San Diego Law Review

Volume 31 | Issue 3 Article 6

9-6-1994

# True Blue? Whether Police Should Be Allowed To Use Trickery and Deception To Extract Confessions

Laure Hoffman Roppe

# Comment

# True Blue? Whether Police Should Be Allowed To Use Trickery and Deception To Extract Confessions*

> [Homicide detectives] like to imagine their suspects imagining a small, open window at the top of the long wall [in an interrogation room]. The open window is the escape hatch, the Out. It is the perfect representation of what every suspect believes when he opens his mouth during an interrogation. Every last one envisions himself parrying questions with the right combination of alibi and excuse; every last one sees himself coming up with the right words, then crawling out the window to go home and sleep in his own bed. . . . [But] what occurs in an interrogation room is indeed little more than a carefully staged drama, a choreographed performance that allows a detective and his suspect to find common ground where none exists.[1]

## I. INTRODUCTION

Police interrogation is firmly rooted in American law enforcement. Proponents of police interrogation say it is a vital crime-solving tool.[2]

* Special thanks to Professor Jean Montoya for her immensely helpful guidance and suggestions. Thank you also to Lieutenant Tom Thompson, John Callahan, Mike Barmettler, and Mark Burnley for their input and help. Finally, thank you to Brad Roppé for his unending support.

1. DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 209 (1993). In his award-winning book, Simon chronicled a year in the Baltimore Police Department's homicide unit. Simon detailed the real work of the detectives, sergeants, and a lieutenant who investigated dozens of Baltimore's 234 murders that year.

2. *See generally* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (7th ed.

Because many criminal cases lack witnesses or physical evidence,[3] police would, in many cases, be incapable of collecting enough evidence to punish the wrongdoer without a confession.[4] Even when other evidence is available, a police officer will try vigorously to procure a confession for a variety of reasons: a confession is powerfully persuasive to a jury;[5] it may establish a motive; or it may establish that the defendant had the requisite mental state of the charged offense.[6] Hence, police actively seek to procure confessions, whether or not they have supplemental forensic evidence, in an effort to minimize the need for further investigation and to secure a conviction.[7]

Regardless of the vital importance of the confession to effective law enforcement, a society based on an accusatorial rather than an inquisitorial system of justice inherently chooses to place limits on the tactics law enforcement may use to extract confessions.[8] An accusatorial system contemplates a point when the degree of infringement on a defendant's constitutional rights during interrogation

---

1990); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986); FRED E. INBAU, POLICE INTERROGATION — A PRACTICAL NECESSITY, POLICE POWER AND INDIVIDUAL FREEDOM 147 (C. Sowle ed. 1962).

3. INBAU ET AL., *supra* note 2, at xiv.

4. For the purposes of this Comment, "confession" includes self-incriminating statements which may fall short of an explicit confession of the crime.

5. *See* Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting) (a defendant's confession "is probably the most probative and damaging evidence that can be admitted against him"); Bruton v. United States, 391 U.S. 123, 140 (1968) (White, J., dissenting) (a confession is so damaging that a jury cannot be expected to ignore it even if instructed to do so).

6. GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY 23 (1992) [hereinafter GUDJONSSON I] (detailing police interrogation practices, the specific procedures used to extract confessions, and the psychology of both reliable and unreliable confessions).

7. The rate at which interrogators obtain confessions from suspects varies from study to study. Part of the reason for the inconsistency in results is the failure of researchers to define precisely the term "confession." GUDJONSSON I, *supra* note 6, at 50. The confession rates for studies that fail to specify the precise meaning of "confession" range from 42% to 76%, but the rate is as high as 85% when self-incriminating admissions are included with explicit confessions. *Id.* at 50-53. Another researcher suggests that more than 80% of all crimes are solved by the suspect making a confession; further, once a defendant has confessed, acquittal happens very rarely. P.G. Zimbardi, *The Psychology of Police Confessions*, 1 PSYCHOL. TODAY 17 (1969).

8. *E.g.*, Watts v. Indiana, 338 U.S. 49, 54 (1949) (coerced confessions are subversive to an accusatorial system of justice under the Due Process Clause of the Fourteenth Amendment); Chambers v. Florida, 309 U.S. 227 (1940); Lisenba v. California, 314 U.S. 219 (1941); Rochin v. California, 342 U.S. 165 (1952); Moran v. Burbine, 475 U.S. 412, 436 (1986) (Stevens, J., dissenting) ("The recognition that ours is an accusatorial, and not an inquisitorial system nevertheless requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others."). *See generally* Martine M. Beamon, Comment, Illinois v. Perkins: *Has Our Criminal Justice System Turned From "Accusatorial" to "Inquisitorial"?*, 52 U. PITT. L. REV. 669 (1991); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 671-95 (1968). For a helpful comparison of inquisitorial and accusatorial systems of justice, see PHILLIP E. JOHNSON, CRIMINAL PROCEDURE 355-59 (1988). *See also* Joseph D. Grano, *Selling*

becomes too high a price to pay for the resulting confession. For instance, in modern times, physical torture as a means of obtaining confessions unquestionably constitutes an impermissible infringement on constitutional rights.[9] Although the settled proscription of physical coercion clearly sets the outer parameters of improper police conduct, the propriety of more subtle forms of police behavior remains unclear. Beyond the uncontroversial ban on physical coercion, the line between proper and improper police interrogation conduct becomes blurred.

The widespread use by law enforcement officers of trickery and deception to induce confessions constitutes one important issue in the modern debate about proper police activity. The use of trickery and deception in the questioning of criminal suspects is an undisputable foundation of law enforcement practices.[10] Police practice a variety

---

*the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 687 (1986) (book review) (arguing that the American system is a mixed system of justice, rather than a purely accusatorial system); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).

9. *See* Brown v. Mississippi, 297 U.S. 278 (1936) (convictions which rest upon confessions procured by torture violate Due Process Clause of Fourteenth Amendment). Nonetheless, the problem of using physical brutality to beat a confession out of a criminal suspect is perhaps not an extinct modern occurrence. *See generally* Abramovitz, *When Suspects Are Abused*, NAT'L L.J., June 11, 1979, at 1.

10. *See* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581 (1979) (calling the use of trickery or deceit in the questioning of criminal suspects a "staple of police interrogation practices"). The frequency with which deceitful police tactics are reported in newspaper articles also attests to widespread use of such techniques. "Standard interrogations by Arizona law enforcement officials led to four matching confessions to the murders of nine people at a Buddhist Temple. But all four suspects were innocent." Roger Parloff, *False Confessions*, AM. LAW., May, 1993, at S8. Parloff emphasizes that even though the police's interrogation tactics produced four false confessions, "[I]t is quite possible that [the police department] did nothing wrong. In fact, it seems to have been doing its job just the way police agencies across the nation have been training their officers to interrogate suspects for years: using isolation, sleep deprivation, intimidation, persuasion, positive and negative reinforcement, deception, and trickery." *Id.*; *see also* Anne Krueger, *Troubled Judge Sends Barstow Man to Life in '86 Rape-Murder Case*, SAN DIEGO UNION-TRIBUNE, July 16, 1992, at B1 ("detectives lied to [the suspect] by telling him that they had forensic evidence tying him to the crime when they did not"); Tom Condon, *Try Again to Understand the LaPointe Tale*, HARTFORD COURANT, July 12, 1992, at B1. The suspect signed three separate confessions in a 10 hour interrogation "so he could go to the bathroom, get a drink of water and go home." *Id.* The public defenders charged that police "lied, tricked and cajoled" the suspect into signing the confessions. *Id.* One of the confessions read, "If the evidence shows I was there and that I killed her, then I killed her, but I don't remember being there." *Id.*; *see also* Steve Jensen, *Police Using Deceit to Get Confessions; Psychological Tricks Challenged in Court; Police Use Psychological Tactics to Get Suspect to Confess*, HARTFORD COURANT, Feb. 16, 1992, at B1; *Police Tactics Are Questioned by Legal*

of deceptive techniques, masterfully designed to psychologically coerce a suspect to confess. The vigorously debated issue is whether such tactics should be permitted by law.

The current law regarding proper police interrogation tactics is extremely ambiguous. Although the United States Supreme Court has recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it,"[11] the Court will not admit an *involuntarily* extracted confession into evidence. In determining voluntariness, a court must ask whether, under the totality of the circumstances, the "confession [is] the product of an essentially free and unconstrained choice by its maker,"[12] or the "product of a will overborne."[13] The Court has failed to define these phrases.

Therefore, even after consulting the case law, a detective who strives to conduct a proper investigation under the law might wonder what such an investigation entails.[14] The detective can only guess where the Supreme Court would draw the line between techniques which have "coercive aspects" to them on the one hand, and activity which would overbear a defendant's will on the other. A general rule is particularly difficult to glean because Supreme Court decisions regarding the constitutionality of deceitful interrogation techniques have generally rested on a case-by-case factual analysis.

This Comment addresses whether or not, and if so, to what extent, police should be allowed to use trickery and deception to extract confessions from criminal suspects. Part II will first survey the deceitful interrogation tactics included in the term "trickery," while Part III will briefly summarize the psychology of confessions. Part IV will trace the major developments in the law regarding coerced confessions. Part V will inquire what the law should be: should police be allowed to use trickery to obtain confessions? After exploring the policy arguments for and against the use of such police interrogation tactics, this Comment will recommend the prohibition of specific

---

*Experts*, PROPRIETY TO THE UNITED PRESS INTERNATIONAL 1991, Apr. 30, 1991, at Regional News; Lorie Hearn, *Court Hits Police Use of Coercion on Suspect*, SAN DIEGO UNION-TRIBUNE, July 27, 1993, at B1; *Philly Mother Guilty of Slaying Daugther*, SAN DIEGO UNION-TRIBUNE, Nov. 5, 1993, at A10 (suspect claims she confessed only to end 10 hours of interrogation); Laura Griffin, *Confession in Murder Case Upheld*, ST. PETERSBURG TIMES, Jan. 12, 1993, at 1 (police accused of using a friendly technique to make defendant think that killing victim was "understandable and not that bad"); J.P. Sherwood, *Virginia Beach Jury Hears Tape of Youth; Detective Says He Tricked Teenager into Admitting Killings*, WASH. POST, Mar. 6, 1992, at C6 (judge admitted three-hour videotaped statement by defendant even though several deceptions were used to extract the confession, including a lie by detectives that defendant's fingerprints were found on the bodies).

11. Oregon v. Mathiason, 429 U.S. 492, 495 (1977); Jenner v. Smith, 982 F.2d 329, 334 (8th Cir. 1993).

12. Columbe v. Connecticut, 367 U.S. 568, 602 (1961).

13. Davis v. North Carolina, 384 U.S. 737, 742 (1966).

14. White, *supra* note 10, at 582-83.

forms of trickery and offer an analytical approach as to whether a confession is admissible.

## II. WHAT IS TRICKERY?

Courts and scholars have not formulated a universal definition of trickery in the interrogation context. One commentator has summarized that deceptive police conduct intended to induce confessions falls into three broad categories:

> (1) police misrepresentation of a fact, when such a fact, if true, would provide an affirmative reason for the suspect to confess, or would remove a reason why he should not confess; [citation omitted] (2) police use of a verbal or behavioral technique to take unfair advantage of the emotions or beliefs of the defendant; [citation omitted] and (3) police failure to inform the suspect of some important fact or circumstance that might make the suspect less likely to confess.[15]

Although this provides a useful general definition of trickery, it lacks the specificity necessary to illustrate the types of police conduct addressed by this Comment and its ultimate recommendation.

Police interrogation manuals provide another general overview of the types of tactics included in the definition of trickery. These interrogation manuals instruct law enforcement officers on how to effectively elicit confessions from suspects through the use of a variety of deceptive techniques. The leading interrogation manual is *Criminal Interrogation and Confessions* by Fred E. Inbau, John E. Reid, and Joseph P. Buckley, which details a deceptive nine-step interrogation plan.[16] The nine steps are strategically designed to reduce the suspect's reluctance to confess while simultaneously increasing the suspect's desire to tell the truth. In general, this plan relies heavily on the exploitation of the inherent power differential between the accused and the police.[17] Scholars have emphasized that Inbau, Reid,

15. Daniel W. Sakasi, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1598 (1988).

16. INBAU ET AL., *supra* note 2. John E. Reid, now deceased, was engaged in the professional specialty of criminal interrogation for almost 40 years, and aside from coauthoring numerous articles and books on criminal interrogation, he conducted training seminars throughout the country personally and by the staff of John E. Reid and Associates. Joseph P. Buckley was trained by Reid and is the current President of John E. Reid and Associates. Fred E. Inbau is a leading author in the field of police interrogation. All three authors fervently advocate the retention of trickery in police interrogation, and deny that any form of deception implicates a constitutional violation, unless it is so eggregious as to cause an innocent person to confess.

17. *Id.* at 77-79. The nine steps of interrogation are to be used in cases where the interrogator feels reasonably certain that the suspect is guilty of the alleged offense. The nine steps are as follows: (1) "Direct Positive Confrontation": the suspect is firmly told

and Buckley's nine-step plan is inherently deceptive. The plan involves either frightening or tricking the suspect into a confession, using such tactics as offering false sympathy, blaming the victim, offering excuses, or minimizing the seriousness of the charges.[18]

However, it is important to have a more detailed working knowledge of the types of conduct included in the definition of trickery for purposes of this Comment. The most effective way to construct a detailed definition of police trickery is to examine the types of conduct labeled as such by the courts. Case law indicates that trickery or deception[19] includes a wide range of techniques such as good cop-

---

that the interrogator is undeterrably confident of the suspect's guilt, even if the interrogator has no evidence against the suspect; (2) "Theme Development": the interrogator suggests various themes to the suspect in order to morally justify the crime in the suspect's mind; (3) "Handling Denials": the interrogator attempts to prevent the suspect from verbalizing denials by maintaining a monologue. The good-cop/bad-cop routine is especially effective here; (4) "Overcoming Objections": the interrogator is instructed about a variety of ways to overcome the objections that the suspect may give as an explanation or reasoning for his innocence; (5) "Procurement and Retention of Suspect's Attention": the interrogator moves physically close to the suspect, touching the suspect, mentioning the suspect's first name, and maintaining good eye contact in order to maintain the suspect's interest and attention and to make the suspect more attentive to the interrogator's suggestions; (6) "Handling the Suspect's Passive Mood": as the suspect appears attentive, the interrogator exhibits signs of understanding and sympathy, or appeals to the suspect's sense of decency, honor, or religion to urge the suspect to confess; (7) "Presenting an Alternative Question": the suspect is presented with two possible alternatives, both of which are incriminating, for the commission of the crime. Of the two incriminating alternatives, one choice appears to be justified and the other is plainly morally repulsive; (8) "Having Suspect Orally Relate Various Details of the Offense": once the suspect has made a choice in step 7, the initial admission is expanded into a full-blown detailed confession; (9) "Converting an Oral Confession into a Written Confession": oral statements are reduced to written or recorded form and voluntariness of the statement is established along with corroboration of material details. The suspect signs the statement in the presence of two or more persons. *Id.*

18. Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW HUM. BEHAV. 233, 235 (1991).

19. "Trickery" is not the only terminology used by courts to describe the type of conduct with which this Comment is concerned. Other terms for "trickery" used by courts include deception, misrepresentation, fabrication, artifice, fraud, deceit, and subterfuge. *See, e.g.*, People v. Howard, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988); People v. Hogan, 31 Cal. 3d 815, 840, 647 P.2d 93, 108, 183 Cal. Rptr. 817, 832 (1982) ("deception"); People v. Houston, 36 Ill. App. 3d 695, 698, 702, 344 N.E.2d 641, 644, 647 (1976) ("subterfuge" and "misrepresentation"); People v. Arguello, 65 Cal. 2d 768, 774-75, 423 P.2d 202, 206, 56 Cal. Rptr. 274, 278 (1967) ("subterfuge" and "deception").

bad cop,[20] the "tag team" approach,[21] the reverse line up,[22] the production of false evidence,[23] lies regarding the evidence collected against the suspect,[24] lies about whether an interrogation is in fact

20. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 452 (1966); United States v. Ellis, 595 F.2d 154 (3rd Cir. 1979); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965); State v. Adams, 145 Ariz. 566, 703 P.2d 510 (Ct. App. 1985). *See generally* David Abney, *Mutt and Jeff Meet the Constitution*, 22 CRIM. L. BULL. 118 (1986); White, *supra* note 10, at 625-28; INBAU ET AL., *supra* note 2, at 62.

21. *See, e.g.*, People v. Esqueda, 17 Cal. App. 4th 1450, 22 Cal. Rptr. 2d 126 (1993) (murder conviction overturned because "outrageous" police tactics, which included fresh officers rotating interrogation duties over the course of an eight hour interrogation, violated the defendant's constitutional rights).

22. The suspect is confidently pointed out of a line up by a coached person, who poses as a witness. Miranda v. Arizona, 384 U.S. 436, 453 (1966).

23. *See, e.g.*, Florida v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (holding that police overstepped the line of permitted police deception when police fabricated laboratory reports and exhibited the falsified documents to defendant during the interrogation in attempt to secure confession).

24. Interrogators falsely tell suspect that they have evidence that proves the suspect is guilty. *See, e.g.*, *Esqueda*, 17 Cal. App. 4th at 1473-77, 22 Cal. Rptr. 2d at 139-44 (detectives told the murder suspect that the victim made a dying declaration that implicated the suspect, that the suspect's fingerprints were found on the victim's neck, that the suspect's fingerprints were found on the fatal bullet, that there was a witness to the killing, and that gunshot residue was found on the suspect's hands - all of which were false); Jenner v. Smith, 982 F.2d 329, 332 (8th Cir. 1993) (police officers falsely intimated that the suspect's husband was "putting all the blame on her"); State v. Jackson, 308 N.C. 549, 567-68, 304 S.E.2d 134, 144 (1983) (detective falsely told the murder suspect that bloodstains had been found on the suspect's pants and shoes, that the suspect's shoes matched footprints found at the crime scene, that the suspect's fingerprints were on the murder weapon, and that a witness had seen the suspect running from the crime scene); Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (police falsely stated that defendant's fingerprints were found at the burglary scene); Frazier v. Cupp, 394 U.S. 731, 737-39 (1969) (upholding the validity of falsely telling a suspect that his crime partner had confessed).

taking place,[25] lies about the detective's adversarial role in the interrogation,[26] lies about the seriousness of the proceedings or the possible consequences of a confession,[27] and vague and indefinite promises of leniency.[28] Each of these tactics is advocated in police training manuals and widely used by interrogating officers across America.[29]

## III. PSYCHOLOGY OF CONFESSIONS

In order to decide whether certain interrogation practices should be prohibited, it is important to understand what makes psychological tactics so effective. Experts have conducted countless studies in search of the reasons why suspects confess during police interrogation. There are five main theoretical models about confessions, each of which focuses on different aspects of the interrogation process.[30]

---

25. *E.g.*, Massiah v. United States, 377 U.S. 201, 206 (1964) (defendant's incriminating statements admissible when made to a friend who was cooperating with the government and wearing a recording device); *see* White, *supra* note 10, at 602-08. Professor White concludes that this form of deception undermines the defendant's Fifth and Sixth Amendment protections. White argues that the defendant in *Massiah* was deprived of his Sixth Amendment privileges because, due to governmental deception, the defendant was unaware that he was in fact under interrogation by a government agent. *Id.* at 603. White concludes that "[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." *Id.*

26. This category includes the good cop-bad cop routine. Another tactic included in this category is the misrepresentation of the law enforcement officer's identity. *See* Leyra v. Denno, 347 U.S. 556 (1954) (suspect provided with a physician who was actually a police psychiatrist, and suspect confessed after the "physician" assured him that the suspect was not at fault and the police would be lenient); Illinois v. Perkins, 469 U.S. 292, 294-95 (1990) (suspect confessed to committing murder to undercover agent who was posing as a fellow inmate).

27. *See, e.g.*, People v. Esqueda, 17 Cal. App. 4th 1450, 22 Cal. Rptr. 2d 126 (1993) (in an effort to misrepresent the seriousness of the situation, detectives failed to tell suspect for a considerable amount of time that the murder victim had in fact died).

28. Although explicit promises of leniency have been presumed to be coercive since 1897, courts continue to permit vague and indefinite promises of leniency. *See, e.g.*, Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) (upholding validity of confession resulting when police repeatedly told suspect that he had mental problems and thus needed psychological treatment rather than punishment).

29. White, *supra* note 10, at 581-82; INBAU ET AL., *supra* note 2, at 77-79. For a general discussion regarding different tactics employed by interrogators see *supra* note 10 and accompanying text.

30. *See* Gisli H. Gudjonsson & I. Bownes, *The Reasons Why Suspects Confess During Custodial Interrogation: Data for Nothern Ireland*, 32 MED. SCI. & L. 204, 204 (1992). Gudjonsson and Bownes.summarize the five theoretical models about confessions as:

> (i) "The Reid Model of Confession," where confessions are seen as a result of subtle psychological manipulation to overcome resistance and deception; (ii) "A Decision-Making Model of Confession," where an attempt is made to draw attention to the kind of factors that influence the suspect's decision-making during interrogation; (iii) "A Cognitive-Behavioural Model of Confession," where confessions are viewed in terms of their 'antecedents' and 'perceived consequences;' (iv) "Psychoanalytic Models of Confession," where confessions are

After studying the five theories as a group, Dr. Gisli Gudjonsson[31] has observed three common general factors responsible for most confessions:

> (1) perception of proof, where the suspect believes that there is no point in denying the allegation as the police will eventually prove his or her involvement; (2) internal need to tell the police about [his or her] criminal deed; (3) external pressure, such as police persuasion and fear of confinement.[32]

The focus of this Comment is on the proper legal scope of the third factor, i.e., external pressure consisting of the interrogator's use of deceptive psychological persuasion. The first factor, the suspect's perception of proof, is related to external pressure, because police frequently misrepresent the strength of proof regarding the suspect's guilt.

However, even when police misrepresent or falsify proof of a suspect's guilt, and the "external pressures" are masterfully used, not all suspects who undergo interrogation confess to the crime of which they are accused. Therefore, it is important to briefly consider whether there are certain characteristics which make a suspect more prone to deceptive police interrogation tactics, and hence, more

---

seen as arising from internal conflict and feelings of guilt; (v) "An Interaction Process Model of Confession," where the outcome of interrogation is seen as resulting from the interaction of background variables and contextual characteristics.

*Id.* For a more detailed survey of the five theoretical models of interrogation, see GUDJONSSON I, *supra* note 6, at 61-72. For a detailed explanation of each model of interrogation by the authors of each theoretical model, see Brian C. Jayne, *The Psychological Principles of Criminal Interrogation*, *in* CRIMINAL INTERROGATION AND CONFESSIONS app. at 327-47 (1986) (Reid Model); E.L. Hilgendorf & B. Irving, *A Decision-Making Model of Confessions*, *in* PSYCHOLOGY IN LEGAL CONTEXTS: APPLICATIONS AND LIMITATIONS 67-84 (1981) (DECISION-MAKING MODEL); GISLI H. GUDJONSSON, *The Psychology of False Confessions*, 57 MED. L.J. 93 (1989) (Cognitive-Behavioral Model); E. BERGGREN, THE PSYCHOLOGY OF CONFESSIONS (1975) (Psychoanalytic Model); T. REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT (1959) (Psychoanalytic Model); F.C. Redlich et al., *Narcoanalysis and the Truth*, 107 AM. PSYCHIATRY 586 (1951) (Psychoanalytic Model); S. Moston et al., The Effects of Case Characteristics on Suspect Behaviour, Address presented at the British Psychological Society Annual Conference, Swansea University (Apr. 5, 1990) (Interaction Process Model).

31. Dr. Gudjonsson is a prolific author in the field of criminal psychology, and acts regularly as a consultant to police in England, as well as appearing as an expert witness in many criminal cases. He pioneered the empirical measurement of suggestibility, which he has applied in a number of landmark cases. He is also a senior lecturer in psychology at the Institute of Psychiatry, University of London, and the head of forensic psychology services at the Maudsley and Bethlem Royal Hospitals.

32. Gudjonsson & Bownes, *supra* note 30, at 204.

likely to confess. Studies suggest that there are certain types of suspects who are more likely to confess than others.[33] Some studies indicate that age is a factor which tends to influence whether or not a suspect confesses. In general, the younger the suspect, the easier it is to obtain a confession from him or her.[34] There is also evidence that indicates that suspects confess more readily to some types of offenses than others.[35] Finally, first-time offenders might be less likely to confess than suspects who have had several previous convictions.[36]

Any effective legal framework for the use of trickery to extract confessions must take into consideration the reasons why suspects confess. Without an understanding of the pressures that motivate a suspect to confess, one would likely fail to appropriately assess the magnitude of the persuasion that trickery exerts upon a suspect.

## IV. WHAT IS THE LAW?

The development of the law governing the exclusion of confessions reflects the classic conflict between law enforcement interests and the protection of a defendant's constitutional rights. In order to propose

---

33. *See* GUDJONSSON I, *supra* note 6, at 54-58.

34. Experts attribute the ability of older suspects to resist interrogation pressures to life experience, maturation, and a greater ability to understand and assert their legal rights. *See* L.S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENV. L.J. 1 (1970); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980). Grisso's study reported that juveniles as a class do not understand their *Miranda* rights. *Id.* Consequently, the researcher concluded that juveniles' comprehension "is so deficient as to mandate a per se exclusion of waivers made without legal counsel." *Id.* at 1166. The study was conducted on juvenile subjects between the ages of 10 and 16 and I.Q.'s ranging from 11% below 70 to 22% above 100. *Id.* at 1151 nn.77-78. The author argues that because the children could not understand the nature and significance of the *Miranda* warning, they could not have made "knowing, intelligent, and voluntary" waivers. *Id.* at 1160. However, there have been contrary studies which indicate that age is not a significant factor in whether a suspect confesses. *See* Michael McConville & Philip Morrell, *Recording the Interrogations: Have the Police Got It Taped?*, 1983 CRIM. L. REV. 158.

35. *See* David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 106 (1974) (finding that suspects interrogated about property offenses confessed more readily than suspects interrogated about violent offenses); Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 CRIM. L. REV. 596, 602 (noting that some studies indicate that suspects interrogated about sexual offenses were most likely to confess).

36. There is evidence that repeat offenders are more familiar with the probable consequences of confession, are more likely to be informed of and assert their rights, and because they are familiar with police tactics, they are not fooled. Thus, some studies indicate that first offenders are more compliant at the police station than repeat offenders. *E.g.*, Neubauer, *supra* note 35, at 106-07. However, other studies suggest that suspects with previous convictions are more likely to confess than suspects without such experience. This finding is accounted for by the speculation that suspects who repeatedly commit crimes may believe it is futile to resist, they have no reputation to lose, or they may possess minimal intelligence, which makes them less able to cope with interrogatory pressure. Mitchell, *supra* note 35, at 602.

a new course for the law, it is first essential to understand the development of the existing jurisprudence.

### *A. The "Voluntariness Standard"*

The doctrine of voluntariness governs the admissibility of confessions.[37] Simply stated, the doctrine holds that a confession may not be used in a court if it was extracted from a suspect involuntarily. The source of voluntariness jurisprudence was the 1936 landmark case *Brown v. Mississippi*, in which the Supreme Court turned its attention to coercive misconduct by local police, as opposed to federal police, for the first time.[38] In *Brown*, a group of white police officers had used brutal torture to extract false confessions from three black defendants accused of murder. Two of the defendants were whipped and beaten into compliance. When the third defendant defiantly denied the charges, the police officers repeatedly hanged him by a noose from a tree limb and whipped him until he, too, inevitably confessed.[39] The trial court admitted the confessions, even though it was fully aware of the way in which the confessions had

37. Exclusionary rules governing the admissibility of confessions stem from the rights granted criminal defendants in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without the due process of law." U.S. CONST. amend. V. In cases prior to 1964, the Court relied on the due process clause of the Fourteenth Amendment when deciding the propriety of a defendant's confession. *See* Malloy v. Hogan, 378 U.S. 1 (1964); *see infra* note 43. The due process clause of the Fourteenth Amendment provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. CONST. amend. VI. The United States Supreme Court has relied on all three constitutional provisions in determining the admissibility of confessions since 1936; however, the Court varied its emphases as its approach to coerced confessions changed over time. *See* STEPHEN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 447-48 (3d ed. 1988); ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 257-309 (1993).

38. 297 U.S. 278 (1936). The Supreme Court's first confession cases arose from a series of lower federal court cases. In its first confession case in 1884, the Supreme Court adopted the English common law rule which excluded confessions that were induced by a promise of benefit or the threat of harm. Hopt v. Utah, 110 U.S. 574 (1884). The rationale for exclusion of such induced confessions was that they were inherently unreliable. *See generally* OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 19-26 (1973); SALTZBURG, *supra* note 37, at 447-48; ISRAEL ET AL., *supra* note 37, at 257-60.

39. *Brown*, 297 U.S. at 281-82.

been procured and no other evidence was offered; the Supreme Court of Mississippi affirmed.[40] The United States Supreme Court railed that the violent tactics used by the police were "revolting to the sense of justice"[41] and held that such physically coercive tactics were a "clear denial of due process,"[42] even though the Court had not yet held that the Fifth Amendment applied to the states.[43]

*Brown* and the early confession cases established that police overreaching was the crucial element of involuntariness.[44] However, the blatant physical coercion used by police officers in *Brown* and in other early cases was easy to identify. As law enforcement officials became increasingly aware of the *per se* involuntariness of a confession induced by physical coercion, interrogators cleverly turned to more subtle forms of psychological persuasion.

In *Spano v. New York*,[45] the seminal case concerning psychological coercion, the Supreme Court held a confession involuntary when teams of police officers questioned the defendant for eight hours, during which an officer who was the suspect's boyhood friend misrepresented that the officer would lose his job if the suspect failed to cooperate.[46] The Court recognized that the more subtle behavior of the law enforcement officials complicated the voluntariness inquiry, but it refused to abdicate its duty to safeguard individual rights. The

---

40. *Id.* at 284-85, 287.
41. *Id.* at 286.
42. *Id.*
43. *See* Malloy v. Hogan, 378 U.S. 1 (1964). The Supreme Court held that the Fifth Amendment privilege against self-incrimination applies to the States. *Id.* at 3. In cases prior to *Malloy*, the Court relied upon the due process clause of the Fourteenth Amendment to determine the admissibility of a suspect's confession.
44. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (defendant held incommunicado without adequate food for 16 days in closed cell without windows); Reck v. Pate, 367 U.S. 433 (1961) (defendant held for four days without adequate food or necessary medical attention until he confessed); Columbe v. Connecticut, 367 U.S. 568 (1961) (defendant held for five days of interrogation, during which investigators used a variety of coercive techniques); Payne v. Arkansas, 356 U.S. 560 (1958) (defendant held incommunicado for three days with little food; officers obtained a confession when defendant was informed that the Chief of Police was preparing to allow a lynch mob entrance into jail); Watts v. Indiana, 338 U.S. 49 (1949) (suspect held without a hearing for five days, during which he was intermittently interrogated by detectives); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (holding that a presumption of coercion was created when relays of detectives interrogated the defendant for an uninterrupted 36 hours without an opportunity for sleep); Ward v. Texas, 316 U.S. 547 (1942) (confession procured by unrelenting questioning, whipping, beating, and burning of the defendant was not admissible); Chambers v. Florida, 309 U.S. 227 (1940) (confessions obtained by threatening defendants to such a degree that they feared for their lives were inadmissible). *See generally* Y. KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (7th ed. 1990); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW, POLICE AND THE EXCESSIVE USE OF FORCE, 43-61 (1993).
45. 360 U.S. 315 (1959).
46. *Id.* at 320, 323.

Court maintained, "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, [the Court's] duty to enforce federal constitutional protections does not cease. It only becomes more difficult."[47]

Consequently, the *Spano* Court expanded the traditional scope of the voluntariness inquiry to include scrutiny of numerous other factors besides police conduct alone. In determining whether a confession was voluntary, the *Spano* Court considered the mental state and intelligence of the accused, the conditions of interrogation, and whether the suspect was denied the proper implementation of his legal rights.[48] Thus, in addition to the deceptive ruse employed by police, the suspect's history of emotional instability, lack of education, and denials of his requests for counsel factored into the decision to exclude the defendant's confession.[49] Although the *Spano* Court noted society's interest in "prompt and efficient law enforcement,"[50] the Court emphasized that even though the conduct of the police officers did not approach the brutal torture of past cases, it was sufficiently coercive to compel an untrustworthy confession.[51] More importantly, the Court emphasized that law enforcement officials have a burden to protect the rights of all citizens, including those accused of a crime.[52] In protecting those fundamental rights, the Court insisted that "police must obey the law while enforcing the law."[53]

---

47. *Id.* at 321.
48. *Id.* at 321-22.
49. *Id.* at 321-23. In ruling to exclude the defendant's confession, the Court noted:
> [The Defendant] had progressed only one-half year into high school and the record indicates that he had a history of emotional instability. . . . [Defendant] was questioned for virtually eight straight hours before he confessed . . . . The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

*Id.* at 322-23. The use of defendant's childhood friend to entreat defendant to confess was "another factor which deserves mention in the totality of the situation." *Id.* at 323; *see* GUDJONSSON I, *supra* note 6, at 293-94; White, *supra* note 10, at 605-06. In addition, it appears that the denial of the suspect's request for counsel weighed heavily in the Court's decision. This arguable shift in focus, from police conduct to whether there was a denial of right to counsel, was foreshadowed the previous year in *Crooker v. California.* 357 U.S. 433 (1958) (four dissenters argued that the police had violated the defendant's due process right to legal representation and legal advice by denying his specific request for counsel, and that any confession obtained under these circumstances should be barred); *see* ISRAEL ET AL., *supra* note 37, at 272.
50. *Spano,* 360 U.S. at 315.
51. *Id.* at 320-24.
52. *Id.* at 320.
53. *Id.*

After *Spano*, the traditional due process "voluntariness" test remained viable. Nevertheless, the focus of the voluntariness inquiry had broadened to include assessment of many factors besides police conduct. As a result, the voluntariness inquiry into the "totality of the circumstances" was extremely difficult for the lower courts and law enforcement officers to apply.[54] Although the Court in *Spano* had provided an illustrative list of factors to be considered under the totality of the circumstances, the list failed to create a "single litmus-paper test for constitutionally impermissible interrogation[s]."[55] The weight to be given the presence or combination of any of the *Spano* factors in each individual set of circumstances remained ambiguous. Furthermore, the Court's list of relevant factors clearly was not intended to displace the established case-by-case analysis.[56] The lack of objective rules gave trial judges license to "give weight to their subjective preferences" in assessing the admissibility of confessions.[57] In addition, appellate courts were unable to devise an objective standard of review of the lower courts' inconsistent decisions.[58] Moreover, the ambiguity of the voluntariness jurisprudence in the courts failed to provide specific guidance to interrogators regarding which tactics would render a resulting confession inadmissible. Therefore, the voluntariness test allowed law enforcement officers wide latitude to exert psychological pressure to extract confessions; such pressure most frequently exploited psychologically vulnerable suspects.[59]

### *B.* Miranda: *Rejection of the "Voluntariness Standard"*

In the 1966 landmark case *Miranda v. Arizona*,[60] the United States Supreme Court observed that contemporary police interrogation practices were laden with psychological coercion. In response to

---

54. SALTZBURG, *supra* note 37, at 450-51.

> Because the [Supreme] Court could not possibly pass on all of the state confession cases in which review was sought, usually certiorari was limited to death penalty cases or others of special concern. Thus, the confusion in the lower courts was not something with which the High Court could concern itself.

*Id.* at 451.

55. Columbe v. Connecticut, 367 U.S. 568, 601 (1961) (Frankfurter, J., concurring).

56. *Spano*, 360 U.S. at 323-24; *see* White, *supra* note 10, at 605-06; Beamon, *supra* note 8, at 671-72 nn.17 & 20.

57. Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 870 (1981) (book review).

58. *Id.* In fact, it has been argued that each totality of the circumstances decision caused a greater division among lower trial and appellate courts. SALTZBURG, *supra* note 37, at 451.

59. Schulhofer, *supra* note 57, at 871-72.

60. 384 U.S. 436 (1966).

this widespread problem, the Court seemingly rejected the voluntariness analysis and promulgated a new standard for the admissibility of confessions, based on the privilege against compelled self-incrimination under the Fifth Amendment.[61]

The Supreme Court had originally intended to achieve two deliberate objectives by its decision in *Miranda*. First, the Court attempted to provide defendants in custody the opportunity to make informed and rational decisions about whether or not to incriminate themselves.[62] Second, with the adoption of a required advisement of rights, the Court attempted to place greater constraints on police activity and to deter police misconduct.[63]

The *Miranda* Court broadly held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[64] Thus, the *Miranda* Court extended the reach of the Fifth Amendment right against self-incrimination from the

61. ISRAEL ET AL., *supra* note 37, at 309-11. In 1966, *Miranda* provided an alternative analysis of confessions, rooted in the Fifth Amendment's privilege against self-incrimination, as opposed to the due process focus of the traditional voluntariness test. *Id.* By 1964, the Supreme Court had already moved away from the voluntariness standard using the Sixth Amendment in Massiah v. United States, 377 U.S. 201 (1964). The *Massiah* Court held that any confessions extracted in post-indictment interrogations deliberately elicited from defendants in the absence of counsel are excluded, regardless of the voluntariness of the confession. *Id.* That same year, the Court also decided that when the crime solving process shifts from investigatory to accustory, the accused must be allowed to consult with counsel because the adversary system has begun to operate. Escobedo v. Illinois, 378 U.S. 478, 492 (1964). This "right to counsel" approach met with much criticism, and certainly did not replace the due process voluntariness test, under which a wider range of factors were relevant under the totality of the circumstances. After *Massiah* and *Escobedo*, the Supreme Court moved the Fifth Amendment to center stage for analysis of confessions in Miranda v. Arizona, 384 U.S. 436 (1966). For further elaboration, see SALTZBURG, *supra* note 37, at 450-51; ISRAEL ET AL., *supra* note 37, at 281-83. Thus, the emphasis of this Comment tends to be on the Fifth and Fourteenth Amendments; however, the Sixth Amendment right to counsel is still important and figures into any constitutional analysis of police interrogation tactics.

62. *See* W.J. Stuntz, *The American Exclusionary Rule and Defendants' Changing Rights*, 1989 CRIM. L. REV. 117, 119-28; GUDJONSSON I, *supra* note 6, at 295.

63. Stuntz, *supra* note 62, at 120.

64. *Miranda*, 384 U.S. at 444. A distinction between conduct that departs from *Miranda's* procedural safeguards and conduct that abridges a person's substantive constitutional right to remain silent rather than answer incriminating questions by police has been explored at length in *Michigan v. Tucker*. 417 U.S. 433 (1974) (holding that the police conduct in question presented only a safeguards violation rather than a substantive rights violation); *cf.* Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (finding that repeated interrogation by police of suspect after he invoked his right to counsel is a violation of his substantive Fifth Amendment right against compelled self-incrimination).

courtroom to police stations.[65]

Once the Court had established the right not to incriminate oneself in a police station, the Court sought to ensure that the right could survive the realities of the interrogation room. To foster this purpose, the Court ordered that all custodial interrogations be preceded by a specified advisement of rights. *Miranda* requires that when a suspect is taken into custody, she must be advised that she has a right to remain silent, that anything she says can and will be used against her in a court, that she has the right to consult with a lawyer and to have the lawyer present during interrogation, and that if she cannot afford a lawyer one will be appointed to represent her.[66] Furthermore, the suspect must be advised of her continuous opportunity to exercise her rights throughout custodial interrogation.[67]

Regardless of some disapproving language the Court uses regarding police trickery, *Miranda* stops short of interdicting the use of trickery. The Court indicated its aversion to deceptive tactics when it stated that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege."[68] Furthermore, the Court carefully examined and condemned a representative sample of deceptive interrogation techniques.[69] Nevertheless, *Miranda* did not hold that any specific tactic or trickery would render a resulting confession involuntary.

"*Miranda* was viewed by many as a radical change in the law" because it departed from and implicitly rejected the established voluntariness standard.[70] Prior to the *Miranda* decision, the failure by police to implement a suspect's due process rights did not guarantee the exclusion of a subsequent confession. Because the lower courts applied the voluntariness approach inconsistently, interrogators often successfully gambled that questionable conduct would not result in exclusion of a resulting confession. By creating increased and explicit safeguards of a custodial suspect's Fifth, Sixth, and Fourteenth Amendment rights, the *Miranda* Court implicitly recognized that

65. *Miranda*, 384 U.S. at 467. The Court stated, "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.*

66. *Id.* at 444.

67. *Id.* at 444-45.

68. *Id.* at 476.

69. *Id.* at 450-55. The Court examined the "Mutt and Jeff" routine (also known as good cop-bad cop), the reverse line-up, and the offer of incriminating excuses for the suspect's actions. *Id.*

70. SALTZBURG, *supra* note 37, at 481-82.

the previous "voluntariness" standard alone did not sufficiently protect these rights. Clearly, if the existing system had provided adequate protection of individual rights, an explicit advisement would not have been necessary.

Even though the decision increased protection of suspects' rights, there are two inherent limitations on *Miranda's* holding. First, *Miranda* warnings need only be given when a suspect is in custodial interrogation. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[71] Second, a suspect may waive her privilege against self-incrimination. An interrogation is presumed coercive unless the suspect has "voluntarily, knowingly and intelligently" waived her constitutional rights.[72] If the suspect does in fact waive her rights, then police may permissibly use deliberate trickery and deception to obtain a confession.

In subsequent years, *Miranda* has had only minimal effect in protecting suspects' rights.[73] There are reasons for *Miranda's* minimal effect. First, the *Miranda* warning is relevant to custodial interrogation only, that is, when the subject is either under arrest or not free to leave. Therefore, the warning need not be given to suspects who have not been formally arrested.[74] As a result, police who aim to extract confessions have learned to "*interview* rather than *interrogate*."[75] This means that police usually try to conduct a consensual

71. 384 U.S. at 444.

72. *Id.* Commentators have suggested that it is not possible for a criminal suspect to "intelligently" waive his or her constitutional rights. *See Miranda*, 384 U.S. at 441 n.3 (quoting 40 L.A. B. BULL. 603 (1965)); Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances"); SKOLNICK & FYFE, *supra* note 44, at 59; Fred E. Inbau, Miranda's *Immunization of Low Intelligence Offenders*, 24 PROSECUTOR J. NAT'L DISTRICT ATT'YS ASS'N 9 (1991); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980). Studies vary regarding the actual percentage of suspects who waive their right to silence or to have an attorney present. It appears that 80-95% of custodial suspects eventually waive their *Miranda* rights. *See generally* Skolnick & Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 11 n.24; GUDJONSSON I, *supra* note 6, at 59-60.

73. Arguably, the *Miranda* decision has had very little effect at all, either in protecting defendants' rights or in hindering law enforcement efforts. The decision has become a lightening rod of criticism and debate. *See generally* SALTZBURG, *supra* note 37, at 483-84 and authorities cited therein.

74. Beckwith v. United States, 425 U.S. 341, 347 (1976). *See generally* ISRAEL ET AL., *supra* note 37, at 309-11.

75. SKOLNICK & FYFE, *supra* note 44, at 58.

interview with witnesses in such a way that the witness remains physically free to leave at any time. The police must advise a witness of his or her rights only in the event that the witness says something that indicates involvement in the crime. Prior to that point in time, the witness is not a suspect and need not be advised of his or her rights.[76] The practical line between a potential suspect and an actual suspect is tenuous, but detectives have become experts at toeing that line.

The second reason for the minimal practical effect of *Miranda* is that the *Miranda* warning has become a mere formality.

> [T]he same law enforcement community that once regarded the 1966 Miranda decision as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself.[77]

Through a variety of tactics, detectives artfully de-emphasize the importance of the *Miranda* warning, giving the suspect the impression that the warning is a mere formality[78] or a burdensome obstacle which only hinders the detective's efforts to help the suspect.[79] Moreover, once the suspect waives his or her rights and opts to cooperate in the interrogation, she is "fair game."[80] Thus, once detectives have obtained a waiver, which appears to occur in most cases, the suspect's *Miranda* protections no longer exist.

The third reason for *Miranda's* minimal effect is that subsequent decisions have narrowed the scope of its broad holding, effectively

---

76. *E.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977).

77. SIMON, *supra* note 1, at 211.

78. Skolnick & Leo, *supra* note 72, at 5. Skolnick and Leo explain that:

> [P]olice routinely deliver the *Miranda* warnings in a flat, perfunctory tone of voice to communicate that the warnings are merely a bureaucratic ritual. Although it might be inevitable that police would deliver *Miranda* warnings unenthusiastically, investigators whom we have interviewed say that they *consciously* recite the warnings in a manner intended to heighten the likelihood of eliciting a waiver.

*Id.*; *see also* J. MACDONALD & D. MICHAUD, THE CONFESSION: INTERROGATION AND CRIMINAL PROFILES FOR POLICE OFFICERS 17 (1987) ("Do not make a big issue of advising a suspect of his rights. Do it quickly, do it briefly, and do not repeat it."). *See generally* STEPHENS, JR., *supra* note 38 (summary of studies of the impact of *Miranda* in various jurisdictions); Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

79. *E.g.*, People v. Esqueda, 17 Cal. App. 4th 1450, 1474-76, 22 Cal. Rptr. 2d 126, 140-41 (1993). The first officer told the suspect that by not talking it only "makes it worse for you." Later, the second officer asked "[H]ow come you want to hang for first degree murder?" When the suspect did not reply, the officer indicated that a conviction for premeditated murder was certain. Then the officer said, "You can't even defend yourself now." Later still the second officer said, "Now our job is [to] convince you that by talking to us, you'll have a better chance all the way around to [avoid being locked up] . . . . If we have to be here two days straight, we'll be here . . . . Your decision to stay quiet [is] not the right decision." *Id.*

80. *See* Abney, *supra* note 20, at 118; Skolnick & Leo, *supra* note 72, at 4.

crippling *Miranda's* original thrust.[81] Subsequent cases essentially have reverted back to the voluntariness approach, which *Miranda* implicitly rejected. Most significantly, the Supreme Court has ruled that the voluntariness standard applies to waivers of rights.[82] "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."[83] Furthermore, a defendant's waiver must be made in "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[84] Thus, the Supreme Court has not subsequently embraced *Miranda's* promise of moving away from the voluntariness standard.[85] Consequently, *Miranda* has had only a limited impact on

81. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (holding that self-incriminating statements made in absence of *Miranda* warning usable for impeachment of defendant's direct testimony); Michigan v. Tucker, 417 U.S. 433 (1974) (holding that incomplete warnings are sufficient protection); Beckwith v. United States, 425 U.S. 341 (1976) (limiting "custody" for purposes of giving *Miranda* warnings); Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that confession was admissible when elicited without *Miranda* warnings because defendant voluntarily went to the police station in response to request by police officer); Rhode Island v. Innis, 446 U.S. 291 (1980) (limiting "interrogation" for purposes of *Miranda* warnings); New York v. Quarles, 467 U.S. 649 (1984) (violation of the *Miranda* warning is acceptable when public safety is at stake); Colorado v. Connelly, 479 U.S. 157 (1986) (holding that a confession cannot be involuntary absent police coercion); Moran v. Burbine, 475 U.S. 412 (1986) (holding that a new version of the voluntariness standard applies to *Miranda* waivers); Oregon v. Elstad, 470 U.S. 298 (1985) (second confession, extracted after *Miranda* warnings given, admissible because sufficiently attenuated from previous confession obtained in violation of *Miranda*). *See generally* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826 (1987); Althea Kuller, Note, Moran v. Burbine: *Supreme Court Tolerates Police Interference with the Attorney-Client Relationship*, 18 LOY. U. CHI. L.J. 251 (1986); Bettie E. Goldman, Note, Oregon v. Elstad: *Boldly Stepping Backwards to Pre-*Miranda *Days?*, 35 CATH. U. L. REV. 245 (1985); Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429 (1984).

82. Colorado v. Connelly, 479 U.S. 157, 169-70 (1986). *See generally* Scott A. McCreight, Comment, Colorado v. Connelly: *Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207 (1987).

83. Moran v. Burbine, 475 U.S. 412, 421 (1986).

84. *Id.*

85. Furthermore, in Title II of the Crime Control Act of 1968, Congress purported to repeal *Miranda* in federal prosecutions. The statute provides: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501(a) (1988).

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including . . . whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, . . . whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel. . . . The presence or absence of any of the above mentioned factors to be taken into consideration by

the protection of suspects' Fifth Amendment rights.[86]

### C. *Current Status of the Law: Return to Voluntariness*

Today, all that remains of the broad agenda promulgated in *Miranda* is the basic holding that a custodial suspect's confession is inadmissible to establish guilt unless he has previously been advised of, and has knowingly and intelligently waived, his rights.[87] Courts have also remained true to the holding that even if the suspect initially waives his rights, he may reinvoke them at any time.[88] However, *Miranda* has been unmistakably weakened as the

---

the judge need not be conclusive on the issue of voluntariness of the confession. 18 U.S.C. § 3501(b). Although the statute seems to overrule *Miranda*, it has not in fact resulted in a federal departure from the Supreme Court decision.

> The Attorney General in office when the statute was passed instructed his subordinates not to rely on it where it differed from *Miranda*, and, although a later Attorney General changed this as official office policy, most U.S. Attorneys appear to have continued to adhere to the restrained position initially taken.

ISRAEL ET AL., *supra* note 37, at 306-07. Most commentators originally thought the statute was invalid; but those who conceded that *Miranda* was subject to congressional redress argued that Title II did nothing more than return to the pre-*Miranda* voluntariness test. *Id.* at 307.

86. The Supreme Court has subsequently held that the harmless error rule applies to the admission of involuntary confessions. Arizona v. Fulminante, 499 U.S. 279 (1991). In *Fulminante*, a confession was obtained when a prison inmate, who was also an informer, offered to protect Fulminante from prison violence, but only if he confessed to the murder of his daughter. *Id.* at 284. In a 5 to 4 decision, the Court found that the admission of this confession was error, but merely harmless. *Id.* at 285. Thus, the Court upheld the defendant's murder conviction. Previous to this decision, a resulting conviction was automatically invalidated when a confession used as evidence against the defendant was found to have been coerced. *See* Malinski v. New York, 324 U.S. 401 (1945). Although the harmless error issue is beyond the scope of this Comment, it is important to note this decision and how it might dramatically weaken a suspect's Fifth Amendment rights. Commentators suggest that the *Fulminante* decision foreshadows further infringement on defendants' rights, and that this case sends a message to police that they may use threats of violence to obtain confessions. *See generally* Robert Paul, Comment, Arizona v. Fulminante: *The Application of Harmless Error Analysis to Admission of a Coerced Confession in Violation of the Due Process Clause of the Fourteenth Amendment*, 94 W. VA. L. REV. 1061 (1992); Amy B. Bloom, Note, *Constitutional Law—Harmless-Error Analysis Applies to Erroneously Admitted Coerced Confessions*—Arizona v. Fulminante, 26 SUFFOLK U. L. REV. 269 (1992); Jason Cenicola, Comment, Arizona v. Fulminante: *Accusation or Inquisition?*, 27 NEW ENG. L. REV. 383 (1992); John J. Henry, Note, *Criminal Procedure —Application of the Harmless Error Rule to* Miranda *Violations*, 14 W. NEW ENG. L. REV. 109 (1992); Karina Pergament, Comment, Arizona v. Fulminante: *Romancing Coerced Confessions*, 69 DENV. U. L. REV. 153 (1992); Joan M. Galli, Note, Arizona v. Fulminante: *Paving the Way for the "Harmless" Coerced Confession*, 36 ST. LOUIS U. L.J. 409 (1992).

87. *E.g.*, Estelle v. Smith, 451 U.S. 454 (1981); People v. Boyer, 48 Cal. 3d 247, 271, 768 P.2d 610, 622, 256 Cal. Rptr. 96, 108 (1989), *cert. denied*, 493 U.S. 975 (1989). However, statements obtained absent notification of these rights may still be used to impeach the credibility of the defendant if he testifies. Harris v. New York, 401 U.S. 222 (1971).

88. *E.g.*, People v. Esqueda, 17 Cal. App. 4th 1450, 1480-81, 22 Cal. Rptr. 2d 126, 144 (1993).

jurisprudential view of the criminal justice sytem has shifted away from a due process orientation to a crime control orientation.[89] Even though *Miranda* implicitly rejected the voluntariness standard as insufficient to protect the constitutional rights of suspects, the Supreme Court has since resurrected it. The voluntariness test currently applies to waivers of rights and confessions.

Thus, modern confession law is currently almost as ambiguous as the era before *Miranda*. To determine whether admissions or statements are involuntary, the "totality of the circumstances" test has survived to become the established rule. The list of relevant factors has expanded since the inception of the approach in *Spano v. New York*. An inquiry into the totality of the circumstances includes, among other factors, examination of the age of the accused, the suspect's intelligence or education level, the suspect's mental state at the time of confession, the site of the interrogation, the implementation of the suspect's legal rights, whether the investigation has focused on the suspect, the length and form of the questioning, and the absence or use of psychological or physical coercion.[90]

The presence of coercive police tactics is not dispositive to the voluntariness inquiry, but the absence of police misconduct is dispositive. In other words, coercive police activity is a necessary predicate to finding that a waiver or confession is involuntary. Regardless of the suspect's mental state or capacity, his or her self-incriminating statements can be admitted without violation of the due process clause if the court finds that the police conducted themselves properly.[91] The Supreme Court maintains that:

> as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. . . . But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart

89. David M. O'Brien, *Thinking About Crime: High Court Changes Course*, PUB. PERSP., July-Aug. 1991, at 6.

90. United States v. Montgomery, 14 F.3d 1189, 1194-95 (7th Cir. 1994); People v. Shawn D., 20 Cal. App. 4th 200, 208-10, 24 Cal. Rptr. 2d 395, 400-01 (1993); People v. Esqueda, 17 Cal. App. 4th 1450, 1484-85, 1485 n.20, 22 Cal. Rptr. 2d 126, 147-48 (1993).

91. Colorado v. Connelly, 479 U.S. 157, 163 (1986). The Supreme Court maintained in *Connelly*:

> [T]he Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by [a mentally ill defendant] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, . . . and not by the Due Process Clause of the Fourteenth Amendment.

*Id.* at 167.

from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."[92]

Thus, the mental capacity of the suspect is one factor, but not a sole determinant, in considering the "totality of the circumstances."

The use of police trickery is a relevant factor to a voluntariness inquiry under the "totality of the circumstances" test, but trickery alone will not render a resulting statement involuntary.[93] When the relevant factors under the "totality of the circumstances" test are assessed, courts generally exclude only those confessions procured by egregious tactics that would coerce an "innocent person [to] confess."[94] Therefore, it is settled that police may not use force, threats of force, and explicit promises of immunity or reward, because such tactics would coerce an innocent person to confess.[95] Moreover, flagrant ploys, like having a detective pose as a priest or a defense lawyer to get a confession, are regarded as unacceptably coercive. Nonetheless, in the vast majority of cases when the conduct in question is substantially more subtle, these few established rules do not provide clear guidance. Under the current body of law, it is up to the discretion of judges to decide in individual cases if police tactics were appropriate, considering both the conduct of police and characteristics of the accused. The majority of courts also require confessions to be corroborated by evidence from an independent source as a judicial safeguard against untrustworthy admissions.[96]

The sentiments of law enforcement officers confirm that today's "totality of the circumstances" approach gives interrogators wide latitude. According to law enforcement officers who are trained in the techniques espoused by current manuals, it is currently absolutely legal, as well as indispensible, to use deception in interrogation. According to Greg McCreary, an FBI agent and an instructor at the agency's academy in Quantico, Virginia, " '[l]egally, it's OK

---

92. *Id.* at 164.

93. *E.g.*, People v. Arguello, 65 Cal. 2d 768, 775, 423 P.2d 202, 56 Cal. Rptr. 274 (1967); People v. Atchley, 53 Cal. 2d 160, 171, 346 P.2d 764 (1959).

94. INBAU ET AL., *supra* note 2, at 217.

95. Bram v. United States, 168 U.S. 532, 542-43 (1897).

96. JOHNSON, *supra* note 8, at 355-59. However, one commentator has argued that the corroboration rule is insufficient to protect the reliability of a confession. Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121. The commentator argues that there are three major problems with the corroboration rule: (1) The police can suggest corroborating evidence to the suspect which subsequently becomes incorporated into the suspect's confession; (2) The corroboration rule does not protect those who overstate their involvement in a crime; (3) Juries and judges are not able to evaluate independent evidence once they have heard the suspect's confession. *Id.* at 1186-89. For further criticism of this rule of independent corroboration, see generally Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385 (1993).

to trick somebody about the status of the investigation and the evidence you have. It's not like Perry Mason where a guy gets up on the witness stand and blurts out a confession.' "[97] As expressed by Louis Campanozzi, a retired New York police detective who teaches interrogation methods to police across the country, " 'It's totally legal to use deception.' "[98] Lieutenant Tom Thompson of the Henderson, Nevada Police Department explains that it is the policy of his department that an investigating officer must not use "outright deception" such as falsified evidence or false claims that evidence of the suspect's guilt exists.[99] However, "psychology and body language"[100] are necessary because a defendant will not confess without some encouragement. Lieutenant Thompson admits that it is very difficult to lay out "hard and fast rules of conduct"[101] in this area, and that ultimately, it is "up to the integrity of the officer"[102] to conduct himself properly.

In summary, police are not currently prohibited from using trickery and deceptive psychological tactics to elicit self-incriminating statements from a suspect. But whether police *should* be prohibited from using trickery and deception is an entirely different matter.

## V. SHOULD POLICE BE ALLOWED TO USE TRICKERY?

### *A. Effective Law Enforcement*

One argument in favor of allowing police to use trickery and deception to elicit confessions from suspects in interrogation is that such psychological persuasion is justified for purposes of effective law enforcement, crime control, and public safety.[103] Fred Inbau and his associates, the preeminent advocates of the official use of deceitful interrogation practices, defend such practices as completely proper.

---

97. Steve Jensen, *Police Using Deceit to Get Confessions, Psychological Tricks Challenged in Court; Police Use Psychological Tactics to Get Suspects to Confess*, HARTFORD COURANT, Feb. 16, 1992, at B1 (quoting Greg McCreary).

98. *Id.*

99. Telephone Interview with Lieutenant Tom Thompson of the Henderson, Nevada Police Department (October 14, 1993).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959). *See generally* Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial*, 25 PROSECUTOR J. NAT'L DISTRICT ATT'YS ASS'N 23 (1991); STEPHENS, JR., *supra* note 38, at 90; INBAU ET AL., *supra* note 2.

Inbau and his associates argue that interrogation tactics are improper only when (1) the tactic would induce an innocent person to confess, or (2) a confession is obtained in violation of a judicial rule designed to safeguard a constitutional right.[104] In the first category, tactics which would induce an innocent person to confess include physical force, threats of physical injury, or explicit promises of leniency in return for a confession.[105] Under the second category, it would be improper to obtain a confession in the absence of *Miranda* warnings.[106] Crime control advocates argue that, as long as police conduct falls outside of these two categories of proscribed behavior, the conduct is proper. According to this rationale, psychologically sophisticated interrogation techniques are proper because, while they are certainly effective enough to elicit confessions from guilty suspects, they would not cause an innocent person to confess.[107] In addition, as long as officers advise a suspect of his or her rights and subsequently obtain a proper waiver, any interrogation tactics used to elicit a confession would not violate a judicial rule designed to safeguard a constitutional right.

Second, police and prosecutors argue that deceptive police interrogation tactics are not only proper, they are essential.[108] The United States Supreme Court has conceded that the creation of a "favorable climate for confession"[109] is generally necessary because "very few people give incriminating statements in the absence of official action of some kind."[110] Despite the Supreme Court's concession regarding the use of some official coercion, crime control advocates complain

---

104. INBAU ET AL., *supra* note 2, at 217; Jayne & Buckley, *supra* note 103, at 23.

105. Jayne & Buckley, *supra* note 103, at 23. *See generally* FRED E. INBAU, LIE-DETECTION AND CRIMINAL INTERROGATION (1942).

106. Jayne & Buckley, *supra* note 103, at 23. Jayne and Buckley argue that none of the interrogation tactics they consider proper involves continuing a custodial interrogation after the suspect has invoked his *Miranda* rights. "Nor do we advocate preventing a suspect from leaving the room. On the other hand, if the suspect has made no attempt to terminate the interrogation, he cannot legitimately claim that his confession was compelled." *Id.* at 30.

107. *Id.* at 28-29. Jayne and Buckley argue that the concept of "psychological coercion" does not exist. The authors refer to Webster's dictionary as proof that coercion means "to constrain or force to do something; to bring under control by force." As these authors argue, coercion necessarily involves the use of physical force, or a threat of physical force which constrains the suspect. The authors concede that practices such as "persuasion, deception, propaganda, and positive and negative reinforcements . . . may influence behavior, beliefs, and expectancies; but they certainly do not force or constrain the suspect in any way." *Id.* at 29. Thus, the authors argue, because psychological tactics do not involve causing, or threatening to cause, physical harm to the suspect, such techniques are entirely proper.

108. *See* Fred E. Inbau, *Police Interrogation — A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 412 (1961); STEPHENS, JR., *supra* note 38.

109. Hawkins v. Lynaugh, 844 F.2d 1132, 1140 (5th Cir. 1988), *cert. denied*, 488 U.S. 900 (1988).

110. Schneckloth v. Bustamonte, 412 U.S. 218, 224 (1973).

that many judges do not comprehend the extent to which psychological tactics are absolutely essential to elicit confessions.[111] As Professor of Law Joseph D. Grano explains, "The professional interrogator, with his anxiety-inducing tactics, is employed precisely because the inherent pressures of custodial interrogation usually are insufficient by themselves to produce the desired confession."[112]

In sum, crime control advocates emphatically argue that psychological persuasion is indispensible because suspects have very little incentive to confess without such prompting.[113] Furthermore, there is no question that the use of trickery and deception provides a highly effective means of extracting confessions; and given the important role of confessions in law enforcement, police must be free to employ effective means of obtaining them. Thus, police deceit is justified as a necessary and proper means of ensuring effective law enforcement and crime control. Moreover, police are confident that each individual officer's careful avoidance of false admissions will provide sufficient safeguards against that danger.

### *B. False Confessions*

Members of the staff of John E. Reid and Associates, a firm that specializes in criminal interrogation, advocate that a detective may distinguish permissible interrogation tactics from impermissible interrogation practices by asking herself the following: "Is what I am about to do, or say, apt to make an innocent person confess?"[114] They insist that a detective who poses this question to herself and answers in the negative may confidently and properly proceed, without danger of false confession:

> [T]o elicit a confession from a guilty suspect, . . . the interrogator must be allowed to use techniques which effectively decrease the suspect's resistance to confess, while at the same time increasing a desire to tell the truth . . . .
>
> Out of necessity, these techniques are psychologically sophisticated. They involve persuasion, insincerity, and potential trickery and deceit . . . . But they do not involve coercion, [or] compulsion, . . . and they do not remove

111. Jayne & Buckley, *supra* note 103, at 24.

112. Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Criminal Law*, 84 MICH. L. REV. 662, 674-75 (1986) (book review).

113. *See* GUDJONSSON I, *supra* note 6, at 72. Dr. Gudjonsson explains that there are a number of factors which inhibit people from confessing to crimes they have committed. Some of the most important inhibitors are (1) fear of legal sanctions, (2) concern about one's reputation, (3) not wanting to admit to oneself what one has done, (4) not wanting one's family and friends to know about the crime, and (5) fear of retaliation. Furthermore, the more reprehensible the offense, the more the suspect is likely to deny culpability. *Id.*

114. INBAU ET AL., *supra* note 2, at 217.

a suspect's free will. . . .

. . . .

Most assuredly, none of the techniques or tactics presented here would cause an innocent person to confess a crime.[115]

Even without a law enforcement background, a skeptical layperson probably could not fathom how or why an innocent person would confess to any crime, let alone a capital offense. Thus, the logical skeptic concludes that either the alleged false confessors are guilty indeed, or are so few and far between that they are not a legitimate concern.

To the contrary, numerous studies show that false confessions do occur as a result of the psychologically persuasive tactics taught by police manuals and practiced by police.[116] In fact, an influential 1986 study of wrongful conviction felony cases estimated that there are nearly 6,000 false confessions annually in the United States.[117] Another important study in 1987 identified false confessions as the leading source of wrongful convictions of innocent persons.[118] Thus, contrary to both the intuitive reaction of skeptics and the bold assurances of crime control advocates, false confessions do occur, and not merely as a result of physical coercion.

According to one researcher, "over-zealousness" on the part of police interrogators constitutes the single most common cause of false

---

115. Jayne & Buckley, *supra* note 103, at 31. The authors offer no empirical proof of their broad assurance that the psychological persuasion would not cause an innocent person to confess. Apparently, the statement rests on intuition alone.

116. *See* K.S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59 (1984); K.S. Bordens & J. Bassett, *The Plea Bargaining Process from the Defendant's Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCHOL. 93 (1985); Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (S. Kassin & L. Wrightsman eds., 1985); Kassin & McNall, *supra* note 18.

117. Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518-44 (1986); *see also* Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & HUM. BEHAV. 283-93 (1987); E.D. RADIN, THE INNOCENTS (1964); FRANK & FRANK, NOT GUILTY (1957); E.M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (1932). In a study of wrongful convictions in Great Britian, Ruth Brandon and Christie Davies studied 70 British cases of wrongful imprisonment, in which the defendants were subsequently considered innocent of the crime for which they were convicted. The authors found that, after mistaken identification, self incriminating confessions were the most common cause of wrongful imprisonment in Great Britain. RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT (1973).

118. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). For criticism of the 1987 Bedau & Radelet study, see Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). Markman and Cassell contend that the Bedau-Radelet study is severely flawed and that the study actually confirms that the risk of executing the innocent is too small to be a significant factor in the debate over the death penalty.

confessions.[119] Because detectives are trained to presume a suspect is guilty from the outset of the interrogation,[120] it may take "several hours, in order to definitely eliminate innocent suspects . . . ."[121] Therefore, it might be very difficult for an innocent suspect to vindicate him or herself in the eyes of interrogators. "[I]n the interrogation room the suspect has an opportunity to disclose information or evidence that may establish positive proof of innocence. Upon many occasions this may be the only way he can be removed from further suspicion by police."[122] But what of the unfortunate innocent suspect who can offer no such positive proof of innocence? Under this type of prolonged pressure, experts say that it is possible for even an innocent person to become gradually convinced that cooperation provides his or her only way out.[123] In this context, a false confession can be viewed as a normal reaction to unusual circumstances.[124]

---

119. L. KENNEDY, FOREWORD IN KILLING TIME 6-8 (1986). Another possible reason why suspects falsely confess is to protect a close friend, a peer, or a relative from being prosecuted. Gudjonsson & MacKeith, *The Psychology of False Confessions*, 142 NEW L.J. 1277 (1992). In addition, voluntary confessions occur without any external pressure from the police. This variety of false confessor goes voluntarily to the police station to confess to a crime. Often, he or she read about the crime in the newspaper, or saw it on television. Kassin & Wrightsman, *supra* note 116. Kassin and Wrightsman give three reasons why people voluntarily give a false confession. The most important reason is a "morbid desire for notoriety." *Id.* at 76. The second reason is the person's "unconscious need to expiate guilt over previous transgressions via self-punishment." *Id.* at 77. The third main reason why people give a voluntary false confession is that some people are unable to distinguish fact from fantasy. *Id.*

120. *See* INBAU ET AL., *supra* note 2; SAMUEL R. GERBER & OLIVER SCHROEDER, JR., CRIMINAL INVESTIGATION AND INTERROGATION (1972); CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (4th ed. 1978); F. ROYAL & SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973); SALTZBURG, *supra* note 37.

121. Jayne & Buckley, *supra* note 103, at 24.

122. *Id.* at 25.

123. *See* Gudjonsson & MacKeith, *supra* note 119; GUDJONSSON I, *supra* note 6, at 223-28. The most common reasons why innocent people confess include: the suspect was influenced by police pressure and persuasion; the suspect felt it was futile to deny the allegations because it would be her word against the police; the suspect wanted to avoid being taken into custody; the suspect thought he or she might get a heavier sentence if he or she pleaded not guilty. GUDJONSSON I, *supra* note 6, at 223 (citing S. Dell, *Silent in Court*, Occasional Papers on Social Administration, No. 42, The Social Administration Trust: London (ISBN 07135 15767 (1971))).

124. HUGO MUNSTERBERG, ON THE WITNESS STAND; ESSAYS ON PSYCHOLOGY AND CRIME (1908). Munsterberg was the first psychologist to write on the topic of false confession. He theorized that a false confession can be elicited when shock paralyzes or distorts the suspect's memory during interrogation. *Id.* For a disturbing case of a defendant who was convicted of murdering her daughter after she made three self-incriminating statements to interrogators, see Jenner v. Smith, 982 F.2d 329 (8th Cir. 1993). The suspect denied killing her daughter, and agreed to take a polygraph test to prove her innocence. Her test results indicated deception. *Id.* at 331-32. After viewing the tests, the

Studies show that people of normal intelligence have had this reaction to the pressure of interrogation and have falsely confessed to serious crimes.[125] However, the majority of suspects who make false confessions are unusually psychologically vulnerable. Three main types of psychological vulnerabilities may cause an innocent person to confess to a crime he or she did not commit. First, the suspect may suffer from a mental disorder, which might substantially impair his or her ability to make a rational decision.[126] Second, the suspect might not suffer from a mental disorder, but is nonetheless "in an abnormal mental state, due to such factors as severe anxiety, a phobic reaction to the confinement, bereavement, or drug withdrawal" which may affect his or her perception or judgment.[127] Third, the suspect may be particularly prone to suggestibility, compliance, and an inability to handle pressure.[128]

There have been numerous cases which suggest that suspects of low intelligence might be unusually prone to compliance.[129] Fred Inbau, the leading advocate of deceptive police tactics as a necessity, has conceded that "special protection must be afforded to juveniles and to all other persons of below-average intelligence, to minimize the risk of obtaining untruthful admissions due to their vulnerability to suggestive questioning."[130] Persons of minimal intelligence are

---

interrogating officer told the suspect "that she had lied and that she was responsible for [her daughter's] death." *Id.* at 332. The suspect was interrogated for several hours, during which interrogators insisted on her guilt.

> Throughout these interviews, Jenner continually expressed a desire to cooperate in the investigation by getting to the bottom of her adverse polygraph test results. She told [the interrogating officer], "I'm not lying and know I didn't do this, but maybe I psyched out in the night and don't remember it."

*Id.* The suspect "repeatedly offered to undergo hypnosis, psychological interviews, or any other method that might reveal whether she had killed [her daughter]. She told [an officer] she wanted him to be 'the vehicle to jar her memory.' " *Id.*

125. *See* Gisli H. Gudjonsson & James A.C. MacKeith, *A Proven Case of False Confession: Psychological Aspects of the Coerced-Complaint Type*, 30 MED. SCI. & L. 329 (1990); Gisli H. Gudjonsson, *Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trial*, 31 MED. SCI. & L. 147 (1991).

126. Gudjonsson & Mackeith, *supra* note 125, at 1278.

127. *Id.*

128. *Id.*

129. *E.g.*, Johnson v. Trigg, 28 F.3d 639, 640 (7th Cir. 1994); State v. Davis, 637 So. 2d 1012, 1029 (La. 1994); Ex Parte Lucas, 877 S.W.2d 315, 317 (Tex. Crim. App. 1994); Commonwealth v. Duffy, 36 Mass. App. Ct. 937, 938, 629 N.E.2d 1347, 1348 (1994); State v. Van Winkle, 635 So.2d 1177, 1189 (La. Ct. App. 1994); Balew v. State, 872 S.W.2d 339, 341 (Tex. Ct. App. 1994); State v. Cleary, 641 A.2d 102, 108-09 (Vt. 1994); People v. Gordon, 247 Ill. App. 3d 891, 904, 617 N.E.2d 453, 463 (1993); Simpson v. Commonwealth, 227 Va. 557, 563, 318 S.E.2d 386, 390 (1984); Finchum v. State, 463 N.E.2d 304, 308-09 (Ind. 1984); United States v. Barnes, 520 F. Supp. 946, 952 (D.C. 1981); People v. Samuel, 29 Cal. 3d 489, 504, 629 P.2d 485, 492, 174 Cal. Rptr. 684, 691 (1981); Davis v. North Carolina, 384 U.S. 737, 742 (1966).

130. Inbau, *supra* note 72, at 10. Inbau's article responded to a case in Illinois in which the court held inadmissible the burglary confession of a 17-year-old, ninth grade school drop out with an I.Q. of 80 because he was incapable of making a "knowing and

often more prone to obey authority figures than persons of higher intelligence.[131] Because interrogation substantially depends on the enormous power differential between the suspect and the police officers, the grave danger for innocent suspects of low intelligence is that they might be particularly susceptible to make incriminating statements due to the pressures of interrogation.

At a time when states are invoking the death penalty, the problem of false confessions is particularly horrifying.[132] As the late Justice Thurgood Marshall wrote in 1972 when the Supreme Court struck down the death penalty as it was then configured, "Death is irrevocable; life imprisonment is not."[133] Of course, police should be concerned with the potentially disastrous effects that psychological persuasion may have on an innocent individual. However, the innocent defendant is not the only victim when police use tactics which extract false confessions. We are all at risk because a guilty criminal remains free in the innocent confessor's stead.

### *C. Fairness*

Although the unreliability of coerced confessions constitutes an important concern of the justice system, the constitutional principle which dictates exclusion of such confessions is rooted in fairness, which stems from the due process clauses of the Fifth and Fourteenth Amendments.[134] The Supreme Court has long subscribed to the policy that coercive techniques should not be countenanced by a civilized society, regardless of the importance or reliability of the information they may produce. Thus, the Court has established that

---

intelligent" waiver of his *Miranda* rights. People v. Bernasco, 138 Ill. 2d 349, 562 N.E.2d 958 (1990). The thrust of Inbau's article was that, although society must protect low intelligence offenders, society cannot afford to foreclose completely the opportunity to make any inquiries of such persons who are suspected of crime.

131. *See* Tom Condon, *Try Again to Understand the Lapointe Tale*, HARTFORD COURANT, July 12, 1992, at B1; STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: EXPERIMENTAL VIEW (1974); HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND REPSONSIBILITY (1989); Gudjonsson & MacKeith, *supra* note 125; Miranda v. Arizona, 384 U.S. 436, 456 n.24 (1966).

132. *See* Bedau & Radelet, *supra* note 118. Bedau and Radelet presented 350 cases in which a defendant who was subsequently proven innocent had been wrongfully convicted of a capital or potentially capital offense. Of the 350 sample cases, the authors reported that 139 were sentenced to death and 23 were executed before their innocence was established. *Id.* at 36.

133. Furman v. Georgia, 408 U.S. 238, 346 (1972) (Marshall, J., concurring).

134. See *supra* note 37 for text of the due process clause of the Fourteenth Amendment. *See generally* ISRAEL ET AL., *supra* note 37, at 257-60.

the overriding value of due process is fairness, not truth. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[135] Hence, the Court has said that regardless of the reliability of a confession, evidence should be excluded if it was gathered by police methods that "shock the conscience" of the community or violate a fundamental standard of fairness.[136]

Following this logic, confessions extracted by means of trickery or deception should be excluded, regardless of the truth or falsity of the confession, because deceptive tactics are fundamentally unfair. The game analogy is often used to describe our system of adversarial justice. We pit the defendant against the State and provide the contestants with an impartial fact-finder, the "referee." The concern for fairness in this setting stems from a deep rooted American cultural philosophy: "The point of the agonistic ideal is that a game is neither interesting nor fair when it is structured so as to produce mismatches."[137] The recognized price of the American adversarial philosophy is that the guilty may infrequently prevail when the State is penalized for its failure to play by the rules. However, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of the few in order to protect the privacy of us all."[138]

In the confessions context, the police officers are the instruments of the State. Accordingly, they must uphold the fundamental fairness of our system. Interrogation constitutes an inherently unfair "mismatch." Nevertheless, because interrogation serves indispensible crime solving functions, we afford law enforcement agents the advantage. However, the use of trickery and deception by police to obtain confessions impermissibly infringes on established principles of fundamental fairness. The police are provided with an arsenal of deceptive interrogation tactics, while many suspects are ill-equipped to make rational or informed choices about whether to exercise their rights. In order to preserve the underlying policies of the Fifth,

---

135. Lisenba v. California, 314 U.S. 219, 236 (1941); *see, e.g.*, Rochin v. California, 342 U.S. 165, 173 (1952) (even if admission independently established as true, "[c]oerced confessions offend the community's sense of fair play and decency"). *See generally* Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954) (fundamental fairness is essential to our system of justice); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (discussion of role of fairness in the accusatorial system); C. WHITEBREAD, CRIMINAL PROCEDURE § 15.01 (1980).

136. Ashcraft v. Tennessee, 322 U.S. 143, 154-55 (1944).

137. Babcock, *supra* note 135, at 1142. *See generally* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for the Truth? A Progress Report*, 68 WASH. U. L.Q. 1 (1990).

138. Arizona v. Hicks, 480 U.S. 321, 329 (1987).

Sixth, and Fourteenth Amendments to maintain fairness in the criminal adversary system and to check the inherent power advantage of the state, trickery and deception should be excised from the law enforcement arsenal.

### *D. Deterrence of Police Misconduct*

The Supreme Court long ago stressed the important societal need to deter illegal police conduct. In *Weeks v. United States*,[139] the Court first recognized that the only effective way to deter police misconduct is to exclude tainted evidence.[140] Forty years later, the *Spano* Court said "life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[141] Thus, courts exclude confessions resulting from police misconduct to enforce a crucial tenet of our justice system: "the police must obey the law while enforcing the law."[142] The police use of trickery in interrogation runs afoul of this basic rule.

Courts have attempted to deter police misconduct by reversing convictions and excluding confessions. For example, in *People v. Esqueda*,[143] a recent noteworthy California case, the Fourth District Court of Appeal reversed a murder conviction due to police misconduct. The trial court had admitted incriminating statements made by the defendant, who was twenty-nine years old and had seven years of education.[144] He was subsequently convicted of the murder of his live-in girlfriend.[145] The officers obtained the admissions during an eight hour interrogation on the night of the killing. The detectives warned the suspect of his constitutional rights long after the defendant was considered a custodial suspect.[146] Once the officers had administered the warning, they persuaded the suspect that exercising his rights would jeopardize his best interests.[147] The officers also lied extensively to the suspect about the evidence collected against him,[148] and convinced him that they were undeterrably confident of

139. 232 U.S. 383 (1914).
140. *Id.* at 393-94.
141. Spano v. New York, 360 U.S. 315, 320-21 (1959).
142. *Id.* at 320.
143. 17 Cal. App. 4th 1450, 22 Cal. Rptr. 2d 126 (1993).
144. *Id.* at 1465, 22 Cal. Rptr. 2d at 134-35.
145. *Id.*
146. *Id.* at 1482-83, 22 Cal. Rptr. 2d at 145-46.
147. *Id.* at 1476, 1486, 22 Cal. Rptr. 2d at 141, 148.
148. See *supra* note 24 for illustrative list of lies the police told Esqueda.

his guilt. Furthermore, the detectives employed a variation of the good cop-bad cop routine, offered excuses, false sympathy, and minimized the seriousness of the charges. In addition, the officers appealed to Esqueda's religious[149] and ethnic background, pleaded with God, and spoke to Esqueda in Spanish. Finally, after six hours of denials, the officers strategically intimated that a premeditated murder conviction was certain unless Esqueda cooperated.[150] Ostensibly to help Esqueda avoid the certainty of a first degree murder conviction, the detectives suggested equally incriminating alternatives to the story Esqueda told, one of which appeared deceptively preferable to Esqueda.[151] Esqueda eventually adopted the detectives' suggested version of the facts.[152] These taped admissions formed the heart of the prosecution's case.

The Fourth District Court of Appeal reversed the defendant's murder conviction, holding that these tactics amounted to a "flagrant violation" of Esqueda's Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to due process.[153] The court reasoned,

> Once a defendant has waived his or her right of silence, the police have some latitude to interrogate with other than Chesterfeldian politeness. Where, however, the waiver is defective, the defendant has indicated a desire for silence, and the police have taken advantage of his exhaustion, emotions, and minimal education, and have used lies and threats to achieve

149. For an argument that confessions induced by appeals to religion are constitutional, see Richard E. Durfee, Jr., *The Constitutional Admissibility of Confessions Induced by Appeals to Religious Belief*, 4 B.Y.U. J. PUB. L. 219 (1990).

150. As the officers explained, Esqueda could "go all the way up to state prison saying, 'I didn't do it.' " 17 Cal. App. 4th at 1476, 22 Cal. Rptr. 2d at 141. Then the officers proceeded to suggest that "[t]here's a big difference between premeditated planning and accidental, man . . . you've got to tell me that it was an accident and not premeditated." *Id.* at 1477, 22 Cal. Rptr. 2d at 142. In response, Esqueda said, "It was an accident but I didn't do it." *Id.* From this first incriminating statement, the detectives slowly extracted numerous admissions from Esqueda under the pretext that such cooperation would ultimately serve his best interests. *Id.* at 1473-77, 22 Cal. Rptr. 2d at 139-44. In obtaining the admissions, the detectives used almost all the techniques in Inbau, Reid, and Buckley's nine-step plan. *See supra* note 17.

151. 17 Cal. App. 4th at 1474, 1485-86, 22 Cal. Rptr. 2d at 140, 147-48.

152. *Id.* at 1486, 22 Cal. Rptr. 2d at 148.

153. *Id.* at 1455, 22 Cal. Rptr. 2d at 128.

> their result, we do not hesitate to declare such an interrogation violative of the fundamental constitutional protections guaranteed each citizen by the Fifth and Fourteenth Amendments.[154]

The court marveled that the misconduct of the police was "so reminiscent of the police conduct in the late 1950's that led the United States Supreme Court in *Spano v. New York* to strike down a confession as to cause wonder that we have come so far since then, yet progressed so little."[155]

In *Florida v. Cayward*,[156] the District Court of Appeal of Florida excluded a confession that was induced by police trickery. In *Cayward*, the defendant was suspected of sexual assault and smothering of a child.[157] Although they suspected the defendant, the police thought they had insufficient evidence with which to charge him.[158] Consequently, the police officers fabricated laboratory reports, indicating that semen stains on the victim's underwear came from the defendant.[159] When the false reports were exhibited to the defendant, he indicated his involvement.[160] The court held that the resulting confession was involuntary because the presentation of false scientific documents overstepped the line of permitted police deception.[161] Although the decision was grounded in the Fifth and Fourteenth Amendments, the court expressed important practical reasons for its decision. First, the court feared that falsified documents might taint the entire criminal justice system because of their "potential of indefinite life and the facial appearance of authenticity."[162] The court feared that "[a] report falsified for interrogation purposes might well be retained and filed in police paperwork. Such reports

154. *Id.* at 1487, 22 Cal. Rptr. 2d at 148. The court notes that regulation of police misconduct does not mean that police need to purge the interrogation process of all inherent pressure. Some pressure in interrogation is, of course, necessary to achieve the desired result. Opponents of the prohibition of police trickery argue that without trickery, police would be left with pleasantries alone (i.e., "Chesterfeldian politeness") to extract confessions. However, such dramatic predictions do not alter the principle that police behavior must not go unregulated. The Constitution guarantees every individual certain rights; police trickery that infringes on those rights is improper under the Constitution. Surely, police could find ways to interrogate suspects within the bounds of the Constitution.

155. *Id.* at 1484-85, 22 Cal. Rptr. 2d at 147 (citation omitted).

156. 552 So. 2d 971 (Fla. Dist. Ct. App. 1989).

157. *Id.* at 972.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 975.

162. *Id.* at 974.

have the potential of finding their way into the courtroom."[163] The court worried that if falsified documents were ultimately admitted into evidence, police would have little disincentive to falsify other official documents "including warrants, orders, and judgments."[164] This rationale extends to all forms of police trickery and deception, not just the falsification of documents. "When police are permitted to lie in the interrogation context, why should they refrain from lying to judges when applying for warrants, violating internal police organization rules against lying, or lying in the courtroom?"[165]

Furthermore, the *Cayward* court reasoned that when police are allowed to lie in the name of justice, public confidence in the integrity of law enforcement is undermined.[166] The court explained,

> [Public confidence] has been earned over the course of several decades by increased professionalism of law enforcement agencies, education, and community involvement. We recognize that law enforcement officers must be allowed a degree of latitude in interrogating suspects, and we acknowledge the role of confessions in the administration of the criminal justice system. We must, however, decline to undermine the rapport the police have developed with the public by approving participation of law enforcement officers in practices which most citizens would consider highly inappropriate. We think that for us to sanction the manufacturing of false documents by the police would greatly lessen the respect the public has for the criminal justice system and for those sworn to uphold and enforce the law. In a word, in administration of the criminal law, we simply cannot allow the end of securing a confession to justify the means employed in this case.[167]

Public confidence in law enforcement is especially relevant in today's tense social climate. Scholars have suggested that trust in law enforcement has recently hit an all-time low.[168] The videotaped beating of Rodney King was viewed by virtually every household across America,[169] the fierce explosion of the Los Angeles riots underlined

---

163. *Id.* The court listed several factors which make such a possibility realistic:

> First, police departments are involved in thousands of investigations each year. Second, many of these investigations result in criminal trials which swell the already staggering caseloads of the criminal justice system. Third, we must consider the long periods of time which often elapse between an investigation and the trial. During this time, those officials involved in the manufacturing of false reports could leave for other jobs, die, or simply forget the circumstances under which the reports were obtained.

*Id.*

164. *Id.* at 975.

165. SKOLNICK & FYFE, *supra* note 44, at 62.

166. *Cayward*, 552 So. 2d at 975.

167. *Id.*

168. *See generally* ROBERT COULSON, POLICE UNDER PRESSURE: RESOLVING DISPUTES 1 (1993). "Police officers say that they are caught between their difficult, hazardous work and a hostile community, and this book supports that assertion." ANDREW J. GOLDSMITH, COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW (1991) (advocating the need for enhanced police accountability and recommending an expansive procedure of external civilian complaint).

169. *See, e.g.*, Jerome H. Skolnick, *Perspective on the King Case: Dubious Reasoning, a Fair Sentence; Judge Davies' Perspective of Justifiable Blows Is Arguable. Still, Even One Year in Prison Is Tough Punishment for a Cop*, L.A. TIMES, Aug. 5,

law enforcement's inability to contain boiling urban angst,[170] and rapper Ice-T recently made headlines with his anti-police song "Cop Killer."[171] In response, " '[c]ommunity-oriented policing' is being implemented in a number of American police departments to improve trust and citizen cooperation by changing the attitudes of both police and public."[172] Thus, the current social climate of urban America makes it more important than ever for law enforcement officials to reclaim and maintain the public confidence. The police use of trickery and deception in interrogation might have consequences which extend beyond the individual suspect. When the public's respect for law enforcement and the judicial system is undermined, individuals might be less inclined to cooperate with law enforcement efforts. Therefore, as the *Esqueda* and *Cayward* decisions illustrate, both constitutional and practical concerns mandate the prohibition of police trickery.

## VI. RECOMMENDATION

Almost thirty years ago, the Warren Court (1953-1969) evinced the clear objective of safeguarding the constitutional rights of the

---

1993, at B7; *The King Verdicts*, ST. PETERSBURG TIMES, Apr. 18, 1993, at A8; Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1. For an account of the March 3, 1991 incident between the four Los Angeles police officers and Rodney King from the perspective of one of the officers, see SGT. STACEY C. KOON, PRESUMED GUILTY: THE TRAGEDY OF THE RODNEY KING AFFAIR (1992).

170. "The riots that followed the Rodney King verdict show how much anger and chaos is lurking under the surface of urban America. The police provide a primary layer of protection from the horror of unrestrained vandalism and violence. Can we afford to be without strong, effective police protection?" COULSON, *supra* note 168, at 2. *See generally, A Time to Heal but Violence Is Never Cause for Celebration*, SAN DIEGO UNION-TRIBUNE, Oct. 21, 1993, at B14; Christopher Quinn & Sharon McBreen, *Citizens Keep Tabs on Officers' Actions; the Review Boards for Orlando, Orange, and Seminole Look at Complaints About Law Enforcement*, ORLANDO SENTINEL, June 1, 1993, at B1; Bill Wallace, *Law Enforcement Trend: Civilians Keeping Watch Over Police*, SAN FRANCISCO CHRON., Oct. 14, 1992, at A1; *L.A. Riots Had Parallel in the 60's Major Change Called Vital to Break Cycle*, ST. LOUIS POST-DISPATCH, Oct. 3, 1992, at A8; Matthew S. Scott et al., *Resurrecting the City of Angels*, BLACK ENTERPRISE, Nov. 1992, at 94.

171. *See, e.g., Ice-T Mocks San Diego Police with "Cop Killer,"* JET, Oct. 19, 1992, at 36; Jack Miles, *Blacks vs. Browns; African Americans and Latinos*, ATLANTIC MONTHLY COMPANY, Oct. 1992; Thom Duffy & Charlene Orr, *Texas Police Protest Ice-T Song*, BILLBOARD, June 20, 1992, at 98; Robin Kelley, *Straight from Underground (How Rap Music Portrays Police)*, NATION, June 8, 1992, at 793.

172. SKOLNICK & FYFE, *supra* note 44, at 63. For a comprehensive analysis of the relationship between police and the community, see HOWARD H. EARLE, POLICE-COMMUNITY RELATIONS: CRISIS IN OUR TIME (1967).

accused against deceptive police interrogation tactics in *Miranda v. Arizona.* However, since the *Miranda* decision, the focus of the Court has shifted from the rights of the accused to crime control policies. There has been an increasing shift away from the "due process" jurisprudence of the Warren Court to the "crime control" jurisprudence of the Rehnquist Court.[173] The result is that law enforcement enjoys wide latitude at virtually every stage of the criminal justice process, including interrogation.

Of course, there is no question that police interrogation of persons suspected of crimes constitutes a necessary practice in the pursuit of crime solving and justice. Under the proper circumstances, confessions serve a useful social purpose. Because many criminal cases lack witnesses or physical evidence, police often would be incapable of collecting enough evidence to punish the wrongdoer without a confession. Furthermore, as a practical matter, a confession often minimizes the need for further police investigation and often leads to conviction, both of which reduce costs to taxpayers. Nevertheless, the potential for conflict arises because criminal offenders "ordinarily do not utter unsolicited, spontaneous confessions."[174] Thus, the police are confronted with the difficult task of procuring a confession from a less than willing suspect.

The question is whether we value the attainment of a confession at any price. Clearly, on one hand, society has a compelling interest in keeping the guilty off the street. On the other hand, it also has a compelling interest in preserving the Constitution and protecting individual rights. The Constitution safeguards all citizens, even those accused of a crime, in order to protect the innocent. When a suspect's constitutional rights are negated by deceptive police tactics, we pay too high a price for the resulting confession. The risk of false confessions is an unacceptable cost of certain deceptive police tactics. Aside from the obvious risks to the life or liberty of the innocent individual, society is at risk because a guilty person remains free. In addition, police conduct which undermines the public trust creates a

---

173. David M. O'Brien, *Thinking About Crime; the High Court Changes Course,* PUB. PERSP., Vol. 2, No. 5, at 6 (1991). O'Brien provides a comparison of the Warren, Burger, and Rehnquist Court's record on state and federal criminal cases:

| | % decided for gov't | no. of cases | no. of terms |
|---|---|---|---|
| Warren Court | 36 | 527 | 16 |
| Burger Court | 65 | 552 | 16.5 |
| Rehnquist Court | 67 | 154 | 4 |

*Id*; *see also* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (3d ed. 1993); Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court, (Is It Really So Prosecution Oriented?), and Police Investigatory Practices, in* THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T 82-86 (V. Blasi ed., 1983).

174. INBAU ET AL., *supra* note 2, at xvi.

longterm problem of inefficient law enforcment because community cooperation is the foundation for effective law enforcement.

The time has come for the Supreme Court to recognize the costs of trickery and deception: the fundamental unfairness of the tactics in our accusatorial system, a significant danger of false confessions, and the fostering of police misconduct which undermines the public's confidence in its law enforcement agents. Thus, a balance must be struck in the law so that individual rights and public trust are not forfeited in the process of bringing guilty persons to justice.

The law should evince two primary objectives. First, the Court must provide suspects in custody the opportunity to make informed and rational decisions about whether or not to incriminate themselves. Second, the Court must place greater constraints on police activity. Unlike the *Miranda* Court, today's Court must explicitly interdict the use of trickery to achieve these two objectives. The current "totality of the circumstances" test is unworkable. The "totality of the circumstances" approach proscribes the most blatant types of trickery only, but it fails to interdict more subtle psychological tactics. Hence, the ambiguity of the test has led to the absence of meaningful regulation of police conduct.

First, as mentioned above, suspects must have an opportunity to make informed and rational decisions about whether or not to incriminate themselves. Plainly, a suspect cannot adequately make such a decision unless he or she is capable of understanding his or her rights, as well as the potential consequences of cooperation. Thus, as a threshold inquiry, the Court should look to the mental capacity of the accused.

Current law dictates that absent coercive police activity, a suspect's mental capacity is irrelevant to a voluntariness inquiry.[175] Only when evidence of coercive police activity is present will the court consider the "totality of the circumstances," including a suspect's mental capacity, to determine whether a waiver or confession was voluntary.[176]

The current approach inadequately protects suspects who are so psychologically vulnerable as to be incapable of making an intelligent waiver of their *Miranda* rights.[177] The law must protect the

175. Colorado v. Connelly, 479 U.S. 157, 164, 167 (1986). *See infra* notes 91-92 and accompanying text.

176. *Connelly*, 479 U.S. at 165-67.

177. Police can easily take advantage of inexperienced or ignorant suspects. *See supra* notes 33-34, 117-21 and accompanying text. *See also* George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.

constitutional rights of all suspects, especially those suspects who are incapable of protecting themselves. Therefore, if a judicial determination is made that a custodial suspect is incapable of making an intelligent waiver, any incriminating statement made by the suspect in the absence of counsel should be *per se* inadmissible.[178] Thus, even in the absence of coercive police activity, the statements of a psychologically vulnerable suspect would be excluded.

Attacks on such an approach would be concerned with whether there is a practical process for determining whether or not a suspect is capable of making an intelligent waiver. In *People v. Bernasco*,[179] the Illinois Supreme Court employed the testimony of a psychologist to determine whether a 17-year-old, ninth grade school drop out, who had an I.Q. of 80, was capable of making a knowing and intelligent waiver of the *Miranda* warnings given to him by police while he was in custody. Based on the testimony of the psychologist, the police, and the boy's parents, and based on the trial court's observations of the defendant while he was testfying, the court held the defendant's burglary confession inadmissible.[180] Thus, as the Illinois Supreme Court has demonstrated, this approach is practically feasible with the use of psychological evaluation and testimony, a judicial aid which is certainly not new to the criminal law. Such a procedure would safeguard each individual's right of due process and right against self-incrimination.

If the Court determines that the mental state of the accused does not clearly afford him or her special protection, the Court should then proceed to carefully scrutinize the advisement of rights. It is well settled that a failure to warn a custodial suspect of his or her rights will result in an exclusion of any resulting confession for the purposes of establishing guilt.[181] However, even when police actually warn a suspect of his or her rights, police may still use trickery to

---

L.Q. 275; R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40-41 (1981).

178. Of course, this does not prevent police from interrogating the suspect in the presence of counsel or, in the alternative, in order to gain corroborating evidence. Nor does this rule prevent police from building a case with evidence other than a confession.

179. 138 Ill. 2d 349, 562 N.E.2d 958 (1990).

180. *Id.* at 368, 562 N.E.2d at 966; *see also* Colorado v. Connelly, 479 U.S. 157, 161 (1986). In *Connelly*, a psychiatrist employed by the state testified at a preliminary hearing that the defendant was "suffering from chronic schizophrenia and was in a psychotic state [at least starting] the day before he confessed." *Id.* He further testified that the defendant's mental illness interfered with his " 'ability to make free and rational choices.' " *Id.* Nevertheless, the doctor testified that the defendant "understood the rights he had when [the detectives] advised him that he need not speak." *Id.* at 161-62. On the basis of this evidence, the Colorado trial court suppressed defendant's statements because they were involuntary. *Id.* at 162.

181. *E.g.*, People v. Esqueda, 17 Cal. App. 4th 1450, 1481, 22 Cal. Rptr. 2d 126 (1993).

de-emphasize or misrepresent the nature and significance of the *Miranda* warning.[182] When an interrogator misrepresents the significance of the *Miranda* warning, the protective purpose of the warning is not achieved; it is as if the suspect were not warned at all. The Court must renew its emphasis on protecting defendants' constitutional rights by requiring a substantive advisement of rights, in place of the accepted formality it has become. If the warnings are to truly safeguard defendants' rights, they must be given in a manner which is meaningful. Therefore, the Court should carefully scrutinize the warning of rights; if the interrogating officer failed to administer the warning in a meaningful and scrupulous manner, the Court should exclude the resulting confession.[183]

If the Court has determined that the defendant has had an opportunity to make an informed and rational decision about whether or

182. *See supra* notes 76-77 and accompanying text.

183. Jackson v. Denno, 378 U.S. 368 (1974). Perhaps one practical way to administer this requirement would be the mandatory recording of interrogations. With a word for word transcript, blatant examples of meaningless and unscrupulous administration of the warning of rights would not be difficult to detect. *See, e.g., Esqueda*, 17 Cal. App. 4th at 1474-76, 22 Cal. Rptr. 2d at 140-41 (court used audio and video recordings to determine that the "tenor of the questioning changed to accusations even before [the defendant] was read his rights"); *see supra* note 75 and accompanying text. In fact, some commentators suggest that all aspects of police interrogations should be mandatorily recorded to preserve the suspect's constitutional rights in the interrogation setting. Although this issue is beyond the scope of this Comment, it is worthwhile to consider how this requirement would make the task of the reviewing court much more efficient. *See generally* Ingrid Kane, Note, *No More Secrets: Proposed Minnesota State Due Process Requirement that Law Enforcement Officers Electronically Record Custodial Interrogation and Confessions*, 77 MINN. L. REV. 983 (1993). There is also evidence that while the presence of recording devices has a limited impact only on a suspect's behavior, the presence of such devices substantially inhibits police misconduct. Michael McConville & Philip Morrell, *Recording the Interrogation: Have the Police Got it Taped?*, 1983 CRIM. L. REV. 158, 159-60. This suggests that adoption of recording requirements might be a circuitous but effective way to encourage officers to exercise their best judgment in the interrogation room. However, the "outrageous" conduct of interrogating officers who knew they were being recorded in *Esqueda* suggests otherwise. 17 Cal. App. 4th at 1484, 22 Cal. Rptr. 2d at 146. Perhaps the immediate advantage of mandatory recording would be ease and efficiency of appellate review, which would, in turn, restrict police activity longterm.

Another solution to the problem of the advisement of rights given in a meaningless manner may perhaps be extrapolated from a proposal in the juvenile field. One author has urged that the solution to the problem of juvenile comprehension of the warnings is what he calls the "Youth Rights Form." Larry E. Holtz, Miranda *in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 549 (1987). The form would consist of a highly simplified set of warnings, followed by questions. The questions would require a "yes" or "no" answer as to whether the suspect understands each individual right. Perhaps this approach could be adopted for the interrogation of adults. It does not appear that a simplified advisement of rights would be more difficult or impractical to administer than the current advisement. *Id.* at 550-56.

not to incriminate herself, the Court should then turn its attention to the practices of the police officers after the waiver was obtained. Currently, once a waiver of rights is properly obtained, the suspect is "fair game" for an endless array of deceptive tactics.[184] Concededly, "[z]ero-value pressure conditions" are impossible to achieve in interrogation because all police questioning, whether custodial or not, creates some pressure on a criminal suspect.[185] Moreover, the Fifth and Fourteenth Amendments do not, and should not, protect against all the inherent pressures of police questioning if we wish for successful law enforcement. As previously discussed, confessions can be extremely valuable when properly obtained. However, the Fifth Amendment's protection against compelled self-incrimination does indeed safeguard the suspect's choice to maintain silence. This right to choose silence is a nullity if interrogators subject the suspect to tactics which disable her from appreciating the significance or consequences of a self-incriminating statement.

In general, the use of trickery and deception deprives a suspect of the ability to appreciate her rights, and hence, the significance or consequences of self-incrimination. However, such a generalization lacks the detail necessary to institute a change in the law. Unless offending tactics are clearly defined, reform will not occur in the isolation of the interrogation room. Nebulous assertions that "trickery" renders a resulting confession inadmissible are devoid of guidance for courts and law enforcement officers alike. Therefore, Congress must explicitly interdict the use of specific deceptive tactics.[186]

First, Congress must bar police from intentionally misrepresenting a fact that, if true, would induce a suspect to confess. Thus, police should be prohibited by statute from lying about the nature or amount of evidence available against a suspect. This would include both the production of false evidentiary documents as well as verbal misrepresentions. Along the same lines, non-disclosure of a relevant fact that might deter a suspect from confessing constitutes the functional equivalent of active misrepresentation of an important fact. Thus, it would be unquestionably impermissible for police to falsely tell a suspect, for example, that a friend had implicated him or her, or that the suspect's fingerprints were found on the murder weapon, or that the suspect's semen was identified in the victim's underwear through fictitious DNA tests. In addition, it would be impermissible for a detective to conceal the fact that a victim of violence had in fact died during the course of an interrogation.

---

184. *See supra* note 76 and accompanying text.

185. YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 155 n.20 (1983).

186. The ideas expressed herein rely for guidance in part on the hypothetical "Statutory Replacement for the *Miranda* Doctrine," in PHILLIP. E. JOHNSON, CRIMINAL PROCEDURE 540-50 (1988), and Sakasi, *supra* note 15, at 1598.

Although the public has an interest in bringing the guilty to justice, police should not be permitted to lie to serve that end for three reasons. First, public trust in law enforcement is integral to the efficient administration and enforcement of the laws. Public cooperation and the public's perceptions of police behavior are clearly interrelated;[187] when the public's respect for the police is undermined, individuals might be less inclined to cooperate with law enforcement efforts. Second, as the *Cayward* court argued, falsified documents might taint the entire criminal justice system because of their apparent authenticity. Furthermore, if police were allowed to lie in the interrogation context, there would be little disincentive for police to refrain from deception in other contexts, such as the courtroom. The police must conform to society's expectancy of honesty and veracity just like every other citizen; the police must obey the law while enforcing the law. Third, misrepresentations by police are violative of the fundamental constitutional protections guaranteed each citizen by the Fifth and Fourteenth Amendments. Misrepresentations about the evidence hinder the suspect's ability to assess whether or not to remain silent. Because of these three reasons mentioned above, the police should not be permitted to lie in order to serve the public's interest in bringing the guilty to justice.

Second, Congress must prohibit police from intentionally misrepresenting the adversary nature of the interrogation. The leading police manual advocates stratagems designed to "decrease the suspect's perception of the consequences of confessing"[188] by misrepresenting the adversary nature of the relationship between the suspect and her interrogators. When a detective is permitted to misrepresent the agonistic nature of interrogation, the State has an unfair advantage over the defendant.

The Fifth, Sixth, and Fourteenth Amendments reflect the tenet of our adversarial system that the accused should have some equality to protect his or her self-interest against criminal accusations by the powerful state.[189] Part of a meaningful defense against any attack is

187. *E.g.*, Florida v. Cayward, 552 So. 2d 971, 975 (Fla. Dist. Ct. App. 1989).

188. INBAU ET AL., *supra* note 2, at 332. For instance, the manual instructs the interrogator not to take notes, because note taking "may grimly remind the suspect of the legal significance or implication of an incriminating remark." *Id.* at 36. In addition, the interrogator should wear civilian clothes, or the "suspect will be reminded constantly of police custody and the possible consequences of an incriminating disclosure." *Id.* One recent case reflects how interrogating officers follow these instructions to the letter. *See* People v. Esqueda, 17 Cal. App. 4th 1450, 1466, 22 Cal. Rptr. 2d 126, 135 (1993) (detective wore civilian clothing for the interviews and did not take any notes).

189. Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("no system of criminal justice

the identification of the opponent. At the very least, a criminal suspect whose life or liberty may be at stake deserves the bare advantage of identifying his chameleon-like adversary.[190] Because the "relative strengths of the suspect and the police in this context" are grossly disproportionate, the integrity of the defendant's constitutional protections must be steadfastly safeguarded.[191] Furthermore, if a suspect does not understand the nature of the interrogation, she cannot accurately assess whether or not she should exercise her right to assistance of counsel. Accordingly, a detective should not intentionally misrepresent her role in the interrogation, whether an interrogation is taking place, the seriousness of the proceedings, or the possible consequences of a confession.

Third, Congress must codify and extend the existing judicial proscriptions on trickery. As previously mentioned, the Supreme Court has already proscribed the use of force, explicit threats of force, or explicit promises of leniency. The rationale behind the prohibition of these tactics is that they are so coercive as to induce an innocent person to confess. This rationale, however, extends with equal force to implicit threats and implicit promises. In support of this conclusion, some courts have already held that a coercive promise "need not be expressed, but may be implied."[192] Moreover, one research team has studied and compared the communicative effects of permissibly deceptive police interrogation ploys with impermissibly explicit ploys.[193] The study focused on the techniques in Inbau, Reid, and Buckley's nine-step plan, including offers of sympathy, excuses, and

---

can, or should, survive if it comes to depend for continued effetiveness on the citizens' abdication through unawareness of their constitutional rights"). *See generally* Greenawalt, *supra* note 177.

190. This concern for constitutional rights should not be construed as a support of the "sporting theory of justice," which contends that a guilty suspect, like a fox during a hunt, must be given a sporting chance to escape conviction and punishment. *Cf.* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 238 (1827); 7 THE WORKS OF JEREMY BENTHAM 454 (Bowring ed. 1843) (author sharply criticizes the "fox-hunter's" argument for excluding evidence). Rather, a criminal suspect is entitled by the Constitution not to be compelled to incriminate him or herself under the Fifth Amendment, nor to be deprived of life or liberty without the due process of law under the Fifth and Fourteenth Amendments. Due process includes the defendant's right to confront adverse witnesses against him or her. Furthermore, the Sixth Amendment entitles all criminal defendants with the right to be informed of the "nature and cause of the accusation." U.S. CONST. amend. VI. The guarantee of these rights forms the fabric of our system of criminal justice. Maintaining the integrity of a fair adversary system is not mere "sport." When the protection of a defendant's rights is reduced to such a simplistic and cynical analogy as a fox hunt, one could easily forget that although it is morally acceptable to trap or kill an innocent fox in America, it is not similarly defensible to trap or kill an innocent defendant.

191. White, *supra* note 10, at 604. *See generally* Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (suspect is on "unequal footing with his interrogators").

192. People v. Hill, 66 Cal. 2d 536, 549, 426 P.2d 908, 916, 58 Cal. Rptr. 340, 348 (1966).

193. Kassin & McNall, *supra* note 18.

moral justification. The research indicates that these tactics *implicitly* communicate leniency expectations and threats of punishment to suspects just as effectively as *explicit* promises or threats.[194] The only distinction between the currently permissible and impermissible deceptions (implied vs. expressed) is one of form, not substance. Therefore, Congress should (1) codify the settled judicial proscriptions of *explicit* threats of force and explicit promises of leniency, and (2) ban police interrogation tactics involving *implicit* threats or promises. The broad category of implied promises should specifically include offers of sympathy, excuses, and moral justification.

Realistically, even with legislation explicitly banning the above three categories of trickery, the courts will inevitably be confronted with subtle yet questionable tactics which fall outside of the statutory framework. Only in the context of assessing the propriety of these questionable tactics should courts look to the "totality of the circumstances." Thus, only in the absence of a mandatory exclusion of a confession by statute, courts would retain discretion to assess the constitutionality of the interrogation, taking into account the aggregate effect of relevant factors such as the length and form of the questioning, the degree of the coercive nature of the tactics in question, and the mental state of the accused. The retention of this test in narrow circumstances would allow for flexibility, while the statutory framework would substantially alleviate previous ambiguity.

Given the importance of confessions to law enforcement, police should retain the ability to interrogate within the bounds of the Constitution. For example, as long as an officer does not misrepresent the evidence, the adversarial nature of the interrogation, or make threats or promises (either explicit or implicit), an officer should not be restricted from using certain verbal or behavioral techniques. For instance, a detective might appeal to the suspect's sense of humanity, compassion, or conscience. In addition, the detective might appeal to the suspect's sympathy for the victim. Moreover, an officer should not be restricted from honestly conveying information to the suspect, such as information about available evidence against the suspect. On the other hand, the Court should retain the authority to ensure that, even when not statutorily prohibited, tactics employed by interrogators do not deprive a suspect of his or her constitutional rights.

In summary, the law regarding the admission of confessions should change. First, when the mental capacity of the accused is

194. *Id.* at 247-50.

questionable, the Court should assess the defendant's mental state using psychological evaluation and testimony. Once a judicial determination is made of a custodial suspect's inability to understand the nature and significance of her *Miranda* waiver, her incriminating statements should be *per se* inadmissible. In the alternative, if the Court has determined that the mental state of the defendant should not afford him or her heightened protection, the Court should then determine whether the suspect was advised of his or her rights in a manner which would enable the suspect to make a rational decision about whether to waive them. If the advisement of rights was given in a clearly meaningless and unscrupulous manner, the resulting confession should be *per se* inadmissible. If the Court finds that the advisement was proper, it should then scrutinize the conduct of the police. The interrogation tactics should be analyzed to determine whether any of three statutorily proscribed categories of trickery were used: (1) intentional misrepresention of a fact that, if true, would induce a suspect to confess (including lies about the nature or amount of evidence available against a suspect); (2) intentional misrepresention of the adversary nature of the interrogation; or (3) explicit or implicit promises of leniency or threats of harm. Finally, the Court should examine the circumstances surrounding police tactics which fall outside the statutory proscriptions to determine whether the defendant was deprived of his constitutional rights.

## VII. Conclusion

This Comment has argued that police should not be permitted to use trickery and deception to obtain confessions during interrogation. Although society has a compelling interest in effective law enforcement, the official use of trickery and deception constitutes an improper means of achieving that end.

Highly sophisticated interrogation techniques have been proven to elicit false confessions from psychologically vulnerable suspects and from suspects of normal intelligence alike. This danger of unreliable confessions mandates a re-thinking of the interrogation process. Furthermore, the basic tenet of our criminal justice system is that "ours is an accusatorial and not an inquisitorial system."[195] Under this system of justice, the police have the duty to protect the individual rights of all citizens, even those suspected of a crime. When an individual is deprived of the fundamental fairness of our system, reflected in the Fifth, Sixth, and Fourteenth Amendments, our entire system has gone awry; justice has not been done. Moreover, the use of police trickery and deception undermines public confidence in the

195. Rogers v. Richmond, 365 U.S. 534, 541 (1961).

police and the judicial system. In the harsh realities of modern urban America, we can ill afford to lose public trust in and cooperation with law enforcement if police officers hope to retain their control.

LAURA HOFFMAN ROPPÉ