, the Court intimated that stripping a suspect of his clothes in order to induce a confession was impermissible.[248] In light of our increased sensitivity to the effect of psychological tactics, practices that are calculated to strip individuals of their self-respect should be equally objectionable. Accordingly, such interrogation techniques should be barred as inherently unfair.

IV. Conclusion

Without coherent guidelines, the conscientious interrogating officer who wants to comply with the law but still be effective in properly securing admissible confessions is placed in an impossible position. The deceptive practices recommended by the police manuals are undoubtedly effective, and, based on existing case law, few, if any, of them are clearly illegal. On the other hand, the permissibility of police trickery may not be determined solely by asking whether the trickery in question is likely to induce an unreliable confession, as the manuals suggest. The protections provided by the *Miranda* warnings, the sixth amendment right to an attorney, and the modern version of the "voluntariness" test limit the types of deceptive practices that the police may employ. This Article has attempted to demonstrate that effective protection of these constitutional rights can only be achieved through the formulation of per se rules—that is, whenever the practice under scrutiny creates an unacceptable risk that the ordinary suspect's constitutional rights will be infringed, the practice should be proscribed. Application of this analysis to several widely employed interrogation tactics re-

246 *See* text accompanying notes 19-22 *supra.*

247 *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966); Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (plurality opinion) (Frankfurter, J.). *See generally* L. Levy, Origins of the Fifth Amendment 431-32 (1968).

248 Malinski v. New York, 324 U.S. 401, 407 (1945).

sults in a finding that they should be absolutely prohibited. Although the development and application of such guidelines will undoubtedly challenge the institutional competence of the courts,[249] vigorous judicial scrutiny of police trickery in interrogation is essential if the criminal justice system is truly to operate within constitutional confines.

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[249] The adoption of this approach will undoubtedly require procedural innovation to insure its effective implementation. Most significantly, Professor Kamisar's suggestion of mandatory recording of police interrogations should be adopted. *See* Kamisar, *supra* note 111, at 236-43.