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SYMPOSIUM ON COERCION:
AN INTERDISCIPLINARY EXAMINATION OF
COERCION, EXPLOITATION, AND THE LAW

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THE USES OF ABSTRACTION: REMARKS ON INTERDISCIPLINARY EFFORTS IN LAW AND PHILOSOPHY

CATHERINE KEMP*

Legal scholars asking questions whose answers require careful work not only in law but also in some other academic discipline have been issuing warnings recently about the carelessness and/or hubris of legal academics who appropriate the methods, insights, concerns, etc. of those other disciplines.[1] Most of these warnings are directed at what we might call the intentional wrongs of interdisciplinary research carried out by legal academics—self-conscious inquiries into subject matters which lie (at least in part) within the bounds of some other discipline.[2] The efforts of the participants in this Symposium, although they at times involve issues lying outside the conventional bounds of legal scholarship, do not, however, fall squarely under this criticism.[3]

The Symposium's brush with philosophy—as an instance of an interdisciplinary approach to law—is, I think, properly viewed as incidental. The group decided to work on coercion, and found that Professor Wertheimer had written a book on the subject.[4] Although the focus of the discussion was primarily the legal regulation of coercive relationships, in reading a philosopher,[5] the participants inevitably encountered obstacles peculiar to interdisciplinary scholarship. This type of minor collision, although not the primary target of scholars cataloging the afflictions and desiderata of interdisciplinary research, nevertheless raises a couple of important issues about such research, in particular about the mutual perceptions and joint ventures of philosophers and legal academics. In these Remarks I want to pursue two claims. First, from the vantage of one discipline, the perceptual virtues[6] do not necessarily grace investigations into the researches of another discipline, so that subject matters, controversies, and

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1. *See* Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127 (1994); *see, e.g.*, Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79 (1992).

2. Mootz, *supra* note 1, at 128-136 (reviewing types of criticism levelled by philosophers at legal scholars appropriating philosophical material).

3. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

4. ALAN WERTHEIMER, COERCION (1987).

5. Professor Wertheimer.

6. Perspective, proportion, depth, and relation.

strands of theoretical development located in one discipline often appear out of context to scholars trained in another. Second, degrees and types of abstraction form a notable instance of this phenomenon, especially for interdisciplinary work in law and philosophy.

The first part of these Remarks addresses this issue of context as it affects interdisciplinary work in law and philosophy. The second part begins with the observation of several Symposium participants[7] that Professor Wertheimer's theory about coercion is unexpectedly *abstract*, given his disdain for "conceptual analysis,"[8] and then considers different types of abstraction and the ways in which this variety can be misleading when viewed across boundaries of academic disciplines. The third part reviews divisions among contemporary moral theorists in the hope that this will help locate some of the differences between Professor Wertheimer and some of the Symposium participants in substantive controversies over the proper approach to questions of morality.

I.

> "Mr. Tucker, let me introduce you to Dr. Bunney: he too is passionately interested in phonetics." The Duchess gave a commanding nod at the ugly publisher, who instantly entered on a subject about which he knew nothing at all . . . .
>
> "And what," asked Tucker gravely, "do you think of this younger German school?" The question was ninety-nine percent safe. Bunney was enchanted. Conversation went smoothly and efficiently on.[9]

Critics of interdisciplinary legal scholarship argue that most of the scholars with legal training who make forays into other disciplines do not have the competence to read or pronounce on what they find, or to determine its pertinence to the aspect of the law which inspired the expedition in the first place.[10] This criticism, as I have already suggested, is really directed at intentional border crossings by scholars seeking insight or material from another discipline. The Symposium discussions instead encountered a related but different obstacle in the remarks Professor Wertheimer makes about his approach to the question of coercion and about the nature of his conclusions.[11] Many of these remarks come out of, and are directed at, traditions and controversies which are peculiar to philosophy and which by themselves are uninformative to people not trained in the discipline.[12] However, in this case and in other

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7. *See, e.g.*, Nancy Ehrenreich, *Conceptualism by Any Other Name . . .* , 74 DENV. U. L. REV. 1281, 1284 (1997).

8. Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 890 (1997) [hereinafter Wertheimer, *Remarks*].

9. MICHAEL INNES, HAMLET, REVENGE! 28 (1962). Of course, most parties to interdisciplinary conversations are not as conscious or as specific as Mr. Tucker, yet his hunch relies on the operation of the kind of seeming *lingua franca* I consider in this section.

10. *See, e.g.*, Leiter, *supra* note 1, at 90 (charging Jerry Frug with irresponsible appropriation of Friedrich Nietzsche); Mootz, *supra* note 1, at 128-130.

11. *See* WERTHEIMER, EXPLOITATION 8 (1996); Wertheimer, *Remarks*, *supra* note 8, at 2; *infra* Part II.

12. *See infra* Part II.

similar situations,[13] the terms in which these kinds of remarks are expressed often *seem* familiar to non-philosophers, either because they do not appear to be terms of art or because they are technical terms in their own right in the area in which the non-philosophers are trained. Such terms float, as it were, like objects on a spatially indeterminate background, shorn of the proportions and relations they bear to each other and to the traditions which form their contexts. This effect troubles many interdisciplinary discussions, even those we would consider otherwise modest and well-intentioned,[14] and is, I believe, partly responsible for the dissatisfaction on both sides which sometimes attends efforts at the appropriation of philosophical material by legal scholars. In particular I would point out two types of confusion following on this effect which are relevant to contemporary research in legal theory and philosophy.

First, in every academic discipline there are historical divisions and controversies which come with labels by which practitioners can mark and know them. These idiosyncratic features are invisible chasms to the non-specialist who almost inevitably stumbles into them.[15] This is no less true of philosophy as it confronts the legal scholar than of any other academic discipline or area of activity.[16] The contemporary relationship between law and philosophy,

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13. Encounters between legal scholars and philosophers, as well as any interdisciplinary discussion.

14. I would put the discussions of the Symposium in this category.

15. *See, e.g.*, Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (conflating phenomenology with deconstruction). Deconstruction is fundamentally critical of the project of phenomenology and should never be mistaken for it. *See* Joseph Margolis, *Deferring to Derrida's Difference*, *in* EUROPEAN PHILOSOPHY AND THE AMERICAN ACADEMY 195-96 (Barry Smith ed., 1994). *See also* JACQUES DERRIDA, SPEECH AND PHENOMENA, AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS; (1979). Gabel's mistake, however, is instructive for legal scholars working in and with the Critical Legal Studies (CLS) movement: CLS is devoted, among other things, to a critical project whose aim is to reveal the internal inconsistencies of law so as to expose the power relations the law conceals. That is, for CLS, legal doctrine is an appearance behind which there is something real, something the law needs to conceal in order to preserve itself and the *status quo*. *See* James Boyle, *Introduction* to CRITICAL LEGAL STUDIES xiv (James Boyle ed., 1992). *See, e.g.*, David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984) (discussing CLS' notion of truth). Deconstruction, properly understood, objects to this kind of relation between appearance and reality and to the metaphysical assumptions required for the relation to be coherent. *See* Margolis, *supra*, at 208-09.

16. The most important and long-standing division among professional philosophers in the United States lies between the Anglo-American Analytic and Continental traditions. For a general characterization of the division, see NICHOLAS RESCHER, AMERICAN PHILOSOPHY TODAY, AND OTHER PHILOSOPHICAL STUDIES, 18-19 (1994); *see also* David E. Cooper, *The Presidential Address: Analytic and Continental Philosophy*, 94 PROC. ARISTOTELIAN SOC'Y 1 (1994) (characterizing the difference as, in part, a disagreement over the possibility of obtaining an impersonal, explicit command of the 'rules' of language and other human practices). Many scholars view this division as itself unphilosophical and ahistorical; it also ignores the non-Analytic tradition in American philosophy, viz. American Pragmatism, Process and "systematic" philosophy. It is generally agreed that a rapprochement between the two traditions is in the offing. For a whimsical characterization of this possibility, see JOSEPH MARGOLIS, HISTORIED THOUGHT, CONSTRUCTED WORLD: CONCEPTUAL PRIMER FOR THE TURN OF THE MILLENIUM, 6 (1995).

> I take sides and I don't take sides. I admire the sense of rigor in the "analytic" tradition, and I admire the large spirit of the "continental." I deplore the intellectual stinginess of the analytic, and I deplore the philosophical carelessness of the continental. I believe they are literally the half-assed progeny of the halved stock of Aristophanes's joke in *Symposium*. Those divided parts must surely be rejoined . . . .

Id.

however, suffers under the additional burden of being the subject of a territorial dispute waged by different philosophical traditions over the right (or the presumption) to define, delimit, interpret, and purvey philosophy for lawyers and legal scholars.[17] Not content with invisibility, the chasms in this case are magnetic. What is worse, the effects of this battle are exacerbated by what appear to be its echoes in the various controversies internal to legal theory and to legal academia, some of which are very heated indeed.[18] Technical terms which surface in the middle of such conflicts and confusions are likely to be misconstrued and to remain unclear.

Second, the historical development and series of distinctions which characterize the intellectual life of every academic discipline are usually encountered piecemeal by non-specialists, and are thereby susceptible to misconstruction as instances of seemingly similar developments and distinctions in the non-specialists' area of specialization. In teaching legal philosophy to philosophy students, for example, one has to point out that legal positivism is not at all the same thing as the logical positivism familiar to philosophers. Technical terms which mark developments and distinctions in one area can also appear or be understood as making reference to controversies no longer confined to a

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17. *See, e.g.*, Mootz, *supra* note 1, at 134 (noting that Martha Nussbaum's recommendation that philosophers bring rigor to legal theory and adjudication is polemical).

> [Martha Nussbaum] emphasizes that only genuine philosophers are competent to fulfill the role that she envisions, as opposed to the "sophists" of continental literary theory who currently attract so much attention among contemporary legal theorists. Given that philosophy is a deeply contested discipline rather than a univocal practice of rigorous reasoning, one is left with the impression that, at bottom, Nussbaum simply is advocating the colonization of legal theory by pragmatic-minded analytical philosophers.

Id. (citations omitted).

Mootz notes in this passage that "[i]t is plain from the context that Jacques Derrida is Nussbaum's unnamed villain." *Id.* at 134 n. 32 (reviewing Martha Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1641-42 (1993)); *see infra* note 18; *see also* BRIAN LEITER, PHILOSOPHICAL GOURMET REPORT 27 (1996) (ranking graduate programs in philosophy in the United States). "Students interested in 'postmodernism' (e.g. Derrida, Lyotard, etc.) would be better off applying to graduate programs in literary theory, since philosophers generally do not (for good reason) take this stuff seriously." *Id.* In his ranking Leiter rates only Analytic programs, characterizing Continental programs as members of "the 'Continental underground' in the U.S.—i.e. those American philosophers who shun analytic philosophy and work mainly in Continental traditions (e.g. phenomenology, critical theory, postmodernism)". Leiter claims that "the best scholarly work on Continental philosophy is generally done at the predominantly analytic departments." *Id.*; *cf.* Leiter, *supra* note 1, at 101-102 n.77. This is not the place to evaluate Leiter's characterization of graduate programs in philosophy, but note, as evidence of the depth of the chasms and the intensity of the territorial dispute, that his view is not shared by research faculties at Continental programs or by their professional organizations, and that people on both sides are making forays into legal scholarship. It is inevitable that these Remarks are themselves a kind of salvo in this conflict; it behooves legal scholars confronting helpful-seeming philosophers to ascertain the intellectual persuasion of their interlocutors.

18. By this, I mean primarily the late and perhaps continuing unrest over the presence of Critical Legal Studies scholars on law faculties. *See, e.g.*, Peter D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). The flap over CLS in many ways resembles the reaction of all mainstream philosophical traditions, including older Continental movements to Derrida and of the Anglo-American Analytic tradition to Continental philosophy in general. *See* EUROPEAN PHILOSOPHY AND THE AMERICAN ACADEMY, *supra* note 15. *See, e.g.*, LEITER, *supra* note 17, at 27. This is not to say, however, that CLS and deconstruction are the same project, or that mainstream philosophical traditions should be construed as uniformly more sympathetic or more similar to mainstream legal scholarship.

single discipline (e.g., "materialism" or "formalism"). Encountered out of context, such terms lend themselves to inaccurate parallelisms of movements and controversies between disciplines, which mislead and confuse projects relying on interdisciplinary study. I turn now to the cluster of terms and attendant confusion emerging from the Symposium participants' discussion of Professor Wertheimer's theory on coercion and exploitation.

II.

"I am not a lawyer."[19]

"Professor Wertheimer is a political philosopher, I am an attorney."[20]

The story behind these territorial claims, or rather disclaimers, forms an excellent illustration of this thesis that technical terms appearing out of context are troublesome for interdisciplinary work in law and philosophy. In this instance, a misunderstanding over a particular set of terms which are significant in both disciplines has affected not only the substantive discussion of coercion, but also the perception on all sides of the relevance of the interdisciplinary aspect of the Symposium. The terms at issue are *abstract* and its cousins *conceptual, formal,* and *analytic*, each of which is frequently qualified by the term *merely*. The misunderstanding has its source in the ways in which these terms as they appeared in Professor Wertheimer's presentation were understood by the Symposium participants. In this section I tell the story of the misunderstanding, examine some of the uses of the term abstraction as they are relevant to discussions between legal scholars and philosophers, and recast the Symposium discussion in light of this examination.

In some of the remarks Professor Wertheimer makes about the nature of his approach to the subject of coercion he rejects mere "conceptual analysis" in favor of "moral argument informed by empirical investigation" as a means of deciding whether to invalidate or prohibit certain kinds of transaction.[21] These claims were understood in the Symposium's initial discussions to suggest that Professor Wertheimer rejects the kind of apolitical or metaphysical abstraction associated in legal theory with various species of doctrinalism or formalism[22] and rely instead on an approach, generally associated by legal theorists with Legal Realism and its heirs, which takes account of the social and/or political context in which the agreements are embedded.[23] That is, the Symposium's members set out to examine Professor Wertheimer's theory about coercion thinking that he preferred a normative, empirically-informed (political)[24] approach to the question over a value-neutral, "abstract" (apoliti-

19. Wertheimer, *Remarks*, *supra* note 8, at 889.

20. Ehrenreich, *supra* note 7, at 1291-92, n.41.

21. Wertheimer, *Remarks*, *supra* note 8, at 890; *see also id.* at 892. "[T]he best account of coercion is normative. . . . [t]he antinomy of normative is empirical or value-neutral . . . ." *Id.*

22. *See* Ehrenreich, *supra* note 7, at 1283-84; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 617 (1985); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

23. Ehrenreich, *supra* note 7, at 1284. *See, e.g.*, Boyle, *supra* note 15, at xiii, xx.

24. Ehrenreich, *supra* note 7, at 1290 n.37.

cal) one. Over the course of the discussions, however, the group found that what Professor Wertheimer means by "normative" does not involve attention to the social or political context of possibly coercive agreements,[25] that is, having eschewed "conceptual analysis" as empty, he seems to rely anyway on a very formalistic, abstract view of these transactions and of the parties to them.[26] Several participants wondered whether this penchant for abstraction should be attributed to the fact that Professor Wertheimer is a philosopher and not a lawyer.[27] In her article for this Symposium, Professor Ehrenreich charges Professor Wertheimer with engaging in an undesirable (if unintentional) merger of a formalist approach with that of progressive legal theory.[28] Confronted with these criticisms, Professor Wertheimer responds that his contributions to the Symposium are "philosophical, not legal."[29] What has happened here?

The problem lies with the phrase "conceptual analysis,"[30] and with Professor Wertheimer's remark that a normative approach is not "value-neutral", implying that conceptual analysis is value-neutral.[31] Compounding the problem, Professor Wertheimer also says that his normative, non-neutral approach is "empirical,"[32] which conceptual analysis is not.[33] Two strands of the misunderstanding begin at this point. First, to the untutored eye, Professor Wertheimer appears to be rejecting non-empirical, value-neutral approaches *in general.* Second, he seems to favor an approach to the question of coercive transactions which is empirically-based and morally explicit. The first appearance lends itself to the conclusion that Professor Wertheimer is going to avoid formal, conceptual, merely analytic, or abstract methods. The second suggests that his positive theory about coercion might involve claims about the justice of the transactions he considers, that is, their social and political significance. As the Symposium participants discovered, Professor Wertheimer explicitly rejects the second[34] and seems to renege on the first.[35]

25. Wertheimer, *Remarks*, *supra* note 8, at 901, 905; *see also* WERTHEIMER, EXPLOITATION, *supra* note 11, at 270, 298; Ehrenreich, *supra* note 7, at 1299; *infra* Part III.

26. *See* Ehrenreich, *supra* note 7.

27. This came up during weekly discussions in Fall 1996. It was at this juncture that I felt compelled to point out that the abstraction in Wertheimer's treatment of moral agents, which the participants attributed to philosophers, was instead peculiar to some philosophers but not others. I explained that I thought that Professor Wertheimer had been trained in the Anglo-American Analytic tradition in moral theory, and that the significant division among professional philosophers in this country lay between the Analytic and Continental traditions. *See supra* note 16. The Symposium participants were unfamiliar with this division, and it has been my experience that legal scholars are generally unaware of it. This, of course, makes the territorial struggle among philosophers peddling philosophy to lawyers even more perilous. *See supra* note 17 and accompanying text.

28. Ehrenreich, *supra* note 7, at 1284; *see also id.* at 1290.

29. Wertheimer, *Remarks*, *supra* note 8, at 889.

30. *Id.* at 890.

31. *Id.* at 892.

32. *Id.* at 890.

33. *Id.*

34. See Wertheimer's discussion of "Background Injustice." *Id.* at 904.

35. Ehrenreich, *supra* note 7, at 1284.

*

What does 'abstract' mean? Much of the controversy over the nature of Professor Wertheimer's claims winds itself around the fact that there are several only partially-explicit and partially-distinct meanings for this term at play in the Symposium discussions. Some of these significations go to the substance of Professor Wertheimer's theory on coercion, others to methodological differences between lawyers and philosophers. Still others are relevant to historical developments in the intellectual life of both disciplines. I pick it out, in part, because it forms what seems to me to be the *locus* of the difficulty in this particular conversation, but also because I believe this group of terms is especially important for interdisciplinary work in law and philosophy. This is due to the fact that the number and variety of uses of the terms *abstract, formal,* and *conceptual* are staggering in philosophy, substantial in legal theory, and relevant in several pockets of interdisciplinary research already mapped out by scholars working on philosophical approaches to law. Even inside philosophy it is impossible[36] to formulate a grand theory of the abstract; a theory explaining the variety of uses of the term in law and philosophy could only be absurd. Nevertheless, there are a few simple distinctions between types of abstraction which are worth pointing to for the sake of the process of interdisciplinary discussions.

First, it is important to ask what it is in relation to which something is considered abstract: To a historical or political context?[37] To the results of empirical investigation?[38] To a particular experience or instance? To a definite practical resolution?[39] To something else? Second, as I have already sug-

36. Indeed it is undesirable.

37. Members of the Symposium rightly put Professor Wertheimer here, but not because he rejects "conceptual analysis," but rather, because the normative theory he espouses prefers to focus on the moral individual in isolation from his or her social and/or political context. *See infra* note 42, 56 and accompanying text, and Part III.

Notice that the legal formalism associated with Langdell sees law as abstract in relation to its social and political context. *See* FRIEDMAN, *supra* note 22, at 614-17 (1985) (reviewing the career of Christopher Columbus Langdell). Langdell was adamantly opposed to acknowledging the social or political dimensions of American law, and intent on protecting the principles and formal truths of law from the vicissitudes of political and legislative life. *Id.* at 614. Notice also, however, that even though Professor Wertheimer's moral theory and Langdell's view of law may be abstract in relation to the same thing, they are nonetheless abstract in very different ways. Professor Wertheimer's moral theory, as we will see in a moment, is based on a certain way of looking at A and B and at their transaction, rather than on an assumption, like Langdell's about law, that there are essential—formal—truths about A and B. *See infra* note 56 and accompanying text.

38. Older, pre-experimental notions of science relied on the elaboration of abstractions about observed phenomena; modern science is founded on both the abstract expressions of mathematics and on experimental method. *See* A. C. CROMBIE, THE HISTORY OF SCIENCE FROM AUGUSTINE TO GALILEO, 145-50 (1995); *cf.* FRIEDMAN, *supra* note 22, at 617 ("If law is at all the product of society, then Langdell's science of law was a geology without rocks, an astronomy without stars.").

39. Martha Nussbaum characterizes one of the difficulties besetting interdisciplinary discussions in law and philosophy as the conflict between lawyer's desire for definite outcomes and the philosopher's "concern for open-ended investigation and debate." Martha Nussbaum, *Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1642 (1993). It is this version of the difference between legal and philosophical scholarship which inspired Professor Wertheimer's "preemptive strike against those who will want to take me to task on one legal issue or another." Wertheimer, *Remarks*, *supra* note 8, at 889. Professor Wertheimer received the Symposium's charge of formal-

gested, when a scholar on either side designates something as formal or conceptual, it is important that non-specialists try to learn something about the tradition and the controversy which (may) lie behind that designation. Third, neither law nor philosophy is itself uniformly abstract or uniformly particularistic; it is important to avoid stereotyping disciplines and movements within them by simple distinctions between abstract and concrete, formal and particular, conceptual and material. Finally, as I suggested a moment ago, abstraction or formalism is not itself a uniform phenomenon in either discipline, and is properly an object of suspicion for non-specialists encountering it in an interdisciplinary context.

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So, on his own terms—in certain philosophical terms—Professor Wertheimer is perfectly consistent.[40] In refusing to rely on "conceptual analysis" he is rejecting a particular kind of philosophical method.[41] In characterizing his own conclusions as moral and empirical he is placing himself in relation to various controversies in contemporary (philosophical) moral theory.[42]

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ism as a demand that he take account of particular court decisions and fact situations. This, of course, is not that in relation to which some of the Symposium participants found his theory abstract. *See supra* note 37. Indeed, had he obliged the Symposium in what he thought were its demands, he might have come up with a Langdellian account of coercive transactions, which would have been just as unsatisfying, although more familiar, to his critics.

40. Note that this in no way diminishes the misgivings Professor Ehrenreich has about the "domestication" of CLS and related theoretical approaches. *See generally* Ehrenreich, *supra* note 7. Professor Ehrenreich worries about the effect of modes of argument like Professor Wertheimer's on legal scholarship, an effect which is a consequence, not a cause, of the misunderstanding over terms of art.

41. "Conceptual analysis" refers to a method developed and championed by Anglo-American Analytic philosophers in the twentieth century. It begins with the premise that traditional philosophical problems (in metaphysics, epistemology, logic, and ethics) are not really problems but rather confusions caused by mistakes in language. Philosophical analysis looks into the concepts and logical relations raised in a particular problem and "dissolves" the problem by clearing up the conceptual mistakes. Problems which survive this process are really scientific problems. The history of philosophy under this method is a collection of linguistic mistakes made over centuries, which, once dispelled, can be ignored. The goal of conceptual analysis in its most distinctive form is the end of philosophy as a tradition and as a discipline. RESCHER, *supra* note 16, at 34 (1994). Note that conceptual analysis is distinct from *conceptualism*, a theory in traditional metaphysics. Reinhard Grossman, *Conceptualism*, 14 REV. OF METAPHYSICS 243 (1960).

42. The moral theory Professor Wertheimer relies on seems to be a kind of rule-utilitarianism. Rule-utilitarianism is a form of utilitarianism which relies on rules based on the principle of utility rather than on the principle itself to judge the consequences of actions. JAMES E. WHITE, CONTEMPORARY MORAL PROBLEMS 17 (3d ed. 1991). The normative aspect of traditional Law and Economics theory is a form of rule-utilitarianism familiar to legal scholars, wherein definite norms for adjudication are founded on a principle of "wealth-maximization" similar to the 'pleasure-maximization' of traditional utilitarian theories. *See* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 605 (1989). Both approaches assume that the moral subject is an independent rational agent who exercises maximizing choices in his actions. *Id.* at 611; *see* MARK PHILIP STRASSER, AGENCY, FREE WILL, AND MORAL RESPONSIBILITY 183 (1992) (noting that for John Stuart Mill the moral subject is an autonomous choice-maker).

Professor Wertheimer's distinction between "micro-level" and "macro-level" injustice and his preference for the former in his analyses of the potential harm of transactions suggests that he is primarily concerned with individual actors and the quality of their choices. WERTHEIMER, EXPLOITATION, *supra* note 11, at 8-10; *see also* Wertheimer, *Remarks*, *supra* note 8, at 902. *See generally*, WERTHEIMER, EXPLOITATION, *supra* note 11, at 247-277 (discussing the evaluation of

Neither of these claims, however, says as much as it seems to: Professor Wertheimer is rejecting a rather formalistic method in philosophy. He is not thereby rejecting all kinds of formalism, conceptualism or abstraction. Additionally, he may not be rejecting "conceptual analysis" for its abstraction, but for some other reason.[43] He is adopting a moral and empirical approach to the question of coercive transactions. But, in philosophy, there are many kinds of moral theory,[44] and many kinds of empiricism, some of which are hospitable to considerations of social justice, many of which are not. Further, some of these moral or normative theories are very abstract,[45] and certain kinds of empiricism can make Langdell look like a ethnographer. In this series of distinctions we can see that Professor Wertheimer's remarks about his methods are couched in terms which are both *familiar* and *differently* significant to legal scholars, so that what he says is (unintentionally) both misleading and opaque for his interlocutors in the Symposium. The healthy suspicion I have recommended about such terms would limit the damage they do to interdisciplinary discussions between lawyers and philosophers.

III.

The abstraction with which Professor Wertheimer treats the issue of coercion places him firmly on one side of an important divide running through contemporary moral theory. It is misleading, however, to characterize the difference between positions staked out along this divide as a difference in

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consent).

The aspiration to being 'informed empirically' refers to Professor Wertheimer's determination to make sure his claims are true to actually existing conditions of (individual) advantage and harm which attend certain transactions. *See, e.g.*, Wertheimer, *Remarks*, *supra* note 8, at 893. (asking moral questions about pressures on prisoners and whether these pressures for us actually excuse their conduct). I discuss the context for Professor Wertheimer's theoretical positionings below. *See infra* Part III.

43. These are legion, and they are held by people working in many different philosophical traditions. *See* RESCHER, *supra* note 16, at 35-39 (1994).

44. *See* CAHAL B. DALY, MORAL PHILOSOPHY IN BRITAIN: FROM BRADLEY TO WITTGENSTEIN (1996); DWIGHT FURROW, AGAINST THEORY: CONTINENTAL AND ANALYTIC CHALLENGES IN MORAL PHILOSOPHY (1995); Stephen Darwall et al., *Toward* Fin de siècle *Ethics: Some Trends*, 101 PHIL. REV. 115 (1992); *see also infra* Part III.

45. Some are even abstract about the onus of abstraction. See, for example, RESCHER, *supra* note 16, at 114:

> A quandary of concretization arises when a certain generic act is abstractly desirable but yet this can be accomplished only in various particular ways each of which is concretely undesirable. The person facing such a situation looks to the pursuit of an evident desideratum, but is emplaced in the uncomfortable and unhappy position that there is no acceptable way to get there from here.
>
> A schematic illustration of this phenomenon is readily produced. We have a choice of performing *A* and not-*A* in circumstances where *A* can (only) be realized in one or another of three versions (A_1, A_2, A_3). And the situation we now confront stands as follows: *A* is realizable only via the several concrete A_i . . . .
>
> The basic difficulty is that abstract desiderata have to be realized in concrete circumstances. . . . The performance of what is, in and of itself, a perfectly proper act in *A* may—in the existing circumstances—saddle us with collateral negativities, with the result that there just is no acceptable concretization of an abstractly appropriate desideratum.

Id.

degrees of abstraction. That is, the theories themselves on both sides are more or less abstract, more or less formal. There are, however, differences between these types of moral theory in certain kinds of abstraction. In this section I make a couple of points about contemporary moral philosophy and indicate three ways in which contemporary moral theories differ in degrees of abstraction.

Contemporary moral philosophy is, in part, a collection of responses to traditional moral theory[46] and, in part, the collection of theories about moral subjects that tag along with various contemporary logical, epistemological, linguistic, and metaphysical positions.[47] Traditional moral theory[48] is primarily normative.[49] Responses to it fall into two very rough categories: those which question the possibility and conditions of universal moral norms,[50] and those which prefer a different account of the theoretical assumptions on which a particular moral theory is founded.[51] Scholars working in the first category are usually identified with the Continental tradition,[52] those in the second are usually identified with a particular strand of Anglo-American Analytic philosophy.[53] Beyond this point generalizations about Analytic and Continental differences in contemporary moral philosophy are unhelpful, but mention of a few issues over which the two traditions part ways may help clarify the Symposium discussions.

First, moral theories in the two traditions differ in the way they see the relation between people and the moral questions and decisions people confront, on the one hand, and the context in experience, society, and history in which these people are found, on the other. In one camp sit theorists who

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46. *See* FURROW, *supra* note 44.

47. *See* Nicholas Capaldi, *The Dogmatic Slumber of Hume Scholarship*, 18 HUME STUD. 117, 120 (1992) (noting that for Analytic philosophy "theoretical knowledge is primary and practical 'knowledge' has a secondary status"). This view and its assumptions are at issue in contemporary Analytic circles. *See* Darwall et al., *supra* note 44, at 128-30 (distinguishing two trends in contemporary moral philosophy, one which sees facts and values as discontinuous and thereby possessed of merely different kinds of objectivity; a second which holds that moral judgments are objective in the same way as scientific or theoretical judgments). Note, however, that both of these trends are formed in response to the problem of "'placing ethics'" in relation to "empirical science as the paradigm of synthetic knowledge." Capaldi, *supra*, at 126.

48. Deontology (Immanuel Kant) and utilitarianism (Jeremy Bentham and John Stuart Mill). *See* WHITE, CONTEMPORARY MORAL PROBLEMS, *supra* note 42, at 1-4.

49. FURROW, *supra* note 44, at 2-3.

> Normative ethical theories typically offer the promise of applying principles supported by a theory to particular cases of moral decision-making, thereby helping to discover which of our moral beliefs are justified and which are not. . . . The history of normative ethical theory displays a preoccupation with universality, objectivity, and the autonomy of ethical phenomena from other aspects of life . . . .

Id.

50. I owe this picture of contemporary moral theory to Dwight Furrow. He gives the term "anti-theoretical" to moral philosophers who reject the possibility of universal moral norms. *Id.* at xi-xii, 18.

51. Furrow terms these figures "non-foundationalists." By this he means philosophers working on alternative justifications for the kinds of claims made by normative moral theories who share a commitment to the claims but not to the presuppositions of normative theories. *Id.* at 1, 3.

52. Richard Rorty is notable exception. *See id.* at 19.

53. *See id.* at 4; Darwall et al., *supra* note 44, at 115. For the distinction between Analytic and Continental traditions in philosophy, see *supra* Part I.

prefer to concentrate on individual actors in isolation from their contexts;[54] in the other camp are moral philosophers trying to work out the relevance of those contexts to the moral status of individuals and individual actions.[55] Professor Wertheimer's view of parties to transactions which may or may not be coercive places him with theorists who concentrate on individual moral actors and who consider the context of actions and transactions irrelevant to judgments about the moral status of these events.[56] In one sense, those theorists who think social, economic, and historical context is irrelevant to moral considerations see moral situations as abstract from those contexts. Professor Wertheimer certainly seems to fall into this category.[57]

Second, theories in the two traditions often differ according to whether or not they maintain the possibility of formulating norms, imperatives, or other moral claims which are general or universal in application.[58] Many Continental moral philosophers reject such a possibility,[59] while scholars in the Ana-

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54. *See supra* note 42.

55. FURROW, *supra* note 44, at xiii (1995).

> The antitheory position is motivated by the perception that when moral agents think about moral questions, they do so not in terms of abstract principles with an aim to systematize some large chunk of moral experience, but in terms of concrete relationships with other people within the context of their understanding of those relationships, histories, and the institutions in which they are embedded. . . . To the extent that we think about principles and rules, they are viewed as emerging from the aforementioned concrete relationships.

Id.

Among the contemporary figures Furrow considers is Emmanuel Levinas, whose inquiry is driven by concerns about the relation of moral theory to history, in particular to the Holocaust. *Id.* at 140.

56. *See* WERTHEIMER, EXPLOITATION, *supra* note 11, at 8 (defining the "micro-level" of individual transactions as the "locus of exploitation" which is the proper object of moral concern); *id.* at 268-271 (distinguishing features of social, economic, and/or historical context from morally relevant features of individual consent).

> I do not think that we should say that hard circumstances constitute a defect in consent. . . . [W]e should not elide the distinction between problems in one's objective circumstances or background conditions in which choices are made and problems in the quality of choice that one is making given those background conditions.

Id. at 270; *see also* Wertheimer, *Remarks*, *supra* note 8, at 901 ("It is important to note that the injustice of B's background conditions must be distinguished from B's 'moralized baseline' with respect to A . . . ."). Wertheimer assigns features of the social, economic, and historical context to a theory of justice, reserving for moral theory features of individual choice and action. *See also* WERTHEIMER, EXPLOITATION, *supra* note 11, at 298.

> [T]here is a distinction between *taking advantage of unfairness* (or misfortune) and *taking unfair advantage of unfairness* (or misfortune). . . . [W]hen B's suffering is rooted in social injustice, it may (reasonably) be treated as misfortune by A, if A bears no special responsibility for causing or alleviating B's suffering.

Id. (emphasis in original) (citations omitted).

57. After the problem with technical terms, this aspect of Professor Wertheimer's theory is probably the single most important source of confusion for the Symposium, for in it he most resembles, albeit superficially, the classic doctrinalist who eschews consideration of the social, historical, political, and economic aspects of legal culture. *See supra* note 37.

58. FURROW, *supra* note 44, at xiii-xiv (indicating that normative and non-foundationalist moral theorists maintain the possibility of such claims while "anti-theorists" do not). *See also* Darwall et al., *supra* note 44.

59. *See* FURROW, *supra* note 44, at 133 ("Moral obligation and responsibility are . . . characterized in terms of local norms and concrete relations with familiar others, which must be articulated in particularistic terms not widely shared across communities or traditions."). *See also supra* note 55.

lytic tradition generally do not. Professor Wertheimer's development of his "characteristics of choice situations"[60] suggests that he thinks that there are aspects of transactions which guide norms for declaring these transactions coercive or non-coercive, norms which are general at least across American legal culture, and certainly across differences in the justice of "background conditions."[61] In this respect Professor Wertheimer's theory is more abstract than those which see moral claims as irreducibly specific to a particular social context.

Finally, this insistence by certain Continental theorists (as well as others) that moral claims can only be particular and relative has produced problems for the formulation of a notion of moral obligation which extends across contextual differences. That is, it becomes difficult to talk about how people in different social and economic contexts register as proper objects of moral concern.[62] This, in turn, has inspired some scholars to develop an account of the relation between moral actors and other people which is "transcendent" or unknowable but which nonetheless makes certain demands which function as moral obligations.[63] Such a moral theory is then both *more* and *less* abstract than its Analytic contemporaries, including Professor Wertheimer's theory, because while it rests on an assumption that moral claims cannot be abstracted from social or historical contexts, its solution to the problems generated by this assumption is so abstract it cannot be known or understood.

CONCLUSION

I hope that the variety in the uses of abstraction and among types of moral theory I have pointed to in these remarks, together with the little map of contemporary philosophical traditions, is of some help to interdisciplinary discussions in law and philosophy. Would that there were a moral to this story of the Symposium beyond the cautionaries "Watch out!" and "Take care!", but at this point, I believe, there is not.

60. *See* Wertheimer, *Remarks, supra* note 8, at 900.

61. *See supra* note 56.

62. FURROW, *supra* note 44, at 137 ("[I]t seems we are stuck with this parochialism if we wish to preserve the basic tenets of the anti-theory position.").

63. *Id.* at 143.

REMARKS ON COERCION AND EXPLOITATION

ALAN WERTHEIMER*

INTRODUCTION

I am delighted to be participating in this Symposium on coercion and exploitation[1]—topics that are near and dear to my heart.[2] In the interests of launching a preemptive strike in self-defense against those who will want to take me to task on one legal issue or another and also in the interests of full disclosure, I want to make clear that I am a political philosopher. I am not a lawyer. I have never attended a single class in law school. My oldest child is now a third-year student at Michigan Law School, but that's as close as I come.

So my offerings will be philosophical, not legal. In an effort to further reduce your expectations, thus reducing the gap between what you expect and what I offer, I want to say at the outset that my philosophical message will itself be largely deflationary. It will be filled with more distinctions than arguments. And the first distinction I shall make is to note that there are two ways in which my remarks will be deflationary.

Roughly speaking, there are two philosophical questions about coercion (let me bracket exploitation for the moment): (1) What counts as coercion? and (2) When are individuals or the state justified in using coercion? The second question is, of course, a central problems of political philosophy. These are the issues that we discuss under rubrics such as liberty, paternalism, moralism, and so forth. This is the topic of Mill's *On Liberty*[3] and Joel Feinberg's four volume treatise on the scope of the criminal law.[4] And this, I suspect, is the issue at stake in the session on Coercion and Confinement.

Although I am happy to enter discussions of those issues, my first deflationary point is that I shall have nothing to say here about the justification of

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1. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. (1997).

2. *See* ALAN WERTHEIMER, COERCION (1987). To the extent this paper draws heavily on COERCION, that portion is protected by copyright © 1987 Princeton University Press. *See also* ALAN WERTHEIMER, EXPLOITATION (1996); Alan Wertheimer, *Coercion and Exploitative Agreements*, AM. PHIL. ASS'N NEWSL. ON PHIL. OF L., Fall, 1994; Alan Wertheimer, *Consent and Sexual Relations*, 2 LEGAL THEORY 89 (1996); Alan Wertheimer, *Coercive Offers* (Dec. 1994) (unpublished paper delivered at the 1994 meeting of the Eastern Division of the American Philosophical Association in Boston) (on file with the author).

3. JOHN STUART MILL, ON LIBERTY (1947).

4. JOEL FEINBERG, HARM TO OTHERS (1984); JOEL FEINBERG, HARM TO SELF (1986); JOEL FEINBERG, HARMLESS WRONGDOING (1988); JOEL FEINBERG, OFFENSE TO OTHERS (1985).

coercion. Rather, I shall be interested in the first and seemingly less morally charged issue—namely, what counts as coercion and exploitation. I suspect that this is the question that is at stake in the sessions on coercive and exploitative bargaining and coerced confessions.

My second deflationary point is that I shall argue that the questions (and their facsimiles)—what counts as coercion? What is valid or meaningful consent? What is exploitation?—are much less important than they first seem. Let me say a bit more about this at the outset. A standard picture about the role of conceptual analysis with respect to topics such as coercion and consent goes something like this: we start with a principle that agreements are valid and/or should be permitted if they are consensual or voluntary.[5] By contrast, if an agreement is the result of coercion or is made under duress or fraud, then the agreement or decision is invalid, or we can justify prohibiting the formation of the agreement, *ex ante*. It is then suggested that to determine which agreements should be treated as invalid or prohibited, we should engage in an analysis of the concept of coercion (and related concepts such as fraud and consent). If such an analysis can, for example, tell us what counts as coercion, we can then identify the agreements that should be treated as invalid or prohibited.

I believe that this picture of conceptual analysis is mistaken. The concepts of coercion and exploitation provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that. The questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis. Inquires into the essence of coercion or exploitation will prove to be of limited help with respect to the substantive questions in which we are interested.

Consent as Morally Transformative

Let us begin by noting that the organizers of this Symposium are not, I believe, interested in coercion and exploitation as free standing concepts. This Symposium is not dedicated to conceptual analysis, per se. We are interested in coercion and exploitation because consent is typically morally and legally transformative—that is, it changes the moral and legal relationship between parties to an agreement and between those parties and others—and because coercion and exploitation may seem to threaten that moral transformation.[6] Let us note a few ways in which consent is morally transformative: B's consent may legitimate or render permissible an action by A that would not be legitimate without B's consent, as when B's consent to surgery transforms A's act from a battery to a permissible medical procedure. B's consent to transact with A provides a reason for others not to interfere with that transaction, as

5. This principle is, of course, only prima facie. There may be good reasons not to uphold or permit some uncontroversially voluntary agreements.

6. I borrow the phrase "morally transformative" from Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124 (1996). In what follows, I will not distinguish between moral and legal transformation.

when B's consent to let A put a tatoo on her arm gives C a reason to leave them be. And B's consent may give rise to an obligation to A. If B consents to do X for A, B ordinarily acquires an obligation to do X for A.

To say that B's consent is morally transformative is not to say that B's consent is either necessary or sufficient to change an "all things considered" moral judgment about A's or B's action. It may be legitimate for A to perform surgery on a delusional or unconscious B without B's consent. It may be wrong for A to perform surgery on B even with B's consent if the procedure is not medically indicated.[7] Similarly, we may think that exchanging money for sexual relations is wrong even if the prostitute consents to the exchange.[8] But this does not show that the prostitute's consent is not morally transformative. After all, the prostitute's consent to sexual relations with A eliminates one very important reason for regarding A's behavior as wrong, namely, that A had sexual relations with B without her consent. The prostitute's consent may provide a strong although not dispositive moral reason for not interfering with A's and B's behavior.

The Logic of Consent Arguments

To put the point of the previous section schematically, we are interested in the following sort of argument:

Major Premise: If, in response to A's proposal, B voluntarily consents to do X, then B's agreement to do X is binding or valid (or A and B should be permitted to enter into such agreements).

Minor Premise: B has not voluntarily consented to do X because A's proposal has coerced B to consent to do X.

Conclusion: B's agreement to do X is not binding or valid (or A and B should not be permitted to enter into such agreements).

Given the major premise, it seems that we must determine when the minor premise is true if we are going to know when the conclusion is warranted. For that reason, we may be tempted to think that an analysis of the concept of coercion will identify the criteria or necessary and sufficient conditions of coercion, and that empirical investigation can then (in principle) determine if those criteria are met. If the criteria are met, then the minor premise is true and the conclusion follows. If not, then the minor premise is false and the conclusion does not follow.

If things were only so simple. It is a mistake to think that we will be able to make much progress towards resolving the substantive moral and legal issues in which we are interested by philosophical resources internal to the concept of coercion (or consent). In the final analysis, we are always going to

7. For example, it may be wrong for a physician to accede to a beggar's request to have his leg amputated so that he can enhance his success as a beggar.

8. "It is a non sequitur, but a disturbingly common one, to argue from the premise that some act is bad because it is nonconsensual, to the conclusion that the same act, if consensual, is therefore good . . . ." Robin West, *A Comment on Consent, Sex, and Rape*, 2 LEGAL THEORY 233, 247 (1996).

have to ask: Given the facts that relate to issues of coercion, how should we think about the moral and legal status of a transaction or relationship? In that sense, I am squarely in the camp that maintains that the best account of coercion is normative. To say that coercion is normative or moralized is not—as some have thought—to say that it is vague or subjective or has no correct application. The antinomy of normative is empirical or value-neutral, not objective or precise.

In suggesting that coercion is essentially normative, I do not deny that it is possible to produce a morally neutral or empirical account of coercion that would allow us to determine whether B is coerced by reference to specific empirical criteria (such as B's state of mind). I do maintain that if we were to operate with a morally neutral account of coercion, we would have to go on to ask whether that sort of coercion renders B's agreement invalid and that we will be unable to answer that question without introducing substantive moral arguments. In the final analysis, it does not matter much whether we adopt a thin morally neutral account of consent or a thick morally laden account of consent. Either way, the point remains that we will not be able to go from a morally neutral or empirical account of coercion to interesting moral or legal conclusions without introducing substantive moral arguments. The only question (to paraphrase a commercial for motor oil) is whether we want to pay the moral price up front by including moral considerations within our account of coercion or pay the moral price after we have determined that A's proposal has coerced B but before we say that the agreement is invalid.

The Fallacy of Equivocation

Precisely because we can pack a lot or a little into our account of coercion, it is all too easy for a "coercion argument" to commit the fallacy of equivocation, where the meaning of coercion assumed by the major premise is not identical to the meaning of coercion in the minor premise, and thus the conclusion does not follow even though both the major premise and minor premise may be true (given different meanings of a word).

Consider a classic problem of political philosophy: Do citizens have a general (prima facie) obligation to obey the laws of society? A standard argument goes like this:

Major Premise: One is obligated to obey the laws if one consents to do so.

Minor Premise (Version-1): One who remains in his society rather than leaves thereby gives his consent to that society (Plato).[9]

Minor Premise (Version-2): One who benefits from living in a soci-

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9. Plato described the basis for this consent:

You have never left the city, even to see a festival, nor for any other reason except military service; you have never gone to stay in any other city, as people do; you have had no desire to know another city or other laws; we and our city satisfied you. So decisively did you choose us and agree to be a citizen under us.

PLATO, *Crito*, *in* THE TRIAL AND DEATH OF SOCRATES 52 (G.M.A. Grube trans., 1975).

ety gives his consent to that society (Locke).[10]

Conclusion: One who does not leave his society or benefits from living in a society has an obligation to obey its laws.

Is either version of the minor premise true? The problem is this: there may be a linguistically plausible sense in which one who accepts the benefits of one's government has consented to that government or in which one who remains in one's society has consented to remain in that society. In that sense, both versions of the minor premise may be true. But, even if that were so, the conclusion may not follow. We will have to determine if the type or strength of consent that figures in the major premise has been met in the minor premise. And it may not. Thus we could agree with Plato that there is a sense in which one who does not leave his society gives his consent, while also agreeing with Hume that it is not the sort of free consent that would justify the ascription of a strong obligation to obey the law.[11] We can make a similar point about Locke's view.

A similar point can be made about the concept of harm. Suppose we start from the Millian principle that the state can justifiably prohibit only that conduct that causes harm to others. The following questions arise: Does the psychic distress caused by hate speech count as harmful? Does trespass that causes no physical damage to one's property constitute a harm? Does a peeping-tom harm his target? Clearly there is a sense in which psychic distress caused by hate speech is harmful. As a matter of empirical psychology, it is simply untrue that "sticks and stones will break your bones, but names will never hurt you" (just as it is untrue that absence makes the heart grow fonder). And there is clearly a sense in which one has not been harmed by trespass which causes no physical damage, or by the peeping tom, particularly if the target is unaware of his voyeurism. But these observations will not tell us which activities can be legitimately prohibited by the state under the Millian principle.[12]

So we can opt for a morally neutral or moralized account of harm. We can opt for a morally neutral or neurological account of harm, but we will

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10. The benefits derived from society compel consent, according to Locke.

> [E]very man that hath any possessions, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment . . . whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT c. 8 § 119 (J.W. Gough ed., 3d ed. 1956).

11. Hume questions the consent to a society by one who remains in that society:

> Can we seriously say, that a poor person or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.

DAVID HUME, *Of the Original Contract*, *in* HUME'S MORAL AND POLITICAL PHILOSOPHY 363 (1948).

12. "[T]he question is . . . not what 'harm' really means, but what reasons of principle there are for preferring one conception to another. . . the question is not simply which is the better conception of harm, but which conception answers more adequately to the purposes for which the concept is deployed." JEREMY WALDRON, LIBERAL RIGHTS 119-20 (1993).

then have to go on to ask whether harm so defined should be prohibited and whether some acts excluded by that definition can be legitimately prohibited. We can opt for a moralized account of harm, say one in which one is harmed if one's rights or moral interests are violated. On this view, we could maintain that the psychic distress caused by hate speech does not count as a harm because it does not violate one's rights, whereas trespassing and voyeurism do count as harm because they violate one's rights to property and privacy.[13]

A similar danger of equivocation arises with respect to coercion. Consider Harry Frankfurt's example:

> The courts may refuse to admit in evidence, on the grounds that it was coerced, a confession which the police have obtained from a prisoner by threatening to beat him. But the prisoner's accomplices, who are compromised by his confession, are less likely to agree that he was genuinely coerced into confession.[14]

Was the prisoner's confession coerced? There is no reason to think that there must be a single acceptable answer to this question. The answer to this question will depend upon the sort of moral transformation that consent is meant to trigger. We may think that the sort of pressure to which the prisoner was subject may be sufficient to deprive his confession of legal validity. At the same time, and if there is anything like honor among thieves, the very same pressures may not be sufficient to excuse his betrayal of his accomplices. (We need not assume the prisoners are thieves; they may be political prisoners in a just cause). It will do no good to ask what appears to be a conceptual and empirical question: Was his confession coerced or not? Rather, we need to answer two moral questions: What sorts of pressures on prisoners to confess are sufficient to bar the introduction of the confession as evidence? and What sorts of pressures on prisoners are sufficient to excuse the ascription of blame by those to whom the prisoner has obligations of silence? These are irreducibly moral questions, not questions about the concept of coercion.

I have said much more about coercion than exploitation to this point. Whereas we are inclined to refer to some agreements as coerced, other agreements are more naturally characterized as exploitative. And I shall try to say something about the character of exploitative agreements. It is worth noting that whereas the moral force of coercion is relatively clear, as a coerced agreement is not binding, the moral force of exploitation is not clear, for it is not obvious what follows from characterizing an agreement as exploitative. But before proceeding further with an analysis of both exploitation and coercion, it will prove useful to get some more concrete examples in mind. So let me introduce some cases in very simplistic or stylized form.

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13. I am not maintaining that this is what we should say on a moralized account of harm, only that such an account allows us to make these distinctions.

14. Harry G. Frankfurt, *Coercion and Moral Responsibility in* ESSAYS ON FREEDOM OF ACTION 65 (Ted Honderich ed., 1973).

Cases

1. Extortion: A proposes to break the windows on B's store unless B agrees to hire A to collect B's garbage for an exorbitant fee. B agrees.
2. AZT: A owns the patent on AZT, a drug that offers some help to patients with AIDS. A proposes to sell a year's supply of AZT to B, who has AIDS, for $8,000. B agrees.
3. Enlistment: A proposes to offer B monetary compensation if B enlists in the army. Because B lacks any decent civilian career opportunities, B enlists.
4. Stripper: A proposes to hire B as a topless dancer. B, who has been admitted to law school, accepts A's proposal because she expects to earn up to $1,000 a night.[15]
5. Surrogacy: A, whose wife is infertile, proposes to pay B $10,000 to become impregnated with A's sperm through artificial insemination and waive custody rights to the child upon birth. B, who is not affluent, agrees.
6. Automobile: A, a used car dealer, turns back the odometer on a car and sells it to B for a price that B would not have paid if she had known the car's true mileage.
7. Organs: A, who suffers from a kidney ailment, proposes to buy one of B's kidneys for $25,000. B, a poor Egyptian with a wife and several children, accepts A's proposal.[16]
8. Psychotherapy: A, a psychotherapist, proposes to B, his patient, that they have sexual relations. Because B is in the grips of transference and is sexually attracted to A, B agrees.
9. Unfair Rescue: A, a tug, encounters a ship (B) in distress and proposes to take it in tow for a fee that greatly exceeds the normal market price for such services. B agrees.
10. Fair Rescue: A, a tug, encounters a ship (B) in distress and proposes to take it in tow for a fee that is no greater than the normal market price for such services and from which A makes only a modest profit. B agrees.
11. Lumber: There has been a hurricane in Florida. A, a lumber retailer, triples his price for lumber. B, who needs lumber to rebuild, pays A's price.
12. Drowning: A comes upon B, who is drowning. A proposes to rescue B if B agrees to pay A $10,000. A and B know that there are no other potential rescuers.
13. Lecherous Millionaire: B's child will die unless she receives expensive surgery for which the state will not pay. A, a millionaire, proposes to pay for the surgery if B will agree to become his mistress.
14. Experimentation with Prisoners: A (the state) offers B (a prisoner) various benefits, such as a reduced work schedule, a color television, higher quality food, or the likelihood of earlier parole, if B will allow a drug company to test

15. Nick Ravo, *Topless Bars for a Crowd in Pinstripes*, N.Y. TIMES, Apr. 15, 1992, at C1.
16. Chris Hedges, *Egypt's Desperate Trade*, N.Y. TIMES, Sept. 23, 1991, at A1.

the safety of a drug on B. B agrees.

15. Attractive Offer: A, a prestigious Ivy League university offers B (a full professor at a reputable state university) a large salary, a reduced teaching load, and her own secretary, if B will join university A. B accepts.

16. Surgery: A proposes to amputate B's leg for a fair fee. Because B will die unless she agrees to the amputation, B authorizes A to perform the surgery.

17. Plea Bargaining: A, a prosecutor, tells B that B can plead guilty to second degree homicide, in which case, the maximum punishment is 30 years, or stand trial for first degree homicide, conviction for which might result in execution. B pleads guilty to second degree homicide.

18. Norplant: A, a judge, tells B, who has been convicted of a drug offense, that he will place her on probation if she allows a court designated doctor to implant the contraceptive Norplant in her arm. B agrees.

19. Ticket Scalping: A buys a block of tickets to a rock concert for $50 and proposes to sell tickets to B for $200. Because B has no viable alternatives, B agrees.

20. Dance Studio: A, a dance instructor, gets B, a 60-year-old widow, to believe that she has talent for ball-room dancing, and proposes that B purchase $50,000 in dance lessons. Although the payment would require B to sell her home, B agrees.

21. POW: A, proposes to take B as a prisoner of war and provide benevolent quarantine, if but only if B agrees to give up fighting his captors. If B does not surrender, A will attempt to kill B as an enemy soldier. B accepts A's proposal.

22. Part-Time Professors: A, a university, proposes to pay B, an unemployed academic, $2,000 a section to teach a section (or sections) of basic writing, or French, or whatever. B agrees.

23. Unprofitable Employer: A, whose firm will go out of business unless he can reduce his labor costs, proposes to continue to employ B if B agrees to a reduction in her salary. B accepts.

Coercion and Exploitation: A First Cut

Which of these agreements are exploitative? Which of these agreements are coercive? Although I shall try to say something about both exploitation and coercion, in the final analysis I do not believe that much turns on whether we can legitimately say that one agreement or another is exploitative or coercive on some linguistically plausible account of these terms. Rather, the crucial questions concern the moral status of such agreements: Should they be prohibited? Should they be enforceable? Or does the description of the agreement as coercive or exploitative have some other moral force?

Let us begin with the two central concepts. Exploitation and coercion appear to have different foci. Whereas coercion refers to the formation of an agreement, exploitation seems to always include reference to the *substance* or *outcome* of an agreement. A wrongfully exploits B when A takes unfair ad-

vantage of B, but A can coerce B to agree to do X without exploiting B, as when A paternalistically coerces B to make an agreement that will serve B's interests but not A's.

Exploitation

Let us consider two dimensions of exploitative agreements: (1) the effect of the agreement on B's interests; and (2) the voluntariness of B's agreement.[17] If one considers the definitions of exploitation that have appeared in the philosophical literature, one finds disagreement on both dimensions. On some views, an agreement between A and B is exploitative only if it is harmful to B.[18] On other views, exploitation can be beneficial to the exploitee.[19] On some views, exploitative agreements are always coerced or involuntary.[20] On other views, exploitation can occur "despite the exploitee's fully voluntary consent to the exploitative behavior."[21] I think it would be a mistake to tighten up the criteria of exploitation prematurely. Indeed, if agreements are exploitative only when they are also harmful or coerced, exploitation would be of much less theoretical interest. We do not need to be moral rocket scientists to argue that harmful exploitation may be legitimately prohibited by the state or that coerced agreements are neither morally nor legally binding. By contrast, it is more interesting to consider whether we might be justified in prohibiting or refusing to enforce an agreement that is beneficial to B, that is not the result of a direct threat to B, and that B (rationally) wants to make.

For these reasons, I shall distinguish between harmful exploitation and mutually advantageous exploitation.[22] By harmful exploitation, I refer to agreements that are beneficial to A but are harmful to B. By mutually advantageous exploitation, I refer to agreements that are beneficial to the exploiter (A) and are also beneficial to the exploitee (B). In the language of economics, these agreements are Pareto superior: They leave both parties better off. If we reflect on the list of examples, it seems clear that whereas some allegedly exploitative agreements are harmful to the exploitee (as in Extortion), others seem to be beneficial to B, at least as contrasted with the alternative of non-agreement (Lumber). We say that the mutually advantageous agreements are

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17. I believe that exploitative agreements must also be advantageous to A, but I shall ignore that dimension of exploitation in this paper.

18. "Persons are exploited if (1) others secure a benefit by (2) using them as a tool or resource so as (3) to cause them serious harm." STEPHEN R. MUNZER, A THEORY OF PROPERTY 171 (1990).

19. For example, Andrew Levine states:

> An exploitative exchange is . . . an exchange in which the exploited party gets less than the exploiting party, who does better at the exploited party's expense. . . . [T]he exchange must result from social relations of unequal power . . . . Exploitation can be entered into voluntarily; and can even, in some sense, be advantageous to the exploited party.

ANDREW LEVINE, ARGUING FOR SOCIALISM 66-70 (1988).

20. "It is the fact that the [capitalist's] income is derived through forced, unpaid, surplus [wage] labor, the product of which the workers do not control, which makes [wage labor] exploitive." Nancy Holmstrom, *Exploitation*, 7 CANADIAN J. OF PHIL. 353, 357 (1977).

21. JOEL FEINBERG, HARMLESS WRONGDOING 176 (1988).

22. *Id.* at 176-87.

exploitative because we think that the content of the agreement is unfair or wrong.[23] Without prejudging whether our account of what makes a transaction fair is correct, we may think that a transaction is exploitative because the price that B must pay is too high (AZT, Rescue, Lumber) or perhaps because the compensation that B receives is too low (Surrogacy). In other cases, we may say that an agreement is exploitative because it involves the exchange of a good or service that should not be exchanged for money (Enlistment, Surrogacy, Organs, Lecherous Millionaire) or because we think that the service is degrading (Stripper).

It will prove similarly useful to distinguish between consensual exploitation and nonconsensual exploitation. By nonconsensual exploitation, I refer to agreements in which A coerces B (as in Extortion) or in which A's action inducing B's agreement suffers from a cognitive defect (as in Automobile, Dance Studio, and Psychotherapy). By consensual exploitation, I refer to those cases in which A does not threaten B with an adverse consequence should B refuse to agree and in which B's agreement represents a reasonable, non-distorted decision under the circumstances (as in Unfair Rescue). There will, of course, be controversies as to whether an agreement is harmful or advantageous to B or exploitative at all. Those judgments will require us to develop and apply criteria for harm and fairness. In my view, we can say that the agreement is harmful to B in Extortion and Automobile. And it is likely to be harmful in Psychotherapy. In all the remaining cases, it is at least plausible to argue that the agreements are beneficial to B, even if they are also exploitative. Whether an agreement is actually harmful will depend on factual inquiries, for example, the effects of surrogacy on surrogate mothers. It may also depend on moral inquiries, for example, whether an activity is degrading, whether degradation is a harm to the person who is degraded, and, if so, whether the harm of degradation exceeds the benefits to B, all things considered.[24] Moreover, whether an agreement that is mutually advantageous is also exploitative will depend on whether it is a fair agreement, for "high prices" are not necessarily "unfair prices." If A is demanding a fair price for AZT, given the research, development, and production costs of producing the drug, then there is no exploitation.[25]

Still, it might be argued that even to consider mutually advantageous and consensual transactions as exploitative is to fundamentally misconceive the nature of exploitation, that there can be no wrongful exploitation if both parties gain from and consent to a transaction. I do not want to quarrel over words or labels. If someone wishes to insist that exploitation must be harmful and/or nonconsensual, then we can say that the cases of mutually advantageous consensual but arguably unfair agreements are cases of "mexploitation" or shmexploitation or whatever. I am interested in the moral character of cer-

23. A moral defect in the distribution of benefits is, I believe, a necessary condition of exploitation. It may not be sufficient.

24. For example, even if a stripper is degraded and therefore harmed by her stripping, it is possible that the gains to her from the activity exceed the harm.

25. Of course, we may think that B should not have to pay A's price out of his pocket, even if A is not exploiting B.

tain sorts of transactions and relationships, whatever we want to call them. I believe, however, that we call at least some of these cases exploitative.

Coercion

There will be similar controversies as to whether B's agreement is nonconsensual. The voluntariness of B's agreement is clearly defeated by coercion in Extortion and fraud in Automobile. In Psychotherapy, the voluntariness of B's agreement may be compromised by transference. In Dance Studio, the voluntariness of B's agreement may be compromised by manipulation of B's beliefs and desires. In many of the remaining cases (AZT, Enlistment, Stripper, Surrogacy, Organs, Unfair Rescue, and Lumber), it is plausible to maintain that the transaction is consensual, at least in the sense that it is plausible to maintain that A does not propose to violate B's rights if B rejects A's proposal.

But that does not end things. There are consensual agreements and consensual agreements. In many of these cases, B agrees to A's proposal because B's situation is desperate or because B believes that she has no better alternative. And, it may be thought that at least some such agreements are rightly regarded as coerced. Consider B's decision to serve as a surrogate mother. Many commentators have argued that such decisions are coerced: "[A monetary offer] may be difficult for a person of little financial means to refuse and would, in that case, be coercive."[26] The opposing view maintains that surrogacy offers women an additional option to their present menu of choices, and that additional options are never coercive.[27]

Which view is correct? Rather than try to answer that question directly, I propose to take a different tack. I propose to temporarily put aside the questions as to what counts as coercion and exploitation. Instead, and with reference to the cases that I have described, I shall first enumerate several different characteristics of such proposals and acceptances in which we might be interested. I will then distinguish among several possible moral judgments we might make with respect to agreements and sketch some possible relations between the characteristics of proposals and acceptances and the various moral judgments. The crucial question, after all, is how certain specific characteristics of proposals and acceptances are related to certain specific moral judgments and not whether we call them coercive or exploitative.

26. Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood?*, *in* SURROGATE MOTHERHOOD 136, 146 (Larry Gostin ed. 1990). Rosemarie Tong adds "[t]o say that a woman 'chooses' to do this . . . is simply to say that when a woman is forced to choose between poverty and exploitation, she sometimes chooses exploitation as the lesser of two evils." Rosemary Tong, *The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements*, 21 J. OF SOC. PHIL. 40, 45 (1990). Martha Field argues that "to portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances . . . [fails] to take account of realities." MARTHA A. FIELD, SURROGATE MOTHERHOOD 27 (1990).

27. *See, e.g.*, Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 247-48 (1995).

Characteristics of Choice Situations

Status Quo

In some cases, such as Extortion, Unprofitable Employer, and Plea Bargaining, A proposes to make B worse off than B's present status quo or pre-proposal baseline if B rejects A's proposal. In other cases, A proposes to leave B in B's present status quo if B rejects the proposal. Because we often refer to the latter sorts of proposals as offers, most of the cases above can be described as offers rather than threats. This would include, among others, AZT, Enlistment, Stripper, Unfair Rescue, Fair Rescue, Attractive Offer, Surgery, Part-time Professor.

Moralized Baseline

In some cases, A proposes to violate B's rights if B does not accept A's proposal. In some cases, A proposes not to do what A has an obligation to B to do if B does not accept A's proposal. Let us say that in both such cases, A proposes to make B worse off relative to B's moralized baseline if B does not accept A's proposal. In other cases, A does not propose to make B worse off relative to B's moralized baseline if B rejects A's proposal. From this perspective, we might say that Plea Bargaining and Unprofitable Employer are cases in which A proposes to make B worse off than B's status quo but A does not propose to make B worse off than B's moralized baseline if B refuses A's proposal. By contrast, if A has an obligation to rescue B for free in Drowning, then A does propose to make B worse off than B's moralized baseline if B rejects A's proposal, although A does not propose to make B worse off than B's status quo if B rejects A's proposal. Setting B's moral baseline is often controversial. We can disagree, for example, as to whether A does have an obligation to rescue B for free in Drowning. Still, there is a distinction between the claim that a proposal would make B worse off relative to her status quo and the claim that a proposal would make B worse off than her moralized baseline.

Rationality

In some cases, B's decision to accept A's proposal is arguably irrational in terms of B's stable long-term preferences. This may occur when A employs deception as in Automobile and Dance Studio or manipulates B's judgment as in Psychotherapy. In addition, even if A does not intend to distort B's decision-making capacity, A's proposal may lead B to make a decision that cannot reasonably be expected to serve B's long-term interests or aims, perhaps because B underestimates the long-term costs of accepting A's proposal. This may or may not be true in Enlistment, Surrogacy, Organs, Experimentation, Stripper, Norplant, and Lecherous Millionaire. In still other cases, however, there is no reason to doubt the rationality of B's decision to accept A's proposal, and this includes cases that fall on both sides of the first two distinctions, for example, Extortion, AZT, Unfair Rescue, Fair Rescue, Drowning, Attractive Offer, Surgery, Plea Bargaining, Part-time Professor, POW, Unprofitable Employer, and Ticket Scalping. Just as there is no reason to

doubt the rationality of B's decision in Attractive Offer and Fair Rescue, there is no reason to doubt the rationality of B's decision in Extortion and Unfair Rescue.

No Other Rational Choice

In some cases we may say not only that B is acting rationally or reasonably in accepting A's proposal, we may say that A has no other rational choice but to accept A's proposal. This might be true in Extortion, AZT, Unfair Rescue, Fair Rescue, Lumber, Drowning, Surgery, POW, and Attractive Offer. In other cases, we may think that while it might be reasonable for B to accept A's proposal, it may also be reasonable for B to refuse. This might be true of Enlistment, Stripper, Surrogacy, Organs, Lecherous Millionare, Experimentation, Norplant, Part-time Professor.

Desperation

In some cases, B's status quo is arguably desperate, for example, AZT, Organs, Unfair Rescue, Fair Rescue, Drowning, Surgery, POW, Lecherous Millionare. In other cases, B's status quo is not desperate, but it is arguably not good, for example, Enlistment, Surrogacy, Part-time Professor, Unprofitable Employer. In still other cases, there is no reason to think that B's status quo is objectively unsatisfactory, for example, Stripper, Automobile, Attractive Offer, and Ticket Scalping. Note that some cases in which B has no rational choice but to accept A's proposal are ones in which B's present situation is desperate, but not in all (as in Attractive Offer).

Unjust Background Conditions

In some cases, B's status quo is unjust; in other conditions, it is not. Whether this is so will, of course, depend upon a theory of justice. In any case, the injustice of B's status quo may be related to but is independent from desperation. Thus, B's status quo is desperate but not obviously unjust in Surgery, Drowning, Unfair Rescue, Plea Bargaining, POW, and Lecherous Millionare. B's status quo in Enlistment and Surrogacy might be unjust, even if it is not desperate, depending upon whether people would be in B's status quo situation in a just society. It is important to note that the injustice of B's background conditions must be distinguished from B's "moralized baseline" with respect to A: Whereas justice may require that society place B in a better status quo, it may not require A to do so.

Fair Terms

In some cases, the terms of the transaction may be fair on some plausible criterion of fairness, for example, Stripper, Fair Rescue, Surgery, POW, Plea Bargaining. In some cases, such as Unprofitable Employer, we may think that A's proposal is not "fair" by some independent standard, but A may not be in a position to make a better proposal (although here we may have to rethink our conception of fairness). By contrast, in other cases, the terms of the transaction may be unfair and A may well be in a position to make a better proposal, as in, for example, Unfair Rescue, Drowning, Part-time Professor, Ticket Scalping, and AZT. Let me note here that while "equal utility gain"

might be advanced as a criterion of a fair transaction, I believe that this criterion is mistaken. The exploitee typically gains more utility from a transaction than the exploiter. Indeed, it is precisely because the exploiter stands to gain relatively little from the transaction that he is able to drive what we may take to be an exploitative bargain.

Incommensurability and Commodification

In some cases, A's proposal may ask B to choose between goods that should not be treated as commensurable or treated as commodities, as in, for example, Stripper, Surrogacy, Organs, Lecherous Millionare, Experimentation, and Norplant. In saying that A's proposal gives rise to a problem of incommensurability or commodification, I do not mean that B might not reasonably regard herself as better off if B accepts A's proposal; I mean simply that A's proposal requires B to exchange one good (e.g., money, better prison conditions, probation) for another good (bodily exposure, procreational labor, organs, sexual services, bodily risk, non procreation) that ought not to be exchanged for that good.

Rationality and All the Others

Before going forward, I want to stress that the *rationality* of B's decision is entirely separable from all of the other criteria (except the no other rational choice criterion). That B will be worse off than B's status quo if B rejects A's proposal, or that A proposes to violate B's rights (or to do less than A has an obligation to do) if B rejects A's proposal, or that B chooses under considerations of desperation, or that B chooses under unjust background conditions, or that the terms of the proposal are unfair—*none* of these considerations defeat the claim that B may rationally choose to accept A's proposal. I do not deny, of course, that A's deception or manipulation or B's background conditions themselves may lead B to irrationally accept A's proposal, nor do I deny that such irrationalities compromise the voluntariness of B's decision and may justify prohibiting such proposals or invalidating the acceptance of such proposals. This would be most obviously true in cases such as Automobile, Dance Studio, and Psychotherapy, and might also be true of cases such as Surrogacy, Organs, Experimentation, and Norplant. I do want to claim that it is important to distinguish between the cases in which A has acted wrongly because his proposal distorts the rationality of B's choice and the cases in which A acts wrongly because he creates a certain objective situation for B, but where B acts perfectly rationally given that objective situation (as in Extortion). To anticipate two topics that we will be discussing later on in this Symposium, there is no reason to think that plea bargaining typically compromises the rationality of B's decision to accept a plea, whatever else we may want to say about it. By contrast, there may be reason to think that behavior that results in allegedly coerced confessions does compromise the rationality of B's decision to confess, putting aside other objections to such behavior.

Moral Judgments

There are several different moral claims that we might want to advance with respect to agreements that are described as coerced or exploitative. Here are three or four:

Condemnation

It is wrong for A to make some proposals. This is certainly the case with respect to those cases in which A proposes to render B worse off than B's moralized baseline if B rejects A's proposal, as in Extortion and perhaps in Drowning. But we might well regard A's proposal as *wrong*, even if A does not propose to violate B's moralized baseline if B rejects A's proposal. This might be true when A proposes unfair terms (as in AZT, Unfair Rescue, Lumber) or violates notions of incommensurability or commodification, as in Stripper, Lecherous Millionare, Organs, and Norplant.

Prohibition and Invalidation

In some cases, we think it justifiable to prohibit A from making proposals, or we may regard the acceptance of the proposal as invalid or not binding on B. This is most obviously so in the paradigmatic cases of coercion such as Extortion, in which A proposes to render B worse off than B's moralized baseline if B rejects A's proposal. The interesting question is whether there are reasons to prohibit proposals which would not violate B's moralized baseline if rejected, and to treat as invalid agreements that are advantageous to B—if (for example) the terms are unfair or they are made under unjust or desperate background conditions. It is worth emphasizing here that there may be relatively little distance between prohibition and invalidation. It may be thought that we can allow A to make a proposal but not treat B's acceptance as binding. This suggestion is often made with respect to commercial surrogacy.[28] But that solution will generally prove to be unstable. For if A knows that B's acceptance will not be treated as valid and binding, the transaction will typically not occur, and bracketing whatever interests A may have in the matter, the present point is that if the transaction does not occur, then B will not obtain the benefit from the transaction that she sought.

There are at least three different sorts of reasons that might be offered for the prohibition or invalidation of mutually advantageous consensual transactions. First, it is possible that if we prohibit or refuse to enforce grossly unfair transactions, then A will propose fair (or less unfair) terms rather than choose not to transact with B. This will often occur when A is in a position to secure monopoly rents as in AZT, Unfair Rescue, Lumber, and may even apply to cases, such as Ticket Scalping, when B's position is neither unjust nor desperate nor even unfortunate. We can refer to this as *strategic intervention*.

Second, we may consider prohibiting or refusing to enforce certain trans-

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28. *See supra* note 26.

actions not because of their effects on the parties to the transaction but because of their effects on third parties. It is, for example, argued that pornography has harmful effects on virtually all women because it reduces their perceived value as persons, even if pornography is not harmful, all things considered, for those women who are portrayed in pornography and who are compensated for their services.[29] Similarly, it may be argued that permitting or enforcing transactions such as Surrogacy would have harmful effects on women as a class, because such agreements reinforce inequalities of gender, although those transactions might not be harmful, all things considered, to the surrogates themselves, who are compensated for their services.[30]

Third, we may consider prohibiting or refusing to enforce certain transactions not because it would be clearly better for B or for third parties, but because such transactions are immoral, for reasons involving commodification or incommensurability. Such moralistic or perfectionist arguments for prohibition are sometimes made with respect to case such as Stripper, Organs, Surrogacy, Lecherous Millionare, Experimentation, and Norplant. Note that unlike strategic intervention, which seeks to encourage a transaction between A and B on fairer terms, moralistic arguments typically maintain that A and B should not transact at all—even if B might reasonably regard herself as better off if the transaction were to occur.

Background Injustice

In some cases, we may be less concerned with criticizing or prohibiting A's proposal than with calling attention to the injustice or wrongness of the conditions under which it is rational for B to accept A's proposal, and with arguing for the repair of those conditions. It is, however, of capital importance to distinguish arguments for the repair of background conditions from arguments for prohibiting transactions given those background conditions.

SUMMARY AND CONCLUSIONS

In the way of summarizing and concluding these remarks, I want to make three general points. The first general point is that the notions of coercion and exploitation can be used to describe several quite distinct worries about proposals and acceptances. For example, I have argued that there is an important distinction between those proposals that distort the rationality of B's decision and those in which B acts rationally and to her own benefit under the objective conditions in which she finds herself. I have also argued that there is an important distinction between those cases in which the alleged coerciveness of A's proposal turns on whether A proposes to make B worse off than B's

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29. "The mass production of pornography universalizes the violation of the women in it, spreading it to all women, who are then exploited, used, abused, and reduced as a result of men's consumption of it." CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 247 (1989).

30. As Debra Satz puts it, "[Surrogacy] contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal treatment of women." Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107, 123-24 (1992).

moralized baseline (as in Extortion) and those in which A acts exploitatively because he takes advantage of unjust or desperate background conditions (as in Lumber), but where A does not propose to make B worse off than B's moralized baseline if B rejects A's proposal and where A's proposal does not distort B's decision-making capacity.

The second general point is that the moral upshots that stem from some worries about transactions may well be different from the moral upshots that stem from other worries. Let us assume, for the sake of argument, that the phrase "coercive proposals" can legitimately be used to describe proposals to violate B's moral baseline, such as Extortion and Drowning, but that it can also be used to describe proposals and acceptances made under conditions of desperation or injustice, such as Surgery, Organs, and Experimentation, but where A would not violate B's moral baseline by making no proposal at all. Still, it does not follow that we should prohibit proposals or invalidate acceptances on grounds of coercion in the latter cases, just because we should prohibit proposals or invalidate acceptances on grounds of coercion in the former cases. To press this point a bit further, consider the following argument:

1. If a proposal is coercive, then its acceptance is not binding.
2. Proposal X is coercive because A threatens to violate B's moralized baseline if B rejects A's proposal.
3. Proposal Y is coercive because, say, its acceptance stems from desperation or unjust background conditions.
4. Therefore, just as the acceptance of Proposal X is not binding on B, the acceptance of Proposal Y is not binding on B.

The problem with the argument is that the characteristics of the type of proposal that underlies the coerciveness assumed by (1) and true in (2) may be quite different than the characteristics that underlie the coerciveness of proposals assumed by (3). Thus (4) does not follow from these premises, even though (2) and (3) are both true, given their different accounts of coercive proposals. Such arguments run the risk of falling into the fallacy of equivocation.

My final general point relates to those proposals that are thought to be coercive because they arise out of desperation or injustice. And here I wish to make three points. First, our propensity to worry about certain transactions may well be an important indicator that the background conditions that give rise to those transactions should be repaired. Second, that B accepts A's proposal under conditions of desperation or injustice signifies *nothing* with respect to the moral quality of A's proposal and signifies *nothing* with respect to whether A's acceptance of B's proposal should be regarded as valid or binding. Recall Fair Rescue, Surgery, and POW. In all of these cases it is arguable that B's status quo is so desperate that B has no viable alternative but to accept A's proposal. But there is nothing obviously wrong with A's proposal in any of these cases, and I can see no reason not to regard B as bound by his acceptance of A's proposal. How to determine when agreements born of desperation or injustice should and should not be treated as valid is one of the more important challenges presented by such agreements. Third, whatever our

concerns about the unjust or desperate background conditions under which transactions are made, we must still decide—as a matter of *non-ideal* theory—whether we want to prohibit or invalidate those transactions that do occur under these conditions, as for example, in Organs. For when the day is done, and on the assumption that *A* is not required to repair B's background conditions, we must decide whether B should be permitted to engage in a transaction with A that B reasonably regards as beneficial to B, particularly given that B may reasonably regard efforts to prohibit or invalidate such transactions as adding insult to the injury of her background conditions. We can call A's offer coercive and/or exploitative, but such labels will not resolve that moral problem.

Having said that, it does not follow that the best moral answer is always to allow A to propose and B to accept any proposal that would be advantageous to B and rational for B to accept. For reasons I have noted in my reference to strategic intervention, it would often be better for B, ex ante, if A were not allowed to make certain proposals to B and if B were not bound by any such acceptance. And that suggests one plausible approach to determining when A should be permitted to make a proposal and when B's acceptance of that proposal should be regarded as binding, namely, to ask whether, ex ante, B would want A to be permitted to make such a proposal and would want to be held to the terms of his acceptance, ex post. For example, I think that B might well think that if he were to find himself a soldier in the position of being killed or surrendering, he would like A to be able to take him as a POW, and similar things could be said about the offer of life-saving surgery. On the other hand, it is less clear what would be said about Norplant, or Organs, or Experimentation, or Stripper. Again, to say it is less clear is to say it is less clear. Some regard these as easy cases for prohibition. I do not. In any case, if I am right, conceptual analysis of notions such as coercion and exploitation will be of little help.

MORALIZED THEORIES OF COERCION: A CRITICAL ANALYSIS

JOHN LAWRENCE HILL*

There is an old story about a law professor, an appellate court judge and a trial judge who go pheasant hunting together. The law professor is the first to take aim at a bird he believes to be a pheasant. But he is not certain that it is, indeed, a pheasant. As he trains his sight on the creature, he begins to question whether his concept of pheasant-ness is really simply a false construction, a manifestation of some mode of false legitimation, and proceeds to deconstruct the concept of the pheasant to determine whether there really is such a thing as a pheasant for, if there is not, then this bird could not possibly be one and so . . . And, before the law professor has lingered long on his hyper-Cartesian self-indulgence, the bird takes wing.

Next, the appellate court judge spots the bird. As he takes aim, he too questions the nature of the creature. Unlike the law professor, however, the appellate judge has a far more pragmatic three-part test by which to determine whether this bird is, in fact, a pheasant. He first notes its color, then its wing markings, and finally its tail plumage, comparing these with the requisites of the same three-part test. Again, however, before he has completed the analysis, the bird flies off.

Finally, the trial judge spots a bird he believes may be a pheasant. Almost instinctively, and with a celerity that leaves his two companions in hushed embarrassment for his impetuousness, he takes aim and fires, downing the bird instantly. Then, and only then, the trial judge asks himself, "I wonder if that was a pheasant?"

The tale of coercion is not unlike the story of the pheasant. While law professors (and philosophers) struggle to understand the nature of, and justification for, coercion, laymen (and trial court judges) appear to have a more or less cohesive notion of coercion and duress. As with so many other legal concepts, however, the *terra firma* of pre-analytic intuition appears to evaporate into a miasma of self-referential skepticism the closer we examine the nature and *raison d'etre* of coercion. Better to shoot from the hip than to go small game hunting for some Deeper Understanding.

In his book, *Coercion*,[1] the political philosopher Alan Wertheimer undertakes the most exhaustive overview of the legal and philosophical terrain relevant to the issue of coercion of which I am aware. Roughly the first half of the book examines the contours of the concept of coercion as it has developed

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1. ALAN WERTHEIMER, COERCION (1987).

in diverse substantive legal areas including contract law, criminal law, tort law and constitutional law, among others.[2] Throughout this portion of the book, Wertheimer develops an account of the way in which the concept is employed in these various doctrinal areas. Then, in the second half of the book, he seeks to develop a philosophical defense for what he describes as a "moralized" theory of coercion.[3]

While the following is an overview and critical analysis of Wertheimer's moralized theory of coercion, many of the conclusions will be relevant to moralized theories as a class. Furthermore, while Professor Wertheimer contrasts his "fully moralized" theory with partially moralized accounts, I will discuss the latter as a prelude to the former by way of comparing moralized accounts with the other prevailing theory of coercion, which views coercion as the product of an overborne will. In sum, I hope that the analysis here will be helpful in thinking about different species of moralized accounts of coercion generally.

Part I of this Article briefly lays out the taxonomy of various theories of coercion and then describes Wertheimer's theory. Part II of the piece analyzes and critiques moralized accounts generally, with particular emphasis upon Wertheimer's version of the moralized theory. Finally, Part III sketches the departure point for an alternative to both moralized theories and the more traditional accounts which explain coercion as a function of the overborne will.

PART I

There are two prevailing theories which seek to explain what coercion is and why victims of coercion are permitted a defense for their acts. First, there is what I will call the "traditional" theory of duress, which can be traced to the writings of Aristotle,[4] and which received further explication at common law in Blackstone's Commentaries.[5] The traditional theory views coercion as an overcoming of the will of the victim such that the resulting action is viewed as unfree, involuntary, or against one's will.[6] Thus, defenders of the traditional account tend to conceptualize coercion as a type of excuse, rather than as a justification, because the underlying rationale for the defense is that the coerced actor is not responsible for her act.[7] Though there is increasing skepti-

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2. *Id.* at pt. 1, *Law.*

3. *Id.* at pt. 2, *Philosophy.*

4. ARISTOTLE, *Ethica Nicomachea*, *in* THE BASIC WORKS OF ARISTOTLE 935 (Richard McKeon ed., 1941).

5. William Blackstone, *Commentaries on the Law of England*, bk. IV, ch. 2 (1765). Blackstone summarized the rationale underlying all excuses, including duress, as "the want or defect of will." *Id.* at 21.

6. *See* John Lawrence Hill, A Utilitarian Theory of Duress (forthcoming 1998) (presenting a discussion and critical analysis of the traditional theory).

7. The distinction between excuse and justification defenses has been the subject of considerable scholarly analysis. The distinction has been cast in terms of the difference between condoning an act (justification) and holding that, while the act is otherwise morally or legally impermissible, the actor is not morally or legally responsible for its commission (excuse). *See* Kent Greenawalt, *Distinguishing Justifications From Excuses*, LAW & CONTEMP. PROBS., Summer

cism as to the validity of the traditional theory of coercion among philosophers and legal commentators,[8] it remains the prevalent explicit rationale among contemporary judges in deciding actual cases.[9]

In contrast to the traditional theory, moralized accounts of coercion maintain that legal claims predicated upon duress are at least partially a function of normative judgments about the nature of the situation and the right of the victim to respond in a certain way. In other words, a claim of duress is not simply a legal conclusion drawn from empirical premises concerning the psychological state of the actor—i.e., that the actor did not act voluntarily—as with the traditional theory. Rather, the determination that a particular case is coercive may flow from antecedent moral convictions that the putatively coerced actor possessed a kind of moral privilege to yield to the threat, or that no person should have to resist a similar threat. In sum, the defender of a moralized theory of coercion need not maintain that coerced acts are qualitatively different, with respect to the standpoint of the psychological state of the victim of coercion, from uncoerced acts. All that is absolutely necessary for the moralized account is to maintain that the victim's predicament is *morally* different from that of the uncoerced actor—that it would not be fair to hold the victim of coercion responsible for his act irrespective of whether the coerced act is "voluntary."

We can further distinguish between partially and radically moralized theories of coercion. Partially moralized theories are those that persist in utilizing some empirical criterion—typically the concept of voluntariness—to assess the coerciveness of a situation, but use some normative criterion in drawing lines that serve to distinguish the exculpatory from the non-exculpatory. Partially moralized theories tend to conceptualize voluntariness either as a hybrid, half-normative, half-empirical construct or, what might amount to the same thing, as an empirical state that occurs in varying quantities, depending upon the situation. Voluntariness might then be analogized to concepts such as quickness or health, which permit qualitative comparisons on the basis of facts (e.g., the speed of a process or the physical condition of a subject, respectively) but which employ a baseline normative criterion before a thing can be considered quick, healthy, or voluntary.

1986, at 89 (discussing the distinction critically).

8. *See, e.g.*, P.S. ATIYAH, PROMISES, MORALS AND THE LAW 23 (1966); WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 433 (2d ed., 1986); WERTHEIMER, *supra* note 1; GLANVILLE WILLIAMS, CRIMINAL LAW 755 (2d ed., 1961). *But see* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 830-31 (1978) (arguing that the traditional model is an accurate way of stating the basis for duress).

9. *See* MODEL PENAL CODE § 2.09(1) (1962) (using the language of the traditional model, albeit with an objective standard). The Code states that "[i]t is an affirmative defense that the actor engaged in the conduct . . . because he was coerced to do so by the use of, or a threat to use, unlawful force . . . which a person of reasonable firmness in his situation would have been unable to resist." *Id.*

The emphasis upon exculpatory, rather than justificatory, analysis is clear in contemporary case law. For example, one recurring issue is whether the threatened harm was imminent enough to warrant a defense. *See, e.g.*, State v. Toscano, 378 A.2d 755 (N.J. 1977) (permitting the defense even where the threat is not imminent). This makes clear that modern courts continue to examine the effects of a coercive threat upon the actor, rather than a "lesser evils" weighing of the relative harms endemic of the threat and the offense, respectively.

A recent example of a partially moralized theory is found in the work of Professor Joshua Dressler, who argues that:

> In short, duress is not like other excuses. The excusing basis is not merely empirical, but primarily normative. Unlike insanity, infancy and intoxication, the issue is not simply whether, as an empirically-verifiable matter, the actor lacked volitional or cognitive capacity . . . Duress excuses when the available choices are not only hard, but also unfair.[10]

He goes on to argue that duress excuses when the defendant "lacked a fair opportunity to avoid acting unlawfully."[11] Fairness of opportunity is defined by reference to an objective standard: the question to be asked is whether, "in light of the nature of the demand and the expected repercussion from noncompliance, *we could fairly expect a person of nonsaintly moral strength to resist the threat.*"[12]

It might be objected here that Dressler's theory is entirely normative in that he utilizes an objective standard that takes no account of the subjective psychological state of the actor. Indeed, where an objective standard is interpreted as saying simply, "The law will not hold a person responsible for the choices made under a certain range of choice options because we think this would be unfair," the standard would be completely moralized. This is because the prescriptive justification for the theory has to do with normative concerns regarding the fairness of the options rather than factual concerns about the volitional state of the actor.

For his part, Professor Dressler does not appear to go this far. He states that the exculpatory nature of duress is not "merely empirical," implying that it is partially empirical.[13] Moreover, the objective standard he proposes possesses an empirical component insofar as the test for coercion is measured by asking how much pressure the ordinary person—the person of nonsaintly moral strength—should be able to endure. To put it differently, while the move to an objective standard, here as in other legal contexts, is made for purposes of uniformity and because of inherent problems of proof in assessing the validity of subjective accounts of a person's own mental states, the basis for the objective standard in Dressler's theory is firmly rooted in psychological facts regarding the ability of the actor to resist. In sum, Dressler's theory is partially empirical: according to his view, coercion still has something to do with the victim's capacity to resist a particular threat. It is also, however, normative in that an objective standard is used to define the baseline by which coercive situations are distinguished from the non-coercive.

In contrast to partially moralized theories, radically moralized theories of coercion eschew any references to the voluntariness or freedom of particular acts, at least where voluntariness is defined as an empirical state reflecting the

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10. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits* 62 S. CAL. L. REV. 1331, 1365 (1989).
11. *Id.*
12. *Id.* at 1367 (emphasis in original).
13. *Id.* at 1365.

actor's psychological capacity to resist acting.[14] They view coercion not as a function of the inner (moral-psychological) state of the actor, but as a normative assessment of the external options open to the actor—i.e., whether it is fair to hold a person responsible for an act given the range of alternatives available to him or her. As such, radically moralized theories focus upon such explicitly moral questions as whether the putative victim had a privilege to succumb to the alleged coercive proposal, whether the proposal itself was immoral, or whether persons under similar circumstances should be excused for acts committed under like conditions.

Wertheimer begins his analysis and defense of a radically moralized theory of coercion by examining the relationship between coercion and voluntariness.[15] He draws a tripartite distinction between cases where there is an absence of volition, as in instances of physical compulsion, cases of defective volition, such as where the actor is insane, and cases of "constrained volition" characteristic of duress.[16] While these are the three senses in which the term "involuntariness" is used in common parlance, Wertheimer argues that there are important moral differences among these cases.[17] Most particularly, he suggests that the first two senses of the term represent empirical states of affairs reflecting the psychological condition of the actor.[18] By contrast, involuntariness, in the sense of constrained volition, is basically normative in nature.[19] Moreover, the first two senses constitute exculpatory conditions, while the constrained volition endemic to situations involving duress operates as a type of justification.[20]

Wertheimer's rejection of the traditional theory, which he calls the "moral will theory" of duress,[21] begins with the classification of duress as a type of justification.[22] Defenders of the traditional view of duress necessarily must conceptualize duress as a type of excuse: where duress is characterized as the overcoming of the victim's will by the coercive stimulus, the rationale for duress is quintessentially exculpatory, rather than justificatory.

Wertheimer characterizes coercion as an agent-relative justification, thereby distinguishing duress from necessity, a justification that he views to be agent-neutral.[23] This permits him to maintain that duress is a justification in the face of the most convincing argument to the contrary—namely, that duress is sometimes available in situations which are not normally viewed as justified. More specifically, acts are usually justified on the ground that the act

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14. As we shall see, there are inherent ambiguities with respect to the use of the term "voluntary." *See infra* notes 16-20 and accompanying text (discussing Wertheimer's "rationalized" definition of voluntariness); *see also infra* Part III (discussing two other senses of the word "voluntary").

15. WERTHEIMER, *supra* note 1, at 3-5.

16. *Id.* at 9.

17. *Id.* at 9-10; *see id.* at 46-48 (discussing the implications of void and voidable contracts).

18. *Id.* at 164.

19. *Id.* at 31.

20. *Id.* at 165-69.

21. *Id.* at 305.

22. *See generally id.* at 287-306 (discussing parallels of coercion in morality with coercion in the law).

23. *Id.* at 168.

committed produces less harm than what would have occurred in the absence of the act. Duress, however, is sometimes permitted even where the act leads to greater harm than what would have otherwise resulted.[24] Wertheimer responds by arguing that the competing harms must be evaluated from the standpoint of the actor, rather than from a morally neutral vantage point.[25] It is in this sense that he views duress as an agent-relative justification.

The heart of Wertheimer's theory consists of the observation that coercion claims require that a two-part test be satisfied. Throughout his exegesis of various areas of substantive law, Wertheimer argues that the same two-part analysis underlies the law's treatment of coercion, which he dubs the "proposal prong" and the "choice prong," respectively.[26] The proposal prong requires that we ask whether the putatively coercive proposal, typically a threat, is immoral. The choice prong requires that we examine the choice of options with which the victim is faced to determine whether he should be held responsible for the resulting choice. Each of these prongs must be "moralized" in the sense that deciding whether the proposal is immoral and the choice is unfair are overtly normative assessments. The proposal and choice prongs are individually necessary and jointly sufficient to a determination that a particular act was coerced: coercion requires that the proposal is immoral *and* that the choice is an unfair one to expect someone to make.

To take what is perhaps the paradigmatic example of coercion—the case of the gunman offering the pedestrian a "choice" between his money and his life—the analysis would permit a finding of coercion based upon the antecedent convictions that such a threat (the "proposal") is immoral and that the range of options from which the victim must choose (i.e., his money or his life) is not a fair set of alternatives. Other cases raise a plethora of more subtle questions which require normative answers. These include such hotly debated questions as whether offers, in contrast to threats, can ever be immoral in the sense that they may be said to be coercive.

The answers we give to questions such as these—and they are ultimately normative answers, he argues—will shape the contours of our definition of coercion. As Wertheimer notes, however, there is a sense in which our view of coercion must precede the answers we give to these questions. In other words, we must have reached a conclusion about whether a particular offer can be "coercive" before we can decide that the proposal prong can be satisfied by an offer. Thus, the radically moralized theory does not afford us a straightforward deductive proof for coercion claims without a kind of logical circularity. Wertheimer acknowledges this, but argues that there simply are no viable alternatives insofar as the traditional theory is unworkable.[27]

24. One example of this is the recent abrogation of the "no murder" rule. At common law, duress was not permitted as a defense to murder. More recently, however, the Model Penal Code and a number of state decisions have permitted the defense in cases of murder. *See* Dressler, *supra* note 10, at 1370-74 (arguing that the recent elimination of this common law limitation in the Model Penal Code evinces the exculpatory nature of duress).

25. WERTHEIMER, *supra* note 1, at 168-69.

26. *Id.* at 30.

27. *See id.* at 8 (arguing that, if it is workable, an empirical theory would be more attrac-

Throughout the work, Wertheimer maintains that coercion claims are highly contextualized.[28] In the most obvious sense of the term "contextual," the idea that coercion may vary from context to context is an unremarkable one. Where this is interpreted to mean simply that some contexts or situations present coercive conditions while others do not, the statement is obviously true. But Wertheimer means more than this. For example, he cites the example of a prisoner who confesses to a crime after the police threaten to beat him.[29] He argues that the courts may decide that the threat was coercive and, thus, that the confession should be excluded from evidence, but that the prisoner's accomplices may not reach the same conclusion.[30] He then asks whether both the courts and the accomplices can be correct, and answers:

> Not if we assume that, barring some metaphorical uses of the term, the truth conditions of a coercion claim are always the same. But if, as I believe, the truth conditions of a coercion claim can vary with context, then the courts and the prisoner's accomplices may both be right.[31]

This response raises fundamental questions about whether Wertheimer's theory is, in any sense, determinative or, to put it slightly differently, whether it provides any prescriptive guidance in the sense that it tells us when a given set of conditions is coercive and when it is not. Part of the difficulty stems from the ambiguous use of the term "contextual." If by saying that "coercion is contextual" we mean that each viewer may decide for himself whether a particular situation is coercive, this will have profound implications for whether the theory can be viewed to be determinative. We will have a good deal to say about this in Part II. For now, it is worth noting that moralized theories are not all necessarily "contextual," at least if this is what Wertheimer means by the term.

Finally, a word is in order concerning Wertheimer's theory of the relationship between coercion and voluntariness. It might be surprising that Wertheimer has—or thinks he *needs*—such a theory since the major thrust of his book is to argue in opposition to the traditional theory of coercion. In other words, since Wertheimer argues that coercion has little to do with the effect upon the will of the actor, a discussion of coercion and voluntariness might appear unnecessary at best, and might possibly be viewed to undermine his central thesis.

Wertheimer's response to all this is to argue that questions of voluntariness may indeed be relevant to the issue of coercion when voluntariness is itself construed as a fundamentally normative concept.[32] Wertheimer explains the connection between voluntariness and coercion in the following manner: "[T]he argument will be that one acts voluntarily when one

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tive).

28. *See id.* at 179-91.
29. *Id.* at 181.
30. *Id.* at 181-82.
31. *Id.*
32. *Id.* at 301.

acts (or should act) from certain motives or that one acts voluntarily when the factors that define one's choice situation stand in a certain relation to the principles that one does (or should) accept."[33] More specifically, one acts voluntarily when she acts pursuant to a proposal and a range of alternative options that are consistent with principles that she does (or should) affirm.[34] For example, a person cannot be coerced if the proposal with which he is confronted is permissible under the set of principles to which that person does (or should) subscribe (proposal prong). Similarly, he cannot be said to be coerced if the principles to which he adheres in defining the rules of distributive justice could generate the range of alternatives from which he has to choose in the putatively coercive situation (choice prong.)

The distinctly deontological cast to this argument holds that "coerced choices are not unwilled;" rather, they are "against one's will" in the sense that they violate one's system of considered values and judgments.[35] Importantly, it is not relevant that the person does not *like* the proposal and alternatives with which he is confronted. As Wertheimer puts it, "reluctance and voluntariness can well go hand in hand."[36] Instead, it is the fact that one is forced to act in contravention of one's principles that is central to the ascription of involuntariness.

It should be obvious that this use of the term "voluntary" does not comport with our everyday meaning of the concept. On Wertheimer's "rationalized" account,[37] voluntariness becomes a function, not of our ability to resist a choice option, but of whether, under the system of moral principles to which we *do* (or *should*) adhere, we would hold a person responsible for the choice made in that situation. Again, when voluntariness is defined in this manner, coercion and voluntariness become normative proxies for one another. There persists that same normative circularity such that one cannot decide the voluntariness question without having pre-determined the coercion issue.

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33. WERTHEIMER, *supra* note 1, at 301. Wertheimer writes:

> On this view, B acts voluntarily when B succumbs to a proposal that A has a right to make, even if it is one which B finds unattractive and would prefer not to receive. Why? Because B *himself* is committed to the principles which grant A the right to make the proposal. On the other hand, B acts involuntarily when A makes an immoral proposal (a moral baseline threat) because A's proposal attempts to get B to act contrary to his deep preference that he *not* be made to act in response to immoral proposals.

Id. (emphasis in original).

34. Wertheimer appears to waffle here regarding whether the defining principles are those which the victim *does* or *should* affirm. At one point, Wertheimer argues that it is the principles to which the victim is committed which count. *Id.* at 302. His discussion of "wantons" and egoists appears to confirm this. *Id.* at 303. On the other hand, he suggests that the defining principles are those which the victims *should* accept. *Id.* at 301. Both positions have problems. *See supra* notes 62-63 and accompanying text.

35. WERTHEIMER, *supra* note 1, at 302.

36. *Id.*

37. The theory of voluntariness is "rationalized" in the sense that it makes one's volitional capacity a function of reasons or, more accurately, considered moral judgments. Rationalized accounts can be distinguished from empiricist accounts of motivation, which hold generally that reason has no role in the motivational mechanism of human behavior. On the latter view, reason has, at most, only instrumental significance: it tells us how to satisfy some end. *See* Wright Neeley, *Freedom and Desire*, 83 PHIL. REV. 32 (1974) (discussing these competing conceptions of motivation); *see also infra* note 62 and accompanying text (discussing the rationalized account).

Wertheimer maintains that, though we may find this less satisfying than defining coercion in terms of some empirical concept of voluntariness, it is ultimately the only definition of voluntariness that makes coherent sense of the relationship between the two concepts.

PART II

The following sections will sketch in broad strokes the response to partially and radically moralized theories, which will be discussed in Sections A and B, respectively.

A. *Partially Moralized Theories*

Partially moralized theories attempt to bridge the gap between empirical facts about voluntariness and normative propositions concerning coercion by conceptualizing voluntariness as a commodity which occurs in varying degrees. This permits defenders of hybrid accounts, such as that of Professor Dressler, to characterize voluntariness and coercion as inversely proportional concepts which exist at opposite extremes of the same continuum. In this fashion, normative criteria are used to designate the line between acts that are voluntary and those that are coerced.

At first glance, partially moralized theories appear to combine the best of both worlds. They reflect the intuition that persons placed in coercive situations do act, in some sense, "against their will." At the same time, partially moralized accounts appear to be flexible enough to serve the social and legal need for deterrence while simultaneously serving the ends of fair notice and uniformity by establishing a general standard applicable to all.

To the extent that partially moralized accounts are predicated upon questions of voluntariness, however, two types of problems arise. First, partially moralized theories must confront the same types of difficulties that bedevil the traditional theory of coercion. Second, the gradational view of voluntariness implicit in partially moralized accounts raises a number of additional issues.

The first problem stems from the fact that coerced choices are not "involuntary" in the usual sense of the term. In both legal and philosophical contexts, voluntary acts are defined simply as those in which the subject *acts*—i.e., where the subject chooses a course of action and then acts accordingly.[38] They require no more than this. Coerced acts are entirely voluntary in

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38. These are situations in which the *actus reus* requirement in the criminal law is not met, or where an act is not volitional for purposes of intentional torts. The Model Penal Code § 2.01(1) requires a "voluntary act," and specifically excludes the following from the class of voluntary acts: reflex movements, bodily movements during unconsciousness, acts performed under hypnosis, and other acts not the product of a conscious determination by the actor. MODEL PENAL CODE § 201 (1962). Similarly, in tort law, a volitional act is one requiring a mental element representing some corresponding motivational force, such as an intention or desire, and a corresponding bodily movement. PROSSER AND KEETON ON TORTS 33 (5th ed., 1984). This dualistic test, requiring a physical and mental element, can be traced back at least as far as the writings of John Austin in the 19th Century, though it is evident in case law before then. *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 97-98 (1968) (discussing Austin's view of the act requirement).

this prevailing sense of the term. The fact that the individual may not want to perform any of the respective courses of action open to him is irrelevant to the question of voluntariness (though it might be relevant to excusing him for the act). Therefore, coerced acts cannot be distinguished from non-coerced acts on the ground that the former are involuntary.

To put it differently, the traditional theory of coercion depends upon our acceptance of the analogy between acts of physical compulsion—characteristic of "no act" situations—and acts precipitated by coercion (which are sometimes characterized as resulting from a kind of psychological compulsion, as when we say the "will is overcome"). Those who reject the traditional model view such talk to be a kind of figure of speech. They recognize that the impermissible limitation upon external options characteristic of coercion is distinct from issues of voluntariness, which go to a subject's capacity to carry out a chosen course of action. In sum, they distinguish *external* freedom—having differing options open to one—from *internal* freedom—being able to act voluntarily.

Independent of these issues is the problem raised by conceptualizing voluntariness as a gradational concept quantifiable by degrees. Very simply, the problem is that voluntariness does not admit of degrees. While sliding-scale accounts of freedom and voluntariness have attained some currency in common sense accounts of moral responsibility, and are even found enshrined in the law in such doctrines as the defense of diminished capacity,[39] in fact such views of freedom or voluntariness are conceptually incoherent. The defender of the notion that voluntariness is an empirical commodity that occurs in varying degrees must tell us what this strange empirical commodity is. They must be able to point to some psychological fact about the actor that waxes and wanes with differing ranges of options such that a given act can be more or less voluntary. For reasons discussed earlier, it will not do simply to point to the obvious fact that the range of external options may be more or less palatable depending upon the situation. A limited or unwanted range of external options may render the actor's situation more sympathetic, even excusable, but this does not make the act less *voluntary* any more than a particularly palatable range of options would somehow render the choice made from among them more voluntary.[40]

To the extent that any partially moralized theory links duress to the concept of voluntariness, as Professor Dressler's theory appears to do, it suffers from similar difficulties. On the other hand, perhaps such partially moralized accounts can be re-interpreted as justifying duress wholly in non-empirical

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39. *See* MODEL PENAL CODE § 4.02(2) (1962) (providing for mitigation of punishment in capital cases where some mental defect has impaired the defendant's mental state or the capacity to conform his conduct). Other criminal law doctrines such as the heat of passion defense, more recently dubbed the "extreme mental or emotional disturbance" test, have served a similar function. The Model Penal Code provides that a murder charge may be reduced to manslaughter "when the murder is committed under extreme mental or emotional disturbance (EMED) for which there is reasonable explanation or excuse." MODEL PENAL CODE § 210.3(1)(b) (1962); see Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 466-67 (1982), for a limited defense of the EMED excuse.

40. For a more detailed analysis of the relationship between the availability of external choice options and voluntariness, see Hill, *supra* note 6.

terms. This leads us to a discussion of radically moralized theories of coercion.

B. *Wertheimer's Radically Moralized Theory*

The following discussion will focus upon three central themes of Wertheimer's philosophical defense of the radically moralized theory of coercion. First, I will examine his treatment of coercion as an agent-relative justification, rather than as an excuse. Second, and perhaps more centrally, I will explore Wertheimer's contention that coercion claims are contextualized and the related question as to whether it is possible to put a truth value on coercion claims. Here, I will consider whether Wertheimer's theory may be said to be determinative in any sense. Finally, I will survey his theory of voluntariness and its relationship to coercion.

1. Duress, Justification, and Excuse

While duress is generally treated as a kind of excuse in criminal law and contract law,[41] legal theorists are fairly evenly split on whether to consider duress an excuse or a justification.[42] Those who adhere to some form of the traditional theory of coercion tend to conceptualize duress as an excuse in that the coercive condition is viewed to overcome the will of the actor, thereby relieving the victim of responsibility for the act. Thus, theorists defending an exculpatory theory do so on the basis of the *etiology* of the coerced act. Conversely, those who view duress to be a kind of justification look to the *consequences* of the act. On this view, duress is viewed to be a kind of choice of evils justification similar to necessity. Duress can be analyzed this way because the law has placed substantive limitations on the types of consequences for which the defense will be permitted. Most generally, with certain exceptions to be mentioned shortly, a criminal defendant usually will not be allowed the defense where the act he committed in succumbing to the coercive threat is greater than the harm with which he was threatened in the event he did not comply. Similarly, the defense was not available at common law as a defense to murder.[43] This seemingly consequentialist (justificatory) limitation was couched in exculpatory terms by the fiction that the will could (or should) not be overcome unless the threatened harm was roughly proportional to the harm created by the coerced act.[44]

The rejection of the traditional theory of duress tends to blur the distinc-

41. MODEL PENAL CODE § 2.09 (1962); RESTATEMENT (SECOND) OF CONTRACTS § 492 (1981).

42. Some commentators have argued that duress should be viewed as an excuse. *See* Dressler, *supra* note 10, at 1350; Fletcher, *supra* note 8, at 829-31; Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985). Others defend the view that duress is a justification. LAFAVE & SCOTT, *supra* note 8, at 433; WERTHEIMER, *supra* note 1, at 166; WILLIAMS, *supra* note 8, at 755.

43. Dressler, *supra* note 10, at 1370.

44. *See id.* at 1373-74 (arguing that "[s]ociety also has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one").

tion between justification and excuse. In other words, the distinction between excuse and justification becomes considerably less significant in the absence of the traditional theory. For example, on a moralized account, where a person is permitted a defense simply because we have decided that it is not fair to hold someone responsible for any act they have committed under a certain constrained range of options, it becomes more difficult (and less important) to decide whether the rationale is ultimately exculpatory or justificatory. It is more difficult because the rationale can be characterized either in exculpatory terms, as a defense predicated upon the idea that a person faced with a highly constrained set of options simply is not responsible for their action, or in justificatory terms, by arguing that net social utility is achieved by not holding victims of coercion responsible. The distinction is also less important here because, once the availability of duress is made to turn on the question as to whether or not it is fair to hold someone responsible for a choice made under a given set of conditions, issues of justification and excuse become secondary, if not completely irrelevant.

In his account of coercion, Wertheimer attempts to capture both the exculpatory and justificatory dimensions of coercion by classifying justification as an agent-relative justification.[45] Put simply, because he rejects the traditional theory of coercion, he does not wish to conceptualize duress as an excuse. Yet he must explain the fact that the defense is sometimes permitted where, on an objective weighing of harms, the harm caused by the victim is equal to or greater than the threatened harm in the event that he does not comply.[46] For example, imagine a case where the defendant-victim plants a bomb which injures several people to avoid having his six year-old daughter sexually assaulted by the kidnapper-coercers. The agent-relative qualification permits Wertheimer to maintain that, while an objective weighing of harms might preclude the defense here, the law must take special account of what is arguably the natural human sentiment to wish to protect one's own daughter, even at the cost of a greater risk to many others.

While we find cases such as this intuitively sympathetic, I would like to suggest that there are fundamental difficulties with characterizing the reason for this as justificatory in nature. The problem is that the agent-relative qualification permits us to privilege certain aspects of human personality, values, beliefs, and desires, etc., in a manner that ultimately undermines the notion of justification. The point is that justification defenses are essentially "objective" in the sense that society assigns differing values to two competing courses of conduct, permitting a privilege for conduct that, in other circumstances, would be impermissible. The more we take into account the particular individual's personal, even idiosyncratic, beliefs, values, and feelings the more the defense

45. *Id.* at 168.

46. Strictly speaking, where the rationale for duress is viewed to be exculpatory such that the victim is not responsible for his act, the gravity of the resulting act should be irrelevant. While criminal law does place substantive limitations on this by requiring a proportionality between the threatened harm and the act, it nevertheless permits a defense in situations where justification could not apply, such as where the harm created by the victim is greater than or equal to the threatened harm.

begins to look like an excuse. The man who saves his daughter from sexual assault at the cost of greater risk to others is not really justified in performing his act. Rather, we feel sorry for him. We empathize. And we decide accordingly to hold him not responsible for the act.

Nor can Wertheimer defend the agent-relative rationale against this objection by arguing that only "rational" agent-relative decisions will be justified.[47] The introduction of rationality is merely another way of privileging some aspects of personality while excluding others under the guise that some are rational. Put differently, on one (subjective) interpretation of rationality, avoidance of even the most minimal harm to self would be rationally required, even where this entails the exposure of others to great risk. If, on the other hand, by "rational" we mean to impose some objective, agent-neutral analysis concerning the proper distribution of harms, then we have relinquished the agent-relative account altogether. We simply cannot have it both ways. We cannot have an agent-relative account that nevertheless incorporates within its justification some objective standard regarding what a person should do in certain circumstances.

Nor is there a middle way between the two extremes—e.g., by contending that an agent-relative rationale permits some departure from the permissible range of outcomes generated by an agent-neutral justification, while precluding some outcomes as illegitimate, beyond the pale of the "rational." To take, once again, the example of the father who is coerced to save his young daughter, suppose he chooses to save her at the cost of wiping out all civilization on earth. Would this be justifiable on an agent-relative account?

Wertheimer faces a dilemma here: if he concludes that such a decision might be rational, then we are back to the slippery slope. If this is rational, anything might be justified as rational, in which case anything could be justified. In this event, the category of the justificatory collapses into the exculpatory. On the other hand, if he argues that it is not rational, then why not? Why couldn't the rational man who is particularly devoted to his child choose her life or well-being to the continued existence of our entire civilization? In short, if this is not rational, then what is? Who gets to define what counts as rational and what exactly could the criteria be? Finally, even if we could specify some criterion for agent-relative rationality, how could any departure from an agent-neutral justification remain rational without giving up the "objectivizing function" of rationality?

Misconceiving the nature of duress will have profound implications for the way in which the defense is viewed, and for the cases to which it applies, even with the sometimes fuzzy distinction between justification and excuse. Duress should be viewed as inherently exculpatory in nature. Adopting an exculpatory theory of duress, however, does not require that we embrace the traditional theory of coercion, as we will see in Part III.

47. Alan Wertheimer, Address at the Coercion Symposium at the University of Denver College of Law (Mar. 14-15, 1997).

2. Contextuality and the Determinateness of Duress

We now turn to the epistemological core of Wertheimer's theory of coercion. He elaborates upon a theory of coercion which he characterizes as both "moralized" and "contextual." The use of these terms highlights the central tension in his theory between the theory having some prescriptive content and his claim that duress is context-relative. To put it starkly, it simply is not clear whether Wertheimer believes one can ever put a truth value on coercion claims such that they are determinative. Let us briefly survey his general theory to see how this might be a difficulty.

As we discussed in the previous Part, according to Wertheimer, coercion consists of a two-pronged analysis which requires us to examine both the nature of the proposal (e.g., whether it is a threat or an offer) that is the subject of the coercion claim, and the range of choices open to the putative victim. For a situation to be considered coercive, it must involve an immoral proposal to which the victim is morally or legally privileged to succumb. What constitutes an "immoral proposal" and under what circumstances is the victim so entitled? Wertheimer's answer is that these are highly contextualized issues; there is no set of necessary and sufficient conditions which is determinate in specifying when coercion exists.[48] Rather, issues which arise pursuant to either the proposal prong or the choice prong must be "moralized"—they must be evaluated from the standpoint of a moral baseline.

For example, to know whether the proposal is "immoral," we must ask normative questions about such matters as whether the proposal adversely affects the *ex ante* options of the putative victim (e.g., is the "proposal" a threat that reduces her options?), whether it is substantively immoral (i.e., does it propose an immoral exchange?) and whether it exploits the victim in virtue of her background conditions. Similarly, the choice prong requires that we make normative judgments regarding whether the range of choices open to the putative victim were sufficiently limited to preclude moral and legal liability.

A central question must now be addressed: Does having a moralized or contextualized account of coercion entail that there really are no truth conditions for coercion claims—i.e., that we cannot assign a truth value to the questions raised pursuant to the two prongs of Wertheimer's theory. When we say that a particular person was coerced in a given situation, are we saying anything about the world at all, or are coercion claims simply subjective labels attached to a situation after the speaker has decided that he or she should wish to see the victim released from legal responsibility?

If coercion claims are not truth functional in the way that empirical statements are, then a theory of coercion cannot be determinate and particular cases of coercion will not be determinable. Most basically, in this event, the theory will not be able to tell us when coercion exists and when it does not. It will not be able to settle differences when there is disagreement concerning particular situations. Further, it will not be able to generate a set of outcomes

48. WERTHEIMER, *supra* note 1, at 30-46 (discussing the sorts of considerations relevant to coercion on a moralized theory).

which can be compared with existing law by which we could gauge the accuracy of the theory (or the law.) Similarly, because coercion claims remain indeterminate, there is nothing to measure against our normative judgments, and consequently no way of judging whether the theory comports with our pre-analytic moral intuitions in any particular case. Moreover, a theory that cannot tell us *when* coercion claims are satisfied will be unlikely to tell us *why* we permit a defense for coercion as an initial matter. It can only generate the conditional conclusion that *if* we view a certain choice situation as sufficiently unfair and *if* we view a certain proposal as immoral, we will have made out a claim of coercion.

Given these considerations, is Wertheimer's moralized account indeterminate? The answer is unclear, and it is here that the central tension in his theory lies. Wertheimer maintains that a coercion claim with a given descriptive or normative force will have certain correlative *truth conditions*. Roughly speaking, the truth conditions of a coercion claim are what must be the case for the coercion claim to be valid or acceptable.[49] He goes on in the next sentence, however, to say that he does "not want to put much weight on the term 'truth,'"[50] and further states that the truth conditions will sometimes depend upon empirical and sometimes upon normative premises.[51] While this may indicate some provisional commitment to a determinate theory of coercion, this assumption is dramatically undercut in his discussion of "coercion and contextualism." It is in this discussion that he presents the prisoner example mentioned previously, where he states that two persons with contradictory judgments of the same situation can be equally correct about whether a given situation is coercive.[52]

By maintaining that the truth conditions of a coercion claim may vary with context, Wertheimer might mean any of a number of different things. He cannot simply mean that, as the context changes, so too do our intuitions about whether the situation is coercive. This would simply state the trivial truth about which no one would argue: some situations are coercive while others are not. Rather, he states that the truth *conditions* for a coercion claim vary with context. This seems to indicate not simply that our *conclusions* vary with context, but that the *conditions* for our conclusion (or our application of the concept) might vary from context to context—i.e., that more might be required for a claim of coercion in one context vis-a-vis another.

Wertheimer gives as an example of this contextual variability the way in which we use the term "cold." The person who believes that a thirty-five degree January day in Vermont is "cold" will be wrong insofar as the temperature is actually mild, "given the context." But if the same conclusion is reached by someone newly arrived from Miami, they would be correct. Thus, the argument runs, contradictory opinions can both be correct.

The problem with this response is that the term "cold" here is used in two

49. *Id.* at 184.
50. *Id.*
51. *Id.* at 184-85.
52. *Id.* at 181.

distinct senses. The first sense of the term "cold" is used in a statistical sense referring to the normal range of temperature in Vermont during January. It is false to say thirty-five degrees is cold in this sense, whether the remark is made by the native of Vermont or the newly arrived Floridian. The second sense of the term "cold," on the other hand, is used to reflect the speaker's subjective impression regarding the temperature. In this sense, the Floridian's statement that it is cold is true, just as would be a similar statement by a native of Vermont if he simply happened to feel cold. Thus, Wertheimer's example commits the fallacy of equivocation in the very discussion in which he warns against the possibility of equivocation.[53]

Is there any other sense, then, in which the truth conditions of a coercion claim vary from context to context while rigidly designating the same concept of coercion from one context to the next? Perhaps we might think the account could be salvaged by asserting that the same *fact* will take on different significance from one context to the next. For example, thirty-five degrees will be statistically cold in Miami in January while not being so in Vermont. In this sense, it might be argued, the truth conditions for coldness (or coercion) will vary from context to context.

This move, however, is of little use in defending the contextualized account of coercion because, in this example, we have not changed the truth *conditions* for the application of the concept "cold;" we have merely picked out one fact (i.e., the fact that it is thirty-five degrees) and recognized that this is cold in one context and not cold in another. It is not that the truth conditions for coldness have changed; rather, the truth conditions for coldness are always measured relative to some background conditions (the geographical locale and time of year) which themselves vary. In sum, the concept of coldness is univocal though its application is relative to the context being evaluated.[54] The problem with Wertheimer's account is that, while the truth *value* of some propositions (e.g., thirty-five degrees is cold) are context-relative, the truth *conditions* for any such proposition cannot vary without varying the meaning of the concept itself. Maintaining that the truth conditions of coercion vary with context is like saying that coldness will be defined as any temperature that falls below the average temperature for a region in one context, while stipulating that coldness in another context will mean any temperature in the bottom ten percent of the normal range of temperatures for that region. Varying the truth conditions for a concept means abandoning any univocal concept. It is simply a logical contradiction to claim that one is talking about the same concept from one context to the next, though one is applying different truth conditions to the different contexts.

The only other possible route for Wertheimer's theory is to assert that, by claiming that the truth conditions for coercion vary with the context, he means

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53. *Id.* at 182.

54. Thus, if we operationally define as "cold" any temperature that falls below the average temperature for a particular region at a particular time of the year, the truth conditions for coldness will be the same in Miami as they are in Vermont. Although, of course, the background conditions by which coldness is measured will vary from one region to another.

that the concept of coercion is dependent upon the perspective of the viewer—i.e., that one person may legitimately view a situation as coercive while another may not, where both are correct. His example of the prisoner and his accomplices seems to bear out this interpretation insofar as the courts and the prisoner's accomplices could both reach accurate contradictory conclusions. But if this is the correct interpretation of his theory, then he has given up any semblance of a determinative theory of coercion. Moreover, where the truth of coercion claims are simply a function of the subjective beliefs of the viewer, it is simply facetious to speak of there being "truth conditions" for coercion claims at all. We may, of course, assign a truth value to the subjective beliefs of differing individuals—i.e., it may be true that one person feels that a certain situation is coercive while another does not. If this is the move, however, then the truth conditions do not even have anything to do with coercion anymore; they are merely a function of what any individual subjectively believes. In sum, if what it means for the truth value of a coercion claim to be "contextual" is that different people feel differently concerning what constitutes coercion, then Wertheimer has told us something trivially true about persons and nothing at all about coercion itself.

In the end, it appears Wertheimer wants to have his truth and eat it too. He wants to be able to say that there are truth conditions for coercion claims because, if there are not, there would be no point in having a theory (indeed, if we cannot put a truth value on the conditions for duress, in what sense can they be "conditions" for duress?). At the same time, however, he seeks the perhaps infinite flexibility of a protean conception of coercion that would permit two persons to reach contradictory conclusions about the coerciveness of the same identical situation where both are correct in their assessments. If this is what it means for truth conditions to be contextual, then the idea of "truth" itself has lost all meaning.

Having concluded an examination of this aspect of Wertheimer's theory, it should be noted that it is still possible to have a "moralized" and "contextualized" theory of coercion without relinquishing determinacy. The problem with Wertheimer's account is that it employs relativized versions of these two concepts in a way that renders the theory hopelessly indeterminate. First, coercion claims can be context-relative in the sense that particular facts will take on different relevance in varying contexts. Just as thirty-five degrees is "cold" in one context and not in another, so too, given certain background conditions, a particular proposal might be coercive in one context and not in another. This does not mean, however, that the existence of coercion depends upon the subjective impression of the viewer.

Nor does a moralized theory of coercion entail that coercion claims are completely relativized. A moralized theory may be truth functional and fully determinate given one's adherence to some form of moral realism, as opposed to some species of moral relativism or moral noncognitivism.[55] Professor

55. "Moral realism" is used to refer to any view that holds that moral propositions reflect some external reality, or are true or false in something like the way empirical statements are. "Moral relativism" is a meta-ethical view that rejects moral realism—i.e., by arguing that moral

Wertheimer's moralized theory of coercion is not truth functionally determinative because it does not take seriously the possibility of moral realism, as his prisoner example makes clear.[56] Indeed, perhaps the deepest irony of Wertheimer's account is that he seeks to provide a "moralized" account of coercion that cannot tell us what the normative parameters of coercion are.

Part III of this article sketches the parameters of a moral realist theory of coercion that avoid the pitfalls of relativized accounts such as those considered here.

3. Coercion and Voluntariness

Over the course of the past twenty-five years, a number of philosophers have offered differing versions of a novel way of understanding the relationship between motives and values in a way that permits a distinction to be drawn between voluntary acts and free acts. On such accounts, not every voluntary act is free. To put if differently, some sources of human motivation might meet the technical requisites of the "act" requirement (such that they are considered voluntary) without constituting an act which we would consider to be "free." Perhaps the paradigmatic example of this is the heroin addict, whose use of the drug is voluntary in the technical sense, even as he wishes to be free of the addiction.

In a seminal article, Harry Frankfurt argues that, for an act to be free, it is not sufficient that the act simply flow from a first-order mental state such as a desire.[57] Acting from a first order mental state may characterize voluntary behavior, but animals act voluntarily in this sense, as even Aristotle pointed out.[58] What distinguishes persons from animals and free choice from mere voluntariness is the ability to form second-order mental states—i.e., mental states about other mental states.[59] One acts truly freely, on this view, only when he acts from a first-order desire which is itself connected with, or the product of, a second-order value, desire or judgment. In other words, genuine autonomy comes in valuing (in a second order way) that which one desires as a first order matter. We rightly characterize as unfree the addict and the neurotic-compulsive because they act voluntarily in response to (first order) desires that are in conflict with second order desires. In short, the addict is unfree because, though he desires heroin, he does not desire that he desire heroin.

With a different twist, Gary Watson has argued that genuine free agency

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propositions reflect the individual's (individual relativism) or his culture's (cultural relativism) view of what is right and wrong. "Noncognitivism" is the view that we cannot know the truth or falsity of moral propositions—i.e., that moral statements do not refer to some knowable object.

56. *Id.* at 181. There simply is no way to reconcile a moral realist account of coercion with the claim that two persons can reach diametrically opposed positions about the same situation and both can be correct.

57. Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

58. Aristotle, *supra* note 4, at 935, 938.

59. An example of a second-order mental state is having a desire to inculcate a first-order desire to enjoy classical music, or to have a (second-order) intention to restructure one's first order desires. In short, second order mental states are mental states that have as their intentional object some first-order mental state.

exists only when one acts from motives that are themselves in accord with our "evaluational system."[60] In sum, our acts must flow from voluntary impulses which are themselves the product of our considered values and judgments. This evaluational system serves not only to ground our actions in our deepest principles and values, but also rationalizes our values and beliefs, making them consistent with one another.[61]

Wertheimer's discussion of voluntariness follows the tradition of such rationalized accounts of volition. He distinguishes the "volitional" from the "voluntary," using the term "volitional" to designate the traditional sense of the term "voluntary," as where the person has acted in the technical legal sense.[62] In contrast, Wertheimer argues that an act is not voluntary, for purposes of duress, if it is performed as the result of an immoral proposal that leaves the actor with a morally unacceptable range of choice options. These two prongs are "moralized" in accordance with a set of moral principles to which we do (or should) adhere. A range of choices that fails to conform to these principles, Wertheimer contends, are involuntary in the sense that they are "against one's will," even if they are otherwise "volitional."

There are three distinct difficulties with this approach to voluntariness, at least as it relates to duress. First, even if voluntariness were a function of some set of moral principles—even if it could be rationalized in the fashion he suggests—Wertheimer never resolves the inherent ambiguity as to whether voluntariness is defined by reference to the moral principles to which we *do* or those which we *should* conform. Second, regardless of his answer to the first problem, the voluntariness of an act is simply not a function of the system of moral principles to which the actor would (or should) conform. Finally, even if we could overlook the first two difficulties, it is not clear that Wertheimer's treatment of voluntariness is consistent with the rest of his theory.

First, are the moral principles that serve to delimit the scope of voluntariness those principles to which the agent *does in fact* adhere, or those to which he *should* adhere? If we take the former, subjective approach and argue that it is the agent's own principles that define the baseline for what it means to be "against one's will," this approach is clearly inconsistent with the law as it has developed. Certainly a judge, in determining whether a particular case constitutes an instance of duress, does not undertake an examination of the agent's moral principles—e.g., whether the agent is committed to principles that could generate the range of existing alternatives from which he had to choose.

Moreover, this entire approach would relativize duress claims to each person claiming the defense. A person with an amoral set of principles which

60. Gary Watson, *Free Agency*, 72 J. PHIL. 205 (1975).

61. I have argued in a previous piece that one dimension of autonomy is the vertical relationship between first and second order mental states, as Frankfurt argues. Another dimension of autonomy is the horizontal relationship between various second-order desires—i.e., that one's second order desires are consistent with one another so that they do not frustrate one another. John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289, 377-80 (1997).

62. WERTHEIMER, *supra* note 1, at 9.

placed no constraints upon the just range of external options that should be open to an agent might be entirely precluded from maintaining a duress claim. On the other hand, for the person who holds a set of principles that limit the range of choice situations that are considered just, there would exist a correspondingly greater range of cases that the agent would characterize as coercive. And, of course, the great majority of persons have no developed set of principles whatsoever. Thus, the subjectivized approach not only fails to comport with existing law, it does so for good reason insofar as it would prove to be completely unworkable.

The objectivized approach is problematic for other reasons. First of all, what are the defining principles by which we are to judge voluntariness? Who sets the standard, and what is it? Moreover, even if we could agree upon some such objective standard, the objective rationalized account would have the implication that one's act could be involuntary without one knowing it, as when one acts in a situation that violates one's principles, but where one does not stop to consider this. Conversely, one could act voluntarily while believing his action to be involuntary, as where the actor is wrong about the application of these principles.

This leads to the second problem. The rationalized account of voluntariness is simply so divorced from the way in which we normally define voluntariness that it leads to anomalies such as those just mentioned. Most basically, there simply is no necessary link between one's being presented with a choice situation that violates one's moral principles and the voluntariness of one's act in responding to this choice situation. This cleavage between voluntariness and moral principle is particularly aggravated on objectivized accounts, where it is not clear in what sense one acts "against one's will" when one must act in contravention of principles that one *should*, but does not, hold. Most generally, the rationalized approach simply does not ring true as a matter of subjective experience. Every person knows the feeling that accompanies a coercive situation, and this experience has little or nothing to do with the moral principles to which one adheres. The point here is that any theory of duress which so thoroughly divorces the ascription of voluntariness from the phenomenal experience of coercion cannot be correct. Or, to put it differently, such a theory redefines coercion in a fashion that raises doubts about whether we are talking about the same concept. Wertheimer recognizes the problem in noting that the disadvantage of the rationalized account is that it operates by "detaching voluntariness from the will, from its psychological referent."[63]

Finally, the third problem may be more aesthetic than logical. Nevertheless, it raises questions about the adequacy of Wertheimer's account as a whole. After devoting three-quarters of his book to an attack upon the traditional theory of duress and the corresponding notion that duress is a function of the voluntariness of an action, Wertheimer attempts to maintain that coercion is, after all, related to voluntariness (though, as we have seen, he rede-

63. WERTHEIMER, *supra* note 1, at 305.

fines voluntariness). The question that must be addressed is why does he see the need to attempt to relate the two concepts? The answer, I believe, is that we intuitively understand that coercion does have something to do with the *etiology*, rather than simply the immediate *consequences*, of the coerced act. It has to do with the fairness of holding persons responsible for acts performed in situations where their choices are limited. One is left with the unshakable impression that, as heroïcally as Wertheimer struggles to free coercion from the notion that it is essentially exculpatory in nature and function, he implicitly concedes the same in his treatment of voluntariness.

In conclusion, while there may be some convincing normative and linguistic reasons for distinguishing voluntary and free acts, such as the case of the heroin addict or the obsessive-compulsive, it is not because their (voluntary but unfree) behavior is inconsistent with some set of moral principles. It is because each is hopelessly conflicted, and because each cannot control the desire that leads to the resulting behavior. They act voluntarily in satisfying their respective desires to use a drug or to perform some repetitive action, but they have no control over the desire itself. They act voluntarily within the constraints of the situation, but they do not control or will the forces that shape that situation. In this respect, the victim of duress is analogously situated. The problem, however, is not a function of the moral principles to which each does (or should) adhere.

PART III

As we have already noted, the deepest irony underlying Wertheimer's theory of coercion is that it presents a moralized approach to coercion that provides no moral guidance as to when we *should* conclude that coercion exists. This is because, at bottom, the theory purchases descriptive accuracy at the price of a level of generality that precludes any prescriptive commitment. In essence, Wertheimer's theory approaches coercion from the outside, rather than from the inside. It looks more like the observations of a cultural anthropologist, or a social observer, than those of a philosopher performing applied ethical theory. His theory tells the judge that if she concludes that a proposal is immoral and that a given range of alternatives is impermissibly limited, she should find that the act was coerced. But he does not even presume to tell the judge how to answer these other questions—questions which themselves require the judge to have prejudged the coerciveness of the situation.

None of this is to say that moralized theories as a class are inherently flawed. The problem with Wertheimer's account is that it is prescriptively empty. The remedy for this fundamental difficulty is to construct a moralized account that specifies the prescriptive, rather than simply the descriptive, conditions for coercion claims.

What sort of a theory should this look like? First, it should reflect the essentially exculpatory nature of coercion. It should recognize, in other words, that we excuse the victim of duress because we understand that they are not responsible for the act, not because the act is justified in that it promote some good. At the same time, however, the exculpatory model should not be tied

directly to questions of voluntariness, as with the traditional theory of coercion. Rather, the exculpatory nature of duress is a function of the futility of holding persons responsible for coerced acts. In sum, coerced acts are excused not because they are involuntary, but because they are not deterrable—because no appropriate legal sanction could, as a practical matter, have prevented the act.

The distinction between voluntary acts and deterrable acts highlights a central ambiguity with respect to the use of the term "voluntary." In the legal sense, as we have seen, it is sufficient for an act to be voluntary that the act resulted from a conscious mental state and a corresponding bodily movement by which the mental state (e.g., the intention) is carried out. Let us designate this first sense of the voluntary as "volitional" behavior. There is another, closely related sense of the term, however. This second sense of the term "voluntary" entails not only such volitional behavior, but requires additionally that the actor could have performed another course of action had she so chosen or, more generally, that other courses of action were open to the actor. Coerced acts arguably do not qualify as voluntary acts in this second sense insofar as other courses of action have been foreclosed by the coercive threat.

In discussing voluntary acts, we have employed the first sense of the word for three reasons. First, it comports with the technical legal sense of the term, as used in the criminal law, among other places. This avoids linguistic inconsistency brought about by using the term equivocally. Second, it is always open to argument that a person faced with a coercive threat could nevertheless have chosen to refuse to perform the act and incur the threatened harm. This would have the effect of collapsing the second sense of the term "voluntary" into the first insofar as the coerced actor can theoretically always resist the threat. Similarly, it raises a host of philosophical complications inherent in explicating the subjunctive concept that one "could have done otherwise"—issues which philosophers have found notoriously intractable.

Finally, where coercion is defined by the actor's inability to resist the threat, to say that an act will be considered voluntary only if the actor could have chosen otherwise would be to make the "voluntary" definitionally equivalent to the uncoerced. This would have the consequence of making the traditional theory of coercion tautologically true, since all coerced acts would be involuntary in this sense. For all these reasons, we have employed the first, legal sense of the term "voluntary" throughout this piece. Thus, an "involuntary" act, as we will use the term, is simply an act that does not issue from a conscious mental state through a corresponding bodily movement.

To say that an act is undeterrable is not to say that it is involuntary. If an act is deterrable, it is necessarily voluntary, but the converse is not true. Some voluntary acts are nevertheless undeterrable. Indeed, coerced acts are one species of the set of acts that are voluntary but undeterrable. (I leave open the possibility that some uncoerced acts might fall into this same class, such as acts motivated by some form of unyielding desire.) While conceptualizing duress as a function of deterrence casts the defense in explicitly utilitarian terms, there is a human side to this. It is precisely because we understand that coerced acts cannot be deterred that we empathize with the victim of coercion.

The utilitarian justification for duress reflects the very human, pre-analytic intuition that it is unfair to hold the victim responsible not simply because he did not engineer the coercive situation, but because the threat of punishment would not change his behavior. Thus, it is unfair to expect the victim of coercion to conform himself to the usual requirements of the law.

A utilitarian theory of coercion provides the determinacy necessary to guide judges' decisions. The defense should be permitted in those cases where (1) but for the putatively coercive threat, the actor would not have performed the act, and (2) where the threat of certain punishment, appropriately relativized to fit the severity of the offense, would be ineffective in deterring the conduct. The second condition recognizes that deterrence is a relative phenomenon. This is important to make the defense available in cases where an inappropriately severe level of punishment would deter conduct for which the defense of duress should still be available.

For example, imagine a situation in which a street gang threatens to beat up a non-member unless he agrees to take part in vandalizing a school. If deterrence is measured from the standpoint of extremely severe punishment—say, the death penalty—it is likely that the non-member's act is deterrable—i.e., it is likely that he would sooner take the beating than face execution for the act of vandalism. Thus, his act is theoretically deterrable and, as a result, would not be considered coerced if the second condition were not relativized. Holding the victim to this standard, however, would be unfair since his conduct was, by any ordinary definition, the product of coercion. Thus, the coercion claim must be made a function of a more appropriate level of severity of the punishment. As a rule of thumb, then, the second condition should be measured from the standpoint of the actual punishment threatened for a given offense in a just legal system.

The central organizing principle that undeterrable conduct should be excused explains and justifies a number of mediating rules which have developed at common law and more recently. It explains, for example, why those who recklessly place themselves in situations where they are likely to be coerced are denied the defense[64] on the assumption that this prior conduct is deterrable. It also explains the modern trend in the law to permit the defense even for homicide, where the victim-defendant is threatened with the loss of his own life, or that of a loved one.[65]

The foregoing remarks are obviously intended only as a general sketch for a utilitarian conception of coercion. Undoubtedly, a great deal more needs to be written to unpack fully the notion of deterrence central to the theory.[66]

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64. MODEL PENAL CODE § 2.09(2) (1962).

65. *See supra* note 24 and accompanying text for a discussion of the abrogation of the "no murder" rule under the Model Penal Code.

66. *See* Hill, *supra* note 6, at Part IV (discussing an account of the theory).

THE COERCION OF WOMEN IN DIVORCE SETTLEMENT NEGOTIATIONS

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This essay addresses contextual coercion (or, in Alan Wertheimer's terms, unfair background conditions[1]) in divorce settlement negotiations. I argue that psychological, social, practical and legal impediments create a hostile environment in which many divorcing wives bargain. As a result of these unfair background conditions, many wives enter divorce settlement agreements that fail to provide them and their children with adequate financial support. Some wives seek relief from these unfair divorce settlements and move to have them vacated on grounds of coercion, duress, misrepresentation, and unconscionability. These contract doctrines, and the particular spin that family law places on them, generally fail to comprehend or to take seriously the disadvantages confronting many women in settlement negotiations. Rather, as written and as applied, these doctrines frequently confirm, rather than correct, unfair results.

Consider first the financial context in which divorcing wives must bargain.[2] Generally the wife and the children are dependent upon the husband.[3] Until a court orders temporary support, husbands frequently refuse to provide child support and/or maintenance. The wife then has difficulty meeting her basic needs and those of her children. Unless the wife or her lawyer obtains an order for temporary support and the husband complies with that order, the wife's financial situation can become desperate, increasing her willingness to accept a poor settlement. On the streets, this tactic is called "starving her out."[4]

The wife's low or non-existent income also makes it difficult for her to pay attorneys' fees. Many wives proceed without lawyers[5] or agree to joint representation by lawyers their husbands have chosen.[6] A wife who seeks a lawyer sometimes cannot find one willing to represent her. Lawyers know that

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1. Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV U. L. REV. 889, 901 (1997).

2. When I speak of women and their experiences, of course, I speak in statistical generalities that may not apply to all women.

3. Approximately fifty percent of American wives earn no income because they do not participate in the labor force. Most wives who do work outside the home earn substantially less income than their husbands. Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 449-50 (1992).

4. For description of a case where the husband employed this tactic, see Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 177-88 (1994).

5. *See, e.g., In re* Marriage of Broday, 628 N.E.2d 790 (Ill. App. Ct. 1993).

6. *See In re* Marriage of Brandt, 489 N.E.2d 902 (Ill. App. Ct. 1986).

wives frequently cannot pay their fees and that courts commonly refuse to order husbands to pay wives' legal fees. Many lawyers, particularly expensive lawyers, admit that they prefer to represent husbands because they know that husbands can pay their fees. Even when both spouses can afford attorneys, the wife is likely to hire the less expensive and less competent lawyer.[7]

The wife's inadequate financial resources frequently prevent her from conducting her case in a manner that protects her interests. In order for the wife to determine the extent and the value of the marital assets, expensive discovery must occur and valuation experts must be retained.[8] Moreover, dependent persons generally perceive their benefactors as benevolent, and a wife's naive trust of her husband may encourage her to assume that she will not need her own lawyer and that her husband will treat her fairly at divorce.[9] The roles each spouse played during the marriage and their respective spheres of authority within the marriage[10] can exacerbate the problems created by the wife's financial dependency.

While some couples today exhibit egalitarian attitudes about marriage, the traditional division of labor within the family seems quite intractable. More wives than ever now participate in the workforce and share the burden of providing for the family. Yet husbands still exercise greater control over marital decisionmaking, particularly important financial decisions. When a husband has exercised authority over financial issues, the wife may accept his definition and valuation of the marital property rather than require verification by an expert, particularly if she lacks the resources to hire an expert. The wife also may lack the knowledge needed for successful financial negotiations. The husband may even conceal[11] or deliberately undervalue assets,[12] relying upon her ignorance.

Moreover, despite egalitarian attitudes, wives still retain primary responsibility for homemaking and child-rearing.[13] The wife's acceptance of this role is secured through her socialization as a caregiver and through the validation

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7. Bryan, *supra* note 4.

8. Cases challenging settlement agreements provide many examples of wives and/or their attorneys failing to conduct any discovery at all. *See, e.g., In re* Marriage of Broday, 628 N.E.2d at 795.

9. *Id.*

10. Sex role ideologies prescribe spheres of influence and appropriate behavior for marital partners. Currently these ideologies range from egalitarian/modern to traditional. Modern beliefs about sex roles prescribe equality between spouses. Egalitarian couples share decision-making and family roles. Traditional sex role ideology, however, contemplates a marital partnership in which husbands dominate and each spouse has distinct roles. Husbands are the primary providers, while wives nurture and attend to relationships within the family. These separate roles impart primary authority over important financial issues to the husband, and primary influence over decisions relating to children and family care to the wife. *See* Bryan, *supra* note 3.

11. *See, e.g., In re* Marriage of Frederick, 451 N.E.2d 612 (Ill. App. Ct. 1991); Bellow v. Bellow, 352 N.E.2d 427 (Ill. App. Ct. 1976).

12. *See In re* Marriage of Brandt, 489 N.E.2d 902 (Ill. App. Ct. 1986).

13. VICTOR FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 72 (1988). Fuchs concludes that women's disproportionate responsibility for child care provides the most powerful explanation of the difference in men and women's earnings. *Id.* at 62. Although the gap between men and women's wages closed by 7% between 1980 and 1986, Fuchs explains that the improvement largely was due to the increased percentage of women workers who were born after 1946 and had fewer children. *Id.* at 65-66.

she receives from her husband and children, and from society, for behaving in conformity with unspoken expectations of self-sacrifice and service. The importance the wife places on her care-giving role encourages her to place greater value on having custody of the children than does the husband. A loss of custody not only would unacceptably alter her relationship with the children but also would violate her sense of self. A divorcing mother, then, may be inclined to accept an unfair financial agreement if her husband threatens a custody dispute.[14] The wife's meager financial resources may make her fear of losing custody all the more salient, for she may know that she cannot, and that he can, hire attorneys and experts.

Many psychological factors predispose wives more than husbands to accept unfair settlement offers. For instance, wives suffer more from depression than do husbands; wives generally have less status than their husbands; women use less assertive (and less effective) conflict resolution styles than do men; women have lower self-esteem than men; women expect less than men do; and women fear achieving, particularly when their achievement generates disapproval from the men upon whom they have been dependent. Each of these factors causes wives significant problems in divorce negotiations.[15]

Many wives suffer abuse from their husbands.[16] Typically a batterer exercises control over every aspect of his victim's life; her beliefs, her values, and her body as well as her access to family, friends, employment, and money.[17] The problems created by this extensive control are enhanced by other common characteristics of abused spouses: risk aversion, guilt grounded in traditional beliefs about family responsibilities, low self-esteem, low expectations, depression, and passivity.[18] When these factors are coupled with the terror experienced by many battered spouses at the mere mention of their tormentors, the extreme disadvantage of abused spouses in divorce negotiations becomes clear. An abused spouse may want to obtain her divorce without making any requests for property or maintenance that will ruffle his feathers—trading, in essence, her life for their assets.

Divorce laws contribute to these inequitable background conditions. As the wife exits the marriage in which her care-giving and self-sacrifices were endorsed and encouraged, law recasts her experiences in terms of a masculine market ideology—an ideology that comprehends the world through lenses of autonomy, self-interest, formal equality and individualism. The sacrifices she made in the market in order to fulfill her caregiving obligations, the expendi-

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14. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984).

15. *See* Bryan, *supra* note 3, at 457-81 (1992).

16. Estimates of the frequency of wife beating range from one-third to one half of all marriages. M. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 31 (1980); Laurie Woods, *Litigation on Behalf of Battered Women*, 7 WOMEN'S RTS. L. REP. 39, 41 (1981).

17. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2120-32 (1993).

18. For various discussions of these problems, see LENORE WALKER, THE BATTERED WOMAN (1979); LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984); Fischer, *supra* note 17, at 2118, 2165-71.

tures she made of herself, are incomprehensible in a world framed by these concepts.[19] The fiction of formal equality obscures her compromised position in the labor market, her continuing care-giving responsibilities, her prior investment in the family, and her need of assistance. Her continued financial dependency is discounted by an individualism that respects her husband's ability to leave, unencumbered by continuing responsibilities to her. The brutality of the transition from family to law and the market stuns and confuses many wives, leaving them ill-equipped to fend for themselves during divorce negotiations.

A closer examination of the substantive law and its operation clarifies this point. First, custody decisions are governed by the best interests of the child standard. A typical statute lists ten or twelve factors that should be taken into account in determining what custody/visitation arrangement best serves a child's interest. At first blush, this standard appears friendly to a parent who has invested substantial time in child care. The indeterminacy and the politicization of the standard, however, threaten rather than support a caring mother.

The "best interests of the child" standard is so indeterminate as to be no standard at all. Many have noted the lack of guidance the standard gives to negotiating parties, the wide discretion it creates for trial court judges, and the advantage it provides to the wealthier spouse, usually the husband, who can hire the better credentialed and more persuasive experts.[20] Moreover, during the past decade, fathers' groups have employed the rhetoric of formal equality to press for legislation expressing a preference for joint custody and a presumption that divorced children benefit from substantial and continued contact with both parents.

An indeterminate standard grounded in formal equality does not reward a mother who has invested substantially more time in the children than the father. The mother's lack of a solid legal entitlement weakens her position in custody negotiations and makes her reluctant to push for fairness in financial negotiations for fear of provoking a custody contest.[21]

Spousal maintenance law creates a similar problem. As with child custody statutes, maintenance statutes typically list numerous factors a court should

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19. Martha Fineman argues that egalitarian ideology has helped to neuter motherhood by devaluing and making invisible the caretaking function that mothers typically perform. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 68 (1995).

20. *See. e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 BEHAV. SCI. & L. 203 (1991) (stating that in a survey of lawyers, judges, and mental health professionals, over 70% thought the "best interests of the child" standard was unclear); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1533 (1994); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

21. Perversely, the worse the father's performance as a parent during the marriage, the more the mother may desire custody in order to protect the children, and the more vulnerable she may become to financial manipulation.

consider in determining whether and how much spousal maintenance to award. The indeterminacy of the statutes and the inconsistency in judicial opinions weaken a wife's ability to negotiate for maintenance. She cannot, for instance, realistically threaten to go to trial and obtain a maintenance award if her husband balks during negotiations.[22]

The rhetoric of formal equality that pervades divorce law further weakens a wife's claim for maintenance.[23] Thinking of women as equivalent to men suggests that they are able to care for themselves as men do. Moreover, it implies that they can behave as men do and compete successfully in the job market. This formal and gendered idea of equality ignores the fact that women generally receive less pay than men for the same or equally valuable work;[24] that women have more difficulty than men in securing suitable employment;[25] that motherhood inevitably constrains women's marketplace participation[26] especially when women must parent alone after divorce;[27] that spousal maintenance may be necessary for women to begin to achieve actual equality with men; and that society continues to demand that women fulfill the bulk of our collective responsibility for caregiving.

Belying women's worlds, equality rhetoric supports the perception that

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22. *See In re* Marriage of Flynn, 597 N.E.2d 709 (Ill. App. Ct. 1992) (describing a 67-year-old wife with poor health who agreed to waive her maintenance rights primarily because she believed it was the best she could do under the circumstances). Only between 10% and 17% of all divorcing wives receive any spousal maintenance whatever. *See* BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY: 1987, CURRENT POPULATION REPORTS, SERIES P-23, NO. 167. (1990) (stating that in a 1988 Census survey 17% of the divorced women reported that their divorce decree entitled them to spousal maintenance); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 167 (1985); Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 133 (1987); Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View From Canada*, 31 HOUS. L. REV. 451, 485 (1994) (stating that in Canada during 1990 only 16% of women requested spousal maintenance upon divorce and only 19% of custodial mothers requested spousal maintenance). Custodial mothers with dependent children receive maintenance less than one-third of the time. *E.g.*, Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, *in* DIVORCE REFORM AT THE CROSSROADS 84 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (stating that in New York in 1984 only 24% of divorced mothers with custody were awarded spousal maintenance); E. MACCOBY & R. MNOOKIN, DIVIDING THE CHILD 123 (1992) (stating that a California study found that alimony was awarded in 30% of cases in which the divorcing couple had at least one child under the age of 16). Even when wives do obtain maintenance, the awards are small and for short durations.

23. *See generally* FINEMAN, *supra* note 20 (noting that the use of "rule" or formal equality rhetoric in divorce reform has compromised the position of many women on economic and custody issues).

24. Terry J. Arendell, *Women and the Economics of Divorce in the Contemporary United States*, 13 SIGNS 121, 129-30 (1987).

25. Qualified women also have more difficulty than qualified men in achieving deserved promotion. *See* WEITZMAN, *supra* note 22, at 323-56.

26. FINEMAN, *supra* note 19, at 25-27, nn.23-24. As Professor Fineman notes: "[A] primary focus now is on women as economic actors, a role that requires a degree of independence that is difficult, if not impossible, to reconcile with the demands of 'traditional motherhood.'" FINEMAN, *supra* note 19, at 68. *See also* Arendell, *supra* note 24, at 124-25, 128-29; Mary Corcoran et al., *The Economic Fortunes of Women and Children: Lessons from the Panel Study of Income Dynamics*, 10 SIGNS 232, 234 (1984).

27. *See generally* FINEMAN, *supra* note 20, at 5; WEITZMAN, *supra* note 22, at 355-56 (stating that the presence of children in the divorced woman's household depresses her opportunities for economic betterment).

women need only small amounts of short-term maintenance or none at all. Furthermore, the idea that spouses (husbands) have the right to leave their marriages unencumbered by obligations to their prior spouses (wives) finds expression in the law's current preference for a "clean break" at divorce.

The "clean break" rationale favors the use of property distribution, rather than maintenance, to achieve financial equity between spouses.[28] Marital property in most states is subject to equitable distribution. Again we encounter statutory indeterminacy, and the predictable result is that wives generally receive fewer marital assets than husbands.[29] Moreover, even if marital assets were equally divided, equality once again would mask inequity.

Under current definitions of marital property,[30] most divorcing couples have little property to distribute. The marital property of a couple married for many years generally consists only of equity in a marital home.[31] In addition, today's more expansive definition of marital property stops short of embracing a spouse's enhanced earning capacity.[32] A spouse's enhanced earning capacity, however, frequently is the most valuable financial resource in a marriage. Excluding it from marital property, particularly when maintenance is disfavored and infrequent, skews the distribution at divorce.[33] Consequently, under current distribution laws, a wife, at the extreme, may be entitled to half of the value of limited assets. Formal equality again masks inequity.

Representation by an attorney does little to level this uneven playing field. Like judges and legislators, lawyers are steeped in the ideologies of law, the market, and patriarchy that ignore the positions of women and undervalue the caregiving work women perform in the family.[34] In addition, many lawyers are incompetent or they incompetently represent some clients. Many attorneys dabble in divorce cases only when more desirable cases are lacking. Some unimpressive solo practitioners "specialize" in divorces because desirable clients go elsewhere, and the steady stream of divorce clients pays the bills. Only within the past two decades, as attorneys began to recognize the financial

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28. *See, e.g.*, *In re* Marriage of Flynn, 597 N.E.2d 709 (Ill. App. Ct. 1992).

29. *See, e.g.*, WEITZMAN, *supra* note 22, at 106-07; KAREN WINNER, DIVORCED FROM JUSTICE: THE ABUSE OF WOMEN AND CHILDREN BY DIVORCE LAWYERS AND JUDGES 41-42 (1996).

30. Nearly every state defines as marital all property acquired by either spouse during the marriage with the exception of property obtained by gift or through inheritance. J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1094 (1992) (reviewing DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990). During the past several decades most jurisdictions have expanded their definition of marital property to encompass property titled solely in one spouse's name, Milton C. Regan, Jr., *Spouces and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2314 (1994), pension and retirement plans, *id.* at 2318, goodwill of businesses, William A. Reppy, Jr., *Major Events in the Evolution of American Property Law and Their Import to Equitable Distribution States*, 23 FAM. L.Q. 163, 183-84 (1989), and, in a few jurisdictions, increased value of separate assets, for example, COLO. REV. STAT. § 14-10-113(4) (1996). Under extreme circumstances a few states allow judges to award the separate property of one spouse to the other spouse upon divorce. Robert J. Levy, *An Introduction to Divorce—Property Issues*, 23 FAM. L.Q. 147, 156 (1989).

31. WEITZMAN, *supra* note 22, at 66, 78-79.

32. Arendell, *supra* note 24, at 131-32.

33. WEITZMAN, *supra* note 22, at 66, 78-79.

34. *See, e.g.*, PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 198-208 (1987) (describing lawyers' gender bias against women in custody disputes).

potential of divorce law, have high quality law firms specializing in divorce become common. These firms, however, generally handle only a few wealthy clients, and many of these clients are husbands.[35]

The wife's inadequate financial resources encourage attorneys to forego needed discovery,[36] to invest inadequate time in case preparation,[37] to neglect their clients' cases,[38] and ultimately to encourage their women clients to accept poor agreements.[39] The wife frequently cannot resist her attorney's pressure to settle.[40] Put simply, the context of divorce practice far too frequently invites the wife's attorney to compromise the wife's interests during settlement negotiations and to encourage the wife to accept a poor deal.

If the wife enters an unfair settlement, judicial oversight could, but does not, provide relief. At the final hearing most jurisdictions impose a duty on the judge to review a divorce agreement for fairness or lack of unconscionability.[41] Currently, however, for many reasons,[42] judges pay only cursory attention to the actual provisions of divorce agreements.[43] Since judges routinely fail in this task, the only option available to a wife who has entered an unfair agreement is to petition the court to set aside or vacate the agreement.

Many wives lack the financial and emotional resources needed to bring such a challenge. Those who do must confront hostile judges and insensitive legal doctrine. Because the context in which divorce settlements are negotiated is tilted against most wives, courts should listen sympathetically to women's

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35. I know a wealthy lawyer who lives in a town of about 75,000 and who recently filed for divorce. Before choosing his lawyer, he interviewed every law firm in his area known to specialize in divorce. During the interviews he provided enough facts about his finances and the marriage to assure that none of these firms could represent his wife without a conflict of interest. He is not the first wealthy man I have known to employ this tactic.

36. In many cases where the wife's attempts to vacate a prior divorce judgment that incorporated a property settlement agreement, the lack of discovery by the wife's lawyer is apparent. One must assume either that all of these lawyers are incompetent, and/or that their clients lacked the resources with which to pursue discovery.

37. Bryan, *supra* note 4, at 177-88 (recalling the story of a lawyer's failure to conduct discovery, leading to an inequitable settlement).

38. *See* WINNER, *supra* note 29, at 71-92.

39. In Beattie v. Beattie, 368 N.E.2d 178, 179-80 (Ill. App. Ct. 1977), for example, the husband and wife met with the husband's attorney the day before final hearing. The husband's attorney called an attorney to represent the wife. That attorney came to the husband's attorney's office the same afternoon and met with his client, the husband, and the husband's attorney. While there he reviewed with the wife a divorce agreement that already had been prepared. At no time prior to walking to the courthouse with her the next day did the wife's attorney talk privately with her. *Id.*

40. WINNER, *supra* note 29, at 91 (1996).

41. Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C. L. REV. 319, 322 & n.14 (1991).

42. Judicial frustration with the costs of litigation, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlement*, 46 STAN. L. REV. 1339, 1350 (1994); judicial deference to family privacy, see, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479, 483 (1965); and judicial distaste for divorce cases, see, for example, James Delaney, *How to Bring Legal Sanity to Domestic Relations*, 2 FAM. ADVOCATE 20, 20 (1980); Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Persons*, 8 J. DIVORCE, Spring/Summer 1985, at 33, encourage judges to uphold questionably procured or unfair settlement agreements.

43. Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1145 (1988).

complaints of duress and coercion and should look with great suspicion upon agreements with unfair provisions. In fact, many courts do maintain that the freedom of the parties to contract should be restricted in divorce because of the important public policies at stake. The state, say the courts, should guard against unconscionability in the substance[44] and against fraud, duress, and undue influence in the making[45] of divorce agreements.

Despite this lofty rhetoric, courts are very reluctant to set aside divorce agreements.[46] Some of this reluctance can be explained by the failure of masculine legal standards, imbedded as they are in liberal, market, and patriarchal ideology, to capture the experience of women.

The law of the State of Illinois provides an example of how courts address petitions to set aside or vacate property settlements. In support of the State's policy of favoring settlement of divorce disputes, the Illinois courts have created a presumption in favor of the validity of settlement agreements.[47] An Illinois statute specifies that a court cannot set aside or vacate a divorce settlement unless the court finds the agreement unconscionable.[48] In making this determination, the courts employ a concept of unconscionability taken directly from Illinois commercial law.[49] An unconscionable agreement must be extremely one-sided or oppressive, an agreement "which no man, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other."[50] The courts use a two part test to determine unconscionability. They inquire into (1) the conditions under which the agreement was made, and (2) the resulting economic circumstances of the parties.[51] Claims of duress, coercion, and fraud fall under the first prong of the unconscionability test. These claims must be proved by clear and convincing evidence,[52] and the evidence must establish an absence of mean-

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44. *See, e.g.*, McIntosh v. McIntosh, 328 S.E.2d 600, 602 (N.C. Ct. App. 1985) (stating that courts throw a "cloak of protection" around agreements negotiated between husband and wife to ensure their fairness).

45. Sharp, *supra* note 41, at 327 n.42.

46. *Id.* at 329 n.50.

47. *See In re* Marriage of Riedy, 474 N.E.2d 28, 30 (Ill. App. Ct. 1985); Bickson v. Bickson, 183 N.E.2d 16 (Ill. App. Ct. 1962).

48. The Illinois Marriage and Dissolution of Marriage Act provides:

> The terms of the agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable.

750 Ill. Comp. Stat. 5/502(b) (West 1993).

49. *See In re* Marriage of Foster, 451 N.E.2d 915 (Ill. App. Ct. 1983).

50. *See, e.g.*, *In re* Marriage of Gurin, 571 N.E.2d 857, 864 (Ill. App. Ct. 1991); *In re* Marriage of Kloster, 469 N.E.2d 381, 385 (Ill. App. Ct. 1984).

51. *See In re* Marriage of Foster, 451 N.E.2d 915, 918 (Ill. App. Ct. 1983).

52. *See In re* Marriage of Broday, 628 N.E.2d 790 (Ill. App. Ct. 1993) (stating that a claim of fraud requires clear and convincing evidence that the defendant intentionally misstated or concealed a material fact which he had a duty to disclose and upon which the plaintiff detrimentally relied); *In re* Marriage of Carlson, 428 N.E.2d 1005 (Ill. App. Ct. 1981) (stating that evidence of coercion, fraud, or duress must be clear and convincing); Beattie v. Beattie, 368 N.E.2d 178 (Ill. App. Ct. 1977) (stating that a party seeking set aside must prove by clear and convincing evidence that the agreement was entered into as a result of coercion, fraud, duress, or is contrary to public policy or morals).

ingful choice. As should be obvious, the unconscionability standard is difficult to satisfy and it anticipates none of the problems wives commonly encounter in negotiating divorce agreements. Unsurprisingly, wives' claims of unconscionability usually fail.

Consider one court's insensitivity to a mother's fear of losing custody. In August of 1994, Yolanda left her husband, Jeffrey, after nearly twenty years of marriage.[53] She took their three youngest sons with her to the couple's summer home. The older two boys stayed with their father in Bolingbrook, Illinois. Jeffrey worked as a hospital administrator, earning approximately $150,000 per year. Yolanda had not worked outside the home during the marriage. The court soon ordered Jeffrey to pay to Yolanda $ 2,400 per month for unallocated family support.[54]

Sometime within the first year after separation, Yolanda decided to move to Wixom, Michigan with the three youngest sons. On August 28, 1995, Jeffrey filed an emergency petition requesting the court to enjoin Yolanda from permanently removing the boys to Michigan. A hearing was scheduled for three days later. On the date of the hearing, Jeffrey, his lawyer, Yolanda, and her attorney appeared at the court. For two hours they all negotiated in the hallway outside the courtroom. Apparently, no discovery had been conducted prior to negotiations. At her attorney's urging, Yolanda orally agreed to accept what appears to be between seventeen and twenty-three percent of the marital assets[55] and three years of minimal and non-modifiable rehabilitative spousal maintenance,[56] in return for custody of her three youngest sons.[57] Rather than argue the merits of Jeffrey's emergency petition at the hearing, Jeffrey, Yolanda, and their lawyers presented the terms of an oral settlement agreement to the trial court. On the basis of the testimony, the judge agreed to enter judgment on October 5, 1995.

On October 5, Yolanda appeared in court with her new lawyer, Mr. Holden. Mr. Holden requested a continuance, but the court declined and entered judgment. On November 5, Yolanda filed a motion to vacate the judgment, arguing, among other things, that she suffered from duress during negotiations because of her extreme fear of losing her children.[58] Yolanda's fear seems credible because she already had lost her two older sons to Jeffrey, the court might have disapproved of her removal of the three youngest sons to Michigan, she had only three days notice of the emergency hearing, and she had minimal financial resources with which to fight Jeffrey. Moreover, the unfair financial terms to which she agreed themselves suggest that her fear impaired her ability to exercise her free will—she felt she had no other choice.[59] The

53. *In re* Marriage of Steadman, 670 N.E.2d 1146, 1148 (Ill. Ct. App. 1996).

54. *Id.* at 1148.

55. *Id.* at 1149.

56. *Id.* at 1151-52.

57. *Id.*

58. *Id.*

59. At the settlement hearing, Yolanda testified as follows:

MR. KOZLOWSKI [Counsel for Wife]: And that's the agreement we worked out today in the hall, and we will reduce it to writing with the joint custody [agreement], and you're satisfied with that?

trial court, however, denied Yolanda's motion to vacate and the appellate court affirmed. In addressing Yolanda's duress argument the appellate court stated:

> Wife bears the burden of showing duress by presenting clear and convincing evidence that she was bereft of the quality of mind necessary to make a contract. While wife's fear that she may lose custody of her children no doubt caused her anxiety, we do not recognize this as a factor impairing her ability to exercise her free will and make a meaningful choice when the record reflects that she agreed to negotiations, took part in the negotiations and then presented the substance of these negotiations, under oath, to the trial court. Many spouses may experience anxiety when appearing in court because of a petition to dissolve a marriage and this anxiety is no doubt heightened when one fears she may lose custody of her children; however, this factor, without more, does not clearly and convincingly demonstrate that one lacked the ability to make a voluntary decision.[60]

CONCLUSION

Unfair background conditions and insensitive legal standards create the coercive context in which wives bargain at divorce. Understandably, many wives agree to inequitable divorce settlements. If a wife challenges an unfair settlement she confronts a policy favoring settlement, a presumption in favor of the agreement's validity, a hostile legal standard, and a heightened burden of proof. Employing these standards, courts usually refuse wives' petitions to vacate unfair settlements, leaving wives financially devastated and embittered.

Commercial contract doctrine should not govern the validity of divorce agreements. Alternatively, legal standards should be developed that anticipate the common problems wives face during divorce negotiations. Moreover, judges should receive education on the harsh realities of divorcing wives and should not hesitate to vacate inequitable divorce agreements.

THE WITNESS [Wife]: I have no choice.,

THE COURT: Well, ma'am, I want you to understand that you do have a choice. We can sit down right now and have a formal hearing and the parties can present evidence on both sides and call any witnesses that you want and the Court will make a decision.

THE WITNESS: Okay.

THE COURT: The question I have is, is this your agreement?

THE WITNESS: At this time, yes, sir.

Id. at 1149 (alteration in original).

60. *Id.* at 1151-52 (citations omitted).

COERCED WAIVER AND COERCED CONSENT

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Consent and waiver are said to be legally transformative, that is, they are verbal acts with legal repercussions.[1] Coercion undermines the validity of these verbal acts. In the context of criminal procedure, coercion may invalidate the legal significance of a defendant's consent to a search, the waiver of his privilege against self-incrimination, or the waiver of his right to counsel. The question of whether we should or should not invalidate a defendant's actions because of government coercion is for the most part a matter of public policy. An examination of the boundaries established by the courts between acceptable and improper police behavior reveals that the lines are drawn based upon a desire to promote the public policy goals of effective law enforcement and public confidence in the criminal justice system as an accurate truth-seeking mechanism. Depending on whether a law enforcement officer's acts will further or hinder societal concerns, the law may characterize his acts as coercive in one area of criminal procedure but the acceptable norm in another context. Despite the fact that the words "coercion" and "voluntariness" generally connote subjectivity, a defendant's perception of whether his consent was voluntary or coerced is largely irrelevant in the determination of whether the law will invalidate his actions on the grounds of coercion.

Our task in this Symposium[2] is to analyze not the essence of coercion, but to determine when the law should treat a defendant's actions as legally invalid due to coercion. This article examines the circumstances under which a criminal defendant may effect a valid relinquishment of his Fourth, Fifth, and Sixth Amendment rights; how the differences in the procedural safeguards accorded these rights reflect the degree to which our criminal justice system is willing to recognize coercive government actions as an invalidating force with respect to each of these rights; and the moral reasoning underlying this scheme. Part I summarizes the evolution of the law of waiver and consent in criminal procedure. It discusses the Sixth Amendment and the rationale under-

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1. Consent is morally and legally transformative in that "it changes the moral and legal relationship between parties to an agreement." Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 890 (1997).

2. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

lying the concept of waiver, the United States Supreme Court's extension of the Sixth Amendment standards for waiver to the relinquishment of Fifth Amendment rights, and the Supreme Court's refusal to extend the concept of waiver to the Fourth Amendment. Part II analyzes the role of moral considerations in the willingness of the courts to give effect to the invalidating force of coercion upon the transformative acts of waiver and consent.

I. WAIVER AND CONSENT: THE SIXTH, FIFTH, AND FOURTH AMENDMENTS[3]

A. *Waiver of the Sixth Amendment Right to Counsel*

The Sixth Amendment to the United States Constitution provides an accused with procedural protections relating to the structure of a criminal trial, including the right to counsel.[4] The Sixth Amendment right to counsel attaches at all "critical stages" of criminal proceedings in which the absence of counsel may result in substantial prejudice against the accused and where the presence of counsel would mitigate or eliminate this prejudice.[5]

It was in the context of the Sixth Amendment, in *Johnson v. Zerbst*,[6] that the United States Supreme Court first articulated the now familiar definition of waiver: "an intentional relinquishment or abandonment of a known right or privilege."[7] The defendant in *Zerbst* was charged with possessing and passing counterfeit Federal Reserve notes.[8] He had little education, was without the

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3. This background is not a thorough review of the Fourth, Fifth, and Sixth Amendments, but rather a brief overview to highlight the invalidating role of coercion with respect to waiver and consent in criminal procedure. The validity of a defendant's consent or waiver after it has been previously withheld, for example, is beyond the scope of this article.

4. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Supreme Court has also recognized a due process right to counsel independent from the Sixth Amendment. *See* Powell v. Alabama, 287 U.S. 45 (1932). Miranda warnings, created as a prophylactic measure to protect the Fifth Amendment privilege against self-incrimination, also include a right to counsel during custodial interrogation.

Coercion in the waiver of other trial rights raises interesting questions, but is beyond the scope of this article. *See, e.g.*, United States v. Mezzannatto, 115 S. Ct. 797, 800, 805-06 (1995) (holding that defendants who engage in plea negotiations may waive the protection against later use of their statements for impeachment purposes); Town of Newton v. Rumery, 480 U.S. 386 (1987) (holding that release-dismissal agreements—in which defendants agree to release their civil suits against the government in exchange for the dismissal of the government's case against them—are not impermissible per se).

5. United States v. Wade, 388 U.S. 218, 236-38 (1967) (holding that post-indictment lineups possess a "grave potential" for prejudice and are therefore a "critical" stage of the proceedings at which the defendant is entitled to the assistance of counsel). "Critical stages" are those proceedings which lead to the loss of liberty. The Supreme Court has recognized that the defendant has a right to counsel at a preliminary hearing, *see* White v. Maryland, 373 U.S. 59 (1963); at a pretrial line up, *see* United States v. Wade, 388 U.S. 218 (1967); during a pretrial interrogation when the state attempts to elicit information directly from an accused who has been formally charged, *see* Brewer v. Williams, 430 U.S. 387 (1977); and when the government surreptitiously and deliberately attempts to elicit information from an indicted defendant, *see* Maine v. Moulton, 474 U.S. 159 (1985). *See generally* 1 WILLIAM H. ERICKSON, UNITED STATES SUPREME COURT CASES AND COMMENTS: CRIMINAL LAW AND PROCEDURE § 3.01[3] (1997).

6. 304 U.S. 458 (1938).

7. *Zerbst*, 304 U.S. at 464.

8. *Id.* at 459.

financial means to hire retained counsel, and had no family or friends in the area.[9] He was arraigned, tried, convicted, and sentenced on the same day without the assistance of counsel. At trial, the defendant briefly addressed the jury, stating only, "I don't consider myself a hoodlum as the District Attorney has made me out to be several times."[10] He was sentenced to four and one half years of incarceration. Standard procedure at the penitentiary required new prisoners to be placed in isolation for sixteen days; as a result, the defendant was unable to file an appeal within the allotted time.[11] The Supreme Court reversed the conviction on the grounds that the defendant could not have effectively waived his right to counsel if he did not know that he had a right to counsel.[12] In doing so, the Supreme Court emphasized that courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights," and stated that "[t]he determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[13] The Court further stated that the policy underlying this right was one of humanity and fairness, and that the Sixth Amendment:

> [E]mbodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. . . .
>
> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.[14]

The *Zerbst* court held, in essence, that a conviction obtained by government exploitation of the defendant's ignorance as to legal procedure was no conviction at all. Although the public policy behind this rule was, in part, the ascertainment of truth and the exculpation of the innocent, the Court also expressed serious concern for persons overwhelmed by the complexity of our legal system regardless of their guilt or innocence.[15] The Court subsequently extended this "intentional relinquishment of a known right" standard to the states through the Due Process Clause of the Fourteenth Amendment.[16]

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9. *Id.*
10. *Id.* at 461.
11. *Id.* at 469.
12. *Id.*
13. *Id.*
14. *Id.* at 462-63.
15. *Id.* at 469.
16. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

Massiah v. United States[17] extended the right to counsel from the context of a courtroom to encounters between citizens and law enforcement officials. In *Massiah*, law enforcement officials instructed a co-defendant to elicit incriminating statements from the defendant as the officials listened to the conversation through a radio transmitter. The defendant had been indicted and was represented by counsel.[18] The Supreme Court found that the state, by deliberately eliciting incriminating statements after indictment and seeking to use the statements against the defendant at trial, violated the defendant's Sixth Amendment right to counsel.[19]

Although *Massiah* clarified the parameters of the Sixth Amendment right to counsel, the standard for waiver of that right beyond the confines of a courtroom was not clear until *Brewer v. Williams*.[20] The defendant in *Brewer* was an escapee from a mental institution who had been formally charged with the abduction of a young girl.[21] He was represented by counsel and had been advised of his rights.[22] While transporting the defendant to the jurisdiction where the abduction occurred, law enforcement officials who knew the defendant to be deeply religious explained to the defendant, in the absence of counsel, that the weather conditions were such that unless the defendant immediately led the officers to the girl's body it would never be found, and that the child's parents "should be entitled to a Christian burial."[23] The defendant responded by leading the officers to the girl's body. The Supreme Court found the facts to be "constitutionally indistinguishable"[24] from those in *Massiah*, and held that the officers' subtle persuasion amounted to a violation of the defendant's right to counsel.[25] The Court recognized that the murder of a small child inevitably produced great pressure on the state and the courts to bring the perpetrator to justice, but that "it is precisely the predictability of those pressures"[26] that required faithful adherence to the Constitution. Holding that the *Zerbst* standard applied to a waiver of the right to counsel at critical stages regardless of whether the waiver occurred in a courtroom or in a patrol car, the court emphasized that "waiver requires not merely comprehension but relinquishment."[27] Hence, a waiver of the Sixth Amendment right to counsel must be knowing, intelligent, and voluntary.[28]

Zerbst, *Massiah*, and *Brewer* together stand for the proposition that once

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17. 377 U.S. 201 (1964).
18. *Massiah*, 377 U.S. at 201-02.
19. Note, however, that when an undercover agent elicits incriminating information from an indicted defendant but does not convey this information to law enforcement officials, no Sixth Amendment violation has occurred. *See* Weatherford v. Bursey, 429 U.S. 545 (1977) (finding no Sixth Amendment violation where there was no realistic possibility that the state gained an advantage).
20. 430 U.S. 387 (1977).
21. *Brewer*, 430 U.S. at 400.
22. *Id.*
23. *Id.* at 401-02.
24. *Id.* at 400.
25. *Id.*
26. *Id.* at 406.
27. *Id.* at 407.
28. *Id.*

the Sixth Amendment right to counsel has attached, an effective waiver of that right, whether it occurs in a courtroom, a patrol car, or in any other location, must be an "intentional relinquishment of a known right"; the waiver must be knowing, intelligent, and voluntary. These cases reflect the Court's concern with police overreaching and procedural fairness to defendants, especially those defendants who may be vulnerable to such overreaching by virtue of diminished mental abilities, a lack of education, or some other factor related to background or experience. Finally, the Court acknowledged the fact that a layperson's unfamiliarity with legal procedure may prejudice his ability to preserve his rights at trial.[29]

B. *Waiver of the Fifth Amendment Privilege Against Self-Incrimination*

The Fifth Amendment's privilege against self-incrimination protects an accused from being compelled to testify against himself or to provide the government with testimonial or communicative evidence.[30] Two years after the United States Supreme Court held the Fifth Amendment applicable to the states,[31] the Court announced the most significant Fifth Amendment case to date, *Miranda v. Arizona*.[32] In *Miranda*, the Court determined that custodial interrogation—"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,"[33]—was inherently coercive, and that officers must provide the suspect with a prophylactic advisement of his rights in these situations in order to protect the Fifth Amendment privilege against self-incrimination and to ensure that any statements made by the suspect were "truly the product of free choice."[34]

For purposes of this article, *Miranda*'s significance is twofold. First, *Miranda* sheds light on the definition of coercion in criminal procedure by establishing custodial interrogation as a baseline for presumptively coercive state action.[35] In reaching this conclusion, the Court considered the privacy in which custodial interrogation generally occurs and the absence of an accurate

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29. *See generally* Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (holding that a lay person's lack of familiarity with legal procedure cannot be offset by legal counsel's representation).

30. *See* Schmerber v. California, 384 U.S. 757 (1966) (holding that police did not violate defendant's privilege against self-incrimination by taking a blood sample over his objection because the privilege only protects the contents of his mind). The Fifth Amendment provides in pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

31. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment privilege against self-incrimination applicable to the states and noting that both state and federal courts determined admissibility of a confession on a voluntariness standard).

32. 384 U.S. 436 (1966).

33. *Miranda*, 384 U.S. at 444.

34. *Id.* at 457. The documented instances of false confessions are significant enough to justify concern over this issue. *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 84 (1993) (discussing psychological perspectives on why suspects confess and stating that 49 persons in 350 cases were wrongly convicted of murder based on their own false confession).

35. *Miranda*, 384 U.S. at 514-25 (discussing the policy reasons for establishing constitutional safeguards against custodial interrogation without counsel).

gauge with which to measure the atmosphere in an interrogation room. After surveying police department manuals which instructed officers to intimidate suspects through the use of psychological tactics,[36] the Court concluded that custodial interrogation was by nature coercive:[37] "This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[38] If custodial interrogation is presumptively coercive, then the factors that define "custody" are instructive in discerning the Court's understanding of coercion. "Custody" includes such factors as the time and place of interrogation; the length of interrogation; the number of officers present; the actions and words of the officers and the defendant; physical restraint or the threat of physical restraint.[39] The determination of whether a defendant is in custody entails an objective, rather than a subjective, inquiry of "how a reasonable man in the suspect's position would have understood his situation."[40] The subjective views harbored by the officer or the suspect are not relevant.[41]

Miranda is also significant for its adoption of the *Johnson v. Zerbst* standard in the context of the Fifth Amendment. Previously, the Supreme Court's constitutional threshold for a defendant's relinquishment of the privilege against self-incrimination was voluntariness under the totality of the circumstances, which accounted for the characteristics of the accused and the details of the interrogation.[42] The trial court's role was to "determine whether a defendant's will was overborne . . . [under] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. . . ."[43] Confessions that were the product of an "overborne will" and a critically impaired capacity for self-determination were inadmissible as a violation of due process under either the Fifth or Fourteenth Amendment.[44] In *Miranda*, the Court established that a waiver of the privilege against self-incrimination must not only be voluntary, but also knowing and intelligent.[45] According to the Court, the requirement that law enforce-

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36. The tactics included: isolating the defendant in an unfamiliar environment; displaying an air of confidence in the suspect's guilt; pretending to be an ally to the suspect; strategically alternating hostility with kindness; and discouraging a suspect from consulting with a relative or an attorney. *See id.* at 449-54.

37. *Id.* at 465.

38. *Id.* at 457.

39. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420 (1984); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341 (1976).

40. *See Berkemer*, 468 U.S. at 420.

41. *See* Stansbury v. California, 511 U.S. 318, 323 (1994).

42. Cases considering the relevant factors in a voluntariness analysis include the following: Davis v. North Carolina, 384 U.S. 737 (1966) (lack of any advice to the accused regarding his constitutional rights); Fay v. Noia, 372 U.S. 391 (1963) (denial of right to consult with counsel); Spano v. New York, 360 U.S. 315 (1959) (defendant's emotional instability); Payne v. Arkansas, 356 U.S. 560 (1958) (threats and lack of education); Fikes v. Alabama, 352 U.S. 191 (1957) (low intelligence of the accused); Turner v. Pennsylvania, 338 U.S. 62 (1949) (extensive questioning); Lee v. Mississippi, 332 U.S. 742 (1948) (physical abuse); Haley v. Ohio, 332 U.S. 596 (1948) (youth of the accused); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (repeated and prolonged nature of questioning); Chambers v. Florida, 309 U.S. 227 (1940) (length of detention).

43. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (citing Culombe v. Connecticut, 367 U.S. 568, 603 (1961)).

44. *See* Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

45. *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)) ("This Court

ment officers advise defendants of their rights served to ensure the knowing and intelligent nature of a waiver while eliminating the need for lower courts to engage in speculation as to whether a particular defendant, in light of his background, intelligence, and education, was aware of his constitutional privilege against self-incrimination. The institution of *Miranda* warnings created a "simple" means to "overcome [the] pressures" of custodial interrogation.[46]

A waiver of the privilege against self-incrimination must not only be knowing and intelligent, but also voluntary. In the context of confessions, the Supreme Court defined "voluntariness" in *Bram v. United States*[47] as, "not . . . extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[48] Yet in *Brady v. United States*,[49] the Supreme Court upheld the validity of a guilty plea tendered in reliance upon the government's promise of leniency and in an effort to avoid the possibility of a death penalty. Conceding that a promise of leniency was "possibly coercive," the Court held that this "possibly coercive atmosphere . . . could be counteracted by the presence of counsel or other safeguards"[50] in the same manner that the inherently coercive atmosphere of custodial interrogation could be dissipated by *Miranda* warnings. The Court concluded that a plea of guilty entered with the knowledge of the direct consequences "must stand unless induced by threats [or promises to discontinue improper harassment], misrepresentation [including unfulfilled or unfulfillable promises], or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business [e.g. bribes]."[51]

In addition, a statement is "voluntary" for purposes of the Fifth Amendment if coercive forces acting upon the defendant arise from sources other than government action. In *Colorado v. Connelly*,[52] the Supreme Court held that a defendant's confession—an involuntary manifestation of a mental disease which compelled the defendant to make the statement—was "voluntary" because "voluntariness" is defined as "the absence of police overreaching rather than 'free choice' in any broader sense of the word."[53]

In the context of the Fifth Amendment, therefore, the Supreme Court recognizes the impact of coercive government behavior upon criminal defendants, whether these pressures exist in the privacy of an interrogation room or in open court. However, voluntariness is defined as the absence of government

has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in custody interrogation."). A defendant's statement which is not given knowingly or voluntarily is not admissible in the prosecution's case in chief, but may still be admissible for impeachment purposes if voluntarily made. *See* Harris v. New York, 401 U.S. 222 (1971).

46. *Miranda*, 384 U.S. at 468-69.
47. 168 U.S. 532 (1897).
48. *Bram*, 168 U.S. at 542-43.
49. 397 U.S. 742 (1970).
50. *Brady*, 397 U.S. at 754.
51. *Id.* at 755.
52. 479 U.S. 157 (1986).
53. *Connelly*, 479 U.S. at 170.

coercion rather than the defendant's exercise of volition. Advisements and the presence of counsel serve to neutralize these pressures, but a court may find that a confession was coerced despite these safeguards if the confession was induced by threats, misrepresentation, or improper promises.

C. *Consent Searches and the Fourth Amendment*

Government searches conducted without a warrant supported by probable cause are per se unreasonable.[54] Perhaps the most common exception to the warrant and probable cause requirements is a search conducted pursuant to a valid consent.[55] From the perspective of a law enforcement officer, it may be preferable to obtain consent to search instead of securing a warrant.[56] A consent search allows an officer to bypass paperwork and the need to locate a magistrate who can issue a warrant.[57] Evidence produced during a consent search is less likely to be suppressed on technical grounds.[58] Also, because consent searches require no degree of suspicion on the officer's part, they allow an officer to pursue inarticulable hunches in detecting crime.[59]

The flexibility which makes consent searches favored among law enforcement officials also creates a strong potential for abuse. As a practical matter, at a hearing on a motion to suppress evidence on the grounds that the defendant did not give consent, the dispute usually amounts to a swearing match in which the police officer possesses greater credibility than the defendant, who has every motive to lie in order to preserve his liberty. Hence, absent some significant discrepancies such as an inconsistency in documentary evidence or the conflicting testimony of a fellow officer, factual disputes over whether consent was in fact given are overwhelmingly resolved in favor of the state.

A court may find consent where a defendant uttered no words of consent but manifested consent through his conduct.[60] The scope of consent is measured under a standard of objective reasonableness: "What would the typical

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54. *See, e.g.*, Katz v. United States, 389 U.S. 347, 359 (1967) (holding that government recordings of defendant's conversations in a telephone booth violated the Fourth Amendment). The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

55. *See, e.g.*, Florida v. Jimeno, 500 U.S. 248, 250-51 (1991) (holding that defendant's consent to a search of his car included permission to examine the contents of a bag lying on the floor of the car).

56. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 596 (3d ed. 1996).

57. LAWRENCE TIFFANY ET AL., DETECTION OF CRIME 159 (1967).

58. LAFAVE, *supra* note 56, § 8.1, at 596 (stating that despite the prosecutorial burden to prove consent, consent "may be perceived as the 'safest' course of action in terms of minimizing the risk of suppression").

59. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (stating that where officers lack probable cause, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence").

60. *See* ERICKSON, *supra* note 5, § 1.11 [1][d] (citing United States v. Griffin, 530 F.2d 739 (7th Cir. 1976); People v. Bordeaux, 488 P.2d 57 (Colo. 1971)).

reasonable person have understood by the exchange between the officer and the suspect?"[61] In addition, the test to determine whether a suspect has been seized is an objective one of whether, in the totality of the circumstances, the conduct of law enforcement officers would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[62]

Assuming that the defendant gave consent to the search, the government must also demonstrate that the consent was voluntary.[63] Before 1973, lower courts were divided as to whether the definition of voluntariness included a showing that the defendant was aware of his right to withhold consent to search.[64] The United States Supreme Court answered this question in *Schneckloth v. Bustamonte*[65] by holding that "voluntariness" does not include the element of knowledge.[66] The *Schneckloth* court held that although a waiver of Fifth and Sixth Amendment rights must be knowing, intelligent, and voluntary, a consent under the Forth Amendment need only be voluntary.[67] In concluding that a voluntary consent was sufficient to effect a valid relinquishment of Fourth Amendment rights, the Court held that a defendant can effectively surrender his Fourth Amendment rights without being aware of the fact that he possessed these rights in the first place.[68] The Court concluded that voluntariness is a question of fact to be determined under the totality of the circumstances, and that the defendant's knowledge of his right to withhold consent is one factor in this consideration rather than a prerequisite to admissibility.[69]

In explaining its refusal to extend *Miranda*'s prophylactic advisement to the Fourth Amendment context, the Court undertook a detailed analysis of the meaning of voluntariness. The Court considered, and dismissed, the possibility that voluntariness was synonymous with "knowledge," because to equate the two would permit physical or mental threats. The Court acknowledged that official action is almost always the cause for the defendant's incriminating statement, and reasoned that as a practical matter, the concept of voluntariness could not incorporate a "but for" analysis.[70] Unable to agree on a definition

61. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing Illinois v. Rodriquez, 497 U.S. 177 (1990)).

62. Michigan v. Chesternut, 486 U.S. 567, 569 (1988).

63. *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

64. *See, e.g.*, Cipres v. United States, 343 F.2d 95 (1965) (holding that consent is not voluntary unless it is given with the knowledge that it could be withheld); People v. Tremayne, 98 Cal. Rptr. 193 (Cal. Ct. App. 1971) (holding that knowledge of the right to withhold consent was a persuasive, but not a determinative, factor in a voluntariness analysis).

65. 412 U.S. 218 (1973).

66. *Schneckloth*, 412 U.S. at 224-25.

67. *Id.* at 241.

68. *Id.* at 225-26.

69. *Id.* at 248-49. The Supreme Court has also declined to extend *Miranda* to testimony before a grand jury. *See* United States v. Mandujano, 425 U.S. 564 (1976).

70. *Schneckloth*, 412 U.S. at 224 ("Under [a 'but for'] test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.") (citations omitted).

of voluntariness which took into account for the defendant's subjective experience, the Court turned to an area more readily susceptible to a quantitative analysis, public policy:

> "[V]oluntariness" has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.[71]

Hence, under *Schneckloth*, the concept of voluntariness has little or nothing to do with a defendant's subjective perception of the circumstances under which he relinquishes a constitutional right; rather, "voluntariness" is an "accommodation" of "values," specifically, the need for effective law enforcement and the need for the public to perceive the criminal justice system as fair. If a defendant surrenders his constitutional rights under circumstances which further law enforcement and which the public will perceive as fair, the defendant's act is "voluntary." If a defendant waives his rights or consents to a government intrusion under circumstances which do not further law enforcement or which the public may perceive as unfair, the defendant's act is not "voluntary." *Schneckloth* held that the subjective mental state of the person who allegedly consented is not the focus of a voluntariness analysis.[72]

The *Schneckloth* court considered the possibility of imposing a requirement that officers advise suspects of their right to refuse before eliciting consent. The Court summarily rejected this alternative on the grounds that it would be "thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[73] The Court added that while advisements may be appropriate in the structured atmosphere of a courtroom, officers in the field operate under informal and unpredictable conditions which require flexibility on the part of the officer, and hence, freedom from restrictive procedural safeguards. The suggestion, then, is that advisements are not necessarily given when they are needed, but when they do not interfere with the investigation of crimes. The Court's reasoning here is questionable; the phrase, "you can say no" is hardly a "detailed requirement" that is "thoroughly impractical." The Court's concern, instead, appears to be that informed suspects would be less likely to consent to a search, which in turn would frustrate the public policy goal of truth-seeking. As the *Schneckloth* court emphasized, the community possesses a "real interest in encouraging consent" because

71. *Schneckloth*, 412 U.S. at 224-25 (citations omitted).
72. *Id.* at 235.
73. *Id.* at 231-32.

consent searches help convict the guilty and exculpate the innocent.

The Court noted that advisement is required in custodial interrogation because such questioning "contains inherently compelling pressures which work to . . . compel him to speak where he would not otherwise do so freely,"[74] but that advisement is not necessary in order to question individuals who are not in custody because "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[75] Likening consent searches to noncustodial questioning, the Court determined that advisement is unnecessary in a consent search because "[t]here is no reason to believe . . . that the response to a policeman's question is presumptively coerced."[76]

According to the Court, waiver and its additional procedural safeguards apply only to "trial rights," which the Court defined as "a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process."[77] The Court quoted *Johnson v. Zerbst's* reasoning that safeguards were necessary to the "realistic recognition of the obvious truth" that a lay person lacks sufficient skill to protect his legal interests "before a tribunal with power to take his life or liberty,"[78] and emphasized that Sixth Amendment waivers require additional procedural protections because a "wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted."[79] In attempting to explain why this rationale would not apply with equal force in the context of searches and seizures, the *Schneckloth* court stated simply that the Fourth Amendment protects privacy interests rather than trial rights, and that there is "no likelihood of unreliability or coercion present in a search-and seizure case."[80] This statement may not be entirely accurate because the Court does in fact acknowledge the possibility of coercion in a Fourth Amendment context.[81]

However, the Court's assertion concerning the reliability of evidence produced in a consent search is instructive. While coerced confessions may be unreliable or false, the same cannot be said of coerced consent to a search that yields, for example, a quantity of heroin.[82] The Court's distinction between "trial rights" and Fourth Amendment rights is questionable in light of the Court's holdings in *Massiah v. United States* and in *United States v. Wade*.[83] In *Massiah*, the Court held that the Sixth Amendment was violated when officers arranged to eavesdrop as a co-defendant elicited statements from the defendant, who had already been indicted. In *Wade*, the Court held that post-indictment lineups implicate the Sixth Amendment. Arguably, these investigatory tactics on the part of law enforcement officials do not affect the promo-

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74. *Id.* at 247.
75. *Id.* at 232.
76. *Id.*
77. *Id.* at 236-37.
78. *Id.* at 236.
79. *Id.* at 241.
80. *Id.* at 242.
81. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968).
82. *Schneckloth*, 412 U.S. at 228.
83. 388 U.S. 218 (1967).

tion of truth at trial any more than searches and seizures; these "critical stages," however, enjoy the benefit of Sixth Amendment protection. If, as the Court found in *Wade*, lineups contain a risk of abuse or unintentional suggestion which undermine truth-seeking, it is difficult to understand why the law provides protection against this prejudice after indictment, but not before.[84]

In an effort to explain why the *Zerbst* standard was extended to Fifth Amendment, but not Fourth Amendment, rights, the *Schneckloth* court stated that police questioning differs from searches and seizures in that custodial interrogation undermines the integrity of the fact-finding processes because it "enable[s] the defendant . . . to tell his story without fear, effectively."[85] According to the Court, fear in the context of custodial interrogation was not an evil in and of itself, but rather an impediment to the defendant's ability to convict or exculpate himself with accuracy. In addition, the Court pointed to the *Miranda* court's fear that "[w]ithout the protections flowing from adequate warnings and the rights of counsel . . . the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[86] It is true that "[a] confession is like no other evidence."[87] Yet the Court failed to explain how, for example, twenty pounds of marijuana in a defendant's trunk is somehow less compelling evidence of guilt. The rights at issue provide some insight into the course taken by the Supreme Court in refusing to extend the *Zerbst* standard to the Forth Amendment. The language of the Fifth Amendment, for example, unequivocally provides that "no person shall . . . be compelled . . . to be a witness against himself."[88] By contrast, the Fourth Amendment prohibits only "unreasonable" searches and seizures, and therefore contemplates that some searches and seizures will occur against the suspect's will. This difference creates distinct baselines for these constitutional rights. In the Forth Amendment's test of reasonableness, which balances public policy on the one hand with individual rights on the other, public policy often wins out, as evidenced by the "emerging pattern of nonprotection" in the administrative search context.[89]

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84. *See* Kirby v. Illinois, 406 U.S. 682 (1972) (holding that no right to counsel exists in pre-indictment lineups). The Second Circuit has also held that a post-indictment consent to search was not a critical stage of a criminal proceeding. *See* United States v. Kon Yu-Leung, 910 F.2d 33 (2d Cir. 1990).

85. *Schneckloth*, 412 U.S. at 229.

86. *Id.* at 240 (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

87. Arizona v. Fulminante, 499 U.S. 279, 296 (1990) ("Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.").

88. U.S. CONST. amend. V.

89. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992) (discussing administrative searches).

Scholarly interpretations of the distinction drawn by *Schneckloth* are diverse. *See, e.g.*, LAFAVE, *supra* note 56, §8.1(a) (quoting Escobedo v. Illinois, 378 U.S. 478 (1964)) ("[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."); William J. Stuntz, *Waiving Rights in Criminal Procedure* 75 VA. L. REV. 761 (1989) (arguing that waivers in the courtroom receive more protection than other relinquishments of constitutional rights because in these other contexts, the right holder is not the intended beneficiary); Toby M. Tonaki et. al., *State v. Quino: The Hawaii Supreme Court Pulls Out All the "Stops,"* 15 U. HAW. L. REV. 289 (1993) (stating that the waiver of the Fifth Amendment privilege against self-incrimination, as an eviden-

Consent, then, is invalid if not voluntary, and coercive or overbearing conduct on the part of law enforcement officers will invalidate an alleged consent. In *Bumper v. North Carolina*,[90] the Supreme Court invalidated the consent purportedly given by the defendant's elderly grandmother after several officers appeared at her home which was located in an isolated area, announced that they had a warrant to search the house, and proceeded to conduct a search. The Court held the officers' representation that they possessed authority that could not be resisted amounted to coercion. In addition to an officer's claim of authority, other factors bearing on the validity of consent include a show of force or coercive surroundings, such as the presence of a large number of uniformed officers, the display of weapons, or a confrontation in the middle of the night; a threat to obtain a search warrant where there are not grounds upon which a warrant could issue; prior illegal police action; the defendant's maturity, sophistication, and mental or emotional state; the defendant's prior or subsequent refusal to consent; and the defendant's awareness of the right to refuse to give consent.[91]

D. *Summary*

The Supreme Court has held that police-citizen encounters in the context of the Fourth Amendment are not presumptively coercive, although state action in combination with a defendant's characteristics may produce an environment in which a defendant's consent to a search is coerced, and therefore invalid. In the Fifth Amendment context, the Court has held that custodial interrogation is presumptively coercive, but that an advisement of the defendant's rights and the availability of counsel sufficiently neutralizes the coercive nature of such questioning. With respect to the Sixth Amendment, the Court has acknowledged the "reality" that a defendant's ignorance of criminal procedure gives rise to prejudice at critical stages of criminal proceedings, but that the presence of counsel, or the knowing, intelligent, and voluntary waiver of the right to counsel, is an adequate safeguard against this prejudice.

"There is no universal standard that must be applied in every situation where a person forgoes a constitutional right."[92] However, the common thread that exists within the standards for waiver and consent is the public's need to perceive the criminal justice system as accurate. In the Fifth and Sixth Amendment context, the law acknowledges that, by objective standards, the custodial environment is inherently coercive. Because truth-seeking is hindered by the exploitation of a defendant's ignorance in these situations, advisement and the assistance of counsel are provided as a prophylactic measure to counteract this coercion. In the Fourth Amendment setting, however, exploiting a

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tiary privilege, impedes rather than aids the ascertainment of truth and that the *Schneckloth* voluntariness standard rather than the *Zerbst* "knowing, intelligent, and voluntary" standard should apply to confessions).

90. 391 U.S. 543 (1968).

91. *See generally* ERICKSON, *supra* note 5, § 1.11[1] (discussing search and seizure); LAFAVE, *supra* note 56, § 8.2.

92. *Schneckloth*, 412 U.S. at 245.

defendant's ignorance as to his rights furthers the public policy goal of truth-seeking. Hence, consent to a search or seizure need only be voluntary, with "voluntariness" defined not by a defendant's subjective perception, but by public policy concerns.

II. COERCION

Turning from the circumstances under which we allow coercion to negate the legal effect of a defendant's consent or waiver, to the circumstances in which we *should* allow coercion to negate the legal effect of these actions, we begin with the Supreme Court's determination in *Schneckloth* that if not for confrontations with law enforcement officials, it is highly unlikely that the majority of citizens would intentionally incriminate themselves. It follows that citizen-police encounters involve some degree of pressure to cooperate, and that criminal suspects act with constrained volition in their interactions with law enforcement officers.[93] This proposition finds support in the field of psychology, as well.[94]

If the courts were to acknowledge the pressures inherent in police-citizen encounters, procedural safeguards in addition to those already in place might be necessary to counteract these pressures. Because the public's concerns with respect to the criminal justice system revolve around truth-seeking, such safeguards would be perceived as a hindrance to effective law enforcement and would not be tolerated. The need to perceive the criminal justice system as an accurate and fair system may explain some of the inconsistencies created by the problematic *Schneckloth* opinion. A defendant in a search and seizure situation is just as ignorant of his rights as a defendant in a courtroom, and in both situations he stands to lose his liberty. Although the deprivation of liberty is not so close at hand in the Fourth Amendment context, the penalty will ultimately be the same. Our community condones the exploitation of the defendant's ignorance in a search and seizure context, yet condemns the same behavior under the Fifth and Sixth Amendments. Coercion, then, is a legal fiction, a term of art invoked upon consideration of the public policy concerns presented under the facts of a particular case.

Florida v. Bostick[95] is a good example. In *Bostick*, the defendant was a passenger on a Greyhound bus *en route* from Miami to Atlanta. During a brief, scheduled stop in Fort Lauderdale, two uniformed police officers boarded the bus and approached the defendant, who was sitting in the back of the

93. *See* Berkemer v. McCarty, 468 U.S. 420, 438 (1984) ("To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions.").

94. *See* Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte: *Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 97 U. ILL. L. REV. 215 (1997) (detailing Stanley Milgram's 1960 experiment in obedience theory which proved that "[l]egitimate authority . . . influences behavior to a much larger extent than anyone previously imagined, often dwarfing a person's fundamental sense of right and wrong").

95. 501 U.S. 429 (1991).

bus, blocked the aisle, and began questioning him.[96] One of the officers carried a gun in a recognizable weapons pouch.[97] To disembark would have meant risking the departure of the bus and being stranded in a strange city without luggage.[98] Despite the presence of many of the factors which the Court had previously characterized as indicia of coercion, the Supreme Court held that the defendant consented to this encounter.[99] The officers were conducting a suspicionless "sweep" of the bus, a popular method of drug interdiction in furtherance of the "war on drugs."[100] It was this policy in favor of drug interdiction, more than any of the factors previously articulated by the Court, which drove the decision in *Bostick*. A jurisprudence which places greater reliance upon public policy than upon precedent embodies the very problem that the Court hoped to avoid—a loss of public confidence in the accuracy and fairness of our judicial system.[101]

As Professor Wertheimer writes, "however important society's need for searches, it arguably has nothing to do with the voluntariness of consent."[102] Perhaps society's need for searches should not be a relevant factor in defining voluntariness, however, it assuredly is a factor if not the most important factor under the Supreme Court's current framework. Professor Wertheimer states that courts follow moral considerations in delineating the situations in which it will recognize coercion as an invalidating force. In criminal procedure, this "morality" is society's need to perceive the criminal justice system as an accurate mechanism for truth-seeking. Unfortunately, morality in the sense of humanity, as envisioned under *Zerbst*, is notably absent in the context of consent searches. As Professor Wertheimer aptly states, "there is independent moral value"[103] in protecting the volitional dimension of a defendant's choices in addition to the cognitive—the "knowing and intelligent"—aspect. In defining fairness, *Zerbst* recognized the defendant's perspective, emphasizing that the defendant in that case—arraigned, tried, and sentenced in one day without an attorney—must have perceived the criminal justice system as "intricate, complex, and mysterious."[104] By contrast, the Supreme Court in *Schneckloth* explained that the defendant's subjective perception of events was largely irrelevant to the definitions of fairness, voluntariness, and coercion. The defendant's perspective certainly should not be the determinative factor, as such a policy would generate abuse both by and against the defendant. However, in a system that prides itself on individualized justice, an approach that renders a defendant's perspective irrelevant leaves much to be desired in

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96. *Bostick*, 501 U.S. at 429.

97. *See generally id.* (explaining that the defendant was on a bus crossing Broward county on his way to Fort Lauderdale).

98. *Id.*

99. *Id.* at 429-30.

100. *Id.*

101. Consider the statement of veteran criminal defense attorney Larry Pozner after the announcement of the verdict in the trial of Timothy McVeigh: "Wait'll the next time a jury brings in an unpopular verdict, then tell me the system works." Richard Willing & Kevin Johnson, *Effect of Oklahoma Trial Far Beyond Guilty Verdict*, USA TODAY, June 16, 1997, at 1A.

102. ALAN WERTHEIMER, COERCION 117 (1987).

103. *Id.* at 121.

104. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

terms of fundamental fairness.

Professor Joseph Grano has criticized Professor Wertheimer for a failure to incorporate but-for causation in his analysis of coercion, arguing that as a result, Professor Wertheimer overlooks the "overborne will" aspect of coercion. The example given by Professor Grano is that a man who is beaten may be coerced to confess, but a man who is beaten who was planning to confess before the beating occurred may not have been coerced to confess. Because a beating is "wrongful" under Professor Wertheimer's theory, coercion has occurred; however, according to Professor Grano, "[w]hen this sense of volitional impairment, or interference with autonomy, seems lacking, we may hesitate, at least without further thought, to embrace a finding of coercion."[105] It is true that Professor Wertheimer does not fully reconcile the "voluntariness principle" with his theory of coercion, and that his theory of coercion takes into account the Supreme Court's distaste for subjective inquiries as exhibited by its holding in *Colorado v. Connelly*.[106] However, it cannot be said that Professor Wertheimer endorses the view that the defendant's subjective perspective should be eliminated from the equation. To the contrary, he emphasizes that, "[i]f, as the critics suggest, the notion of voluntariness were to be abandoned, I suspect that the problems which haunt its specification would only reappear under another heading."[107]

As Professor Grano's hypothetical demonstrates, a theory of coercion which eliminates but-for causation lends itself to inaccurate results. Yet the *Schneckloth* court explicitly refused to incorporate the concept of but-for causation in its theory of coercion. The Court's reasoning was that subjective standards lead to uncertainty and inconsistent results in the law. However, as Professor Grano's example reveals, ignoring the defendant's subjective perspective altogether will also produce uncertainty, because courts will inevitably be forced characterize some voluntary behavior as coerced, and vice versa. In determining the circumstances under which we should recognize coercion, somewhere between *Zerbst* and *Schneckloth* we eliminated the subjective perspective of the defendant, a factor that is important in ensuring that our system of justice is perceived as a fair system.[108] Perhaps more importantly, we lost sight of the sense of fairness and humanity embodied in the individual rights at the heart of this discussion.

105. JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 76-78 (1996).

106. See *supra* notes 47-53 and accompanying text for a discussion of the "voluntariness principle."

107. WERTHEIMER, *supra* note 102, at 121.

108. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) (stating that in the transition from the Warren court to the Burger and Rehnquist courts, "the Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order," and that the greatest changes have been the creation or expansion of "inclusionary rules" such as harmless error and impeachment).

CONSTRAINT AND CONFESSION

ALBERT W. ALSCHULER*

I. FROM THE SUSPECT'S PSYCHE TO THE CONSTABLE'S CONDUCT

Country lawyers are often better philosophers than philosophers are. Most lawyers have known for a long time that the term coercion cannot be defined, that judges place this label on results for many diverse reasons, and that the word coercion metamorphoses remarkably with the factual circumstances in which legal actors press it into service.[1]

This article focuses on the constitutional requirement that confessions be voluntary. Wayne R. LaFave and Jerold H. Israel have written that this requirement bars the admission of confessions "(i) which are of doubtful reliability because of the practices used to obtain them; (ii) which were obtained by offensive police practices even if reliability is not in question . . . ; or (iii) which were obtained under circumstances in which the defendant's free choice was significantly impaired, even if the police did not resort to offensive practices."[2]

As I see it, LaFave and Israel's second category says it all. Courts should define the term coerced confession to mean a confession caused by offensive governmental conduct, period. They should enter a suspect's mind only insofar as they must to resolve the causation inquiry. Shifting their attention almost entirely from the minds of suspects to the conduct of government officers, courts should abandon the search for "overborne wills" and attempts to assess the quality of individual choices.[3]

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1. *See* ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 109-33 (1952). Alan Wertheimer says that a "crucial defect of the philosophical literature on coercion" is its "insufficient sensitivity to the contextual character of coercion claims." ALAN WERTHEIMER, COERCION 181 (1987). Although Wertheimer is a political scientist and a philosopher, he is enough of a country lawyer (honorary) to overcome this failing. Even Wertheimer, however, like Robert Nozick, Joseph Raz, and virtually every other contemporary philosopher who has addressed the subject of coercion, treats the distinction between threats and offers as crucial to an understanding of the concept. *See id.* at 202. Although the threat-offer distinction is appropriate in many contexts, this article notes that lawyers and judges have disregarded it in coerced confession cases for more than two hundred years. The article contends, moreover, that they were wise to do so. *See infra* text accompanying notes 48-63. In at least this one doctrinal corner, I believe that country lawyers have developed a sounder understanding of the context-specific issues than philosophers have.

2. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2(b), at 295 (1985).

3. The Supreme Court has characterized the issue in coerced confession cases as whether

The constitutional law governing the admission of confessions has in fact devoted less attention over time to the state of mind of confessing suspects and increased attention to the propriety of governmental conduct.[4] I advocate the final step in this progression.[5] An exclusionary rule applicable to the products of improper governmental conduct should mark the full extent of the coerced confession doctrine embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments and the full extent of the privilege against compulsory self-incrimination as well.[6] After identifying constitutionally improper conduct, courts should apply ordinary principles of causation to determine the evidentiary consequences of this conduct.[7] Just as courts exclude evidence (including confessions) derived from unreasonable searches and seizures, they should reject evidence derived from improper interrogation techniques. The Fifth and the Fourteenth Amendments require no more and no less.

The Supreme Court's 1986 decision in *Colorado v. Connelly*[8] was a landmark in the Court's shift from suspect-focused standards of coercion to police-focused standards.[9] LaFave and Israel recognize that *Connelly* effectively eliminated their third category of involuntary confession cases—those in which "the defendant's free choice was significantly impaired even if the police did

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the defendant's "will was overborne." *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 288 (1991); Mincey v. Arizona, 437 U.S. 385, 401-02 (1978); Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Culombe v. Connecticut, 367 U.S. 568, 576 (1961); *id.* at 602 (opinion of Frankfurter, J.); Hopt v. Utah, 110 U.S. 574, 585 (1884); *see also* Haynes v. Washington, 373 U.S. 503, 515 (1963) (declaring that courts must assess the effect of interrogation practices on the "mind and will of the accused"); Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 182 (1988); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 885-86 (1979); Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 951 (1994).

4. Yale Kamisar suggested as early as 1963 that the Supreme Court's talk about overborne wills might conceal its approval and disapproval of particular interrogation techniques. Yale Kamisar, *What Is an Involuntary Confession?: Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728 (1963), *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 14 (1980) [hereinafter KAMISAR, ESSAYS].

5. Short of gratuitously penalizing improper police conduct that did not cause a suspect's confession.

6. For an argument that this position accords with the historic purposes of the Fifth Amendment privilege, see Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996).

7. In judging the reach of exclusionary rules in criminal cases, courts usually speak of "derivative evidence," *see* Nix v. Williams, 467 U.S. 431, 443 (1984), and "the fruit of the poisonous tree," *see* Oregon v. Elstad, 470 U.S. 298, 298 (1985), rather than of "proximate cause." They ask whether the "taint of the primary illegality has dissipated," *see* United States v. Cox, 475 F.2d 837, 841 (9th Cir. 1973), rather than whether an "independent intervening cause" has broken the causal chain. So far as I can tell, this departure from the terminology used in other legal areas marks no departure in the principles applied. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (recognizing that even when wrongful governmental conduct is a "but-for" cause of a confession, a suspect's decision to confess may qualify as an independent intervening cause); Brown v. Illinois, 422 U.S. 590 (1975) (recognizing that courts follow the consequences of purposeful police misconduct further than they do the consequences of inadvertent misconduct).

8. 479 U.S. 157 (1986).

9. *See also* Miller v. Fenton, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

not resort to offensive practices."[10] In essence, *Connelly* distinguished mental incapacity from coercion. *Connelly* held that as long as governmental officers have not induced a mentally ill suspect's confession, the Constitution poses no bar to admitting this confession in evidence.

In my view, pre-*Connelly* efforts to assess whether confessions were the product of free will were always misguided—incoherent in concept, unadministerable in practice, and incompatible with our general understanding of the Bill of Rights as a body of restraints on improper governmental conduct.[11] One can, if one likes, find sufficient governmental action to satisfy the governmental-action requirements of the Fifth and Fourteenth Amendments simply in the admission at trial of a mentally disturbed person's confession—but I do not know why one would want to. Especially in a constitutional system incorporating the principle that "the trial of all Crimes . . . shall be by Jury,"[12] permitting a jury rather than a judge to assess the evidentiary value of a confession obtained without governmental misconduct seems fully compatible with due process.[13]

I do not quarrel with LaFave and Israel's first category of involuntary confessions—confessions "of doubtful reliability because of the practices used to obtain them"—so long as one underlines the phrase "because of the practices used to obtain them." The propriety of police practices should be judged *ex ante* from the perspective of the officer or officers whose conduct is challenged. Courts should consider a confessing suspect's mental condition only insofar as the interrogating officer had reason to know it.[14]

Just as the Constitution does not mandate the exclusion of unreliable eyewitness testimony, it does not mandate the exclusion of unreliable confessions. An almost blind witness may tell a jury she saw the defendant commit a crime despite the fact she previously gave four inconsistent statements and has been convicted of perjury five times. The Constitution requires the exclusion of unreliable eyewitness testimony only when improper governmental conduct—for example, an impermissibly suggestive police line-up—has produced it.[15]

The rule should be no different for unreliable confessions.[16] Unless im-

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10. LAFAVE & ISRAEL, *supra* note 2, § 6.2(b), at 296.

11. *See* George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79, 85 (1993) ("[T]he Framers were concerned about purposive, governmental coercion . . . . If the government did not coerce the confession, concluding that [a suspect] acted unfreely does not seem to be adequate grounds for exclusion.").

12. U. S. CONST. art. III, § 2.

13. In *Connelly*, the auditory hallucinations of a mentally ill killer directed him either to commit suicide or to confess. He then confessed to a uniformed officer on a downtown Denver street. *Connelly*, 479 U.S. at 161. His case was little different from one in which an insane person writes a letter to the police department admitting his crimes. *See* George C. Thomas III & Marshall D. Bilder, *Criminal Law: Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 261 n.95 (1991) (reporting the comments of Yale Kamisar).

14. *See Connelly*, 479 U.S. at 164-65 (noting that the police were unaware of the defendant's mental illness at the time of his confession and recognizing that a police officer's exploitation of known mental disabilities may require exclusion of a suspect's confession).

15. *See* Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Neil v. Biggers, 409 U.S. 188 (1972).

16. *But see* George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987*

proper governmental conduct has generated a confession, the Constitution should give the defendant only a right to present evidence of the confession's unreliability to the jury.[17] With few exceptions, the Constitution makes juries the appropriate judges of the probative value of evidence in criminal cases.[18]

II. FREE WILL AFTER THE KILLING OF GOD

Having sketched my general position on the law of confessions, I want to speak in equally general terms about the concept of coercion, the subject of this Symposium.[19] On its face, this concept affirms the freedom of the human will. Its apparent purpose is to identify exceptional situations in which both moral theory and law should abandon their otherwise pervasive assumption of free will.

Belief in the capacity of responsible adults to choose has been a central tenet of Western thought from the beginning.[20] As Herbert Morris has observed, human beings have regarded themselves as capable of creating, among other things, themselves. Morris notes "the inestimable value to each of us of having the responses of others to us determined over a wide range of our lives by what we choose rather than what they choose."[21] Presuming our power to choose serves us better than the alternative. Moreover, I believe this premise passes more than a pragmatic or consequentialist test of truth. My sense of your freedom and mine rests, however, on an amalgam of fuzzy things—empirical observation, emotional knowledge, reflection on the psychological impossibility of making an assumption of determinism, and faith in the ultimate order of the universe. At best, my belief in people's capacity to choose is the product of what philosophers call reflective equilibrium or inference to the best explanation; the question is not susceptible to hogchoker proof. To some extent, in the words of an Iris Dement song, we must let the mystery be.[22]

When the premise of free will itself rests on squishy foundations, the task

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Supreme Court Terms, 67 TEX. L. REV. 231, 275-76 (1988) (calling the *Connelly* result "insupportable" and declaring, "[A] total deconstitutionalization of traditionally important reliability issues is unjustified"); Yale Kamisar, *Response: On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 946 (1995) (maintaining that *Connelly* overemphasized "the police methods rationale").

17. More than 40 years ago, Bernard Meltzer thought it obvious that a confession could be voluntary even if it were the product of hallucination. He noted that the evidentiary requirement that confessions be corroborated rests on the fear of "false, albeit voluntary confessions." Bernard Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317, 320 & n.15 (1954).

18. *See Connelly*, 479 U.S. at 167 (The reliability of a confession "is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment.").

19. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

20. *See* 3 ARISTOTLE, ETHICS § 1 (A. Wardman & J. Creed trans., 1963); PLATO, THE REPUBLIC 250 (F. M. Cornford trans., 1945) (attributing to human beings "an element of free choice, which makes us, and not Heaven, responsible for the good and evil in our lives").

21. Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 486 (1968).

22. IRIS DEMENT, *Let the Mystery Be*, *in* SONGS OF IRIS (Forerunner Music, Inc.), *recorded on* IRIS DEMENT, INFAMOUS ANGEL (Rounder Records Corp. 1992).

of identifying deterministic exceptions is daunting. Indeed, anyone who purports to separate willed from determined transactions must be either God or an idiot.[23] The attempt of postmodernists to deconstruct the consent-coercion dualism draws on the difficulty of drawing even an intelligible line between the two categories. For all we know, every desire may be learned, and all of our desires may be the products of our culture.

From a postmodernist perspective, the consent-coercion dualism is merely an attempt to remain on good terms with God after killing Her.[24] At the close of the twentieth century, postmodernist scholars have heard Jean Paul Sartre clearly: "Nothingness lies coiled in the heart of being—like a worm."[25] Although we are the far from divine products of heredity, environment, random breeding, and Darwinian struggle,[26] they declare, we treat some choices as voluntary, and we sanctify them. We treat other choices as involuntary, and we say these choices don't count. We use this rhetoric to preserve an illusion of freedom, although we know we aren't free. Our desire for new cars, CDs, and microwave ovens may be simply the product of an addiction (the goods-addiction of our consumeristic society) and no more the product of our wills than a heroin addict's craving for her drug.[27]

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23. I do not contend that courts can always avoid messy, mind-boggling inquiries into free will. The duress defense in criminal cases requires examination of whether a reasonable person could have resisted the unlawful pressure to which a defendant was subjected, and courts must assess individual mental capacity in contested will cases and other cases. Situations in which courts must assess only the mental or moral responsibility of an allegedly coerced actor seem very different from those in which they should focus as much or more on the legal rights or moral entitlements of an allegedly coercing party.

In judging the voluntariness of a confession under the Constitution, I believe that the all-but-exclusive focus should be on the conduct of the governmental officers alleged to have produced the confession, and on the government's entitlement to receive this confession in evidence. *But see* WERTHEIMER, *supra* note 1, at 110 (claiming that when Supreme Court confession decisions focus on either police misconduct or reliability they disregard "the core of the voluntariness principle, namely, the protection of the autonomy of the agent").

Similarly, I suspect that the free will inquiry is unproductive in contract duress cases—cases in which courts ought again to focus primarily on the conduct of the allegedly coercing party. In fact, however, courts focus more often on the subjective effect of the alleged coercion. *See, e.g.*, Laemmar v. J. Walter Thompson Co., 435 F.2d 680, 682 (7th Cir. 1970) (defining duress as a threat that "'has left the individual bereft of the quality of mind essential to the making of a contract'" (quoting Kaplan v. Kaplan, 182 N.E.2d 706, 709 (Ill. 1962)); Wolf v. Marlton Corp., 154 A.2d 625, 628 (N.J. Super. 1959) ("'[D]uress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim'" (quoting Rubenstein v. Rubenstein, 120 A.2d 11, 15 (N.J. 1956)). Terms like duress and coercion do seem to focus on individual agency or autonomy, but unbending linguistic precision could threaten the ability of the concept of voluntariness to serve its protean purposes. *See supra* note 1 and accompanying text.

24. Compare Justice Holmes's remark in a letter to Alice Stopford Green: "I said to a lady at dinner the other night that morals were a contrivance of man to take himself seriously, which means that the philosophers . . . make them . . . an excuse for their pretention to be on the ground floor and personal friends of God." Letter from Oliver W. Holmes to Alice S. Green (Feb. 7, 1909) (quoted in Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L. Q. 703, 721 (1992)).

25. JEAN PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY 26 (Hazel E. Barnes trans., 1966).

26. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) ("The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle.").

27. *See* Louis Michael Seidman, *Rubashov's Question: Self-Incrimination and the Problem*

One can talk this way when one is in a funk, drunk, in France, or at a university, but the problem with deconstructing the consent-coercion dualism is that we need it. Few postmodernists have advocated permitting a robber to demand money in exchange for his victim's life. At the same time, few have proposed to block a worker from trading an apple for an orange at lunchtime. The lunchtime exchange appears beneficial to most of us even if the apple-preferring worker, had she been raised in California, might have preferred oranges. Law and the business of living require a means of distinguishing the workers' exchange from the exchange between the robber and his victim. As the postmodernists remind us, the line between consensual and nonconsensual transactions is not foreordained; it is not pre-political; we may draw it as we like. Until the postmodernists suggest a better way to draw it, however, they give us little reason to listen to them.

People who seek to distinguish coerced from consensual transactions by probing the minds of consenting parties may, however, be less convincing than the postmodernists. One might initially attempt to define coercion as any irresistible or overwhelming inducement—an offer from Don Corleone that you cannot refuse. The Supreme Court apparently invokes this basic concept of coercion when it treats the issue in coerced confession cases as whether the defendant's will was overborne.[28] In psychological terms, however, an offer to buy your house for one hundred times its market value may overwhelm you more than a threat to wreck the birdbath on your lawn unless you pay protection money. No one calls an offer coercive because it is so astonishingly generous that one has difficulty resisting it. Moreover, the attempt to distinguish irresistible proposals from proposals that merely are not resisted is mind-boggling—a task better left to God. The difference between the homebuyer's proposal and the vandal's lies in our evaluation of the moral character of the two proposals. This difference is the difference between a promise and a threat. It has nothing to do with the strength of the homeowner's power to resist.[29]

Abandoning the Godfather's definition of coercion as an offer that one cannot refuse and recognizing the need to distinguish promises from threats, one might take the opposite tack: The problem is not that some offers are irresistible but that one would rather not receive some of them at all.[30] It usu-

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of Coerced Preferences, 2 YALE J.L. & HUMAN. 149, 173 (1990) ("Much of modern social science, political theory, philosophy, and literary theory attempts to demonstrate that desires and beliefs are inevitably intersubjective and social. It is not meaningful to talk about disembodied preferences."). MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 20-21 (1987) (suggesting that a question of duress arises in every contracts case because "it is an open question . . . whether the contract would have been made had each party had other physically imaginable though socially unavailable options accessible to him"). *But see* WERTHEIMER, *supra* note 1, at 261 ("Those who argue . . . that socialization limits freedom would do well to remember that not *everything* about a person or his condition can be said to limit his freedom without devouring the self who is capable of being constrained and whose freedom is to be valued.").

28. *See supra* note 3.

29. *See* WERTHEIMER, *supra* note 1, at 204 ("It is important to see that the distinction between threats and offers is *not* a function of the *distance* between the options or their *efficacy* in securing the desired response.").

30. *See* KELMAN, *supra* note 27, at 22 (attributing to Robert Nozick the view that "[a]n offer

ally does not make your day to hear someone say, "Your money or your life." This offer is far less likely to spark a smile than, "Want to trade an apple for an orange?" Once a robber has drawn his gun, however, the option of paying him off usually becomes one you want. Deciding whether to evaluate the gunman's action at the moment it becomes beneficial or at an earlier moment is a task of normative judgment. This judgment has nothing to do with the victim's psyche.

One might try to resolve this question of temporal vantage point by taking the gunman's actions as a whole: Has *everything* the offeror has done made the person whom he has allegedly coerced better off or worse off? The gunman's victim probably would rather not have met the gunman at all; she might even prefer that he had died when he was young. A worker with no taste for the apple in her lunchbox, however, is grateful both for the birth and for the later appearance in the lunch room of a co-worker willing to supply an orange in trade.

This approach has bite (pardon the metaphor amidst these fruit hypotheticals) in situations that initially may seem problematic. If you were dying in the desert, you would welcome the appearance of a monopolist with a canteen of water even if the monopolist charged you $1000 per sip. The monopolist's offer would make you better off (assuming you had this kind of cash), and it would therefore be inappropriate (not to mention unappreciative) to call his offer coercive.

If this approach were sound, however, the subject of this paper would be easy. All bargained guilty pleas and many confessions would be involuntary. The police officer who arrests you before she obtains your confession, the prosecutor who files a charge against you before she bargains for your guilty plea, and the government that these officials represent are in one respect like the gunman: All of them make you worse off before they make you better off (if they truly make you better off at all). A criminal suspect usually would prefer not to have met them and might even wish them vaporized. What differentiates the government's proposition from the gunman's is not that the government's conduct, judged as a whole, makes the suspect better off. The difference, if there is one, is that the injury threatened by the government, unlike that threatened by the gunman, is not wrongful.[31] The line between threats and promises is normative, and it must be drawn from the perspective of a detached observer.

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is a proposition the promisor would choose to receive whether he accepts it or not, a threat a proposition the promisor would sooner never have heard").

31. For reasons why, in confession cases, governmental threats and promises *should* be treated as wrongful and coercive, however, see *infra* text accompanying notes 48-63.

Joseph Raz writes, "Coercive threats differ from offers . . . in that the former reduce the options available to the person to whom they are addressed whereas offers never worsen and often improve them." JOSEPH RAZ, THE MORALITY OF FREEDOM 150 (1986). This statement is accurate only if the baseline for determining whether options are reduced or enhanced is normative and/or sociological (options that a person is *entitled* to have or *reasonably* expects to have) rather than the status quo ante (options that a person has in fact prior to the offer or threat). *See infra* text accompanying notes 41-47; WERTHEIMER, *supra* note 1, at 205 ("In defining [an offeree's] baseline, we do *not* take a high-speed snapshot of [the offeree's] present state of affairs.").

Of course, even after one recognizes the need for moral evaluation of a threat or offer, problematic cases are likely to remain problematic. At most, one may gain a clearer understanding of why these cases are difficult and what the moral issue is. If a monopolist's moral duty is to offer a canteen of water to a dying person out of charity or to sell it at what medieval Christians would have called a fair price, a threat to withhold the canteen until the monopolist receives $100,000 is coercive. If, however, the only test of a fair price is what the buyer is willing to pay, the monopolist's offer is noncoercive. However one resolves this normative issue, it is the moral character of the threat or offer and not the offeree's mental state that determines the permissibility of the transaction.[32]

To some extent echoing Kant[33] and Hume,[34] Harry Frankfurt maintains that a person is unfree when he "acts against the will he wants."[35] People have mental states *about* their mental states, and when a person's actions accord with a "first-order desire" but not with a "second-order desire" not to have the "first-order desire," she is not free.[36] Frankfurt's paradigm—the case that most closely approximates his model—is the drug addict who wants a narcotic but regrets wanting it. Endorsing Frankfurt's approach, George C. Thomas and Marshall D. Bilder treat a confession as involuntary when a suspect wants to confess but does not *want* to want to confess.[37]

The Frankfurt-Thomas-Bilder approach sounds like double-talk to unsophisticated country lawyers,[38] but I understand what it means. For example, I acted contrary to my second-order desire to sit in a front-row seat at a Chicago Bulls game when, because of the constraining circumstances of my salary, I sat in an obstructed-vision seat instead. I must have wanted to sit in the obstructed-vision seat because I bought the ticket, but I did not want to want to. Given the state of my wallet, I simply could not help myself. Being far less rich than Donald Trump is contrary to my sense of self, and I regretted both my choice and the circumstances that prompted it.

Perhaps this example trivializes the Frankfurt-Thomas-Bilder insight; a second-order desire probably must be a desire more crucial to one's identity than a wish to sit close to a sporting event. Thirty years ago, however, I be-

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32. This is not to deny that the foreseeable effect of an offer on an offeree's psyche may be relevant in assessing its moral character.

33. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 633 (Norman K. Smith trans., 1965); IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS § 53 (Paul Carus trans., 1949).

34. *See* DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING § VIII (1953).

35. HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT 47-57 (1988).

36. *Id.*

37. Thomas & Bilder, *supra* note 13, at 270-71. Thomas and Bilder do not contend that Frankfurt's approach provides a workable standard for identifying individual involuntary confessions. They do, however, defend the presumption of *Miranda v. Arizona*, 384 U.S. 436 (1966), that all confessions produced by custodial interrogation are involuntary on the ground that suspects who do not volunteer confessions generally have a second-order desire not to *want* to want to confess. Thomas & Bilder, *supra* note 13, at 270-71.

38. It is also inconsistent with the economist's concept of revealed preferences—the idea that a person reveals what she wants by what she does. For a hard-nosed economist or a country lawyer, it is the bottom line that counts. Saying that you want to do something but that you do not *want* to want to do it is just whining.

trayed myself more seriously. As I interviewed a judge in Houston about racism in the criminal justice system, he asked me gleefully, "Do you want to see a picture of the first all-nigger jury in the State of Texas?" Because I did not wish to disrupt a revealing interview, I gulped and said, "Sure." Did I *want* to want to see the judge's souvenir? I regretted countenancing and encouraging his racism and felt that I had abandoned an important principle.

Although I knew that I had resolved an ethical issue in a dubious way, it did not occur to me that my choice was unfree. I was pleased to learn from Frankfurt-Thomas-Bilder that it was. It is not clear, however, why the law of confessions should respect a criminal suspect whose sense of self depends on not admitting his wrongdoing. This suspect may be a murderer whose second-order desires to get away with his crimes and to continue his killing are really rotten. Besides, even if a suspect does not *want* to want to confess, he may not *want* to not want to want to confess.[39] In the end, what most unsophisticated country lawyers would say about Harry Frankfurt's first-order and second-order desires seems about right.[40]

People who attempt to define coercion or constraint in terms of an offeree's subjective mental state are somewhat like the postmodernists; they take the business of assessing the existence or nonexistence of free will too seriously. These psychics attempt the impossible while the postmodernists, recognizing the impossibility of the task, abandon the line-drawing effort altogether. Both groups fail to recognize the extent to which our talk of free will has missed the mark. The critical issue in coercion cases is usually not the offeree's state of mind but the propriety or impropriety of the offeror's influences on her choice.

Our first intuition may be that a gunman deprives his victim of free will. This intuition, however, confronts a difficulty that has been recognized for so long that George Thomas and Marshall Bilder call it "Aristotle's paradox."[41] Handing over one's wallet is not like being pushed into a wall; one chooses to do it (just as anyone who confesses makes a conscious decision to confess[42]). The decision to part with one's property rather than suffer the gunman's violence belongs to the victim alone, and she may choose between these limited alternatives as she likes.[43] Our indignation at the robber's treatment of the victim has little to do with the victim's lack of free will. This indignation arises simply because the robber has unfairly restricted his victim's *range* of

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39. For an apparently serious discussion of this possibility, see FRANKFURT, *supra* note 35, at 21.

40. The concept of first-order and second-order preferences does make sense in some contexts—for example, that in which a dieter asks a friend not to give him cheesecake even if he begs (asks the friend, in other words, to honor his second-order rather than his first-order desire). *See* Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

41. Thomas & Bilder, *supra* note 13, at 244; *see* ARISTOTLE, *supra* note 20, at § 1.

42. Wigmore wrote that "all conscious utterances are and must be voluntary," adding that "as between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is nonetheless voluntary." 2 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 824 (2d ed. 1923).

43. *See* Don Locke, *Three Concepts of Free Action: I*, *in* MORAL RESPONSIBILITY 97, 109 (J. Fisher ed., 1986).

choice. All of us have fewer options than we'd like, but the victim has even fewer than the rest of us.[44] And notice what's happened: In a sentence or two, we have moved from assessing the victim's state of mind to judging the morality of the robber's conduct. Fortunately, this more critical issue is also more tractable.

If the gunman's victim is like me, she will give the gunman her wallet in a panic without rational deliberation. If she is like Indiana Jones, she will hand over the wallet coolly while considering whether there may be a way to turn the tables before the transaction ends. If she is a master of stoic philosophy, she may even be emotionally indifferent to whether she lives or dies. Her emotional state and how much or how wisely she deliberates before delivering her wallet do not matter at all. Whatever the victim's state of mind, the robber has coerced her. His wrongful threat induced her to hand over her wallet, and that is all we need to know.[45]

One may envision a spectrum of differing degrees of impairment of volition with the apple-orange exchange at one end and the delivery of one's wallet to a gunman at the other, but the metaphor is misleading. The choice between sacrificing a wallet and sacrificing one's life sometimes may be as volitional as the choice between eating an apple and eating an orange. The gunman, however, has unfairly restricted the "opportunity set" within which his victim may use her volition. Rather than crawl inside an offeree's mind, one can envision a range of more severe and less severe restrictions of an individual's opportunity set. One can then consider the fairness or unfairness of the human actions alleged to make this person's choice involuntary.

The case of Adam, whose dentist recently sued him to recover fees for two dental procedures, underlines the nature of the inquiry. This case began when Adam awoke one day with a toothache. He went to his dentist who pulled the tooth. Adam later refused to pay the dentist's bill, claiming that his contract with the dentist was involuntary. He said that his terrible toothache had denied him any choice in the matter. A judge rejected Adam's contention, and the dentist recovered her fee.

The dentist, however, did not recover her fee for the second procedure. Immediately after her extraction of the tooth, she told Adam that his teeth needed cleaning. Adam replied that he did not want her to clean his teeth. The dentist then grabbed Adam's arm, pulled it behind his back, and twisted it hard. Adam screamed in pain, reconsidered his position, and asked the dentist to clean his teeth. He once more claimed that his contract with the dentist was involuntary, and, this time, the judge agreed with him.

Adam's twisted arm was, however, less painful than his aching tooth. His

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44. *See* WERTHEIMER, *supra* note 1, at 10.

45. A tougher case might be one in which a wrongful threat causes an action that the allegedly coerced actor does not regret or even welcomes. Don Locke suggests the case of a pilot flying to Omaha who is directed by a gunman to fly to Cuba instead. The pilot secretly prefers Cuba and is delighted that he will be able to visit his mistress in Havana. *See* Locke, *supra* note 43, at 100. For the purposes that matter to country lawyers—deciding whether the pilot should be punished criminally or held civilly liable for breach of contract—I have no difficulty concluding that he has been coerced.

subjective sense of constraint—his sense that he had "no choice" but to employ the dentist—was stronger in the case that he lost than in the case that he won. The distinction between these cases rests on the fact that a wrongful human action had induced the second contract but not the first. To speak of an overborne will rarely helps to resolve the issues in dental cases or confession cases. A better focus is the propriety or impropriety of human influences on choice.

Not all improper influences, however, may qualify as coercion. When a bribe paid to a senator has improperly influenced her vote, we usually do not say that this bribe coerced the senator. The bribe was an improper influence on the senator's choice, but we confine the language of coercion to threats (for example, a threat to vandalize the senator's birdbath) and do not use it to include promises.

The normative distinction between threats and promises is captured only crudely by those words. As a linguistic matter, any proposal for a trade can be tagged with either term. A promise to pay for an automobile includes a threat not to pay unless the automobile is provided, and the threat "your money or your life" includes a promise to spare your life in exchange for your cash. In normative discourse, however, the threat-promise distinction invokes a normative baseline. One could call this starting point "the normal set of human expectations and entitlements," "the normal human opportunity set," or simply "the normal human condition." A gunman's threat narrows normal expectations—it worsens the normal condition—while an offer to buy a house for ten times its market value (or to pay a juicy bribe) expands them. The concept of the normal condition is partly descriptive and partly evaluative.[46] People's sense of fair treatment and entitlement are strongly influenced by what happens to others. Indeed, a purely sociological concept of the "normal" condition effectively marks the relevant baseline when social practices and expectations are clear. Nevertheless, the specification of the appropriate baseline is in the end a normative task.[47] When new ethical issues arise, when old ethical issues arise only rarely, and when social practice does not establish a clear baseline, it is everyone for herself: What *is* the fair price for the only bottle of water in the desert? What *should* the purchaser be able to expect from the monopolist with a full canteen?

III. THE REAL ISSUES IN CONFESSION CASES

Although the distinction between threats and promises shapes the law of coercion in other contexts, it has been unimportant in confession cases. Eighteenth century English decisions held inadmissible confessions obtained "by

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46. Joel Feinberg observes that one may use either a "statistical" or a "moral" test to mark the relevant baseline. JOEL FEINBERG, HARM TO SELF 219 (1986). For reasons explained in the text, I believe that the two tests blend together in practice.

47. For a thoughtful discussion of this issue that reaches a more ambiguous conclusion, see Robert Nozick, *Coercion*, *in* PHILOSOPHY, POLITICS, AND SOCIETY 101, 115-16 (Peter Laslett et al. eds., 1972); *see also* WERTHEIMER, *supra* note 1, at 212 (advocating the use of multiple baselines and apparently treating each as equally legitimate). *But see id.* at 217, 242 (treating the "moral" baseline as primary or determinative in most situations).

promises of favour."[48] The United States Supreme Court's first coerced confession decision, *Hopt v. Utah*,[49] said in 1884 that a confession, to be voluntary, must be "uninfluenced by hope of reward or fear of punishment."[50] In 1896, the Supreme Court declared a confession "inadmissible if made under any threat, promise, or encouragement of any hope or favor."[51] One year later—one hundred years ago—the Court placed what earlier had been a common law rule of evidence on a constitutional foundation. In *Bram v. United States*,[52] the Court invoked the Fifth Amendment privilege against compelled self-incrimination and said that a confession could not be received in evidence unless it was "free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . ."[53]

Although the Supreme Court now has abandoned *Bram*'s unqualified prohibition of promises of leniency,[54] the Court has not limited its concept of coercion to threats. If a police officer were to pay a suspect $10,000 to confess, the Court apparently would hold the suspect's confession involuntary.[55]

I said at the outset that courts should define the term coerced confession to mean a confession caused by offensive governmental conduct.[56] This definition collapses both the distinction between threats and promises and the distinction between duress and fraud. In that respect, it accords with traditional law. Judges lose little by calling at least some lies and some promises coercive while they gain the ability to assess all improper influences on choice under one rubric. Treating threats, promises, deception, and all other improper influences under the heading of coercion permits courts to consider what the Supreme Court calls "the totality of the circumstances" in every case.[57]

Asking whether a proposal broadens or narrows the normal human opportunity set may be helpful in some contexts, but it is not helpful in confession cases. First, in a world in which promises of leniency are permitted, the baseline for distinguishing threats from promises is impossible to discern. Officials—judges, prosecutors, police officers, sentencing commissioners, and legislators—are naturally reluctant to punish too leniently offenders who confess

48. *See* Rex v. Warickshall, 168 Eng. Rep. 234 (Cr. Cas. 1783); Rex v. Rudd, 98 Eng. Rep. 1114, 1116 (1775) (Mansfield, J.).

49. 110 U.S. 574 (1884).

50. *Hopt*, 110 U.S. at 584.

51. Wilson v. United States, 162 U.S. 613, 622 (1896).

52. 168 U.S. 532 (1897).

53. *Bram*, 168 U.S. at 542-43.

54. It did so first in guilty plea cases, Brady v. United States, 397 U.S. 742, 754 (1970), and then in out-of-court confession cases, Arizona v. Fulminate, 499 U.S. 279, 285 (1991) (declaring that *Bram* "does not state the standard for determining the voluntariness of a confession").

55. When the Court abandoned its categorical disapproval of confessions induced by promises of leniency, it endorsed a test of voluntariness that condemned "promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." *Brady*, 397 U.S. at 755.

56. *See supra* text accompanying notes 2-3. Of course coercion cannot always be defined in terms of improper human influences on choice, for coercion is not always improper. Our law appropriately coerces all of us not to kill or steal.

57. *See, e.g.*, Fikes v. Alabama, 352 U.S. 191, 197 (1957); Haynes v. Washington, 373 U.S. 503, 514 (1963).

(particularly when these offenders include the overwhelming majority of criminals). When officials wish to encourage confessions, they may therefore skew the baseline by punishing too severely defendants who do not confess. No one, not even the officials, may realize it has happened. One can no longer know the "normal" punishment or what punishment would have been imposed in a regime without bargains in leniency. If the vanished counterfactual baseline could be discerned, few apparent promises might prove beneficial.[58]

Second, even if the distinction between threats and promises could be intelligibly drawn in practice, both threats and promises depart from normal expectations of just and appropriate criminal punishment. Punishment ought to turn on what an offender did and on her personal characteristics, not on accidents of fortitude, strategy, and what deal she can make.[59] If the appropriate moral baseline is sentencing "on the merits," both threats and promises diverge from it.[60]

Third, promises of leniency, particularly when coupled with intimations that conviction is certain, are likely to generate false confessions. Richard Leo and Richard Ofshe have presented chilling evidence of this fact,[61] and they were not the first to notice it. For two centuries before the Supreme Court turned things around, English and American judges rested their condemnation of promises of leniency on precisely this danger. An English court explained in 1783, "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it."[62] As I have noted, police methods that are likely to produce unreliable confessions merit constitutional condemnation for the same reason that suggestive police line-ups do.[63]

Focusing on improper police methods rather than on defendants' states of

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58. So long as the number of defendants who resist the pressure to confess remains small, increasing their punishment need not be costly. One can only guess, for example, whether legislatures and sentencing commissions would have set the same minimum and guideline sentences if promises of leniency had provided no escape hatch and taxpayers truly were required to pay the costs of imposing these sentences on all convicted offenders. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 658-60, 687-89 (1981) (offering a fuller assessment of the difficulty of discovering an appropriate baseline and of separating threats from promises).

59. For a discussion of the strained rationales sometimes offered for rewarding confessions—for example, the claim that even confessions prompted by promises of leniency manifest remorse—see *id.* at 661-83, 718-23.

60. This argument raises the question whether the law of coercion can properly be used to condemn practices that are offensive for reasons other than their harmful effects on offerees. For example, could an offer that benefited a suspect be regarded as coercive because it was incompatible with the public interest or with sound principles of justice? The case of a confession induced by a large cash bribe may suggest an affirmative answer. When a suspect has sought to escape the consequences of an offensive agreement, courts may not pause to consider just why the agreement is offensive. Moreover, departures from desert-based sentencing seem inconsistent with the dignity of defendants as well as harmful to the public. (Of course a defendant who was less interested in his dignity than in the size of his bank account or the length of his sentence might not appreciate my concern).

61. Richard Ofshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 994-96 (1997).

62. Rex v. Warickshall, 168 Eng. Rep. 234, 255 (Cr. Cas. 1783).

63. *See supra* text accompanying notes 15-16.

mind could lead courts in two directions, one less supportive of the defendants' claims and the other more supportive. The first direction is illustrated by a California Supreme Court decision, *People v. MacPherson*,[64] whose grisly facts focus the issue sharply.

Robert MacPherson, who was in custody on a robbery charge, had made no statements to the police. Then Jack Gruber, his cousin and roommate, was arrested and charged with a murder that MacPherson himself had committed. Apparently Gruber's arrest was supported by probable cause and made in the good faith belief that he was the killer. Following Gruber's arrest, MacPherson told Gruber's lawyer that he would, if necessary, confess to save his cousin. Two months passed before the critical events, which are described in the court's opinion as follows:

> [D]efendant, who was still in isolation in his cell at the Alameda County jail, jammed a pointed pencil into the orbit of his left eye, and then repeatedly banged his head against the cell wall in an effort to drive the pencil in deeper. Several police officers ran into his cell to prevent him from further injuring himself. They grabbed his arms and legs and carried him to his bunk. While he was lifting defendant, Sergeant Parker heard defendant say, "Gruber didn't do it. I did." Defendant lay quietly on his bunk for a few moments and then suddenly became violent and had to be subdued again. Officer Heiling grabbed his arms and held defendant in an armlock on the floor. Defendant then whispered: "I killed him; I killed him."[65]

The California Supreme Court said, "A confession is involuntary unless it is 'the product of a rational intellect and a free will.'"[66] It held that the trial court should not have received MacPherson's statements.

The issue in *MacPherson* was not the propriety of the police conduct, which apparently left little room for improvement. Nor was it the reliability of MacPherson's confession.[67] The court excluded this confession because, with a pencil in his eyeball, MacPherson was in no position to make a rational choice. He could not knowingly and voluntarily have waived his right to remain silent.

Contrary to the impression conveyed by countless repetitions of the *Miranda* warnings, however, the Constitution does not provides a right to remain silent that a suspect must knowingly waive. It guarantees a right that almost no one would waive, the right to be free of compulsion.[68] MacPherson was subjected to no governmental compulsion; no government officer improperly influenced his choice. Instead, MacPherson's conscience apparently would not let go of him because of the evil that he was bringing upon his cousin, and

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64. 465 P.2d 17 (Cal. 1970).

65. *MacPherson*, 465 P.2d at 19-20.

66. *Id.* at 20 (quoting *In re* Cameron, 439 P.2d 633, 639 (Cal. 1960), and Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

67. I see little reason to doubt the truth of the defendant's statements, and even if I did, I would see little reason to take the reliability issue from the jury.

68. As I have argued elsewhere, even the ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), is compatible with this view of the Constitution. *See* Alschuler, *supra* note 6, at 2629-30.

he ultimately became deranged. The California Supreme Court instructed MacPherson to go back, regain his senses, consult a lawyer, reconsider his improvident action, and make his choice as a matter of rational litigation strategy. Neither sound policy nor the Constitution required giving him this second chance.

Fred Inbau, whose police interrogation manual was exhibited in the *Miranda* opinion like a relic from a medieval torture chamber,[69] has argued that the norms of polite persuasion in the parlor should not extend to the interrogation room.[70] Supreme Court opinions suggest, however, that in some respects American confession law has taken the opposite tack. This law sometimes seems to rest on an etiquette more refined than Mrs. Astor's.[71]

Richard Leo and Richard Ofshe reveal that Inbau-endorsed tactics of the sort not ordinarily seen in polite society better characterize the interrogation process than the restraint prescribed in some of the cases. The backroom of the stationhouse is still the scene of rough-and-tumble struggle.[72] After suspects waive their *Miranda* rights (and more than three-quarters do[73]), police officers press hard for confession. They disparage, they disbelieve, they ridicule, and they lie. They lie about their own beliefs, about the role of defense lawyers, about victims, about the evidence, about the power of their technology, about what could happen to the suspect if he does not confess, and about what could happen to him if he does.[74] *Miranda*, moreover, may have made

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69. *Miranda*, 384 U.S. at 448-55.

70. Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 16 (1961).

71. Before asking a question, an officer must say, "May I?," and receive an affirmative answer. He must inform an arrested person of his rights even when this person already knows them. *Miranda*, 384 U.S. at 468-69. He also must afford the arrested person access to an advisor, one who may be provided graciously without charge. *Id.* at 472-73. If the arrested person says, "I'd rather not," the officer must retire for a time. Then, if he does so politely, he may ask the arrested person to reconsider. Michigan v. Mosley, 423 U.S. 96 (1975). If, however, the arrested person says "I'd like to see a lawyer," the officer may not request reconsideration, however long the officer waits and however polite his request. Edwards v. Arizona, 451 U.S. 477 (1981). Most of all, an officer must not be indelicate—for example, by mentioning the desirability of burying a murder victim while the murderer is present his lawyer is not. Brewer v. Williams, 430 U.S. 387 (1977). These rules of civility are found, not in the works of Emily Post, Amy Vanderbilt, and Miss Manners, but in the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States.

72. In the post-*Miranda* era, the refinement of the mansion has proceeded to the doorway of the gatehouse but no farther. *See* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* YALE KAMISAR ET AL., CRIMINAL JUSTICE IN OUR TIME 19 (A.E. Dick Howard ed., 1965). When Miranda, the housekeeper, arrived from the mansion, she did not in fact clean the gatehouse. She did a little light dusting and moved an attractive rug over the dirt.

73. *See* Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859 (1996) (84% of 129 interrogated suspects in Salt Lake County waived their *Miranda* rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (78% of the suspects in 182 directly observed or recorded police interrogations in California waived their *Miranda* rights, and prior record was the only statistically significant predictor of their choices: "[W]hile 89% of the suspects with a misdemeanor record and 92% of the suspects without any record waived their *Miranda* rights, only 70% of the suspects with a felony record waived their *Miranda* rights.").

74. As Welsh White notes, the prevalence of police deception is evidenced both by its frequent appearance in reported cases and by the importance that police interrogation manuals afford it. *See* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581-82

American courts less attentive to the abuses that occur once its formalities have been observed.[75]

The interrogating officers ordinarily get what they want. Leo and Ofshe describe an interrogation process so relentless that it easily can, and with surprising frequency has, produced false confessions. They note:

> Interrogators commonly claim that they have witnesses, fingerprints, hair, blood, semen or other evidence when they have little or nothing. Whether revealing evidence or telling lies, the interrogator labors to convince the suspect that the case against him is so overwhelming that he has no choice but to face the fact that he has been caught, will shortly be arrested, successfully prosecuted and severely punished. This sets the stage for eliciting an admission of guilt in exchange for the smallest of benefits.[76]

Officers attempting to undermine a suspect's confidence in his innocence may tell him that a "proton/neutron test" has established that he handled incriminating evidence or that a polygraph examination has revealed his "unconscious" knowledge of the crime. They may inform him that it is time to decide how he will be viewed in court and that his best opportunity to save himself soon will be gone. They may intimate that only a truthful confession will bring their interrogation to an end. And they may tell the suspect, "All we really want to know is whether you planned to do this or whether it was an accident."[77]

False confessions occur primarily in two situations—first, when police officers convince suggestible suspects that they committed crimes that they failed to remember until prompted and, second, when interrogating officers convince innocent suspects that they will certainly be convicted and that things will go better for them if they confess. Concocted evidence is usually essential

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(1979) [hereinafter cited as White, *Police Trickery*]. Among the many examples of police deception cited by White are Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (obtaining confession after falsely telling a suspect that his fingerprints had been found at the scene of the crime); Michigan v. Mosley, 423 U.S. 96 (1975) (obtaining confession after falsely telling a suspect that another suspect had named him the gunman); United States *ex rel.* Galloway v. Fogg, 403 F. Supp. 248 (S.D.N.Y. 1975) (misrepresenting the extent to which other people had implicated the suspect); Moore v. Hopper, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd mem.*, 523 F.2d 1053 (5th Cir. 1975) (telling a suspect that the murder weapon had been recovered when it had not); State v. Cobb, 566 P.2d 285 (Ariz. 1977) (telling a suspect that his fingerprints had been found at the scene of the crime when they had not). For descriptions of many more reported cases in which the police obtained confessions by misrepresenting the incriminating evidence, see Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429-30 (1996).

75. Louis Michael Seidman notes that the Supreme Court has rarely found confessions involuntary in the post-*Miranda* period and that "lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier." Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 745-46 (1992). He concludes, "*Miranda* . . . is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance." *Id.*; *see also* Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 385 (1997) (doubting that "*Miranda* has done anything to eliminate or reduce the mental coercion police employ to persuade suspects to incriminate themselves").

76. Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC'Y 189, 198 (1997).

77. *See id.* at 196-203.

to producing false confessions in both situations.[78]

Leo and Ofshe reveal not only the power of police interrogation but also its susceptibility to judicial control. Interrogations follow clear patterns and generally employ a small number of well understood persuasive techniques. If a coerced confession is, as I have said, a confession caused by offensive governmental conduct, the Constitution requires judges to review these persuasive techniques, to decide which techniques are too dangerous or unfair to use, and to exclude all confessions that the improper techniques produce. In the course of this review, judges can develop at least a few categorical rules; they need not look only to the "totality of the circumstances."[79]

In developing rules for police interrogation and in assessing the totality of the circumstances of particular cases, courts should pay attention to Fred Inbau. When a crime was unwitnessed and the police seek to bridge the gap between probable cause for arrest and proof beyond a reasonable doubt, they cannot be Mrs. Astor.[80] In some circumstances, they should be allowed to express false sympathy for the suspect, blame the victim, play on the suspect's religious feelings, reveal incriminating evidence that in fact exists, confront the suspect with inconsistent statements, and more.

Unlike the current Supreme Court, however, Professor Inbau supports the traditional prohibition of threats and promises, and he does so on the ground that these techniques pose an intolerable danger of causing innocent suspects

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78. *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 109 (1997) [hereinafter cited as White, *False Confessions*); GILSI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 228 (1992). In addition, "[m]ental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely." White, *False Confessions*, *supra*, at 123. Some innocent suspects confess primarily to "escape from a stressful or an intolerable situation," *see* GUDJONSSON, *supra*, at 228, and some disturbed and/or attention-seeking people confess falsely even without prompting by the police. *See Connelly*, 479 U.S. at 174 (Brennan, J., dissenting).

For an indication of the frequency of known false confessions (no more than the tip of an iceberg), see White, *False Confessions*, *supra*, at 108-09 & nn.26 & 29 (citing a number of studies including Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 tbl.6 (1987) (reporting "coerced or other false confession[s]" responsible for erroneous convictions in 49 out of 350 miscarriages of justice in potentially capital cases)); *see also* Richard A. Leo & Richard F. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation (May 30, 1997) (unpublished paper presented at the Annual Meeting of the Law and Society Association, St. Louis, Missouri) (discussing 34 "proven" false confessions, 18 "presumed" false confessions, and eight "highly probable" false confessions).

79. *See* State v. Kelekolio, 849 P.2d 58, 73 (Haw. 1993) ("[D]eliberate falsehoods . . . which are of a type reasonably likely to . . . influence an accused to make a confession regardless of guilt will be regarded as coercive per se, thus obviating the need for a 'totality of circumstances' analysis of voluntariness."). Examining the totality of the circumstances in every case makes "everything relevant and nothing determinative." *See* Joseph Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1986).

I advocate in this article the same sort of low-level generalization about recurring situations that I have advocated for the resolution of search and seizure and sentencing issues. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

80. *See supra* note 71 and accompanying text.

to confess.[81] Leo and Ofshe have shown him right.[82]

In addition to resurrecting *Bram* in the stationhouse (if not in the courtroom where prosecutors rather than police officers promise leniency in exchange for admissions of guilt[83]), courts should forbid falsifying incriminating evidence and misrepresenting the strength of the evidence against a suspect.[84] Especially when suspects are retarded or easily suggestible and when deception is coupled with intimations that leniency will follow confession, this misrepresentation is likely to generate false confessions.[85] In addition, fabricated evidence is well designed to terrify innocent suspects who resist confession;[86] lying during interrogations may desensitize or habituate officers to other dishonest practices;[87] and deception may breed mistrust for the police, limiting

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81. Inbau, *supra* note 70, at 16.

82. *See supra* notes 61-63, 72-77 and accompanying text.

83. *See* Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303, 310 (1987) (arguing that although plea bargaining should be permitted when the accused is represented by counsel and can properly evaluate what is being offered, "[p]romises of leniency from the police during interrogation are too likely to be deceptive, and too likely to give even an innocent suspect the impression that confession is the only way to escape conviction or mitigate the punishment").

84. *See* State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (requiring the exclusion of a confession whenever the police have falsely represented that the defendant's guilt has been established by scientific evidence). *But see* White, *Police Trickery*, *supra* note 74, at 583 (noting that the United State Supreme Court "has neither held nor even indicated that any particular type of police trickery would, in and of itself, render a resulting confession inadmissible"); Christopher Slobogin, *Investigative Lies by the Police*, 76 OR. L. REV. (forthcoming 1997) ("[C]urrent constitutional doctrine . . . by and large has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase."); Young, *supra* note 74, at 426 ("[T]he courts regularly admit confessions obtained by police lying.").

Young notes that in its inception and for a century thereafter the requirement of voluntariness was considerably more demanding than it is today. Young, *supra* note 74, at 433-51. She cites, for example, *United States v. Cooper*, 25 F. Cas. 629 (D.C. Va. 1857) (No. 14,864), in which the court held a confession improperly obtained because the investigating magistrate told the suspect, "It is a very plain case. You might as well confess the whole matter. It will not make the case any worse for you." Young, *supra* note 74, at 436 (quoting *Cooper*, 25 F. Cas. at 630).

85. Although the discussion in text focuses on the empirical consequences of police deception, lying also raises deontological concerns that should at least cast the burden of justification on the defenders of deceptive interrogation. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 30 (1978) ("[W]e must . . . accept as an initial premise Aristotle's view that lying is 'mean and culpable' and that truthful statements are preferable to lies in the absence of special considerations. This premise . . . places the burden of proof squarely on those who assume the liar's perspective."); *id.* at 33 (attributing to St. Augustine the view that "God forbids all lies").

86. The leading police interrogation manual declares that officers should use the manual's methods only when a suspect is "known or strongly believed to be guilty." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986). When a suspect is certainly and provably guilty, however, there is no need to interrogate him. *Cf.* ARTHUR KOESTLER, DARKNESS AT NOON 89 (1941) ("If you have all the proofs, why do you need my confession?"). Despite the view of police officers that they know whether the people they question are guilty, *see* Tom Barker & David Carter, *"Fluffing Up the Evidence and Covering Your Ass:" Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAV. 61, 68 (1990), one cannot assume that the use of any interrogation technique will be limited with rare exceptions to criminals. *But see* Slobogin, *supra* note 84 (relying on Sissela Bok's analysis of permissible deception to argue that false claims of incriminating evidence during interrogation are ordinarily unobjectionable because suspects arrested on probable cause qualify as "publicly declared enemies").

87. Sissela Bok speaks of "the great susceptibility of deception to spread, to be abused, and to give rise to even more undesirable practices." BOK, *supra* note 85, at 26-27. The courts' approval of some forms of police deception in the "war on crime" may affect the attitudes of officers toward other forms—deception, for example, in warrant applications, courtroom testimony,

their ability to secure the cooperation of suspects, other citizens, and jurors who may be tempted to "send them a message."[88] In *Frazier v. Cupp*,[89] a police officer falsely informed a suspect that his companion had confessed. The Supreme Court held that the officer's misrepresentation "while relevant, [was] insufficient . . . to make this otherwise voluntary confession inadmissible."[90] Material fraud vitiates most of life's choices, and although some forms of police deception can be appropriate,[91] permitting false claims of incrimi-

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internal affairs investigations, and requests for permission to search. *See* Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying*, 27 AM. BEHAV. SCIENTIST 529, 533-34 (1984); Jerome Skolnick, *Deception by Police*, CRIM. JUSTICE ETHICS, Summer/Fall 1982, at 40, 45; Young, *supra* note 74, at 464 ("[T]he justification of lying to enemies may extend beyond the interrogation room. Law enforcement officers may view prosecutors, judges, and even jurors as enemies, or at least as obstacles.").

88. Bok observes:

> The veneer of social trust is often thin. As lies spread . . . trust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

BOK, *supra* note 85, at 26-27.

Christopher Slobogin writes:

> Routine deceit coarsens the liar, increases the likelihood of exposure and, when exposed, maximizes the loss of trust. When the deceptive practice is carried out by an agent of the government, it is even more reprehensible, both because the liar wields tremendous power and because government requires trust in order to be effective.

Slobogin, *supra* note 84, at 62; *see also* Margaret L. Paris, *Trust, Lies and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995); Young, *supra* note 74, at 455-75.

Admittedly, many of the harmful consequences produced by misrepresenting the strength of the evidence are also produced by deceptive interrogation practices that I do not disapprove. *See infra* note 91. These troublesome consequences are in fact risked by every form of undercover investigation.

89. 394 U.S. 731 (1969).

90. *Frazier*, 394 U.S. at 739.

91. Falsely expressing friendship or sympathy for a suspect, falsely suggesting that the victim deserved her fate, and even confessing falsely that the interrogating officer himself had considered or engaged in misconduct of the sort alleged seem less offensive than concocting nonexistent incriminating evidence. *See* INBAU ET AL., *supra* note 86, at 98-100. Such tactics seem unlikely to terrify innocent suspects or to induce false confessions.

For example, I do not quarrel with (and indeed applaud) the tactics that J. J. Bittenbinder, a former Chicago Police detective, told me that he employed in a case in which one reputed mobster was arrested for killing another. Bittenbinder opened the door of the room in which the suspect was held and shouted, "Man, I want to shake your hand! I've been hoping that someone would get rid of that sonofabitch for us! We've been trying for years, but we never got close to him. I hear you shot the bastard four times, is that right?"

"No," the apparently puzzled suspect said. "Only once."

"Thank you," said Bittenbinder as he left the room.

Misrepresenting nonincriminating facts to trip-up apparently dissembling suspects seems unobjectionable in many circumstances. Even misrepresenting the existence of physical evidence may be unobjectionable when the police do not claim that this evidence incriminates the suspect. For example, the false statement, "We found the gun and the lab will soon test it," seems less troublesome than the false statement, "We found the gun, and the lab report says that your thumbprint is on it." Although the former statement would be likely to discomfit the guilty, an innocent suspect would probably view it as welcome news. The latter statement, by contrast, could lead an innocent suspect either to doubt her own innocence or to believe that the police were trying to frame her.

I do not object to all forms of undercover interrogation—"deception about whether an interrogation is taking place." *See* White, *Police Trickery*, *supra* note 74, at 602-08. After a right to counsel at interrogation has attached, prohibiting undercover interrogation may be necessary to safeguard this right; in this situation, perhaps the right-to-counsel tail must wag the interrogation

nating evidence exempts the police not only from the rules of the parlor but also from bedrock concepts of decency.[92]

Welsh White, one of America's most thoughtful students of police interrogation, would go less far than I would in forbidding promises of leniency and misrepresentations of incriminating evidence.[93] White, however, has proposed another limitation on police interrogation that courts should consider essential to constitutional fairness. They should interpret the Due Process Clause to establish a maximum period of police interrogation (White suggests five hours), and every suspect should be informed at the outset that questioning will continue no longer.[94] The period of interrogation should, moreover, be shorter for juveniles and mentally retarded suspects.[95] The longer-than-five-hour interrogations that some courts have allowed[96] are likely to indicate to suspects the

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dog. Nevertheless, the interrogation that occurred in *Massiah v. United States*, 377 U.S. 201 (1964), in which a defendant's confederate agreed to "wear a wire" while the two were at liberty pending trial, seems intrinsically no more objectionable than other, routinely accepted forms of undercover investigation. The interrogation in *Massiah* did not frighten or inconvenience the defendant, and the interrogation posed little risk to the innocent. This interrogation did invade the defendant's privacy, but only after probable cause had been established. Some techniques of undercover interrogation, however, should certainly be condemned—for example, securing a suspect's confidences by pretending to be a priest or a court-appointed defense attorney.

I disagree with Welsh White that the police should never be allowed to minimize the seriousness of a suspect's alleged offense or to portray themselves as acting in the suspect's interest. *See* White, *Police Trickery*, *supra* note 74, at 611-17. Misrepresenting a suspect's legal rights, however, merits unqualified condemnation. If legal rights are to be meaningful, they must be known and understood. Law enforcement officers should not be able effectively to repeal these rights by persuading people that they do not exist. *See* Commonwealth v. Dustin, 368 N.E.2d 1388 (Mass. 1977) (requiring the exclusion of a confession obtained through a false assurance that only statements given by a defendant under oath at trial could be used against him); Commonwealth v. Starr, 406 A.2d 1017 (Pa. 1979) (requiring the exclusion of a confession when the police misrepresented the admissibility of polygraph results).

Some writers condemn all police misrepresentation in the interrogation of suspects, and they offer potent arguments in support of this position. *See* Paris, *supra* note 88; Young, *supra* note 74.

92. Without asserting that her analogy to police interrogation is exact, *see supra* text accompanying note 1, Deborah Young notes, "We would be shocked . . . if a doctor presented false test results to obtain a patient's consent to surgery." Young, *supra* note 74, at 470; *see also* Colorado v. Spring, 479 U.S. 564, 576 n.8 (1987) (stating that, in some situations, the Supreme Court "has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege"). *But see* INBAU ET AL., *supra* note 86, at 131 ("With all offenders, in particular the nonemotional type, the interrogator must convince the suspect that not only has guilt been detected, but also that it can be established by the evidence currently available or that will be developed before the investigation is completed.").

93. *See* White, *False Confessions*, *supra* note 78, at 149-53 ("[N]ot all confessions given as a result of promises appear to be untrustworthy," but "[i]nterrogators should be prohibited from making any statements likely to lead a reasonable person in the suspect's position to believe that he may receive a significant benefit with respect to the disposition of his criminal litigation if he confesses."); *id.* at 147-48 ("[S]tatements exaggerating the strength of the evidence against the suspect . . . should not be absolutely prohibited. . . . On the other hand, specific misrepresentations designed to convince the suspect that forensic evidence establishes his guilt should be prohibited.").

94. *See* White, *False Confessions*, *supra* note 78, at 143-45. *Cf.* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (Black, J.) (stating that a 36-hour interrogation is "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom").

95. *See* White, *False Confessions*, *supra* note 78, at 142-43.

96. *See, e.g.*, State v. Doody, 930 P.2d 440 (Ariz. 1997) (holding that the confession of a 17-year-old defendant during a nearly 13-hour interrogation was voluntary); State v. La Pointe, 678 A.2d 942 (Conn. 1996) (holding that a confession after more than nine hours of continuous

only way to end their interrogators' badgering is to yield.[97]

The first step in implementing these rules (or any others) must be the one urged by Glanville Williams, Yale Kamisar, Paul Cassell, and many others—videotaping police interrogations.[98] When interrogations are fair, this process often generates powerful evidence for the prosecution. Jurors can view tapes of competent, unruffled suspects confessing in matter-of-fact tones to civilized interrogators. About one-third of all law enforcement agencies in American jurisdictions of 50,000 or more use videotaping to record some interrogations,[99] and the agencies that do like it.[100] In England, where a statute generally requires the recording of police interviews with suspects, a Royal Commission concluded, "By general consent, tape recording in the police station has proved to be a strikingly successful innovation providing better safeguards for the suspect and the police officer alike."[101] Two American states require the recording of interrogations,[102] but most police departments resist the practice. The objections they voice do not include the one that motivates them: They do not want judges, jurors, and the rest of us to see them do just what Leo and Ofshe say they do.

We know how to fix the defects of our interrogation process, but apparently no one wants to. Repair requires using the technology available to us to learn what occurs inside interrogation rooms, examining the substance of police interrogation practices rather than the ritual dance that precedes them, and forbidding altogether many forms of governmental force, fraud, threats, and promises. Defining coerced confession to mean a confession caused by offensive governmental conduct could help to focus the issues. Nevertheless, we apparently prefer symbols—litigation about *Miranda* niceties, judgments

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interrogation was voluntary); People v. Kokoraleis, 501 N.E.2d 207 (Ill. App. 1986) (holding a confession voluntary although made by a defendant with an I.Q. of 75 during a deceptive interrogation that lasted 13 hours); People v. Towndrow, 654 N.Y.S.2d 69 (App. Div. 1997) (holding that a confession after 14 hours of interrogation was voluntary). I am grateful to Welsh White for calling most of these cases to my attention.

97. One suspect who confessed falsely later compared his interrogation to "when I went in for surgery." This suspect ultimately decided that the only way to persuade his interrogators to "back off" was to agree with them. "Every time I answered, 'No,' they were getting close to my face," he said. "One of the Detectives had bad breath." *See* White, *False Confessions*, *supra* note 78, at 143 & n.249 (citing Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58).

98. *See, e.g.*, Glanville Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6; Yale Kamisar, *Foreword:* Brewer v. Williams*—A Hard Look at a Discomfiting Record*, 66 GEO. L. J. 209, 236-43 (1977); KAMISAR, ESSAYS, *supra* note 4, at 132-36; Paul G. Cassell, Miranda's *Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 486-97 (1996); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934); EDWIN M. BORCHARD, CONVICTING THE INNOCENT xvii (1932); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4, at 39 (1975); UNIFORM RULES OF CRIMINAL PROCEDURE Rule 243 (1974).

99. *See* William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. OF JUST.: RESEARCH IN BRIEF, Mar. 1993, at 2.

100. *See* WILLIAM A. GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES—A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 152 (1992) (stating that 97% of the agencies that videotape confessions or interrogations consider the practice either very useful or somewhat useful).

101. ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT 26 (1993).

102. *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

about the totality of the circumstances (after we studiously avoid discovering them), and metaphysical appraisals of which misguided suspects truly had free will when they succumbed to Dirty Harry.

THE DECISION TO CONFESS FALSELY: RATIONAL CHOICE AND IRRATIONAL ACTION

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I. INTRODUCTION[1]

How do police elicit confessions from the innocent? Why do the innocent confess to crimes that carry lengthy prison sentences, life imprisonment or execution? Though researchers have studied psychological interrogation and false confession for more than eighty-five years,[2] these questions have not been adequately answered. This is largely because only recently has the process of interrogation been studied directly.[3] Over the past thirty years researchers have undertaken many observational,[4] retrospective[5] and labora-

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1. We thank Paul Cassell and Welsh White for helpful comments. This article extends and documents the model of interrogation influence that we first developed in RICHARD J. OFSHE & RICHARD A. LEO, THE SOCIAL PSYCHOLOGY OF POLICE INTERROGATION: THE THEORY AND CLASSIFICATION OF TRUE AND FALSE CONFESSIONS 189-251 (1997) [hereinafter OFSHE & LEO, SOCIAL PSYCHOLOGY].

The interrogation transcripts and interviews excerpted herein come from more than 125 cases of disputed interrogation that Richard J. Ofshe evaluated between 1987 and 1997 and from additional interrogation transcripts and case materials that Richard A. Leo collected during the same period. Although not all of the interrogations are mentioned in this article, the disputed interrogations that resulted in statements were classified as either voluntary true, coerced true, stress-compliant false, coerced-compliant false, persuaded or coerced-persuaded false confessions. Voluntary false confessions that were not elicited by police interrogation are also contained in the archive. The excerpts are unedited, with the exception of ellipses inserted by the author when deleting redundant statements.

All specific examples of interrogation tactics are taken from recordings of interrogations in major felony or murder cases. All of these interrogations resulted in confessions. The persons classified as guilty were convicted at their trials or entered guilty pleas. The persons classified as false confessors are almost all individuals who were either proven innocent by indisputable evidence before trial and therefore not tried, proven innocent and acquitted at trial, acquitted at trial or found guilty and subsequently proven innocent. In a few instances the persons identified as false confessors were convicted at trial or entered a guilty plea despite maintaining their innocence. An independent analysis of the case facts has led to their classification as false confessors for research purposes. For a discussion of case classification, see Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997) [hereinafter Leo & Ofshe, *Consequences*].

2. *See, e.g.*, EDWIN BORCHARD, CONVICTING THE INNOCENT (1932); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); HUGO MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908); EDWARD D. RADIN, THE INNOCENTS (1964); THEODORE REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT (1945); O. JOHN ROGGE, WHY MEN CONFESS (1959); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

3. For a review of this literature, see OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221-33 (1997).

4. *See, e.g.*, John Baldwin, *Police Interview Techniques: Establishing Truth of Proof?*, 33 BRIT. J. OF CRIMINOLOGY 326 (1993); Barrie L. Irving, *Police Interrogation: A Case Study of Current Practice* (Royal Comm'n on Criminal Procedure, Research Study No. 2, 1980); Barrie L. Irving & Linden Hilgendorf, *Police Interrogation: The Psychological Approach* (Royal Comm'n on Criminal Procedure, Research Study No. 1, 1980); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Paul Softley, *Police Interrogation: An Observational Study in Four Police Stations* (Royal Commission on Criminal Procedure, Research Study No. 4, 1980); Michael L. Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967).

5. *See, e.g.*, GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992) [hereinafter GUDJONSSON, PSYCHOLOGY OF INTERROGATIONS]; LAW-

tory[6] studies that have allowed for the testing of hypotheses about how interrogation procedures influence suspects and lead to the decision to confess.[7] Understanding the interrogation influence process has also been greatly aided by the mandatory recording of interrogation in Alaska (since 1985),[8] Minnesota (since 1994),[9] and England (since 1984),[10] together with the spreading practice of recording by police agencies across the United States.[11] The studies and records of interrogation that have accumulated now make it possible to empirically describe and analyze the process of interrogation and the decision to confess.[12]

RENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM (1993); Phillip M. Coons, *Misuse of Forensic Hypnosis: A Hypnotically Elicited False Confession with the Apparent Creation of a Multiple Personality*, 36 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 1 (1988); Gisli Gudjonsson & James MacKeith, *A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type*, 30 MED. SCI. & L. 329 (1990); Gisli H. Gudjonsson & James MacKeith, *False Confessions, Psychological Effects of Interrogation*, *in* RECONSTRUCTING THE PAST: THE ROLE OF PSYCHOLOGISTS IN CRIMINAL TRIALS 253-69 (A. Trankel ed., 1982); Leo & Ofshe, *Consequences*, *supra* note 1; Mickey McMahon, *False Confession and Police Deception: The Interrogation, Incarceration and Release of an Innocent Veteran*, 13 AM. J. FORENSIC PSYCHOL. 5 (1995); Stephen Moston et al., *The Effects of Case Characteristics on Suspect Behavior During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23 (1992); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989) [hereinafter Ofshe, *Coerced Confessions*]; Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992) [hereinafter Ofshe, *Inadvertent Hypnosis*]; T.N. Thomas, *Polygraphy and Coerced-Compliant False Confession: 'Serviceman E' Redevivus*, 35 SCI. & JUST. 133 (1995); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Philip Zimbardo, *Coercion and Compliance: The Psychology of Police Confessions*, *in* THE TRIPLE REVOLUTION 492-508 (C. Perruci & M. Pilisuk eds., 1971); Richard A. Leo, False Memory, False Confession: When Police Interrogations Go Wrong, presented at the Annual Meetings of the Law & Society Association, Toronto, Can. (June 1995) (unpublished manuscript, on file with the *Denver University Law Review*) [hereinafter Leo, False Memory].

6. *See, e.g.*, Darryl J. Bem, *Inducing Belief in False Confessions*, 3 J. PERSONALITY & SOC. PSYCHOL. 707 (1966); Saul M. Kassin & Lawrence Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489 (1980); Saul M. Kassin and Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991) [hereinafter Kassin & McNall, *Police Interrogations*]; Saul M. Kassin & Lawrence M. Wrightsman, *Prior Confessions and Mock Juror Verdicts*, 10 J. APPLIED SOC. PSYCHOL. 133 (1980); Saul M. Kassin & Katherine Keichel, *The Social Psychology of False Confessions: Compliance, Internalization and Confabulation*, 7 PSYCHOL. SCI. 125 (1996); Christina Maslach, *The 'Truth' About False Confessions*, 20 J. PERSONALITY & SOC. PSYCHOLOGY 141 (1971).

7. The most recent observational study of interrogation in America found that suspects gave partial or full confessions 42% of the time. Leo, *Inside the Interrogation Room*, *supra* note 4, at 270.

8. Stephan v. State, 711 P.2d 1156, 1157-58 (Alaska 1985) (stating that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process"); Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980) (establishing the recording requirement).

9. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

10. Police and Criminal Evidence Act, 1984, ch. 60 (Eng).

11. *See* William A. Geller, *Videotaping Interrogations and Confessions*, NAT'L INST. OF JUST.: RESEARCH IN BRIEF, Mar. 1993, at 1; William A. Geller, Police Videotaping of Suspect Interrogations and Confessions (1992) (report to the National Institute of Justice).

12. Unlike the Supreme Court's analysis in *Miranda v. Arizona*, 384 U.S. 436, 445-55 (1966), it is no longer necessary to rely on interrogation industry accounts to learn what happens in the confines of those base, little rooms in the bowels of police stations across America.

Police-induced false confessions are a serious problem for the American criminal justice system.[13] Because the "third degree" has virtually disappeared,[14] false confessions might seem unlikely, irrational, and perhaps so rare as to be exotic for those unfamiliar with modern psychological interrogation techniques.[15] However, confessions by the innocent still occur regularly,[16] and will likely continue until police and other criminal justice officials develop a better understanding of the dangers of contemporary interrogation practices and establish safeguards to prevent their misuse. This article documents the process of interrogation and explains why police-induced false confessions, like truthful ones, are rational responses to the influence tactics and manipulation strategies that American police use during interrogation.[17] False confessions occur when interrogation tactics are not understood and are misused by those who implement them, most often when the misuse violates legal rules that are in place for well-settled reasons.[18]

No one suggests police set out to extract false confessions or prosecutors intentionally seek to convict the innocent. There is little evidence that such intentional abuses of power happen with significant frequency. While some miscarriages of justice are caused by malicious intent, it appears that poor training and negligence are the principal reasons that false confessions occur. Police are not trained to avoid eliciting them, to recognize their variety and distinguishing characteristics,[19] or to understand how interrogation tactics can cause the innocent to falsely confess. Instead, interrogation manual writers and trainers persist in the self-serving and misguided belief that contemporary psychological methods are not apt to cause an innocent suspect to confess[20]—a fiction that is flatly contradicted by all of the scientific research on interrogation and confession.

A confession—whether true or false—is arguably the most damaging

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13. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

14. *See* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992) [hereinafter Leo, *From Coercion to Deception*].

15. *See* Paul G. Cassell, *The Exotic and the Routine: An Empirical Essay on the Tradeoffs Between False Confessions and Lost Confessions*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1998).

16. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

17. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; E.L. Hilgendorf & Barrie Irving, *A Decision Model of Confessions*, *in* PSYCHOLOGY IN LEGAL CONTEXTS 67 (S.M. Lloyd-Bostock ed., 1981); Irving & Hilgendorf, *supra* note 4.

18. *See* discussion *infra* Parts III.B.2.c.-III.B.2.f.

19. *See* discussion *infra* Part II.F.

20. *See, e.g.*, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 147 (3d ed. 1986) ("None of what is recommended will induce an innocent person to confess."). The only advice this manual gives interrogators with respect to avoiding taking a false confession is that before doing something about which there might be a concern, the investigator should ask himself, "[i]s what I am about to do, or say, apt to make an innocent person confess? If the answer is no the interrogator should go ahead and do or say what is contemplated." *Id.* at 217. The authors of this well-known, widely read, and highly influential interrogation training manual do not even have an index reference for "false confessions." *See also* Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial*, SEC. MGMT., Oct. 1992, at 69 (stating that "none of these techniques, in and of themselves, is unique to interrogation, and none of them would cause an innocent suspect to confess to a crime").

evidence the government can present in a trial.[21] As a result, when police elicit a false confession, they are likely to cause the wrongful conviction and imprisonment of an innocent person. Someone who confesses is presumed guilty and treated more harshly by every criminal justice official and at every stage of the trial process.[22] Once police elicit a confession—even if it is obtained by questionable or prohibited means, is internally inconsistent, is contradicted by the case facts, and does not lead to corroboration—they will almost always arrest the confessor and consider the case solved.[23] Criminal justice officials typically will not believe a defendant's retraction[24] and may see it as further evidence of deceitfulness. Defendants who have confessed are likely to experience greater difficulty making bail, a disadvantage that significantly reduces their likelihood of acquittal.[25] If a person has confessed, prosecutors are likely to file charges, "charge high," and make the confession the centerpiece of their case.[26] Prosecutors are less likely to initiate or accept a plea bargain, and defense attorneys are more likely to pressure their clients to plead guilty because of the high risk of conviction.[27] At trial, the jury is likely to treat the confession as more probative of the defendant's guilt than any other evidence[28] and, if convicted, the defendant is likely to be sentenced more harshly because he[29] failed to show remorse.[30]

This article first sets forth and illustrates a decision-making analysis that explains why contemporary interrogation methods, if misdirected, used ineptly, or utilized improperly, sometimes convince ordinary, psychologically and intellectually normal individuals to falsely confess. The illustrations of police tactics come from recordings of interrogations conducted throughout the United States.[31] Part II of this article briefly presents the decision model in the context of an abstract interrogation and explains the influence process that underlies interrogation. Part III explicates the decision model using field data to illustrate the steps through which psychological interrogation proceeds.[32]

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21. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 820b, at 303 (James H. Chadbourn ed., 1970).

22. See OFSHE & LEO, SOCIAL PSYCHOLOGY, supra note 1; DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (1991); Kassin, *supra* note 3; Leo, *Inside the Interrogation Room*, *supra* note 4, at 298.

23. *See* Leo, *Inside the Interrogation Room*, *supra* note 4.

24. *Id.*

25. *See* SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS: A POLICY GUIDE (3d ed. 1994).

26. Paul G. Cassell & Bret J. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 905-12 (1996).

27. *See* PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS (1988).

28. Gerard R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* PSYCHOLOGY AND THE LEGAL PROCESS (Bruce Dennis Sales ed., 1977).

29. Because the majority of interrogators and criminal suspects are men, we use male pronouns throughout this paper.

30. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

31. *See supra* note 1 and accompanying text.

32. We often choose not to indicate whether quoted material was taken from the interrogation of an innocent or a guilty party. The confessor's guilt or innocence makes little or no difference in how the tactics of contemporary American interrogation are implemented. Often, inter-

Finally, Part IV discusses how to better identify false confessions, reduce their frequency and thereby reduce the miscarriages of justice they needlessly cause.

II. How Police Elicit True and False Confessions: An Overview[33]

A. *Introduction*

Contemporary American methods of interrogation have been developed for the purpose of influencing a rational person who knows he is guilty to rethink his initial decision to deny culpability and choose instead to confess. An interrogator strives to neutralize the person's resistance by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs. To accomplish this, interrogators manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action. An interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate.

Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making—people make optimizing choices given the alternatives they consider.[34] Psychologically-based interrogation works effectively by controlling the alternatives a person considers and by influencing how these alternatives are understood. The techniques interrogators use have been selected to limit a person's attention to certain issues, to manipulate his perceptions of his present situation, and to bias his evaluation of the choices before him. The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike.[35] Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelm-

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rogators have considerable evidence indicating the guilt of someone they decide to interrogate, but in investigations that culminate in a confession from an innocent, this is never true. When an innocent is interrogated, all of the evidence an interrogator claims to possess is invented or erroneous. Even when the suspect is guilty and an interrogator has some evidence against him, much of what is claimed may be invented.

Although the truth of an interrogator's claim to any piece of evidence is questionable, and his picture of what the future holds for the suspect is deliberately distorted, these truths cannot be guessed based either on his statements or his conduct. For an innocent to decide to confess, he must believe that the evidence the interrogator claims to have actually exists, even if he believes it is entirely mistaken or has been fabricated. He must also believe that his future is as certain as the interrogator paints it, even though it is unjust.

The reader is invited to sometimes pause after reading an interrogation excerpt, suspend disbelief, imagine being confronted with whatever the interrogator has just said and, presuming that the suspect believes it, ponder this question: Might a reasonable, innocent person fully enmeshed in the sort of interrogation described by the quoted materials become demoralized, fearful, hopeless and so panicked that he might comply and make the choice to falsely confess?

33. This analysis presumes that the crime under investigation is homicide.

34. *See* DECISION MAKING (W. Edwards & A. Tversky eds. 1967); ANATOL M. RAPOPORT & A. CHAMMAH, PRISONER'S DILEMMA (1965); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

35. The decision-making model presented in this paper applies both to interrogations that produce true confessions as well as interrogations that produce false confessions. For purposes of this paper, however, we focus almost exclusively on false confessions. For an analysis that focuses both on true and false confessions, see OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1.

ing, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess. Investigators elicit the decision to confess from the innocent in one of two ways: either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.

B. *Detective Work and Suspects*

Suspects fall in two categories: likely suspects, for whom there exists solid evidence suggesting their guilt; and possible suspects, which includes everyone whose name comes up during an investigation. When police interrogate suspects whose guilt is a mere possibility rather than a reasonable likelihood, they run a significant risk of eliciting a false confession.[36] Not surprisingly the chain of events that leads to a false confession starts with the error of choosing to use methods of psychological interrogation against the wrong target.[37]

No matter why a suspect is selected, the interrogation process that follows will, at least superficially, be the same. However, at every step of the process, the commonly used tactics of interrogation will not produce their intended and normal influence effects when directed at an innocent suspect. A suspect's knowledge that he is innocent necessarily interacts with each tactic and will produce a different understanding of what is happening than will the cognitions that result from the interaction of an interrogation tactic with a person's knowledge that he committed the crime. While the major effects of these different interactions are not necessarily observable in the behavior of the person under interrogation, their impact on the sequential decision making of guilty and innocent suspects will eventually lead to conduct that distinguishes them.

If an interrogation is poorly founded—based on guesses, hunches, or pseudoscientific behavioral cues[38]—a detective necessarily lacks a valid founda-

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36. In the Phoenix Temple murder case, Maricopa County Sheriff's detectives subjected five mistakenly chosen individuals to psychological interrogation and succeeded in eliciting three false confessions to mass murder, a batting average of .600. Richard Ofshe, *I'm Guilty If You Say So*, *in* CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG" MAN (Donald S. Connery ed., 1996); *see also* Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58-62; Russell Kimball & Linda Greenberg, *False Confessions*, PHOENIX MAG., Nov. 1993, at 85-95.

37. *See* GUDJONSSON, PSYCHOLOGY OF INTERROGATIONS, *supra* note 5; OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; WRIGHTSMAN & KASSIN, *supra* note 5; Coons, *supra* note 5; Leo & Ofshe, *Consequences*, *supra* note 1; Ofshe, *Coerced Confessions*, *supra* note 5; Ofshe, *Inadvertent Hypnosis*, *supra* note 5; McMahon, *supra* note 5; Thomas, *supra* note 5; White, *supra* note 5; Zimbardo, *supra* note 5; Leo, False Memory, *supra* note 5.

38. Police trainers and interrogation manuals mislead detectives into believing that they can divine whether a suspect is innocent or guilty from simple non-verbal and behavioral responses to their questions. *See* INBAU ET AL., *supra* note 20; *see also* DAVID ZULAWSKI & DOUGLAS WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION (1993). There are no non-verbal or behavioral signs that somehow distinguish truth-tellers from liars. *See* Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOL. 913 (1991).

tion from which to accuse and confront the suspect. The weakness of the interrogator's position and the suspect's knowledge of his innocence will likely affect the style of the suspect's resistance and the strength with which he resists. Dealing with a strongly resistant suspect will tend to frustrate the investigator because it makes his task more difficult. The difficulty of the interrogation may lead him to use a very aggressive or a hostile questioning style that emphasizes the power and authority of his role, and eventually to use coercive tactics. An investigator may employ tactics that coerce confessions by blatantly threatening the suspect, or he may use an indirect approach by leading a suspect to reason by pragmatic implication[39] that he will receive an extreme punishment if he continues to deny guilt, but lenient treatment if he confesses.

If a detective is inadequately trained, interrogates a poorly selected suspect, is inept, and/or uses certain techniques improperly, he runs a risk of obtaining a false confession. For example, too often the pressure of high-profile cases causes investigators to make the mistake of interrogating a suspect who is, at best, only a possible perpetrator and under normal circumstances would not be considered a sufficiently strong suspect to warrant interrogation. Circumstances may, however, force a detective to try to obtain a confession from his best suspect no matter how weak the evidence suggesting guilt may be. With no evidence pointing to anyone, the investigator will know that he has to rely only on his intuition and interrogation to close the case. When this happens, interrogations may be conducted unwisely and in their most extreme, stressful, and error-producing forms.

Once investigators identify a likely or a possible suspect, they often conduct what appears to be an interview. This session may truly be an investigative interview or it may be an opening move in what the investigator intends to develop into an interrogation. At this point investigators neither take a hostile tone nor tell the individual that he is a suspect. Instead, they treat him respectfully and are likely to say they need his help in solving the crime. Under the non-threatening guise of information-gathering, the interrogator typically begins by obtaining an account of the suspect's relations with the victim, his knowledge of the offense, and his whereabouts at the time of the crime. The goal is to obtain information that elevates the person into a likely or principal suspect and ties him to a baseline account that establishes his knowledge of, and alibi for, the crime.

By using an interview format, the investigator is better able to develop a rapport with the suspect and to initially define their interaction as an exchange between persons involved in a cooperative effort to solve the crime. Even after the interrogation has turned openly accusatorial, the investigator is advantaged if he continues to personalize the interaction by finding common ground with

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39. "Pragmatic implication" refers to information processing that occurs "between the lines," or is inferred from what the speaker is saying or suggesting. *See* Kassin & McNall, *Police Interrogations*, *supra* note 6; *see also* Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977); Richard J. Harris & Gregory E. Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*, 107 J. EXPERIMENTAL PSYCHOLOGY 1 (1978).

the suspect; by claiming to understand what led him to commit the crime; by telling the suspect that he does not think badly of him despite his certain belief in the suspect's guilt; and by telling him that it is others in the criminal justice system, who do not understand or empathize with him, who will make the important decisions in his case and apply the law without mercy.

By personalizing the interaction, the interrogator avoids reminding the suspect of the irrevocably adversarial nature of their roles and the power differences between them. To the extent that the investigator is able to conduct the interrogation in an interaction style appropriate for two people working on a problem-solving task, he facilitates the suspect's decision to say "I did it" and his subsequent confession. It is far easier to admit wrongdoing to someone who appears to be a sympathetic acquaintance, if not a friend, than to someone whose role is simply to build the most damning case possible and to help send one to prison.

An investigator who acts like a zealous agent of the state is not as believable as someone who sympathizes with the suspect's plight, understands his transgression, and might be willing to bend the rules to help him. An investigator who casts himself in the role of an understanding person obliged to gather evidence and solve the crime is more likely to be believed when he offers advice about the suspect's best course of action and indicates how he can help once the suspect admits his guilt and confesses.

Although during the interview investigators often learn information that causes them to exclude an individual from suspicion, their goal is to discover information that is incriminating. It doesn't matter whether a detective had always planned to abandon the interview format and shift into an accusatory interrogation style or whether he decides to do so during the interview. The quality of the evidence underlying his decision, however, has consequences for what tactics will be effective during questioning. If the investigator's decision is well founded he will have evidence such as witnesses' statements, coperpetrators' confessions, or laboratory reports with which to confront the suspect, and he will be able to prove he has the evidence when and if it is necessary. Moreover, if the guilty party has been selected, he will be genuinely vulnerable to the interrogator's tactics, and is likely to be more easily convinced he is caught and led to make an admission.

C. Miranda

An interrogator who presses forward will eventually abandon the interview style and turn the interaction into a full-blown interrogation. The reading and waiver of *Miranda* rights typically signal the transition. The optimal point at which to advise a suspect of his constitutional rights and obtain a waiver is prior to the start of the accusatory part of the interrogation. The nonthreatening interview format contributes to a suspect's decision to allow questioning to proceed.[40] Up to this point police have portrayed questioning as

40. Empirical studies have found that the vast majority of suspects—ranging from approximately 78% to 96%—waive their *Miranda* rights. *See* Leo, *Inside the Interrogation Room*, *supra*

relatively risk free; they have treated the suspect solicitously or in a business-like manner; and they have not informed him that he is their prime suspect—all of which makes it easier for him to waive his rights to silence and counsel.

Neither an innocent nor a guilty party is likely to appreciate the full significance of the *Miranda* warnings. An innocent person will likely believe that he is not in any jeopardy by waiving his rights and answering questions because police have sought out his help in solving the crime and, after all, he is innocent. He may also believe that the *Miranda* warnings are merely a bureaucratic formality that are significant only for the guilty. The guilty person will likely risk waiving his rights because he doesn't believe the police have decided to arrest him, wants to find out what evidence they have, and hopes to direct their attention elsewhere.

D. *Two Steps to Admission*

Interrogation begins in earnest after the *Miranda* advisement. Both the tone and the content of the interaction change dramatically. No longer friendly or solicitous, an investigator may become confrontational and demanding. He no longer asks the suspect for information, but instead accuses him of committing the crime. Interrogation is not simply insensitive to a suspect's denials and protestations of innocence; it requires that both be strongly rejected. Presuming the suspect's guilt, an investigator's objectives are to overcome the suspect's denials, neutralize his resistance to making an admission, obtain the admission, and, finally, elicit a confession that describes why and how the crime was committed.

Because a guilty party who lies when denying responsibility and an innocent person who truthfully denies it are often indistinguishable to an investigator, they are in exactly the same functional position throughout the interrogation and will be treated in ways that are more similar than they are different. While a guilty party will likely be very unhappy that he is being accused and confronted with evidence that supports the accusation, he is somewhat insulated from shock because he has always been aware of possible detection and can understand that he has been caught.

An innocent suspect is likely to experience considerable shock and disorientation during the interrogation because he is wholly unprepared for the confrontation and accusations that are the core of the process, and will not understand how an investigator could possibly suspect him. An innocent individual may become progressively more distressed, confused, and desperate as he is told of evidence that incriminates him. He will express doubt and dismay when the investigator claims to possess a lengthening list of damning evidence. When an investigator assures an innocent that the evidence does in fact exist, the suspect will likely insist that someone has made an error or is trying to frame him.

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note 4; George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A 'Steady State' Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

Two sub-goals must be accomplished before a suspect can be expected to make an admission of guilt. The first is convincing him that he will soon be arrested. The second is motivating him to say "I did it" rather than continue to deny guilt or to remain silent. The first goal is achieved by shifting the suspect's perception of his situation from confident that his denials of guilt will be adequate to protect him from arrest, to recognizing that all his future holds is certain arrest, certain prosecution, and certain conviction. The second task can only be worked on effectively after the first goal has been achieved. Once a suspect fully appreciates his dismal situation, the investigator can influence him to admit guilt if he is led to believe that making an admission will improve his position.

As the influence process moves forward, an investigator cannot stop to ponder whether a suspect is guilty or innocent. He focuses his attention and efforts on convincing his target that the case against him is airtight. The investigator accomplishes this by repeatedly accusing the suspect of committing the crime; by exuding unwavering confidence in his guilt; by pointing out or inventing logical and/or factual inconsistencies, omissions, contradictions, and the implausibility in his account; and, most importantly, by repeatedly confronting him with supposedly *incontrovertible* evidence of his guilt. The investigator impresses upon the suspect that his best arguments are unconvincing, that there is no way out, and that his immediate future inevitably involves arrest, prosecution, and imprisonment or execution.

The next step in interrogation is to motivate a now resigned and despairing suspect to admit guilt. When an investigator judges the suspect to be at a low point, he offers the suspect incentives to motivate him to re-evaluate his decision to deny responsibility for the crime. The strategy presumes that a suspect who realizes that his arrest and incarceration are certain will find that the incentives associated with admitting guilt make doing so appear to be the alternative that leaves him best off. The range of incentives that investigators use to tip the scale can be arrayed along a continuum ranging from weak to strong. At one end are intangible and nonmaterial psychological and interpersonal benefits such as an assuaged conscience, an improved self-image, the investigator's respect, the community's respect, or the liberation that comes with telling the truth. At the other end are outright threats of harm and promises of leniency. Investigators sometimes suggest that a suspect's failure to confess will lead to a death sentence, while confessing will lead to a lesser charge or even avoidance of any prosecution. Whether the investigator offers incentives at the low or high end of the continuum and whether he communicates them through pragmatic implication or direct statement, he seeks to convince the suspect that his new situation will only be improved if he admits guilt, but that it will continue to worsen if he denies guilt or remains silent.

E. *The Post-Admission Narrative*

Once a detective elicits an admission, the most important task of interrogation commences. While the dramatic high point of interrogation scenes in film occurs when the suspect says, "I did it," in real life this moment signals

that a suspect is ready to make a confession and to provide the investigator with the internal indicia of reliability and independent evidence he needs to obtain a conviction. Any investigator who is not fully aware of the limited psychological and legal significance of the words "I did it" is always in danger of arresting an innocent who has been overwhelmed by the interrogation process.

While a suspect who says "I did it" is far more likely to be guilty than innocent, this may not be true in any particular interrogation. Because both guilty and innocent suspects can be made to say "I did it," a mere general admission, absent additional indicia of reliability provided by the *fit* between the confessor's description of the crime and the crime facts and/or corroborating evidence derived from the confession (e.g., location of the missing murder weapon, loot from a robbery, the victim's missing clothing, etc.), is not a sufficiently strong indicator of guilt on which to base an arrest. Investigators are not trained to realize that the words "I did it" are not a certain admission of true guilt when uttered after hours of confrontational and manipulative interrogation that is possibly, in a legal and psychological sense, coercive. These words establish merely that the investigator has succeeded in overcoming the suspect's resistance, reversing his denials and eliciting an admission. This is equally true whether the "I did it" statement is, in fact, a voluntary or an involuntary admission from a guilty party, or a compliant or persuaded admission from an innocent.[41]

Admissions and confessions are different in the law.[42] An admission does not itself prove guilt and is far less significant than a confession, which requires a description of the circumstances of the crime. Such descriptions are usually obtained as part of a suspect's post-admission narrative. While the legal definitions of "admission" and "confession" probably contribute to why interrogators are trained to take post-admission narratives, their conscious goals are more simple. The investigator seeks to obtain evidence that will prove the suspect's guilt and produce a conviction. A guilty party's post-admission narrative will likely demonstrate his personal knowledge of the crime, often leads to new evidence, and can explain anomalous crime facts.

The likely truth of a suspect's admission can be evaluated by analyzing the fit of his post-admission narrative with the crime facts, and/or establishing that the confession statement leads to new physical evidence. While it is not possible to verify every post-admission statement, a skillful interrogator will seek as much verifiable information about the crime as he can elicit.[43] If the

41. *See infra* Part II.F.

42. A criminal admission is "[t]he avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense charged, and not amounting to a confession of guilt." BLACK'S LAW DICTIONARY 48 (6th ed. 1990). A confession is a "voluntary statement made by a person . . . wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it." *Id.* at 296.

43. As interrogators are presently trained, they fail to obtain corroboration of a confessor's statement in many of the ways that are possible. Typically, an interrogator will seek to demonstrate the validity of one or more points that are dramatic (i.e., method of killing, unusual method of binding or silencing the victim, etc.). There are a host of far less dramatic pieces of information

confessor's description of the crime fits the verifiable facts and is not inconsistent with the physical evidence, it is likely that the confessor possesses the personal knowledge that would be known only to the perpetrator. The more verifiable information elicited from a suspect during the post-admission period and the better it fits with the crime facts, the more clearly the suspect demonstrates his responsibility for the crime.

Using this fit standard to evaluate the validity of an admission is well understood by law enforcement. For example, police are trained to use the post-admission portion of the interrogation to develop actual evidence of the suspect's guilt through both fit and derived evidence. They also regularly rely upon this standard to identify a true admission that might be mixed in with a collection of volunteered false statements.

If an element of a crime is particularly heinous or novel, police often keep this fact from the press so that it can be used to demonstrate a confessor's guilty knowledge. Police sometimes deliberately include an error in media releases or allow incorrect statements to go uncorrected so that a true perpetrator will be able to demonstrate his personal knowledge of the crime.

The problem of finding the true confession in a pile of false statements occurs regularly in high profile cases. Such cases often provoke voluntary false confessions from the mentally troubled.[44] Police routinely evaluate the validity of these statements by testing the fit of the confessor's description of the offense against crime facts that have not been made public but that the perpetrator would surely know.[45]

Seeking corroboration during the post-admission phase of interrogation is fundamental to investigating a crime.[46] Police routinely demonstrate the value of obtaining a complete narrative following an admission. They recognize that the strongest form of corroboration comes through the development of new evidence using a suspect's statement.[47] Police also seek proof that the suspect knows at least one piece of information that is particular to the crime and so unusual that it is highly improbable that anyone would guess it. If information—such as the fact of a certain sort of mutilation of the victim—has been kept from the public and if the interrogator has not deliberately or inadvertently suggested it, then a person who reveals it corroborates his confession.

A guilty suspect who voluntarily makes an admission is thereby demonstrating a willingness to cooperate with the interrogator to some extent.[48] Since a suspect is unlikely to realize the distinction between an admission and

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that a true perpetrator would be likely to know and would be at least, or perhaps more, likely to surrender. While these sorts of facts are not dramatic, they are just as valuable for establishing that the suspect has personal knowledge of the crime. Such things might include a description of the room in which the crime happened, especially if it has distinctive furnishings (assuming that the suspect has never before been there), the type of clothing the victim was wearing, the method of entry into the residence, etc.

44. *See, e.g.*, Miles Corwin, *False Confessions and Tips Still Flow in Simpson Case*, L.A. TIMES, Mar. 25, 1996, at A1.

45. *See* INBAU ET AL., *supra* note 20, at 198.

46. *See id.* at 172.

47. *Id.* at 173.

48. *Id.* at 73, 192-93.

a confession, he is likely to think that he has already confessed when he utters the words "I did it," and is likely to view his post-admission narrative as nothing more than an elaborated "I did it" statement. A suspect who says "I did it" should also be willing to tell some, if not all, of the story of the crime.

This logic applies equally to involuntary admissions made by both guilty and innocent suspects who have been coerced. Because the interrogator has promised each suspect that he will receive a benefit and avoid a harm by making an admission, coerced suspects should also be willing to contribute the story of the crime if asked for it. Both guilty and innocent suspects are likely to view their admission as functionally equivalent to a confession, and both are likely to think of the post-admission narrative process as part of the deal that led them to make the admission. The innocent who has been persuaded of his guilt is also likely to be motivated to answer the interrogator's questions because he feels both shock and genuine remorse about what he has concluded he has done.

The post-admission narrative can in many instances be used to distinguish the innocent from the guilty.[49] Because the person's post-admission narrative is a statement about the crime, it is evidence of something—the question is whether it is evidence of guilt or innocence. Whereas a guilty suspect can corroborate his admission because of his actual knowledge of the crime, the innocent cannot. The more information the interrogator seeks, the more frequently and clearly an innocent will demonstrate his ignorance of the crime. His answers will turn out either to be wrong, to defy evaluation, or to be of no value for discriminating between guilt and innocence. Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance.[50] The only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large.[51]

Although an investigator's purpose in taking a post-admission narrative is to develop evidence of the suspect's guilt, he may develop evidence of the suspect's innocence. If a suspect's post-admission narrative accurately describes the crime and leads to missing evidence, the narrative is strong evidence of guilt. If, however, his answers about missing evidence are proven wrong, he cannot supply verifiable information that should be known to the perpetrator, and he inaccurately describes verifiable crime facts, then the post-admission narrative provides evidence of innocence.

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49. *Id.* at 105, 180-81.

50. Techniques currently taught to investigators tend to contaminate the suspect. *Id.* at 189.

51. When the alternative answers are small in number ("Was the body face up or face down?"), a correct answer does not necessarily reveal anything about whether the person knew the answer or made an accurate guess—someone who is ignorant will be right 50% of the time. When the number of possible answers are enormous ("Exactly where did you hide the murder weapon in the 72 hours since the crime?") and the suspect's answer leads the investigator to the evidence, the significance of a hit can be as great as a DNA match with a probability of error in the tens of millions.

While a guilty suspect can prove his accurate knowledge of the crime, an innocent person cannot prove his ignorance. Because a suspect's post-admission narrative can never prove that he does not possess certain information, his incorrect answers can only be taken as evidence consistent with a lack of actual knowledge of the crime. Therefore, while a good fit between a suspect's confession narrative and the crime facts is strong evidence of his guilt, a poor fit is, at best, consistent with innocence.

The relationship between the fit of a suspect's post-admission narrative and his guilt or innocence is illustrated by the interrogations and prosecutions of Johnny Lee Wilson,[52] Edgar Garrett,[53] the Phoenix Temple murder suspects,[54] George Abney,[55] and Richard Bingham.[56] Johnny Lee Wilson was pardoned by the governor of Missouri in 1995 although he had confessed to arson, robbery, and murder in 1986.[57] During interrogation, Mr. Wilson told police many facts that could be proven to be wrong and did not contribute any accurate information that would certainly have been known to the perpetrator.[58] For example, he told the interrogators where to find the loot from the robbery—but it was not there. Also, he was unable to tell them that a stun-gun was involved in the crime, that it had been lost in the house, and that the killers had set a fire to destroy it. Years later, the real killer came forward, confessed, and proved his guilt. Although the stun-gun's existence had been kept secret, the true killer was able to tell the police all about it.[59]

Police in Goshen, Indiana, persuaded Edgar Garrett that he killed his daughter, Michelle, who had mysteriously disappeared.[60] During fourteen hours of interrogation, Edgar Garrett gave an increasingly detailed confession describing how he murdered his daughter, whose body had not yet been found. No independent evidence linked him to the crime or corroborated his confession. At the same time, his post-admission narrative contradicted all the major facts in the case. Edgar Garrett confessed to walking into a park with his daughter through new-fallen snow, bludgeoning her with an axe handle at a river's edge, and dumping her body in the river. However, the police officer who arrived first at the crime scene did not see footprints in the snow-covered field at the entry to the park but, instead, saw tire tracks entering the park, bloody drag marks leading from the tire tracks to the river's edge, and a single set of footprints going to and returning from the river. Obviously, someone had unloaded Michelle Garrett's body from a vehicle and dragged it to the

52. Interrogation Transcript of Johnny Lee Wilson, Lawrence County, Mo., Sheriff's Dep't (Apr. 18, 1986).

53. Interrogation Transcript of Edgar Garrett, Goshen, Ind., Police Dep't (Jan. 27, 1995) (Case No. 20C01-9502-CF-003).

54. Interrogation Transcripts of Dante Parker, Leo Bruce, and Mark Nunez, Maricopa County, Ariz., Sheriff's Office (Sept. 12, 1991); *see supra* note 36 and accompanying text.

55. Interrogation Transcripts of George Abney, Flagstaff, Ariz., Police Dep't (Aug. 28-Sept. 1, 1987).

56. Interrogation Transcript of Richard Bingham, Sitka, Alaska, Police Dep't (May 15, 1996).

57. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1, at 222-26.

58. Interrogation Transcript of Wilson, *supra* note 52.

59. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1.

60. *See infra* Part III.B.3.b.

river, but Edgar Garrett did not own a car and no evidence was ever developed that he had access to one that day. Michelle Garrett's coat was recovered from the river separately from her body and had no punctures, suggesting that she had been killed indoors and transported to the river bank.

Edgar Garrett's confession regurgitated the theory the police held at the time of the interrogation: that his daughter had been clubbed to death. Weeks later, when Michelle Garrett's body was recovered, police learned that she had been stabbed thirty-four times; that her body showed no evidence of significant head trauma; and that the axe handle Edgar Garrett confessed to club her with showed no traces of her hair or blood. At trial, the jury acquitted Edgar Garrett.[61]

None of the three individuals from whom Maricopa County, Arizona, detectives coerced false confessions during the Phoenix Temple mass murder investigation could tell police where to find the missing loot or independently describe the physical facts of the crime.[62] The real killers were eventually identified because they were in possession of the murder weapon on the night of the killings. When police searched their homes, loot from the robbery was found. The perpetrator who confessed was able to describe how the crime was planned, its execution, and a significant fact withheld from the public—that certain graffiti had been left at the crime scene to mislead the police.

A Flagstaff, Arizona, interrogator persuaded George Abney that he had murdered a woman he had never met. He promised Abney that if he cooperated he would not go to prison but rather would receive hospital treatment for the mental illness that allegedly caused him to kill. During the post-admission questioning, Abney was invariably wrong in his guesses about the crime facts, including the most basic essentials of the victim's description. Among many other things, Abney's interrogator insisted on knowing where the victim's missing clothing could be found. On the night Abney confessed, he was taken to the murder scene to help him remember the location of the clothing. He failed. Because he had been told that only by demonstrating remorse through cooperation would he receive hospital care rather than prison, more than a day later he called the interrogator to his cell and literally begged to be allowed to try again. He failed a second time. It was later discovered that Abney had an airtight alibi, which was corroborated by several witnesses who came forward as soon as his arrest was reported in the press. For these and many other reasons, including the identification of the likely killer, a jury acquitted Abney at trial.[63]

Richard Bingham confessed to murdering a young woman by himself in a forest in Sitka, Alaska, and was immediately arrested. At the time of Bingham's arrest, police had not tested the semen found in the victim's body, the foreign hairs found on her body or the fingerprint evidence found at the

61. Indiana v. Garrett, No. 20C01-9501-CF-003 (Ind. Cir. Ct., Goshen, Ind., Nov. 7, 1995).

62. Interrogation Transcripts of Parker et al., supra note 54. *See* Parloff, *supra* note 36; Kimball & Greenberg, *supra* note 36.

63. State of Arizona v. George Abney, No. 13314 (Coconino Cty. Sup. Ct., Flagstaff, Ariz., July 19, 1988).

crime scene. When the DNA testing, the hair testing and the fingerprint comparisons were completed, the results all excluded Bingham. In addition, the perpetrator had silenced the victim by carefully packing a great quantity of mud into her mouth. The interrogators raised the subject of how the victim was silenced several times during the post-admission portion of the interrogation. Each time Bingham offered a commonplace guess that was wrong. At trial, the jury acquitted Bingham.[64]

While interrogators routinely seek post-admission narratives, in some instances they may not be able to move a suspect, whether guilty or innocent, beyond making an admission. If a suspect says "I did it" but provides no confession narrative, the interrogation has failed at its primary objective: developing evidence of an individual's guilt in a way that will lead to conviction, or revealing his innocence in a way that will deter an unjust arrest. When this occurs, the results of the interrogation should be carefully considered, and the reason why the interrogator failed to obtain a post-admission narrative should be examined. For example, the interrogation may have ended prematurely because the investigator did not even try to obtain more than a general admission. Or he may have considered collecting a post-admission narrative unnecessary because of the great strength of the independent evidence corroborating the suspect's guilt.

If, however, an investigator attempts to debrief a suspect but fails to get a full confession narrative, the history of the interrogation needs to be considered when weighing the admission. What were the circumstances under which it was given? What caused the post-admission portion of the interrogation to fail? It makes a difference, for example, whether the interrogator had a valid evidentiary basis for interrogating the suspect or was playing a hunch; whether the evidence of the suspect's guilt was real or fabricated; what motivational tactics the interrogator employed to elicit the admission; whether the interrogator's tactics were coercive; whether the suspect demonstrated a simple reluctance to answer any more questions but never recanted his admission; whether he terminated the interview by requesting an attorney; whether he reasserted his innocence before terminating the interrogation; or whether the investigator terminated the interview after the suspect reasserted his innocence.

Psychological interrogation methods will inevitably continue to produce many true and some false confessions. The procedure of evaluating a post-admission narrative provides a decision rule for weighing the importance of a confession when evaluating a suspect's likely guilt or innocence. If a narrative leads to previously undiscovered evidence known only to the perpetrator, or demonstrates a suspect's personal knowledge of the crime, the confession must be given great weight. Because one correct answer is sufficient to prove personal knowledge, there must be no question of possible contamination, and the answer must be so improbable that there is no reasonable likelihood that it could have been correctly guessed.

If the interrogator fails to explore whether a narrative lacks indicia of

64. Alaska v. Bingham, No. 9601712 (Alaska Super. Ct., June 20, 1997).

reliability and whether it fails to provide accurate information on numerous points that can be objectively evaluated, then it must be concluded that the interrogation has failed to produce evidence of the suspect's personal knowledge of the crime. Since a failure to demonstrate something is not proof of its non-existence, an evaluator of the statement cannot conclude that the absence of this information proves an absence of personal knowledge. The failure to demonstrate actual knowledge can only lead to the conclusion that the admission is suspect, and that both it and the narrative are of little or no value as evidence of guilt.

If an interrogator inquires about provable matters and/or seeks to derive new evidence from the suspect and the confession statement is replete with demonstrable errors about the crime scene and does not lead police to new evidence, then the narrative should be recognized as consistent with the capabilities of someone who has given a false confession, and it should be considered evidence demonstrating the unreliability of the statement and tending to support a suspect's innocence.

F. *Types of False Confessions*

The improper use of interrogation procedures can result in four types of false confession: *stress-compliant*, *coerced-compliant*, *non-coerced persuaded*, and *coerced-persuaded*.[65]

1. Stress-Compliant False Confessions

The inherent stressors normally present in the accusatorial phase of interrogation, together with exceptional factors associated with either the interrogation or the suspect, can so overwhelm a person that he chooses to give a type of confession known as a stress-compliant false confession. He makes this choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation.

Interrogation in America is anxiety-provoking by design. Many of the variables that make interrogation effective tend to distress a person to some extent. At a minimum, suspects are confined in an unfamiliar setting, isolated from any social support, and perceive themselves to be under the physical control of the investigator. They exercise little or no control over the timing, duration, or emotional intensity of the interrogation, the outcome of which remains uncertain. To overcome a suspect's resistance, an investigator employs influence techniques that are intended to induce significant distress and anxiety, attack the person's self-respect, eviscerate his self-confidence, and reinforce the claim that his guilt is well known and certain.

For example, an investigator may invade a suspect's personal space; falsely confront him with *incontrovertible* evidence of his guilt; misrepresent the seriousness of the crime; accuse him of fictitious crimes; press him with lead-

65. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1, at 207-20.

ing questions; assert the futility of denying guilt; alternate displays of sympathy with displays of hostility; cut off any attempt to verbalize his innocence; or offer to support or personally help him only if he confesses. An investigator is likely to use these techniques repeatedly and in combination. As a result, a suspect may become physically exhausted, emotionally distraught, and/or confused.

An investigator may suggest, or a suspect may come to reasonably believe, that the interrogator will not let up unless the suspect says "I did it." If an innocent suspect fails to realize that he can terminate the process by invoking his *Miranda* rights, is ignored when he does invoke, or believes that he will be arrested as soon as the interrogation concludes, he may continue the interaction until he can no longer stand the strain and must escape the physical confinement, fatigue, and distress of relentless questioning.

Confessing may seem his best choice by the time he reaches the point at which he is no longer able to protest his innocence.[66] Some persons are not able to withstand the intensity of interrogation. This may be due to unusual characteristics of the person, such as an abnormal reactivity to stress,[67] activation of a phobia,[68] an intellectual limitation that has led to learning to become submissive,[69] or some other unusual characteristic that comes into play. Or this may be due to the character of the interrogation—it may reach an exceptional level of intensity, its length may fatigue and debilitate an otherwise normal individual, or it may incorporate some other exceptional and improper element.[70] Although interrogation is an inherently distressing experience, it should not cause a stress-compliant false confession when reasonably conducted and directed at a normal individual.

2. Coerced-Compliant False Confessions

In response to classically coercive interrogation techniques such as threats of harm and/or promises of leniency, some suspects will knowingly give a coerced-compliant false confession. More than any other category of police induced statements, coerced-compliant false confessions are recognized in the law as overbearing a suspect's will.[71] While the use of explicit threats and

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66. Interrogation is a time-sequenced process. As it progresses, a suspect's perceptions of his situation change due to the tactics through which interrogation is carried out. Early in the process a suspect's perception of the consequences of each of the three possible choices open to him will be different than what it is later. At the start he may believe that both invoking his *Miranda* rights and maintaining his denial of responsibility are associated with arrest and trial. In the beginning, he may believe that only confession leads to certain punishment for something he did not do. Later, in reaction to the investigator's strategy, he will likely associate both invoking his *Miranda* rights and maintaining denial with arrest and the *harshest* possible punishment; he will associate confessing with minimizing his inevitable punishment. Under these circumstances, a person who can no longer tolerate the stress of interrogation will reason that it is better to escape it by complying with the investigator's demands and confessing rather than by remaining silent or invoking his *Miranda* rights.

67. *See* GUDJONSSON, PSYCHOLOGY OF INTERROGATIONS, *supra* note 5.

68. *Id.*

69. *Id.*

70. *See* Brown v. Mississippi, 297 U.S. 278 (1936); Ashcraft v. Tennessee, 327 U.S. 274 (1946).

71. For example, in *Lynumn v. Illinois*, 372 U.S. 528 (1963), Chicago Police officers threat-

promises may not be as common as it once was, American investigators using psychological methods can communicate coercive threats and promises by subtle, indirect, and camouflaged means. For example, investigators sometimes suggest that they will accept an account of the offense in which the central act is described as an accident or an act of self-defense.

In its most extreme form, the "accident scenario technique," also known as "maximization/minimization,"[72] includes formatting and suggesting a version of the crime facts that drastically lowers the legal seriousness of the offense and the appropriate charge. For example, if the crime is obviously a premeditated murder, the investigator leads a suspect to believe that the crime facts can be recast so that the appropriate charge is involuntary manslaughter, a reasonable response to the victim's provocation, or perhaps that the killing happened in self-defense. This tactic is effective at eliciting admissions for the same reason that more explicit promises of prosecutorial leniency work: because the interrogator communicates that the suspect will receive a reduced level of punishment, or no punishment at all, if he admits to a description of the offence that the interrogator finds acceptable.[73]

3. Persuaded False Confessions

Both types of "persuaded" false confessions—non-coerced and coerced—are given after a person has become convinced that it is more likely than not that he committed the crime, despite possessing no memory of having done so. Both are elicited when an interrogator attacks and shatters a suspect's confidence in his memory. A non-coerced persuaded false confession is elicited when an investigator relies on routine influence techniques of interrogation, whereas a coerced-persuaded false confession is elicited when threats, promises, or other legally coercive interrogation techniques are added to this mix.

Although persuaded false confessions are typically neither intended nor recognized by investigators, they follow a common pattern. Investigators typically open an interrogation by confronting the suspect with evidence of his guilt. If the suspect is innocent, the supposed evidence will be either erroneous

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ened to arrest Lynumn—which, they told her, would lead to a cut-off of her welfare payments, the loss of her children, and a prison term—if she did not confess to selling marijuana. Lynumn confessed and was subsequently sentenced to 10-11 years. The Supreme Court unanimously ruled that police coerced her confession and reversed her conviction. In *Leyra v. Denno*, 347 U.S. 556 (1954), a police psychiatrist elicited a confession from Leyra after explicitly promising him that he would be let off easily if he admitted murdering his parents. As in *Lynumn*, the Supreme Court ruled that Leyra's confession was coerced and reversed his conviction. *Id.* at 537.

While the use of explicit threats and promises may no longer be as common as in the 1950s and 1960s, interrogators currently employ more subtle and camouflaged threats and promises to elicit confessions of guilt. The accident scenario technique, for example, is nothing more than a device for delivering veiled threats and promises: it communicates the expectation that the suspect will receive a lower level of punishment if he confesses (leniency), but that he will receive a significantly higher level of punishment if he does not confess (threat). *See infra* Part III.B.2.f.

72. *See* Kassin and McNall, *Police Interrogations*, *supra* note 6.

73. *Id.* at 248 ("Although the courts take promises and threats more seriously when they are made explicitly than when they are implicit in an interrogator's remarks, our data indicate that because people often process information 'between the lines'. . . these different means of communication are functionally equivalent in their impact.").

or fabricated. If an innocent person believes that the evidence exists, he may become confused because he cannot account for the incriminating facts that contradict his memory of where he was when the crime occurred and his knowledge that he has no awareness of committing the crime. The investigator may lead the suspect to resolve his dilemma by persuading him that he has experienced some form of amnesia.

Because guilty suspects sometimes also claim no memory of committing the crime, interrogators have developed a routine counter to this disingenuous denial. An interrogator will typically respond by suggesting some convenient reason for the suspect's otherwise inexplicable absence of memory—for example, a drug or alcohol-induced blackout,[74] a momentary lapse in consciousness,[75] a repressed memory,[76] or perhaps even multiple personality disorder.[77]

The guilty and the innocent react differently to these ploys. When dealing with a guilty suspect, the interrogator's counter can easily and effectively blunt the suspect's attempt to use this denial. An innocent suspect, however, is likely to be confused and shaken by the investigator's tactics. If the innocent reasons that the evidence objectively proves his guilt, he may accept the amnesia suggestion because it explains his absence of any memory of committing the offense. If an investigator is knowledgeable about a suspect, he will propose an amnesia theory that fits the suspect's background. For example, if the suspect is an alcoholic or a drug abuser, the interrogator will likely suggest some form of alcohol or drug-induced blackout. If the suspect has a history of alcohol- or drug-induced mental illness, the interrogator will likely suggest some form of psychogenic amnesia.

The issue of amnesia is likely to become a major turning point in the interrogation and can, in combination with other interrogation tactics, lead the suspect to conclude that "I probably committed this crime." A persuaded person's belief in his guilt is tentative and unlikely to rise to the level of certainty. But it is sufficient to lead him to agree that he is probably guilty and motivate him to confess by confabulating answers (i.e., make good faith guesses) to questions about how the crime occurred, inferring how the crime must have occurred from the investigator's suggestions, and/or regurgitating the investigator's theory of the crime.

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74. Interrogation Transcript of Tom Sawyer, Clearwater, Fla., Police Dep't (Nov. 6-7, 1986) (Case No. 86-28504); Interrogation Transcript of Garrett, *supra* note 53.

75. Interrogation Transcript of Peter Reilly, Connecticut State Police Headquarters, Hartford, Conn. (Sept. 29, 1973).

76. Interrogation Transcript of Bradley Page, Oakland, Cal., Police Dep't (Dec. 10, 1984); Interrogation Transcript of Paul Ingram, Thurston County, Wash., Sheriff's Dep't (Nov. 28-29, 1988); *see also* Ofshe, *Inadvertent Hypnosis*, *supra* note 5.

77. Interrogation Transcript of Diane Colwell, San Diego, Cal., Police Dep't (Nov. 8, 1994) (Case No. 94-20678).

III. ILLUSTRATING THE DECISION MODEL

A. *The* Miranda *Warning*[78]

Investigators tend to introduce the *Miranda* advisement in a manner that is to their advantage. They might do so by presenting it as a bureaucratic formality and deliver the warnings in a perfunctory manner; they might actively deemphasize the significance or implications of *Miranda* and suggest that it is unimportant or something to be ignored; or they might try to persuade the suspect that it is in his best interest to waive *Miranda* altogether by telling him that if he does not consent to questioning, people will think him guilty.[79] At this point, investigators encourage suspects to believe that answering their questions is relatively risk free.

Sometimes police question "outside *Miranda*" by ignoring a suspect's explicit invocation, or by telling him that nothing said during the interrogation can be used in a court of law.[80] The likely outcome of ignoring *Miranda* is exclusion of the improperly obtained admission into evidence at trial; the admission can, however, be used for impeachment if the defendant testifies.[81] Therefore, interrogators have little to lose by ignoring a suspect's invocation of *Miranda*, but may gain incriminating information and possibly have it admitted at trial.

In some cases, American police do not give *Miranda* warnings because they reason that a suspect is not technically in custody since he is not under arrest and is free to leave the station house.[82] An investigator reasons that if he informs the suspect of these facts, then he does not have to remind him of his constitutional rights. For example, investigators in three different California locations told suspects:

Interrogator: Okay. Now I want you to understand, you're not under arrest, okay? The door is right there, it's not locked, you're free to leave at any time. Okay?[83]

Interrogator: You know that if you want to leave you're able to leave. I've only shut the door for our privacy and it's unlocked, so you just say I don't want to talk about it and off you go.[84]

Interrogator: Shane, uh, let's get a couple ground rules straight here. You're not under arrest. We don't suspect you did wrong. You're here to help us out, okay? If you don't

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78. The illustration of the decision model begins here since the *Miranda* advisement often signals the beginning of the obviously accusatory portion of the interrogation process.

79. *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) [hereinafter Leo, *Miranda Revisited*].

80. This sometimes occurs even during recorded interrogations.

81. *See* Harris v. New York, 401 U.S. 222, 224 (1971).

82. *See* Leo, *From Coercion to Deception*, *supra* note 14, at 43-44.

83. Interrogation Transcript of Tom Jordan, Placer County, Cal., Sheriff's Dep't 3 (Apr. 8, 1993).

84. Interrogation Transcript of Albert Gonsalves, Sacramento, Cal., Police Dep't 1 (Dec. 16, 1992).

wanna talk to us, you don't have to. If there's anything that you don't wanna answer, you don't have to answer it. Anytime you wanna stop or leave, you can. So, that's how it is.[85]

An investigator in Barrow, Alaska, was even more explicit about the voluntary nature of a suspect's presence:

Interrogator: You do know that you're not in custody or anything like that and the same rules apply. We're not, you know, you're free to get up and go or when you, the only reason the doors closed and we're sitting in here is for privacy purposes and not cause you're under arrest or anything like that, ok?

Suspect: Yeah.

Interrogator: You understand that.

Suspect: Yes.

Interrogator: Okay. And you come down here voluntarily to talk with us, right? Ok.

Suspect: Yes.[86]

Even clearly custodial suspects most often waive their *Miranda* rights and consent to interrogation.[87] Although innocent suspects are likely to waive their rights because they do not perceive a risk in speaking to police, some view invoking *Miranda* as either wrong and/or tantamount to an admission of guilt. For example, shortly after falsely confessing, a middle class university student described why he did not invoke his *Miranda* rights when he was first accused:

Suspect: Somehow it seems—it feels to me that if I ask for a lawyer that I'm admitting guilt and I know I'm not, but it's, you know, it's just a preposterous idea to me that it's even considered.[88]

Sometimes interrogators increase the likelihood of receiving a waiver by first heightening the suspect's motivation to speak and then reading the *Miranda* warnings. A Sacramento, California, investigator handled the *Miranda* advisement of a man who had been taken into custody, photographed, and was already being questioned as follows:

Interrogator: I don't think this woman was telling us the whole truth. Okay. I think that it's not, probably not as significant as she's letting on at this point. Okay. So this is why you're here. Now I'd like to talk to you about what this woman is saying, we've more or less ah, you know, if we just talk to her and she alleges this felony crime

85. Interrogation Transcript of Shane Schmitt, Sacramento, Cal., Police Dep't 1 (Aug. 27, 1992).
86. Interrogation Transcript of John Adams, Barrow, Alaska, Police Dep't 5 (Sept. 3, 1993).
87. *See supra* note 40.
88. Interrogation Transcript of Page, *supra* note 76, Tape 3, at 4-5.

occurred, then we're more or less obligated to make an arrest.

Suspect: Uh-huh.

Interrogator: And I know there's more to it and I know, I know you were there. That's not a problem because, because we have, that, that ain't no big deal. But I also need to know the real truth because I'm not sure she's telling us the whole story.

Suspect: What, what is she trying to say?

Interrogator: Well, she's alleging that you pointed the gun at her.

Suspect: Uh-huh (negative). Nah-uh.

Interrogator: (Unintelligible). Alright before we, before we do that, I, like I said I know there's more to this story than she's telling us. But —

Suspect: I don't even know her, you know what I'm saying (unintelligible) —

Interrogator: Whoa, whoa, whoa. I can't take your statement until we get through that *Miranda* issue.

Suspect: Oh.

Interrogator: You can't tell me anything until we get through that.[89]

Because they do not see any reason to distrust the police, the innocent are unlikely to realize that they are about to undergo a highly stressful and fatiguing experience that has been designed to change the course of their lives and may do so for the wrong reasons.

B. *The Two Parts of Interrogation: Pre-Admission Influence and Post-Admission Narrative*

Although interrogation occurs during the course of an investigation, it is not usually part of the information-gathering process that leads a detective to believe someone is guilty. Even the leading interrogation training manual recommends that an accusatory interrogation should be undertaken only when an investigator is certain of the suspect's guilt.[90] The purpose of interrogation is not to discover or evaluate an alibi, but to obtain an admission of guilt and a complete account of how the crime happened. As one Seattle, Washington, detective commented, "Interviews are just to see what the truth is, an interrogation is an in-your-face situation."[91]

89. Interrogation Transcript of Kentrick McCoy, Sacramento, Cal., Police Dep't 14-15 (Sept. 1, 1996).

90. *See* INBAU ET AL., *supra* note 20, at 77.

91. Interview by Richard Ofshe with Rick Geis, Detective, Seattle, Wash., Police Dep't 9 (Jan. 17, 1996).

1. Pre-Admission Step One: Shifting the Suspect from Confident to Hopeless

a. *Accusation*

Even after an investigator has issued *Miranda* warnings, he may continue to use a non-threatening interview format to question the suspect about his alibi or any other subject that may provide information that contradicts or confirms facts he has already learned from the investigation. At some point, however, the investigator's manner, tone, and style shift from neutral, friendly, and non-threatening to accusatory—serious, aggressive, and confrontational. No longer pretending to seek general and background case information, an investigator now claims full knowledge about the suspect's culpability and demands that he admit guilt.

The investigator typically commences the accusatory phase of interrogation by pointing out something that contradicts what a suspect has said or that the suspect has been inconsistent in his statements. He may also commence his overt attempts to manipulate the suspect with a direct and often surprising accusation. A Pasco County, Florida, interrogator told a suspect:

Interrogator: She left with you. Look at me Jeff.

Suspect: Say what?

Interrogator: She left with you.

Suspect: What are you tellin' me?

Interrogator: What I'm tellin' you. I think you killed your wife. I think you got into an argument, I think she hit you. She's got a temper.[92]

At this early stage, a detective's accusation is usually simple and straightforward. As a San Diego, California, detective told a suspect:

Interrogator: Robert, this is our case, on Mary Shelton. You could see we've done a lot of work. Our shit is together. We know what we have. We know that you did it and you know that you did it.[93]

Early on and repeatedly throughout the pre-admission part of interrogation, an investigator will implore the suspect to "tell the truth." As a Kern County, California, sheriff's detective told a suspect:

Interrogator: We've been nice to you and we're giving you a lot of credit, from what you're telling us. Don't lie to us. Because it doesn't change anything. It changes absolutely nothing. You sit here and you tell us the truth.[94]

Detectives sometimes feign anger or actually lose their tempers and resort

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92. Interrogation Transcript of Jeffrey Christian Crouch, Pasco County, Fla., Sheriff's Office 7 (Jan. 28, 1987) (Case No. 87-008093).

93. Interrogation Transcript of Robert Byars, San Diego, Cal., Police Dep't 84 (Dec. 21, 1993).

94. Interrogation Transcript of Michelle Duke, Kern County, Cal., Sheriff's Office 27 (Aug. 27, 1995) (Case No. 95-95-33322).

to screaming at the suspect and demanding that he confess. This heated exchange occurred during an interrogation in San Diego, California:

Interrog. 1: Tell us about it!

Interrog. 2: Tell us about it! You give up! Tell us about it! Tell us about it! For once in your life, tell us about what the hell happened! For once in your life!

Suspect: I don't know what the hell happened, to her, who, somebody killed her! Or who, who, it was that killed her! I don't know!

Interrog. 1: You killed her!

Suspect: No! I sure in the hell didn't!

Interrog. 1: Now, listen to me.

Suspect: That's a fuckin' lie!

Interrog. 1: You killed her.

Suspect: No I did not!

Interrog. 1: Okay.

Suspect: I did not! That's a damn.

Interrog. 1: You caused her death, okay?

Interrog. 2: I think it's over.

Suspect: It is! I did not kill her!! You wanna, can you prove it!?

Interrog. 2: Yes!

Suspect: I didn't kill that woman, I don't go out killin' nobody. I had no gun! I had no kind of gun or nothin', or no knives!

Interrog. 2: (Unintelligible).

Suspect: I can, I don't use my hands on nobody! Unless I have to.

Interrog. 2: Bullshit!

Suspect: Unless I have to!

Interrog. 2: Bullshit!

Interrog. 1: Bullshit! Don't, that's all you got! That's all you need!

Suspect: But I don't hit no, no woman with 'em!

Interrog. 1: Bullshit![95]

b. *Overcoming Objections*

One of an investigator's first challenges is to overcome a suspect's tendency to object when accused of committing a crime and his preference for protesting his innocence. By taking the position that he is certain of the correctness of his accusation, the investigator puts the suspect on the defensive

95. Interrogation Transcript of Elmer Lee Nance, San Diego, Cal., Police Dep't, Tape 2, at 29-30 (Sept. 27, 1991).

from the beginning. The investigator attempts to set up the interaction so that the suspect tries to convince the investigator of his innocence—something that is unlikely to happen. Because of the context in which interrogation is set, an investigator cannot dare to obviously seek information that might, with additional checking, allow him to evaluate whether the suspect's denials are true or his alibi is valid. Because an appearance of certainty makes claims about having evidence more likely to be believed, the investigator can never depart from his position of certainty. From this position all of the suspect's denials must be reacted to as if they are recognized as attempted deceptions. Any denial is called a lie and lies are not going to be tolerated. A San Diego, California, detective told a suspect:

Interrogator: Now, why do you think we are here? You know, if you lie to me that's not really good for you because, you know, I've interviewed, Mark and I've been up all night interviewing people so we know what's going on and we know if you're going to lie to us and we just want the truth. We just want to hear your side of the story. Because all the other people we've talked to we've heard their side of the story and now we want to hear your side. So, just be up front with me. You know, just tell me like a, like a man, you know. You're 18, you're an adult. Tell me what happened.[96]

An angry display of impatience may be accompanied by an accusation that the suspect is trying to manipulate and deceive the investigator:

Interrogator: I don't think you do understand our situation.

Suspect: You know you are trying to get.

Interrogator: We are trying to find out who killed that woman by asking you for your cooperation and you're jacking us around, Lee![97]

Whether it is a genuine outburst or a calculated tactic, yelling at a suspect and demanding that he confess is a primitive interrogation tactic. However, some investigators seek to elicit admissions simply by startling and intimidating a suspect, aggressively posturing, and forcefully demanding that he confess. If, however, an investigator chooses to show extreme displeasure, for more well-developed tactical reasons he is likely also to attack the suspect's self-image. A San Diego, California, investigator told a suspect:

Interrogator: Don't lie to me, okay?

Suspect: I'm not I'm not lying to you.

Interrogator: Just don't fuckin' lie to me. Just listen to me. You've been lying your whole fuckin' life. You've been blaming other people for all your problems and that's bullshit. It's time you faced the music. It's time to say

96. Interrogation Transcript of Eric Jerrod, San Diego, Cal., Police Dep't 4 (Sept. 24, 1995).
97. Interrogation Transcript of Nance, *supra* note 95, at 16-17.

> yeh, okay, I did fuck up. Now's the time in your life to get your act together and finally stand up, be a man and say okay, God-damn it this is the truth, I'm gonna tell the truth and I'm gonna be proud of myself, other than being such a shit ball.
>
> Bullshit, you just sat here and you said yeh, I saw her and I know what happened. That's what you just said Mr. Nance and you said nobody'd believe me. And you haven't even started to explain it. 'Cause number one, either you're such a chicken-shit that you don't want to tell the truth or number two, you're afraid to tell the truth or number three you've been lying so God-damn long your whole fuckin' life, you don't know what the truth is, now which is it?[98]

Sometimes investigators refute a suspect's denials by bluntly asserting that he is lying, as in this passage from another San Diego, California, interrogation:

Interrog. 1: That's a crock of shit Jason. Who in the hell's gonna believe that? You're really setting yourself out to hang here buddy. I mean that figuratively. Not literally. What I'm saying is you're sticking your butt out there and there's no protection. Come on. That's not what happened. I know it. Donaldson knows it. And you know it.

Interrog. 2: The ship is sinking and you're the captain of the ship, buddy.

Interrog. 1: Start doing something here. Start telling us the truth.

Interrog. 2: You are sinking fast.[99]

Frequently an investigator will communicate his certain belief in the suspect's guilt by trying to downplay interest in gaining more evidence or even having any discussion about this question. The attitude he expresses is that there is already enough evidence to satisfy him of the suspect's guilt. Having no interest in any discussion of guilt or innocence, the investigator expresses interest in a secondary matter—why the crime happened. Any discussion of this, of course, requires the suspect to first admit responsibility. A Sonoma County, California, investigator told an adolescent defendant:

Defendant: Well, I can't give you any answers because I didn't do it.

Interrogator: Well, it's not a matter of you not or, doing it or not. We know you did it, okay? And we're

Defendant: (Inaudible).

Interrogator: Listen. I would like to be very fair with you and open

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98. *Id.* at 41-42.

99. Interrogation Transcript of Jason Albritton, San Diego, Cal., Police Dep't 148-49 (July 20, 1995) (Case No. CD114372, P66142).

> with you and up front with you about this, okay? And that's why I'm telling you this. Um, I don't feel an obligation to go through all the evidence . . . . The game is over, okay, and I hope you're not lookin' at it as a game. Because it's not a game. Um, you know, some people were, uh, some, some people were killed and we would like to know the reason behind that . . . . It's not a matter of whether or not you did it, so, um, that's not what we're here for. We know that you did it. And we have a quite provable case.[100]

The investigator repeated this theme a few minutes later:

> Interrogator: I hope, I hope that you're not sittin' here tryin' to conspire how can I get out of this, how can I beat this. You know? It's not a matter of if you did it. That's not the issue. You need to understand that no, we're not here asking you if you did it. If we didn't know, we wouldn't have arrested you. We would have brought you in and asked you if you did it. We know that you did it. We don't know why you did it, Alan. You understand what I'm tellin' ya?[101]

c. *Evidence Ploys*

i. General Claims of Strong Evidence

The message of interrogation in the pre-admission phase is that the evidence already in hand leads to the conclusion that the suspect's factual guilt has been established beyond any doubt.[102] Although sometimes it is possible to be entirely truthful when making this claim, it is permissible for the claim to be a complete lie. By forcefully presenting a claim that he knows is entirely fabricated to someone he guesses is guilty, the investigator hopes to create the impression of an airtight case and convince the suspect that resistance is futile. When real evidence is lacking the investigator knows full well that it is only by getting the suspect to give a full and detailed confession that he will be able to find the evidence that will prove correct his speculative, intuitive, and risky guess.[103]

When the investigator who interrogated the Sonoma County adolescent discussed above began to reveal his evidence, he was careful to distinguish

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100. Interrogation Transcript of Alan Adams, Sonoma County, Cal., Sheriff's Office 2 (July 4, 1991) (Case No. 910605-16).

101. *Id.* at 7.

102. The most recent observational study of interrogation in the America found that in 85% of the interrogations observed, investigators used the tactic of confronting suspects with the evidence of their guilt. In 43% of the interrogations, investigators attempted to undermine the suspect's confidence in his denial. In 30% of the interrogations, suspects were confronted with false evidence. *See* Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

103. INBAU ET AL., *supra* note 20, at xiii-xiv.

between the evidence he had and the evidence he anticipated he would find. Because the suspect had committed the crime, both he and the detective knew that the as yet untested categories of evidence would strengthen the case against him:

Interrogator: Listen. I'm not gonna insult your intelligence. Uh, and please, don't insult ours, okay? We've been doin' this for a long time. But the problem is here, is that we have a case that is proven, a proved case, and it's, it's all matters of fact. We're not here guessing.

Suspect: I don't understand how it's proven.

Interrogator: Well, actually, um, we have witnesses to the fact that you made the purchases. Um, we haven't yet rolled your fingerprints but we are going to be rolling them, to compare those. Uh, there's also other physical evidence in terms of microscopic evidence that you're not aware of, but we are, because of the business that we're in. You're gonna have to explain to us, uh, or you should explain to us how in the hell the weapon is at your house, that's gonna ballistically match back up to the one that killed the victims, Oscar and Betty, as well as all the other bullets, and the casings. There are casings (inaudible) uh, the property that was purchased with the cards after the fact. We already have some of them. We're retrieving more. In fact, um, some of it I expect will be in your truck. So you see, the case is, is, is well-proved. I don't know why you did it. Maybe you don't know why you did it. But the fact is that you did it.[104]

Sometimes interrogators grossly overstate their case and claim to possess a great deal of evidence that simply does not and never will exist. For an innocent suspect who naively trusts the police and believes that they would not lie, the cumulative effect of an endless stream of false evidence can be devastating. A young suspect interrogated in South Carolina recounted his experience:

Interviewer: Did it ever, did you ever think about the possibility that maybe they were intentionally lying to you?

Suspect: No. You see, um, you have to understand, when I was, I was always grew up my Mom and Dad always told me "You trust a cop," you know "They're not going to lie to you." You know and I always had faith in them until now.

Interviewer: OK. So the possibility of their playing games with you, your telling me, just didn't even pop into your mind.

Suspect: Right. You know and um, so they kept on talking to me

104. Interrogation Transcript of Adams, *supra* note 100, at 3-4.

and we started talking about my Mom, you know, then I brought up the subject up of my Mom, um, they told me, they said "Why don't you go ahead and tell us now, and quit lying to us. We know you did it." And then he said that, they said "Your Mom even says it's time for you to tell the truth. Says she loves you but you know this whole thing needs to be over."

And, um, at that point in time I didn't, well it blew my mind. You know, they was telling me about my Mom, and um, they told me that, um, they went up there, you know, they talked with Mom and you see they left me about 45 minutes alone one time.[105]

I mean it just, when you think about your Momma, you know she's always going to be there no matter what. You know you could always turn to your mother if you can't turn to nobody else and um, um, it was like, you know, she was, I guess you could say was, I feel like my Momma is my backbone, you know. Cause she has helped me out a lot and it's just like I lost it. You see where I'm coming from.

Interviewer: Uh hum.

Suspect: And, you know it's like, when I lost her it was all, you know, it's like well it's over.[106]

They told me they had a DNA match on me. They said that it's never been beaten before in court. That it was no way on earth that it was wrong, and that, you know, it was mine.

Interviewer: What was your reaction when they told you they had a DNA match?

Suspect: Um, my reaction was, you know, it just can't match, I mean, I told them, I come out and told them said it's "Mine don't match, I volunteered to give it to you." Um, I told them, I said, why would I want to come down here and sign my own death certificate. They said, see here, it's just a matter of time you gonna find out it's me, you know, I told them if I'd have done it I sure wouldn't volunteered to give it to them, they'd have to make me give it to them.[107]

An investigator's claim of an ever increasing amount of valid, incriminating evidence is likely to eventually cause a guilty party to recognize that the game is over and that he is caught. In response to the repeated evidence ploys, an innocent is likely to perceive his situation as frustrating, unreal, desperate,

105. Interview of Kenneth Register by Richard Ofshe at 15-16 (Aug. 24, 1992).
106. *Id.* at 17-18.
107. *Id.* at 22-23.

and tending toward hopeless.

Although an investigator will not know whether all or some of a suspect's denials and answers are true or are a collection of entirely implausible, inconsistent, and impossible lies, it does not matter since the investigator's strategy is to treat every major component of the account as utterly false. For example, in a Richmond, California, interrogation, a detective sought to obtain a confession by insisting that the suspect would not have sought out a prostitute for any reason other than the thrill of committing a rape:

Interrogator: You got a gun in your car and you've got prior gun convictions, okay? Looking at all these things, I think you're giving me a little bit of bullshit. And I don't think you're being a hundred percent truthful. And a little bit of bullshit, you may as well bullshit me the whole way and tell me you're President Clinton's brother or something, okay? I need the truth. I want the absolute truth. That's what we work on. This story makes no damn sense, it makes no sense whatever.

Suspect: Sir, I didn't tell her, I didn't.

Interrogator: Prostitutes, you don't stick your tongue down a prostitute's throat.

Suspect: I didn't stick my tongue down her throat.

Interrogator: You don't kiss prostitutes. You don't lick their ears, you don't suck their nipples, you don't bite their nipples, okay? That, that doesn't happen. When you screw them you use a condom. Okay? When they give you head, you use a condom. All righty? When your girlfriend's sitting in the shower, she lives less than five minutes away from you, you guys live together, you don't find a prostitute, you go lay your girlfriend, let her give you head. It makes no sense.[108]

During the interrogation of an adolescent about a murder that had occurred earlier in the day, a San Diego, California, detective worked to undermine the suspect's position as follows:

Interrogator: We have neighbors that see things, and we collect evidence, and you could sit here and lie all night if you want, but all that stuff, bloody clothes that you're wearing, the scratches on your body, the neighbors that saw ya, the lady that you almost ran over, the man that was standing right there at the corner, and you know what else?

Suspect: What?

Interrogator: We've already talked to Danielle? She's up front with

108. Interrogation Transcript of Newell DePuy, Richmond, Cal., Police Dep't 39-40 (May 20, 1995).

us. And you're sitting here giving us a B.S. story, but this does not make sense.

Suspect: I'm not.

Interrogator: It just doesn't make sense, okay? Everything you're saying just doesn't make sense. Let me just tell you something. The neighbors saw you, okay, it's, it's simple as that. They, they described you to a "T," what you were wearing and everything. So, so your, your story just doesn't make sense, okay, and I'm, I'm being up front with you. This is the only time to bail yourself out. This is the only time to start telling the truth. George didn't sit here and take all these clippings and all these evidence and blood stains and everything from ya, okay. Together we've been do, probably doing this kind of work for almost 40 years.

Suspect: Yeah.

Interrogator: Okay. And, and what you're saying doesn't make sense. I've asked you two or three times the same question, and each time you give a different answer. Okay. I, I think, I think you're being honest in, in the aspect of your describing everything except you, you're being dishonest in one aspect of it.[109]

A Kern County, California, interrogator told a female murder suspect:

Interrogator: I know exactly what you're telling us and we find that very hard to believe because there's blood in the kitchen where you went and got a soda, you know, on the floor and there's blood on two paper towels in the kitchen, tissue paper, you know, sitting right there at the first chair when you were getting in the refrigerator to get your Sprite, the chair that would be against your back there, right there. Right in full view of the living room. I mean, if you are in the living room, you can see right there. And there was nobody in that house during the time the guy was found and the time you guys were there so where did these mystery tissues come from. You're out in the living room the whole time. You know how they got there.[110]

Whether it is real or fabricated, interrogators represent that their evidence against the suspect is conclusive. For example, during a Salt Lake City, Utah, interrogation:

Suspect: If you are implying that I killed Irene to get away from the kid, then you are dead wrong.

109. Interrogation Transcript of Viktor Jarod, San Diego, Cal., Police Dep't 48-49 (Sept. 24, 1995).

110. Interrogation Transcript of Duke, *supra* note 94, at 18-19.

Interrog. 1: Then why did you kill her?

Suspect: I didn't kill her.

Interrog. 1: Who did?

Suspect: I don't know. Finding this out, I would like to know.

Interrog. 1: Why would some people and all of the evidence say that you killed her.

Suspect: I didn't kill her. I can get really pissed and I can beat the snot out of someone if I wanted to. I couldn't kill anyone man.

Interrog. 2: Well that's not what the evidence is pointing to.

Interrog. 1: I think you're having a hard time sleeping at night.

Suspect: No I haven't been, I have no reason to.

Interrog. 2: We're not just talking about Irene's life, we're talking about a fully developed six month old fetus.

Suspect: And you're telling me that it was my baby.

Interrog. 1: And we're talking about on the night that she died, some people that saw you with her and Steve, here in Summit County. We're talking about a guy who told us that he saw you do it. We're talking about a lot of other evidence.

Interrog. 2: Overwhelming evidence.[111]

Evidence ploys are intended to overcome a suspect's resistance to the realization that he has been caught. The fact that the suspect's denials of the evidence has failed to convince the investigator of the his innocence is intended to serve as a demonstration. The implication is that he will also be unable to convince a prosecutor, a judge, or a jury of his innocence. The investigator strives to create the impression that because his opinion is based on hard facts, all other equally reasonable and informed persons will reach the same conclusion.

Vallejo, California, detectives portrayed a defendant's continuing denials as pointless:[112]

Interrog. 1: Okay, that, the problem we're having Eugene is this, first off in order to make it clear to us exactly what participation you had in this crime, because I'm not gonna, ya know like I said from the get, we're not gonna sugarcoat it. We're talkin' to you. This is a crime. Obviously you know what happened. We have overwhelming evidence to indicate that you were involved. We're here from California to give you this opportunity. Now I don't know how much clearer I can get

111. Interrogation Transcript of Calvin Shane Myers, Salt Lake City, Utah, Police Dep't 11-12 (Case No. 94-6578).

112. Eventually this man confessed to avoid a threatened penalty. At trial he was acquitted. *See infra* notes 263-265 and accompanying text.

with you on that. What you need to understand is, first off, is you're still denying to us that you were even involved in this, is that correct?

Defendant: This is correct.

Interrog. 2: Okay, and until you can realize and understand that the evidence we have that implicates you in this crime is too overwhelming to deny that. It's going to be a losing battle for you Eugene.[113]

ii. Demeanor Evidence

Investigators use a variety of evidence ploys to explain why they are confident of a suspect's guilt. Sometimes they assert that the suspect's guilt is revealed by his demeanor. While this is arguably the weakest type of evidence ploy, it is also the easiest to claim and the safest. A suspect may ignore it, but cannot disprove it.

Because interrogations that follow from well-developed investigations sometimes allow the investigator to literally destroy the guilty suspect's often absurd defensive claims with the same evidence that will be used in court, an experienced investigator is likely to have observed some dramatic examples of the impact of revealing evidence to a guilty suspect. The response is often an obvious and striking inability to mobilize resistance. This sort of dramatic reaction would tend to convince most casual observers that the response is a reasonable indicator of guilt. An experienced investigator's confidence that he can read a suspect's guilt is probably, in part, based on having sometimes seen these sorts of reactions from guilty suspects.

The problem is that these reactions are not invariable for all guilty suspects nor are all emotional reactions to interrogation tactics so crystal clear. While these peak moments stand in sharp contrast to the confused, anguished, and desperate expressions that permeate the record of an interrogation in which an innocent suspect is being confronted with an accusation based on false evidence, confusion, anguish, and desperation are not unique to innocent suspects. Many guilty parties will reveal considerable distress and anguish about what they have done or because they have been found out.

Investigators are not trained to realize that hunch-based interrogations will often bring them into contact with an innocent, perhaps vulnerable, suspect who will show distress at being confronted with an accusation of murder and the possibility of life in prison or a death sentence. They may also not have been trained to appreciate the variability with which people express distress. Therefore they may easily categorize a suspect's distress as an indicator of guilt and both convince themselves that their initial guess was correct and feed back to the suspect their misperceptions of the suspect's conduct.

113. Interrogation Transcript of Eugene Livingston, Vallejo, Cal., Police Dep't, Solano County, Cal., Prosecutor's Office, and Federal Bureau of Investigation (FBI), FBI Office in Albany, Ga., 58 (Dec. 18, 1993).

Sometimes an investigator will pretend that he is a human lie-detector and assert that the suspect's body language demonstrates his guilt. A San Francisco, California, detective told a suspect:

Interrogator: The problem is, Robert, you want, you've wanted to tell somebody about this since they arrested you and let you know you had a warrant for murder in San Francisco, you were shocked it took this long for it to come out, and you wanted to tell somebody about this, I could tell by looking at your body language, the way you're acting, you wanna get this off your chest, you wanna resolve this matter, and put it behind you so you can go on with your life.[114]

A Goshen, Indiana, interrogator told a suspect:

Interrogator: Listen to me. Your eyes are like windows to your soul, Ed. Okay, and your eyes want to tell me.

Suspect: My eyes are all messed up because I haven't hardly—ain't had a hell of a lot of sleep.[115]

During the interrogation of a female suspect, Orange County, California, police claimed that her reaction to a photograph demonstrated her guilt:

Interrog. 1: Lisa, as soon as we laid that picture down in front of you. It was written all over your face. As soon as you saw that bite mark it was written all over your face.

Interrog. 2: Your eyes said it all.

Translator: We discovered we can tell from your eyes that you knew this wound was bitten by you or not.

Suspect: (Sobbing).

Translator: We put this picture in front of you right? Your attitude and the color of your face that showed it all you know.[116]

iii. Eyewitness Evidence

One of the most common evidence ploys is to tell a suspect that one or more uninvolved eyewitnesses have identified him. Often these reports are valid, but sometimes what the investigator claims is completely fabricated. Solano County, California, detectives told a suspect:

Interrogator: I know when you get into a bad situation that you want to try to protect your friends and/or yourself. Okay? And to do that, the only way to do it is to lie. Okay? And

114. Interrogation Transcript of Robert Junior Anderson, San Francisco, Cal., Police Dep't 23 (undated).

115. Interrogation Transcript of Garrett, *supra* note 53, at 274.

116. Interrogation Transcript of Lisa Peng, Orange County, Cal., Sheriff's Dep't 95 (Jan. 8, 1994) (translation from Chinese).

> right here and now the lies won't work. They're not gonna, you know, to not tell exactly the truth the way it happened, the way you know it happened in your heart, that's the only thing that's gonna work here and now. Okay? And there's a, there's a lot of inconsistencies in your story that I already know about. Okay? And I've got too many eyewitnesses to this whole thing that, that call, that you call your friends that when it comes down to a serious situation, they done sold you out.[117]

Salt Lake City, Utah, interrogators claimed:

Interrog. 1: How would an old retired couple that's working at Bell's in Silver Creek, remember you being up there with her about 2:00 o'clock in the morning?

Suspect: I wasn't up at Bell's at 2:00 in the morning

Interrog. 1: They remember you being there.

Interrog. 2: And they remember Steve.

Interrog. 1: They remember the three of you.

Suspect: I was not up there.

Interrog. 1: You mean they're lying these people?

Suspect: I'm not going to say they're lying, but I was not there.

Interrog. 2: If it wasn't you, Steve and Irene were there, who would it have been?

Suspect: I don't know, Steven has a lot of friends and he knows a lot of people.

Interrog. 2: But you were with Steven that night? The night they say you were there.

Suspect: Yeah but I wasn't with him at 2:00 o'clock in the morning.

Interrog. 2: Well what time was it?

Suspect: I dropped him off at his house, probably about quarter after one. I went home and went to sleep.

Interrog. 1: In the morning?

Suspect: Yeah.

Interrog. 2: Were you there, were you at Silver Creek.

Suspect: No I wasn't.

Interrog. 2: They say you were.

Suspect: I've seen people that resemble me, walking in the mall.

Interrog. 1: You're saying that it was just coincidental that there were three people.

Interrog. 2: Steve was with you.

Interrog. 1: Steve was with you and they picked you out, they

117. Interrogation Transcript of Childs, Solano County, Cal., Sheriff's Dep't 18-19 (Apr. 26, 1992).

picked him out and they picked Irene out.[118]

A Boynton Beach, Florida, interrogator told an innocent suspect:

Interrogator: Something's wrong. I mean the boy is saying you were there. There's no reason in the world that a nine year-old's going to lie about who was there.

Suspect: I was not there.

Interrogator: Well, you know, I don't know what to tell you. I can't make you tell me you were there at all, you know, obviously. But the stories just ain't matching up here. Everybody's story matches up except yours.[119]

Regardless of the validity of the alleged eyewitness evidence, a suspect can blunt its impact by insisting that the eyewitnesses are mistaken or lying. Eyewitness ploys are weak unless embedded in a foundation that makes them just icing on the cake. An interrogator is not likely to be surprised when an eyewitness ploy fails to prove to a suspect that he is caught. The following illustration is from a San Diego, California, investigation:

Interrog. 1: Now, let me tell you another thing. You said a black fellow accused you of kidnapping somebody. While you were have, while, you, well, let me finish to this black fellow, the guy you said that accused you of kidnapping somebody. That is the victim's husband. He's a black guy. He drove in to the map stop, he talked to these people here, Mr. and Mrs. Casias. Mr. and Mrs. Casias pointed you out, you drove into the map stop, is what they said and what the victim's husband, the black fellow, they said, you know, we did not see the girl. But it's funny, you may want to go talk to that gentleman over there in the Chevrolet pickup truck with the camper because he told us, he told us that he saw the girl.

Suspect: That's a lie.

Interrog. 1: The reason, hang on a second, hang on a second. That is the reason why he went over to talk to you and confront you, that's the reason why he accused you, is because he got the information from these folks here.

Suspect: They're both a bunch of damn liars.

Interrog. 1: I don't think, I'm sorry.

Interrog. 2: Hey Mr. Nance, shut up and listen. God damn it, shut up. Now listen to me. We have talked to an awful lot of people here and all through your life, all you've been doing is saying other people lie, other people are full of shit, you, friend are a God-damn liar.[120]

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118. Interrogation Transcript of Myers, *supra* note 111, at 9-10.

119. Interrogation Transcript of Martin Salazar, Boynton Beach, Fla., Police Dep't 24 (Feb. 17, 1996).

120. Interrogation Transcript of Nance, *supra* note 95, Tape 1, at 36-37.

iv. Co-Perpetrator Witness Evidence

If investigators know that more than one person is involved in a crime and are either interrogating two or more suspects, or can lead the suspect to believe that his co-perpetrator are also being interrogated, they may play one suspect against another. This tactic is implemented by claiming that the co-perpetrators have already confessed and have provided evidence that will be used against the suspect. If the suspect rejects this claim, the investigator may ask why his friends would lie or why so many others would identify him as a perpetrator.

If the suspect is guilty, the interrogator might be able to bring a co-perpetrator to the door or into the room and might allow the suspect to speak if the co-perpetrator has actually confessed. Sometimes, however, investigators make mistakes. For example, in a Fort Lauderdale, Florida, case detectives allowed a killer to become a witness against a young man who had seen the killing. When the killer was brought into the interrogation room and presented as a police-endorsed witness, the suspect became convinced that his situation was hopeless. Several months later he described his experience during the unrecorded portion of his interrogation when the co-perpetrator confrontation occurred:

Suspect: Well, at first Wiley just, when it first, when he first started getting a little defensive, he said that they got witnesses against me and that they can, he can prove that I did it. And I kept telling him no, that I don't know what he's talking about; that it's the, the two-guys story.

He said, "Yeah?" He said, "All right. We got [][121] in the next room next to you that's telling us that you did it. Now, what do you thing about that?"

I said, "I don't believe you." I said, "I don't believe you." He said, "You don't believe me, huh?"

So he went out of the room. I didn't think nothing of it. And then he comes back. The door is open. He opens up the door, and John is standing right there. He said, "Now tell us what you said, John." He said, "Yeah, that's David Adams. He's the one that killed Butch." At that point my heart dropped. I didn't know what, I didn't know what to do then. I looked at John. I just got scared, started crying.

Interviewer: You said you looked at John and you got scared?

Suspect: Yeah.

Interviewer: What did you get scared of?

121. The name of the man identified as the killer has been deleted because he has never been arrested for this homicide.

Suspect: I remembered what he was telling me, if I say something. I didn't know what to say now. Because he has told me he's going to hurt me and my family if I say something.

And I just, I just started crying. I didn't know what to do, and my mind just started racing a hundred miles per hour at that minute. I didn't, I was, I was like in a situation like, I said, "Screw it. I did it."[122]

As a Kern County, California, sheriff's detective told a suspect:

Interrogator: Your friends are the most important assets right now, always have been, cause you don't have a tremendous amount of them that you have been close to, so you'd do anything to protect losing those friends because if you didn't Billy would be alone, those friends would be taken away from you, you wouldn't have anything if you didn't have Joel, or you didn't have Scott.

Well you don't have Joel and you don't have Scott right now, they have turned on you. They have told us what's happened, they told us that, that it was your idea, they told us that you were the one who did it, um so without that friendship that you held so dearest in your life, that is no longer. Because if it was, they would still be true to you and not tell on you and you know that what I am saying is true.

And I'm not just in here making it up, because I know too much after, after our last interview. But they've told us exactly what's happened. Now do you consider that to be true friendship? This was not the pact that you guys had after the killing when you went to Mexico. That bond has been broken, they're standing out here for themselves, they really don't give a shit about Billy right now because they're out there for themselves and Billy's all alone in this room right now, and Billy needs to talk, and tell us what happened. So what happened in there Billy?[123]

Similarly, a Vallejo, California, detective told an innocent defendant:

Interrogator: Okay, as Sgt. Becker said Eugene, we, we, have talked to a lot of people in this case. We've talked to you a couple of times, and every time we've talked to you, I think we were pretty, pretty honest with you. We were tellin you what we were hearing, and we asked you a

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122. Interview of David Adams by Richard Ofshe. Broward County, Fla. 28-29 (Mar. 18, 1993).

123. Interrogation Transcript of Billy Wayne Smith, Kern County, Cal., Sheriff's Office, Tape 2, Side A, at 11-12 (Nov. 22, 1992).

> couple times to uh tell us what you know about this case.
>
> Now Mr. Young, uh as Sgt. Becker said, has uh given us a complete statement. He told us exactly what happened, what his role in the robbery was, and uh what everybody else's role in the robbery was. He implicated you also in the robbery. He's identified you as being a participant.
>
> Now everybody who tells us things, at times may see things different, or may not be completely truthful. That's why we wanta come to you now and get your part of exactly what happened, and your participation in the robbery. In other words, we got a folder, about four or five folders thick of what the people are saying about Eugene Livingston. We have nothing on what Eugene Livingston had to say about this incident, and the best thing we can do now Eugene is be completely truthful, because it's over with . . . [124]

In the Phoenix Temple murder case,[125] Maricopa County, Arizona, detectives used a bold, false co-perpetrator ploy against an innocent man.

Interrog. 1: We can't find anybody who can tell us that you were in Tucson.

Interrog. 2: But we found four people that say you were in Phoenix at a church.

Suspect: I wasn't in a church.

Interrog. 1: And those people said that you were in a Blazer and that you went inside the church and that you know what happened inside there and that you came out and left there after (Unintelligible). Now Victor, ah Leo, you know that that's right. I mean you're shakin' your head trying to convince yourself, you know, but you cannot erase what happened. You cannot erase what happened. You were there.

Suspect: No I wasn't.

Interrog. 1: You went there (unintelligible).

Suspect: I was not there!

Interrog. 1: You know who you were with.

Suspect: No I don't.

Interrog. 1: You know who the people were that were there and you know what you know about what happened.

Suspect: I don't know anything.

Interrog. 1: Sooner or later, you know, you've got to say it.

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124. Interrogation Transcript of Livingston, *supra* note 113, at 3-4.

125. *See supra* note 36 and accompanying text.

Suspect: I, I wasn't there, I was not there.

Interrog. 2: We have four witnesses. We've got absolutely no one in Tucson, no one in the world that can say you were in Tucson on that night. We've got physical evidence from the Bronco's, from the church, and you're tellin' us you weren't there.

Suspect: I wasn't there!

Interrog. 1: You want to go down for these killings, I mean, you know, and just take what everybody says that you're involvement was, I mean that's what we're talking about.

Interrog. 2: The fingers pointed at you right now, Leo. Not anyone else, but you.

Suspect: I, I don't know nothin' about that cause I was not here in Phoenix at that time.

Interrog. 2: Well you're gonna take the rap for it. All yourself, its gonna be all on your shoulders because everyone else is saying you, Leo, they're not saying themselves. Hell no, they're not saying themselves. Sure they're saying they were there. But you were the one. And that's the way it's gonna come down, plain and simple, plain and simple.

Interrog. 1: Leo, we're talkin about murder here.[126]

The detectives returned to the confessing co-perpetrators several times before they elicited a false confession. In fact, the only supposed witness the police actually had was a psychiatric patient who could not correctly relate the major facts of the crime:

Interrogator: Leo, there were too many people there, you've got too many people (unintelligible) eight guys now. You can't expect 8 guys to keep a secret forever. No way. And, it has already been opened up, it's over. By the time we get done with this investigation, we'll have contacted a number of more people who these people have told, and all will give an account of what happened that night.

So (unintelligible) we are going to have a bunch of guys who confessed to the crime, who indicated you were there, picked your photo out of the photo-lineup. And then we're going to have all the people that they talked to giving out the same information and point their finger at you and say he was there also. You are going to be standing there alone, denying it, and it is only going to hurt you. Because, when you walk out this door, you are going to make a big mistake.[127]

126. Interrogation Transcript of Bruce, *supra* note 54, Tape 2, at 34-35.

127. *Id.* Tape 3, at 12.

The same team of investigators told another innocent Temple murder suspect that others had named him:

Interrog. 1:	Are all these people lying?
Suspect:	I guess. Yes.
Interrog. 1:	They're all saying the same lie.
Suspect:	Yes, I don't know, I don't know what's going on.
Interrog. 1:	What you're saying, what you're saying is that all these people got together, that they concocted their same story to cause you problems?
Suspect:	I don't know why they picked me out. Why they did it, I don't know.
Interrog. 1:	Did you piss someone off?
Suspect:	No.
Interrog. 1:	So why, why did they do it?
Suspect:	I don't know.
Interrog. 1:	Well, there's only one good answer to that. To verify it. That it did happen.
Suspect:	Well maybe they are lying and I don't know why they did it.
Interrog. 1:	But if they're lying Mark, what they're going to do is tell us a bunch of different little stories (unintelligible) not the same story.
Suspect:	(Unintelligible) the same story. I, I can't remember what went on.
Interrog. 1:	Well, no, you do remember. It's just that, that you don't want to remember.
Suspect:	You think I do, I don't want to be here. I don't know why you don't believe me, that I don't want to be here.
Interrog. 1:	Well, how can I believe you
Interrog. 2:	The reason you don't want to be here is you're here because we know you what you did, but what you knew about it
Interrog. 1:	How, how can we believe what you're saying if it's totally contradictory of what we're told by other people?
Interrog. 2:	One more person, just one more person, hey Pat. We have (unintelligible). I mean this is, this is a (unintelligible) just, just one more person.
Suspect:	I know, I'm, I'm stuck, I'm, I'm
Interrog. 2:	This is going to be getting out of hand. You're going to be the last one and they're going to lay it all on you.[128]

128. Interrogation Transcript of Nunez, *supra* note 54, Tape 4, at 18-19.

v. Technical and Scientific Evidence

(a) *Introduction*

Suspects can easily counter all types of witness observations that supposedly prove their guilt. They can counter demeanor evidence by rejecting the investigator's interpretation, eyewitness evidence by claiming it is in error, and co-perpetrators' evidence by asserting it is a lie. Evidence ploys that are based on well known technical or modern scientific procedures are likely to be more influential because the mere mention of a special technology—whether it is well-known or new—carries the prestige and incomprehensibility of modern science. Both the guilty and the innocent have a harder time explaining away evidence that is allegedly derived from scientific technologies.

In the investigation of infant deaths, false and erroneous reports of medical evidence can be so devastating that they can lead a grieving parent to misclassify a child's natural or an accidental death as a murder, and result in a false confession. If an investigator prematurely accuses a parent of a recently deceased infant by claiming supposedly conclusive medical evidence, the result can be disastrous.

Sometimes a false medical evidence tactic is directed at a grieving parent who has literally been taken directly from the emergency room where his or her child has been pronounced dead. By the time a careful evaluation of the medical evidence reveals that the death was not a crime, the parent may have already falsely confessed. "Shaken baby" cases are a particularly difficult and dangerous problem since even when the report of a significant head trauma is accurate. Dating the age of the injury is difficult and, therefore, the mere fact that the suspect was with the infant during the period immediately prior to the discovery of obvious symptoms of serious injury does not guarantee that he is the perpetrator. The infant son of the partner of a Los Angeles woman lost consciousness while she was the only adult in the apartment she shared with her associate. Medical evidence later revealed that the child's fatal head injury had happened due to a fall about a week earlier. Despite two visits to hospitals because of the child's listlessness in the intervening week, his skull fracture was not discovered until after his death. Although CAT scans done before his death showed the fracture, no one at the hospital had taken the trouble to examine the films, and so his condition was missed.

The suspect was brought in for a polygraph examination by a civilian technician. The polygraph examination, however, was nothing more than an excuse to put the suspect in a position to be interrogated by an investigator who used the machine as part of his act. During the primitive and heavy-handed interrogation, the technician repeatedly threatened and browbeat the woman. Initially she maintained that she never mistreated the child in any way. She also repeatedly expressed her fear of being sent to jail and losing custody of her three children.

The polygrapher was not subtle about coercing the woman. As soon as the polygraph examination was concluded he departed for a brief time, reappeared, announced that she had failed, and went to work:

Polygrapher: It's not a question anymore, I'm not asking you. I

> know what happened, Okay. But what I'm trying to find out, is this something that happened that was premeditated, then a cold blooded thing or was it some accident.[129]

Over the course of the interrogation the polygrapher pressed the woman to agree that she had done something to the child that caused his death and that whatever she had done it was an accident. He stressed the accident explanation forty times during an interrogation that took less than two hours. His repeated assurances that he was sure that the death was not what it might seem, a premeditated murder, set up two alternatives for the suspect: one leading to a high level charge and the other to a far less serious punishment.

The woman was adamant that she had not shaken, hit, or mistreated the infant. When she realized that she was going to jail, the polygrapher suggested that if she simply cooperated, she would receive the non-jail alternative that he set up early on:

> Polygrapher: I'm here because Billy Jack needs your help because his doctors need your help, so they know what the correct treatment is. Maybe you need to go to parenting classes.[130]

Although the polygrapher emphasized a non-jail alternative if the death was an accident, the woman continued to express her fear of jail and losing her children:

> Suspect: So I'm going to jail for something I didn't do?
>
> Polygrapher: No, it doesn't (unclear) into that. (unclear) is one thing, how did this accident happen. . . . I'm asking you to learn from this so it doesn't happen again. . . . Now I'm here to accept the reason. I'm here, I don't mind talking to the detective, calling back downstairs, say hey look at this wasn't planned out, there was no plan here, this is how the accident happened.[131]

Later, the suspect again expressed her fear of jail and the polygrapher again eased her mind:

> Suspect: I don't want to go to jail.
>
> Polygrapher: Nobody does, we're not talking about that, all I'm saying is if this was an accident, I need to know, if it's something simple like losing your patience.[132]

Eventually the woman acquiesced and started making up stories that fit the polygrapher's suggestion of an accident. She was arrested. It was not until months later that the CAT scan was read and the correct cause of the child's

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129. Interrogation Transcript of Sonja Stapleton, Los Angeles, Cal., Police Dep't 13 (Oct. 12, 1994).

130. *Id.* at 24.

131. *Id.* at 25.

132. *Id.* at 32.

death was determined.

In another southern California investigation, a father was pressured to admit that he had shaken his baby. San Diego, California, interrogators told him about the mistaken medical evidence:

Interrogator: There's medical evidence and what you're telling us does not match the medical evidence. The medical evidence only happens one way and one way only. You shook your baby whether you meant to or not very, very hard. Very hard. She can't get bloodshot eyes and hemorrhaging in her eyes from just doing what you just showed us. It's a violent shaking whether you lost control, lost your temper, whatever reason. And you just can't sit here and tell us that didn't happen.

These doctors are gonna testify it's a violent shaking. You know what retinas are in the eyes? They're quite possibly detached. That means pulled away. That means it's a violent shaking. And we don't think you did that on purpose. But we know you did it and you did it quite hard. So you need to tell us how you did it. Your baby is now dead. And this is very serious. What you told us today needs to be the truth. We don't think you meant to do it. Now you're doing real good Jason, but you got to tell us the truth. Okay? You got to tell us the truth.[133]

(b) *Marks Made by Fingers, Mouths, and Shoes*

While an investigator will sometimes declare that he possesses scientific evidence, it is safer to suggest that he may have it and ask the suspect to respond to this possibility—a ploy that permits the investigator to save face should the suspect know that he could not possibly have left behind any evidence. For example, a Richmond, California, investigator claimed to possess a suspect's fingerprints but obviously erred and then attempted to recover in mid-ploy.

Interrogator: Okay. Now my concern is that her fingerprints are going to come up on your gun for some unknown reason, okay? Along the same lines, they fingerprinted the condoms you have, okay? They fingerprinted the condoms, you can fingerprint latex.

Suspect: We didn't have a condom, though.

Interrogator: Okay, now just listen. They fingerprinted those condoms, okay? What I want to know, number one, is are we going to find her fingerprints on your gun?[134]

133. Interrogation Transcript of Albritton, *supra* note 99, at 76.

134. Interrogation Transcript of DePuy, *supra* note 108, at 28.

In San Diego, California, an investigator first made certain that a false fingerprint claim would be possible:

Interrogator: Did you ever have your fingerprints taken?

Suspect: Yeah. I got, I got arrested for a trespassing on (inaudible) and when they took me then I got fingerprinted.

Interrogator: What if I told you your fingerprints are all over that knife? And what if I told you that I think that you stabbed her too? Be up front with me Eric. You've been up front with me so far. Did you stab her too?[135]

In some cases, an investigator may lie and claim that he has access to new, high-technology scientific instruments with which to extract fingerprints that will conclusively establish the suspect's guilt. For example, this ploy may be used when it might otherwise seem unlikely or impossible that police could have obtained fingerprints from the crime scene such as when a body has been dumped into the surf at a beach. A Pasco County, Florida, interrogator told a suspect:

Interrogator: Jeff, I want to explain somethin' to you, what we got down there. We found your wife, we got tire tracks. You ever heard of a laser. Know the kind that you shoot on Star Wars

Suspect: Yeah, I know.

Interrogator: A laser, law enforcement have had a laser, I guess for what, about three or four years, we've used it. We can actually get fingerprints off bodies. We actually can. It's, it's been proven. This is what's made this job a little easier. Uh, a lot of things go on partner, we're gonna be talkin' to your babysitter. We'll also be talkin' to your five year old. Listen to me. You're wife didn't leave with nobody last night. We're gonna find that out.[136]

San Diego, California detectives told a suspect of a non-existent technology—the "Cobalt Blue" test—that lifted his fingerprints from a corpse.

Interrog. 1: There's only, the only thing we have left to do and we have done it because we send them off to a special lab, okay is, is, she was strangled. What we do is we put, what we do is we dust, we dust her neck with ah.

Interrog. 2: Cobalt blue.

Interrog. 1: Cobalt blue. Okay? And what we do is when we put that, when we go ahead and dust it, we have to photograph at the same time that we're dusting because when you apply pressure on somebody, on somebody, it will leave, it will leave an imprint. It will leave an imprint.

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135. Interrogation Transcript of Jerrod, *supra* note 96, at 18.
136. Interrogation Transcript of Crouch, *supra* note 92, at 6.

Now, these, we took your prints.

Suspect: (Unintelligible).

Interrog. 1: Okay yeah we did take your prints at the time that the detectives were here. Apparently they did. It's my understanding because.

Suspect: A method I haven't seen before.

Interrog. 1: Yea well they do it, yeah they do it a little bit different here in Sacramento than we do. We do the basic, you know, just the basic ah fingerprints, palms. You know. We have sent the file and your prints over to the FBI lab okay? They're gonna go ahead and, and see what they get on it. There are prints on her. Okay I'm gonna tell you right now there are prints on there. For any reason, are your prints gonna be found on her neck?[137]

A Solano County, California, sheriff's detective told a suspect about a Ninhydrin Gas Test that does exist and can under some circumstances lift fingerprints from clothing. The test's ability to retrieve the prints was taken as certain:

Interrogator: Okay, so let me ask you this. We sent his clothing off to the Department of Justice Criminalistics Laboratory. There's a new technique that they use, where, you might even have heard of it. It's called a Ninhydrin Gas and they can get fingerprints off of clothing and off anything now. Paper, currency, and they put it in the tank and they let the fumes go with it and everything shows up. Are your fingerprints from your hands, either one hand, gonna show up on his back as if you pushed him? Think close cause this is important. On his clothing. On his outer clothing that he was wearing.[138]

Child sexual assault crimes that involve touching or even a small degree of penetration are unlikely to leave physical evidence. A creative investigator can easily maneuver around the problem. For example, an Anchorage, Alaska, interrogator told a suspect:

Interrogator: Well is there any, any reason why we'll find anything on her—on her clothes or . . .

Suspect: Oh no go ahead.

Interrogator: Hands or, or uh . . .

Suspect: Go ahead.

Interrogator: Uh, her face or.

Suspect: No.

137. Interrogation Transcript of James Nimblett, San Diego, Cal., Police Dep't 14 (July 30, 1990).

138. Interrogation Transcript of Michael Johnson, Solano County, Cal., Sheriff's Dep't 45 (Apr. 26-27, 1992).

Interrogator: In her hair.

Suspect: No go ahead. Go ahead.

Interrogator: Okay and if we do find that where, where does it come from, where did it come from?

Suspect: It wasn't well I'll tell you what you won't find any on her because it's — there's nothing there, you know just.

Interrogator: Ok. Robert have you heard about uh, DNA?

Suspect: DNA?

Interrogator: Um hum.

Suspect: I know uh. What do you mean?

Interrogator: Uh, DNA, it's a, it's a sys, it's a-a-a scientific method of uh, identifying people through body fluids such as . . .

Suspect: Um hum.

Interrogator: Blood and semen.

Suspect: Oh yeah, yeah, okay yeah.

Interrogator: And all of that uh, and it's, and it's very specific.

Suspect: Yeah.

Interrogator: It's, it's as specific as a . . .

Suspect: I know they can tell a person (inaudible) semen (inaudible) what it is you know and.

Interrogator: Uh huh, um hum, and, and it's as specific as a fingerprint.

Suspect: Yep.

Interrogator: Okay.

Suspect: I've heard about that yeah.

Interrogator: Have you, did, and let me ask you this have you ever uh, the skin cells, the skin cells right off your hand, have you ever changed like the, the sheets on a bed or anything like that. It looks like dust comes off of 'em uh, what those are is, it's not really dust it's skin cells even. And when we, we shu, shuffle this off as you know, whatever every where we are all day long.

Suspect: Um hum.

Interrogator: There's, we can use these in DNA also.

Suspect: Um hum.

Interrogator: Did you know that? Okay. Is there any reason why we're gonna find any of your skin cells inside of any of Chelsea's clothes?[139]

Sometimes investigators select a suspect for interrogation because they are

139. Interrogation Transcript of Robert Lindell, Anchorage, Alaska, Police Dep't 11-12 (May 6, 1994).

mislead by erroneous forensic evidence. Flagstaff, Arizona, investigators relied on a doubly flawed forensic report when they told an innocent man that his dental impression matched what was erroneously believed to be a bite wound found on the murder victim:[140]

Suspect: I've had that fear. But this is all really weird. I can't believe this is happening.

Interrogator: (Inaudible) and . . .

Suspect: Yeah, and I appreciate it.

Interrogator: You know . . .

Suspect: I.

Interrogator: . . . bite marks are just like fingerprints.

Suspect: Pardon?

Interrogator: Bite marks are just like fingerprints.[141]

Tucson, Arizona, police simply invented the existence of shoeprints that supposedly matched a pair of a suspect's shoes:

Interrogator: The, the reason I ask you, okay, is that comparing some of your shoeprints, with the shoeprints in the wash, when we went out there Sunday.

Suspect: Yeah.

Interrogator: They look like your shoeprints. Okay? And that's why I need you to, to remember. Okay? Because I've got this bad feeling that you go down there and you passed out in the wash and, and you don't know what's going on.[142]

(c) *DNA Evidence*

DNA testing has in many respects transformed the process of criminal investigation in little more than a decade. So much attention has been given to the procedure that most people, even those who are generally poorly informed about scientific advances, have some awareness of its reputation.

Orange County, California, police told a suspect that DNA in saliva found in a bite wound on the victim's body irrevocably linked her to the crime:

Interrogator: How did your saliva get on her arm then? How did your mouth get on her arm?

Suspect: I, I had no idea.

Translator: I don't know.

Interrogator: This is your mouth okay? You explained to us how it got on her arm?

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140. The supposed bite wound was actually a knife wound. The suspect was shocked by these test results. *See id.*

141. Interrogation Transcript of Abney, *supra* note 55, Interview 3, Video 2, at 45.

142. Interrogation Transcript of Jamie Givens, Tucson, Ariz., Police Dep't 12 (Nov. 16, 1995).

Translator: Then if it was not yours, you, you can explain that how did your saliva got on, got on, got on to that dead body's arm?

Suspect: I, I, I had no idea. I had no idea. Could it be some error made on your test?

Translator: No error was made. One hundred percent accurate.[143]

Knowing that a suspect had once been treated at a local hospital, San Mateo County, California, sheriffs used an elaborate false evidence ploy:

Interrogator: When you're taken into an emergency room when you're a gunshot victim or you've got any trauma where it involves the cardiovascular system, in other words when you're bleeding, what they do is take blood samples, okay, and they use those blood samples for type and cross matching. They also keep a blood sample on hand in case the patient comes back in or needs any further blood transfusions. And what they do a test they call it an examination. They call it type and cross matching.

Okay? And what that is they, they can go through and tell what blood type you are, and then they break it down as far as clotting factors. Well there are a number of other tests that they can do to the blood, and that's why they preserve the sample in case anything goes wrong. They also take urine samples. When they give you that (unintelligible) bag, you know the bag with the, uh, urine to, which in this case they did do for you. And what they do is they go through and they check your urine. They check to see if there are any, uh, blood cells in your urine. They also check it for a bunch of other types of tests.

Uh, the reason I'm mentioning this is because the incident that we're talking about that occurred on or about the, uh, Valentine's Day in 1992. And when those fluids were examined, they positively matched the, uh, samples that were taken from Stanford Medical Center of you. Okay? So what I'd like to do, Stephen, is I think there's an explanation for everything. And, and we try to give everybody an opportunity to tell their side of the story. So do you or don't you remember something that occurred on or about Valentine's Day this year?[144]

The ploy was developed further by introducing DNA:

Interrogator: Let's go back to what I first told you. Okay? You had

143. Interrogation Transcript of Peng, *supra* note 116, at 73.

144. Interrogation Transcript of Stephen Lamont Williams, San Mateo County, Cal., Sheriff's Detective Bureau Office 5-6 (July 6, 1992).

your surgery before, they took blood samples.

Suspect: Um-hum.

Interrogator: Stanford Medical Center.

Suspect: Um-Hum.

Interrogator: They retained one of the blood samples that they retained in the blood bank, and they also do what they call a printout, and where they print it out, the type and cross-matching of the blood to show what type of the blood you have. Subsequent to that, we've had some tests done on the sample of blood that they had. And those tests included testing for DNA. Do you know what DNA is? When they break your blood down.

Suspect: Drugs and Alcohol?

Interrogator: No, no, no. When they break, when they break your blood down to the cells, individual cell, each individual cell has a little code inside it. And for each individual, those codes are different. Okay? Now we had that examined and then we also had some fluids that were found at the scene of the crime examined. And so

Suspect: Hey, hold it. I was with somebody and they took a (unintelligible), and now I'm in trouble?

Interrogator: Well, let's, put it this way. I'm sure there's some logical explanation, but we just need some help here. What they're saying is that the examination of the blood that they had taken over at Stanford Medical Center from you in the examination of the fluids at the crime scene, they break it down to the genetic factor, the DNA, and they say it's you. No ifs, ands or buts.[145]

False evidence ploys based on scientific procedures leave a suspect with little opportunity for a counter. Investigators represent positive results of fingerprint, hair, or DNA tests as error-free and therefore unimpeachable: "[T]he DNA doesn't lie. That's the only thing that doesn't lie,"[146] or "This thing is a scientific test. These things won't lie."[147]

Investigators search for weaknesses in a suspect's denials, seek to exploit them and move the suspect towards confession. If the evidence ploy does not prompt a suspect to reverse his denials, the investigator may suggest that the evidence contradicts at least part of the suspect's previous account. If the suspect changes any part of his account, even if it is irrelevant to the issue of guilt, an interrogator will take this as evidence that the suspect is lying and as informal confirmation of his guilt.

Sometimes even innocent persons will change part of their account to

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145. *Id.* at 22-23.

146. *Id.* at 53.

147. Interrogation Transcript of Robert Smith, Richmond, Cal., Police Dep't 17 (Mar. 26, 1991).

lessen the pressure they feel to comply. An innocent suspect who makes the mistake of complying and departing from his initial account on even one minor point makes a major mistake. Making the change will increase the investigator's confidence in his guess about the suspect's guilt; he will read the change as a sign that resistance is weakening and therefore is likely to become more determined to intensify his attack.[148]

A San Diego, California, detective told a murder suspect that his laboratory confirmed a DNA match between the suspect and semen found in the victim's body. While the interrogator hoped that the tactic would yield a confession, he also suggested that the suspect might admit having had sex with the victim the evening before her death. If the suspect had agreed, the investigator would have interpreted this change as demonstrating the suspect's guilt.

Interrogator: Okay they took head hair from you, they took ah I don't know all the other physical evidence that ah that they did on Monday. Ah I did the ah, the autopsy on the young lady from Balboa Park. I went to the coroners and we took swabs from her. We took oral, we took vaginal swabs. We took ah, we combed her public ah area. Ah we took head hair. We, we did it all. We went ahead and sent you, sent your blood to our lab as soon as, as soon as detectives got there. And we matched them up with the semen that, that, from the young lady. They matched, so we do have a comparison here.

Suspect: Uh ha.

Interrogator: And I'm gonna be very up front with you on that. You did have sex with her whether or not it was the night before or that morning. Again, things aren't right and it may be this gentleman that's down in Stockton right now may be off but the bottom line is you did have sex with her. And that's what we're here basically to find out. Ah they do match.[149]

(d) *Off-The-Shelf Technology*

One way to strengthen an investigator's argument that the suspect has been found out is to claim the existence of a new technology that links the guilty party to the crime. A clever investigator can invent a technology that can link any suspect to any crime and even to any specific act that the suspect declines to admit. Some investigators are so creative that they seem able to immediately invent whatever technology is necessary, as a Sacramento, California, investigator demonstrated:

Suspect: I can't (unintelligible) had no control over how she got, ah, what whatever, you know what I'm saying, she

148. Interview of Jerry Lee Louis by Toby Hockett in Arcadia, Fla. (July 31, 1992); *see also* Interview of Jessie Misskelley by Richard Ofshe in West Memphis, Ark. (Dec. 15, 1993).

149. Interrogation Transcript of Nimblett, *supra* note 137, at 7.

could have got bruised coming out of the window.

Interrogator: He didn't tell you about the reticulated demographic, ah subcutaneous photos. He didn't tell you about that?

Suspect: What is that?

Interrogator: Okay. When a blunt instrument impacts a soft body tissue. . . . There is a chemical, okay, that reacts physically to damaged enzymes and also subdural contacts with metal surfaces. . . . Okay, let's say you're wearing a T-Shirt and someone walks up to you and puts a knife up against you, with this chemical that we use we can take trace elements that are present in, in the metallurgy of a firearm. And it reacts and it almost looks like a tattoo. So that we can take that knife or we can take that gun and we can put it against that reaction, that chemical reaction and you see ah, trace the object that was against the person. Okay.[150]

When inventing new technologies, an investigator is constrained only by the limits of his imagination and his ability to lie convincingly. For example, Richmond, California, investigators not only invented the "Neutron Proton Negligence Intelligence Test," but conducted it on young man and reported that it conclusively demonstrated that he had fired the gun that killed two people.

Interrogator: What this is, it's a chemical test Ok. It's good for about a week. It's the latest thing. It's high tech. What happens is that those two papers we put on your hands and the chemicals, it would react with the paper. Take it down to the lab guy, he runs some tests on it. It's a presumptive test. That's all it is.

Suspect: What's a presumptive?

Interrogator: Presumptive? That means it's just the first step OK. It tells me to take Test 2. Test 2, I stick your finger, your trigger finger is usually the best one cause that's usually the one people use, stick it in a little, it's like a plastic thing, close it up and there's little chemical things in there and they break 'em up. Ok. And the molecules on your fingers reacts to the neutrons and protons and all of the other good stuff which I don't really understand, I just know how to do it, a, I stick your finger in there and put it in there and I seal it up and then I pop these three little vials.[151]

Interrogator: This is the newest thing. The only way to get, if you handled the gun when it's shot. Just give me your trigger finger. Just stick in here as far as you can. Ok, for a

150. Interrogation Transcript of McCoy, *supra* note 89, at 114-15.

151. Interrogation Transcript of Smith, *supra* note 147, at 11-12.

second. Really get a good reading on it, so that there is no mistakes. Do you have a piece of white paper that we can stick in front of this Darryl? So he can, a note pad will do. These chemicals are so strong, I don't wanna, I'll bust it with these. Now what it should do if you haven't fired anything, there's not going to be any color. Ok. But if there are particles of neutron and proton and all that gunshot residue stuff, then it'll.

Suspect: Wait! Would them gloves, don't them plastic gloves I had on.

Interrogator: Were they latex or rubber?

Suspect: They are ah, I don't know. I want you to look at them and tell me because while I put them on.

Interrogator: You have some gloves? You have some gloves? Are they like surgical gloves?

Suspect: Yea, cause when I take them off, they got powder shit on my, hands.

Interrogator: That's a different kind of powder. However, if you use the latex gloves, latex aren't good. Ah, if you use.

Suspect: But I didn't.

Interrogator: When you are using those kind of gloves even for cooking your dope, you're taking a real serious health risk. Cause those gloves, everything goes right through 'em. That's why we don't don't even use them. Let's just, let's see. I mean maybe there's nothing here. But if it's clear, you're in the clear as far as shooting. If there are colors especially pink. If it shows blue first then pink that means you fired a gun.

Suspect: I didn't fire no gun.

Interrogator: Watch out when I smash it cause sometimes these break and the chemicals fly out. Huh. You didn't fire a gun but your hand did.

Suspect: My hand didn't fire no gun, officer.

Interrogator: Well, why is that pink man?

Suspect: Man, I didn't fire no gun. That's real.

Interrogator: And that's pink Robert.

Suspect: Man, I didn't fire no gun, man that's real.

Interrogator: You have a lab envelope so I can retain this as evidence.

Suspect: Do you have a regular crime lab one?

Interrogator: Yea, there we go.

Suspect: Man, I didn't fire that gun Sgt. Browne. I'm serious, man.

Interrogator: Well, so am I Robert. This thing is a scientific test.

These things won't lie. That's why we use them. And as I was saying before, I have a real hard time believing, ah, now I have a hard time believing that you didn't fire that gun out there at least once.

Suspect: Man, I didn't fire that gun, not even once. Man, I swear, man, I swear I didn't man. Oh no, I didn't shoot that gun man. If I shot that gun, I would have broke down and told you man. I didn't shoot that gun.

Interrogator: Robert listen. This is scientific.

Suspect: Man, ya'll. Ya'll. Ya'll. Ya'll framing me with this or something cause I ain't touched that gun. Man, I swear I didn't shoot. I touched it but I didn't shoot that gun.[152]

Interrogator: You didn't fire that gun one time? Up in the air? Into a wall? Into the ground?

Suspect: Man, I swear I didn't shoot that gun. To my solid memory man, I didn't shoot that gun.

Interrogator: Well, take a second and research your memory because the Neutron Proton Negligence Intelligence Test tells me differently. You sure you didn't test fire it or something. You had to shoot it somehow.

Suspect: I might have shot it at my brother's house or something.

Interrogator: You might have?

Suspect: I'm telling you the truth.[153]

Even so-called evidence as nonsensical as the Neutron-Proton Test can influence a naive suspect or someone easily intimidated. The target of the Neutron-Proton ploy described his reactions to the test results.

Suspect: I felt relieved. OK, well I said, now they fixing to know who, who really did it. Then when you talking about, he came and said it was positive, then I said, Jesus Christ! Then I said, man I know you didn't say positive. But then you tell me that test and everything. Well this test will show that I didn't do it and then when that test didn't, man I then, that's when I said fuck that, it's time to start coming with the truth. Man, look man, I know whatever I say can't hold up to that fucking thing man, cause that's ya'll thing. Ya'll invented that thing to catch killers and man, only thing I say is man, I don't know.[154]

152. *Id.* at 15-17.
153. *Id.* at 32.
154. *Id.* at 41.

vi. Lie Detector Ploys

One of the most common and influential evidence ploys involves lie detecting machines—whether polygraph devices or voice stress testers. While the nominal purpose of a lie detection test is to diagnose the subject as truthful or deceptive, the primary function of any lie detector test administered during an interrogation is to induce confession.[155] By creating the impression that the procedure is infallible and by playing on a suspect's fear of arrest, the lie detection examination can be a powerful pseudoscientific tool of persuasion and manipulation. The passages below illustrate how investigators can use such examinations to lead a suspect to believe that his situation is hopeless.

A San Diego, California, investigator introduced the idea of taking a lie detector test by saying that he wanted to eliminate a suspect from the investigation. The investigator knew that he would be free to accuse the suspect regardless of the test results and could feed back a false test result if necessary.

Interrogator: Okay. Let me ask you another question. Would you be willing to take a polygraph test today?

Suspect: If it's part, if it has to be done I would.

Interrogator: Okay. Let me explain the reason I asked that. I really want to believe you. You know, I really do. I, I respect a man like yourself. But there's always that question and you know as well as I do, and you obviously are a responsible person, and you're proud of what you accomplished. And I think that's to be respected.

Suspect: Right.

Interrogator: Well, Dan and I are proud of what we do and we try and do the best job we can. And we try and cover all the bases. And with you in particular, we want to be real honest with you, we want to get your interview done and over with so we don't have to bother you again, so you can go about living your life and we can go about doing what we need to do. One of the things that would help us, and you, is if you would be willing to take a polygraph test.[156]

An Anchorage, Alaska, investigator used a similar ploy:

Interrogator: Well you know like the polygraph, if you took that thing and passed it then you could tell everybody pointin' the finger at you that you passed it.[157]

Earlier, the investigator had stressed the downside of not taking the examination:

155. *See* DAVID THORESON LYKKEN, A TREMOR IN THE BLOOD: USES AND ABUSES OF THE LIE DETECTOR (1981).

156. Interrogation Transcript of Nance, *supra* note 95, at 4-5.

157. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 13 (Sept. 30, 1993).

Interrogator: Charlie took and passed the polygraph. See he's not afraid to take the polygraph. You've been around long enough to know that there is no way you can go in there and pass that polygraph if you did this to Jim. And that's why you keep stallin', my, my lawyer don't want me to, my sister don't want me to, I need, I'm sleepy, I'm tired, I need to sober up, Susan I've heard all those excuses before from different people. Now I'm not even gonna ask you to take it.

Suspect: Whatever, whatever.

Interrogator: Any more because it's obvious you don't want to, OK? And I told you the only reason we wanted you to take it was to give you an opportunity to show us that you're telling the truth. But I didn't want you to go in there because I don't think you'd pass it. I know you wouldn't pass it.[158]

If a suspect questions the validity of the lie detector, the investigator will claim that the device is highly reliable, if not infallible. He may suggest or infer that only a guilty suspect would question or refuse to take the examination and that taking the test will allow him to prove his innocence. A detective in Sacramento, California, put it this way:

Interrogator: Are you saying that you did not ever touch her in her breast area, vaginal area?

Suspect: Yes, I'm saying that.

Interrogator: Okay, would you be willing to take a lie detector test to prove that?

Suspect: A lie detector test?

Interrogator: Uh huh.

Suspect: Umm, I don't know, you know, what good are lie detectors?

Interrogator: It gives me an indication.

Suspect: They don't work.

Interrogator: Oh, that's not true. If they didn't work, they wouldn't use them.

Suspect: Why aren't they legal then?

Interrogator: They're legal, they're just not allowed to be brought into court.

Suspect: Well that's what I mean about legal. Why aren't they legal being in court?

Interrogator: Because there are a lot of questions there's.

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158. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 4-5 (Sept. 28, 1993).

Suspect: That's what I'm saying you know, that's where I'm, my first thought was, I mean you know it doesn't prove nothing.

Interrogator: Yeah, it does prove something.

Suspect: Then why isn't it legal in court?

Interrogator: Because there can be misrepresentations on those parts.

Suspect: Right now, right now I'm getting this claustrophobic feeling right now because of the fact that I'm suppose to be innocent until proven guilty, yet I've got to prove my innocence?

Interrogator: Well, in this situation it's important, that's why I'm giving you the opportunity to show that.[159]

Some investigators tell suspects that the polygraph never makes mistakes and that it can discern their inner thoughts or, as a Barrow, Alaska, investigator claimed, "The thing reads your mind."[160] With this sort of build up, the practice of falsifying test results and reporting to a suspect that he failed the test convinces some innocent persons that they have no hope of escaping arrest, while for others the tactic can undermine their confidence in their innocence. There is no way for a suspect to rule out the investigator's claim that his unconscious mind is revealing his guilt, even if he has no awareness of committing the crime.

An investigator who uses a false lie detector strategy may believe that the suspect who claims no knowledge of the crime is merely lying. However, for an innocent who credits the lie detector with the impressive power of plumbing the unconscious, the device reveals a "truth" that becomes increasingly difficult to deny. For example, Connecticut State Police used this approach with an innocent teenage male who had no awareness of having killed his mother. When the investigator later told him that he failed the test, he came to believe that he was the murderer.

Interrogator: All right. That's why I have this. That reads your brain for me.

Suspect: Does that actually read my brain?

Interrogator: Oh, definitely, definitely. And if you've told me the truth this is what your brain is going to tell me.

Suspect: Mm-hm.

Interrogator: If you.

Suspect: Will this stand up to protect me?

Interrogator: Right, right.

Suspect: Good. That's the reason I came up to take it, you know, for the protection of having.

Interrogator: Let me put it this way, Pete. If you didn't hurt your

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159. Interrogation Transcript of Gonsalves, *supra* note 84, at 53-55.

160. Interrogation Transcript of Adams, *supra* note 86, at 17.

mother last night, I'll be only too happy to say so. All right? If you did, I'll have to say that. All right?

Suspect: Right.[161]

A Sacramento County, California, sheriff's detective worked hard to convince a suspect that he was caught because he supposedly failed his polygraph and this established his guilt without question:

Interrogator: I uh, I worked your charts. Why don't you turn around here so we can talk. Worked your charts. In fact, I did em' a couple of times.

Suspect: Uh-huh.

Interrogator: And um, 'member I, how I told ya about uh, how uh, reliable they are?

Suspect: Uh-huh.

Interrogator: Based on the type of stuff I do? They are very reliable.

Suspect: Yes, sir.

Interrogator: What uh, what I did was, I did three charts on ya, and let's say we have a zero.

Suspect: Uh-huh.

Interrogator: And we have a minus nine over here to show that that's where I would have to go to show that you were deceptive. Excuse me, minus thirteen I really have to show, and it's plus nine. So I don't have to go as far to show you're telling the truth as I have to go to show you're telling, telling a lie.

Suspect: Uh-huh.

Interrogator: Okay. And this is in regards to the shooting incident.

Suspect: Uh-huh.

Interrogator: Okay? Nothing else. I didn't uh, didn't uh, worry about anything else really.

Suspect: Yes, sir.

Interrogator: Where I ended up was over here at minus twenty-nine, which means absolutely. I mean I have, I have absolutely no uh, no qualms about it whatsoever as uh, you, you were being deceptive with me, and I can understand why. I really can. Uh, you know, as I said I have no uh, personal thing in this and I, you know, I, I, I really tend to think that you have been an alright guy and somethin' happened here that uh, on that particular day that, somethin's screwed up somewhere. And I went through the entire report and what you're saying doesn't jive because of the many witnesses that saw what was going on.[162]

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161. Interrogation Transcript of Reilly, *supra* note 75, at 37-38.

162. Interrogation Transcript of Wright, Sacramento, Cal., Sheriff's Dep't 1-2 (Aug. 20,

Detectives in Clearwater, Florida, relied on a similar ploy but had to order the polygraph operator to make a false report to the innocent suspect. When he did, he told the suspect that his test result was the worst the operator had seen in twenty-five years.

Interrog. 1: The test says you're a liar.

Interrog. 2: Did you tell him about the other part? I didn't tell him about the part why he's afraid to tell us, John. Do you know what it is? Do you know why, John?

Interrog. 1: I know why. He's embarrassed.

Interrog. 2: He's embarrassed to tell us that.

Interrog. 1: That test says you're a liar. No ifs, ands or buts. You're lying. The test even says you tried to hold your breath to readjust your breathing through the thing. But you know what blew it off the screen. He's going to show you. Your heart. Your heart pumped those needles right off the screen. He's never seen one that high. This guy's been doing that for as long as I'm here, I think.

Interrog. 2: Yea, the guy's an expert at it. He's got.

Interrog. 1: You know why your heart. Cause you were a caring guy. A guy thirteen months on the wagon. A guy who was trying not to kid himself. You're a fucking liar. You're lying to us and we're gonna prove you're wrong.[163]

During the interrogation of a false confessor in an Arcadia, Florida, investigation, a Florida Department of Law Enforcement (FDLE) polygraph operator refused to make a false failure report to the suspect. The lead investigator, a FDLE interrogation specialist, took it upon himself to transmit the false polygraph report. He also confronted the suspect with false fingerprint and erroneous eyewitness evidence. Shortly after the interrogation started, an officer was dispatched to contact the alibi witnesses, who verified the suspect's alibi. Nevertheless, the interrogator coerced a false confession from the suspect.

At the suppression hearing, the interrogator claimed that during the more than ten hours that followed the verification of the alibi, no one ever told him that the suspect's alibi was solid and exonerated him. It took over four and one-half years for the confession to be suppressed and for the man to be released from jail.[164]

A man who falsely confessed described the thinking that led him to comply with an investigator's demand that he take a voice stress test. Although he was proven innocent of the murder, he was told he failed the test:

Suspect: And at this time it was like I just, what's going through

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1993).

163. Interrogation Transcript of Sawyer, *supra* note 74, at 167.

164. *See* Interview with Louis, *supra* note 148.

my mind is I knew that I was going to fail this and I don't know why, because on the way over I had doubts about doing this, I said "But," you know, "I don't want them to think that I'm hiding something so I have to go through with it."[165]

The effect of negative lie detector results, in conjunction with other false evidence ploys, can be so devastating that it can actually shatter a person's belief in his innocence as well as convince him that he will be convicted. A few hours after an innocent man confessed in Oakland, California, he explained his reaction to being falsely told that he failed the polygraph:

Interrogator: Okay, and the other thing being that we told you we disbelieved the story you were telling us and the, the, that in fact that the polygraph, you were uncomfortable with the polygraph, did that come into this, us convincing you too, or.

Suspect: Um, well I, I mean, I'm, I was willing, I was so open to everything right then and I've been so, that's my problem right now. I do not have any barriers up and when, so this polygraph said I was lying and I went God, you know, maybe I lied. Maybe there is something I can't remember. I don't recall and then you guys were insistent on, "No, you're lying, you're lying, we know, you have, you know, fingerprints."[166]

d. *Shifting the Innocent from Confident to Hopeless*

The strategy of relying on evidence ploys to lead a suspect to believe that he has been caught and that admitting guilt does no real harm will work with some guilty parties.[167] That this strategy can produce the decision to confess from someone who is guilty is illustrated by the comments of suspects in two northern California investigations. A Sacramento, California, investigator asked a suspect who had just confessed:

Interrogator: What made you to decide to admit something in here? Why did you do it?

Suspect: Because I knew it was hopeless to lie to you.[168]

A suspect in a San Francisco, California, murder investigation described how the perception that he had been caught altered his decision making:

Interrogator: You explained to us in great detail what happened in San Francisco and about the murder.

Suspect: The only reason why is because I'm gonna be found

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165. Interview of Martin Salazar by Richard Ofshe 36 (May 16, 1996).

166. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 25.

167. *See* Moston et al., *supra* note 5 (discussing strength of evidence on three factors that predict the decision to confess).

168. Interrogation Transcript of Schmitt, *supra* note 85, at 142.

guilty anyway.[169]

The sanguine and resigned attitude expressed by these two guilty parties is a far cry from what an innocent is likely to say. Innocent persons and some guilty parties struggle to maintain their position of denial and express their shock by stating that a mistake has been made, offering reasons why the interrogator's reported evidence is in error, and offering to undergo whatever testing will establish their innocence. For example, a man erroneously accused in a Boynton Beach, Florida, investigation reacted to his interrogator's use of both flawed and false eyewitness claims as follows:

Interrog. 1: I can put you there at the house today. I know you were there today.

Suspect: I was not there.

Interrog. 2: The boy says you were there.

Suspect: I was not there. I was not there.

Interrog. 1: Why would the boy mistake you for somebody else, saying "Martin was here?"

Suspect: I have no idea.

Interrog. 2: I mean you're pretty distinct; you're kind of big like me, you know.

Suspect: I was not there. I mean I'll swear on a stack of bibles; I'll take a polygraph, anything. I was not there. I left my house.

Interrog. 1: Paul never came in one morning and busted you having sex with her.

Suspect: No, he did not. I've never had sex with that woman.

Interrog. 1: Why are all these people lying about you, then?

Suspect: I have no idea. I mean I don't even know what all this is about.[170]

A few days after his arrest, a wrongfully accused defendant in an Arcadia, Florida, investigation described his emotional reaction to some of the false evidence ploys used during his interrogation:

Defendant: Yeah, and he tells me, he looks at me and he says, we got your fingerprint. No, the first thing he told me was, when he took out, he took out my picture, right, my pictures, he told me the people identified me.

Attorney: Well, tell me in, try to play him for a second and I'm you, and he comes in and sits down. You be him and tell me what he said.

Defendant: You've been identified by the witnesses. You've been pointed out.

Attorney: What did you say?

169. Interrogation Transcript of Anderson, *supra* note 114, at 34.

170. Interrogation Transcript of Salazar, *supra* note 119, at 27.

Defendant: I say, how am I going to be pointed out when I wasn't there? Are you sure they ain't talking about a Mexican, because I always get mistaken as a Mexican, right?[171]

Determined to prove his innocence, this man had had a heated argument with his interrogator, insisting that the evidence could not be true and that the tests should be re-done.

Defendant: He said they are my fingerprints.

Attorney: Okay.

Defendant: All right, and I sit there and told him, how can my fingerprints match up to someone else's fingerprints? And the only thing I knew of history of fingerprints, don't no man's fingerprints even match the next man's fingerprints.

Attorney: Okay.

Defendant: All right, but yet he said, told me again, they's your fingerprints. Now, I know you was at the store, now.

Attorney: All right. What did you say?

Suspect: Now, I'm getting mad again.

Attorney: And what did you do then?

Suspect: So then I just kept telling him, I don't know how my fingerprints match up to somebody's, y'all better redo them fingerprints. Because my fingerprints don't match up to nothin in that store, because I ain't been in that store.[172]

Once the accusatory phase of interrogation begins, an investigator does not attempt to discriminate between denials or alibi claims that are truthful protestations by an innocent suspect or the flimsy lies of a guilty party. It no longer matters that the interrogator cannot distinguish truth from lies because he has been trained, above all else, to express unwavering confidence in the suspect's guilt. To maintain the facade of well-founded certainty, an interrogator must clearly establish that no amount of denial will shake his belief in the suspect's guilt.

For an innocent suspect, the experience of suddenly being embroiled with a person in authority who levels serious accusations of guilt but is unwilling to acknowledge the possibility that they may be false must be akin to awakening and discovering that you have changed into a cockroach and that no amount of breast beating will alter the situation.[173] A Maricopa County sheriff's office investigator told an innocent suspect in the Temple murder case:

Interrogator: Well, uh, we have a problem. And, uh, the problem is that, you know, your name has come up in this deal.

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171. Interview of Louis, *supra* note 148.

172. *Id.* at 49.

173. *See* FRANZ KAFKA, THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES (Willa Muir & Edwin Muir trans., Schocken Books 1995) (1919).

Okay? And, uh, for your name to come up, I mean, we just didn't wake up and open the newspaper one day and, uh, you know, pick your name out or throw a dart at a dart board and say come down and pick you up, alright?

And, uh, there has been some, uh, you know, statements and information given and that has checked out. You know, uh, almost one hundred percent okay? Leo, your time has come, man. Okay, your time is now. And you got a big, heavy, giant weight on your shoulders. I can tell by looking at you.[174]

For an innocent suspect, the steadily growing list of inculpatory facts makes it increasingly difficult to classify the interrogation as a simple mistake. Wrongly accused suspects frequently come to see themselves as either being set up or railroaded. A man who had falsely confessed described the experience in an interview:

Suspect: What made me most scared is at one point I thought I was being, you know, framed or set up by somebody, because once again, I don't remember which one of the interrogations it was, but they drew a picture of the cord for me when they were asking me, "Don't you think your fingerprints are going to be on this cord?" and this and that, "Because the end of the cord is pretty flat so, you know, you can get a pretty good fingerprint on there." And I believe it was Shelke who asked Griswald to draw a picture of it for me.[175]

Regardless of the theory that the innocent suspect entertains, he cannot fail to understand that the case against him is airtight, that his arrest is inevitable and that his fate is determined.

Interrogator: I'll tell you what we know about you. You were involved with the incident at the Temple. Plain and simple. And you're gonna go down hard. You're gonna go down hard because everyone else is gonna put the shit on you. Like they already have.[176]

Each time the suspect objects, the interrogator has an opportunity to repeat the list of facts that irrefutably confirm his guilt. As the false confessor in Arcadia, Florida, described the experience:

Defendant: All right, then he gave me the impression I ain't going nowhere, see what I'm saying, and then they told me my fingerprints matched, which I kept continuously telling them, well, how can my fingerprints match something when I wasn't there. They told me they had, I

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174. Interrogation Transcript of Bruce, *supra* note 54, Tape 1, at 11-12.
175. Interview of Salazar, *supra* note 165, at 90-91.
176. Interrogation Transcript of Bruce, *supra* note 54, Tape 2, at 40.

failed the polygraph test, now, see, now I done got to the point where I know I didn't do nothing, but they telling me that I done something and ain't no way for me to get out of it, see what I'm saying? So the only way out for me, for me to get out, was to tell them what they told me.

Attorney: Why did you feel that was going to do anything for you?

Defendant: Because, I knew it wasn't going to do nothing good for me, I'm just saying. I knew it wasn't going to do nothing good for me, I just knew either way it went, I wasn't going nowhere, see what I'm saying? That was the impression I was getting. They say, we have your fingerprints, your fingerprints matched, you failed the polygraph test, all right, witnesses, pointed you out, all right.[177]

During an interrogation in the Phoenix Temple murder case, a Maricopa County, Arizona, sheriff's detective made it clear that the suspect's statements during the interrogation would determine his fate. Eventually this man confessed falsely to executing nine people. Under pressure to provide a post admission narrative of the crime, he used the information with which he had been deliberately contaminated during the interrogation and invented a description of how it happened. Although much of what he invented was wrong, because he had been told how the killings were done he was able to correctly describe how the death wounds were made. He explained that he placed the barrel of the rife at the base of each victim's skull and fired. If this man's innocence had not been independently established and the interrogation demonstrating his contamination had not been recorded, his ability to contribute this sort of precise information would almost certainly have led to his conviction and incarceration.

The interrogator reversed the suspect's denial and elicited a false confession by convincing him that his situation was hopeless:

Interrogator: OK. Alright, the bottom line is, ok, we got you in the Blazer and the Bronco goin to the church that night, ok. You're one of 8 people in the Bronco and Blazer at the church that night Leo. And it's all over with, it is all over with. The game's up, alright.

Now let me tell you something, man, this is the biggest moment of your life right here. You gotta make a decision.[178]

Another innocent Temple murder suspect expressed his mounting confusion and fear:

Interrog. 1: So these other people that are telling these facts?

177. Interview of Louis, *supra* note 145, at 16-17.

178. Interrogation Transcript of Bruce, *supra* note 54, at 29.

They're the same. How could they be lying? So it had to be you cause you tell us something totally different. I don't know what you're talking about. Mark it don't make sense. You understand common sense.

Suspect: Yes, I understand.

Interrog. 1: You think a judge uh prosecutor is gonna believe that Mark doesn't know what he's talking about, Mark has no knowledge about what's going on?

Suspect: I don't believe this is happening.

Interrog. 1: Mark, you have to believe this is happening because it happened about a month ago.

Interrog. 2: It's not gonna go away either.[179]

Later, he expressed more about how he was reacting to the interrogation:

Suspect: I'm scared, I don't know where to go, I don't know what to do, what to say. And you're telling me I know something I don't know. And I don't, I don't, how is that supposed to feel? Tell me that what someone going to feel your gut busted out and stuff like this. You, your held for two hours and not knowing what's going on and someplace out of town and blamed for something that you, you weren't there, or didn't do.[180]

In Sacramento, California, a detective graphically drove home the nature of the situation of a young man who had witnessed a murder but had initially claimed that he had not been at the crime scene:

Interrogator: Well I hear you failed the polygraph.

Suspect: I just can't get that picture out of my head, Sir. I know, I know in my heart and soul I, I did not shoot that man, Sir. I saw everything that happened. I saw every, I saw when he got hit. I saw him jump. I heard the girls screaming', but I didn't shoot the man, Sir. I'd never shoot the man. I did not touch the gun. I did not know the gun was in the car, Sir. I was, maybe I could have stopped it. I know I probably could have stopped it, but its, it seemed like it happened too fast and I don't know, I was just stuck in one spot. When you showed me those pictures of the men, I know those men. And I know that you knew, that I knew those men, and I apologize for lying to you. Uh, uh.

Interrogator: Well at this point Cheval, I'm, I'm not here trying to help myself. Frankly I've got you by the balls.

Suspect: Yes, sir.[181]

Vallejo, California, police investigators conveyed the message that there

179. Interrogation Transcript of Nunez, *supra* note 54, Tape 3, at 10.
180. *Id.* Tape 4, at 8.
181. Interrogation Transcript of Wright, *supra* note 162, at 33.

was no way out for a man they wanted to use as a witness against members of a group that robbed a Loomis Armored Car facility and killed three men. The threat of a death penalty eventually motivated him to confess falsely, but his attempt to save himself fell apart because he could not supply the information the investigator's demanded:[182]

Interrog. 1: We've got you, and we've got Mr. Young. You may not realize it yet, that we have you.

Interrog. 2: You should realize it, but you don't.

Interrog. 1: That man is gonna come into court and testify to that and more. You know why the jury's gonna believe him, beyond the fact that he knows so much about the crime, one of the uh, uh arrangements that we have with this man is that if we prove he's lyin', deal's off, but we can still use the tape against him. We can play the tape against him in court, where he just admitted killing two people, and we can go all the way.

This is a special circumstance crime. You know what that potentially means. If that man is lying, the, the one count of first degree murder is out the door, and he can be tried for everything that he was involved in. There's no way that man's not gonna be found guilty. I got him on video tape, admitting to killing two people. You think he's gonna jeopardize his life to lie about you.[183]

Later, this man expressed his comprehension of his circumstances:

Interrog. 1: Eu, Eugene, everybody that tells us these things, the, the only response you can have is that they're not being truthful. Is it possible Eugene that you're not being truthful with us?

Suspect: I'm being very truthful. I'm just in awe basically at this nightmare, and these people that you went and be on the front line at war with me. I'm dead.

Interrog. 2: Well Eugene it's not a nightmare, cause you wake up from a nightmare, but tomorrow when you wake up, this'll still be there.[184]

He perceived the interrogation to be his worst nightmare because he understood the interrogators' message perfectly: the (false and erroneous) evidence the police were confronting him with was going to lead a jury to sentence him to death:

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182. This man stood trial for the triple murder because of his coerced confession, only to be acquitted by a jury who watched his interrogation and confession on videotape. The jury considered the videotape in light of the fact that the state had no evidence except that he admitted participation in a crime he could not describe, with others whose identities he was unable to supply, even when complying with the interrogator's demands would save his life. *See infra* text accompanying notes 263-65.

183. Interrogation Transcript of Livingston, *supra* note 113, at 48.

184. *Id.* at 126.

Interrogator: Let, let's get right down to it the chase here, what are you worried about? What are you worried about? If, if you was to tell us the truth of what's happened out there, what's your main concern, because it's obvious to me that you're worried about something, because looking at you right now, all, everything you're doing here you're tellin me you do wanta be straight up with us, something is worrying ya. What's worrying ya?

Suspect: Well I'm worried this right here, that uh what I'm telling you, and you guys seem to have patched enough things to present to the court room and make me look guilty. Uh, so that means I gotta go to the gas chamber for something I didn't do, that's what worries me.[185]

Flagstaff, Arizona interrogators threatened a woman with losing her children and spending twenty-five years in prison if she did not comply with their demands:

Suspect: Please don't do this to me. (Sobbing). You guys let me take my kid to my parents.

Interrogator: No.

Suspect: And talk to my parents.

Interrogator: No, we'll let your

Suspect: You guys can drive with me! Please!

Interrogator: We're gonna call them and have them come in and pick them up. Let them know.

Suspect: How can you call my parents?

Interrogator: We're gonna go out there. We're gonna send an officer out there, okay. And

Suspect: Gil, you can't take me to jail, I didn't do anything. I'm begging you, please, I didn't do anything. (Crying).

Interrogator: Get up, Trena.

Suspect: I didn't do anything (sobbing), I swear I didn't do anything! I didn't do anything, honestly, I swear to God I didn't! (Crying)

Interrogator: Trena. Trena. Get up off your knees.[186]

In a post-interrogation interview, a young man in Oakland, California, recounted his reaction to the fabricated evidence the investigators introduced and to the stress of the interrogation:

Interrogator: [I]f I can reiterate, we had, we've put evidence having you in the area earlier, you were told that we had an eyewitness putting you in the area further down than

185. *Id.* at 70.

186. Interrogation Transcript of Trena Richardson, Flagstaff, Ariz., Police Dep't 77 (Apr. 20, 1994).

you're admitting to being, that it was our belief that your story was, you were telling us a lie and that the fourth thing you said was that the polygraph had scared you. I guess the physical surrounding of the machine and the fact that you always had to be in control while answering the questions in a cooperative manner.

Suspect: Um, (pause) the eyewitness I'm not sure about. Somehow that, I mean that because I was scared and that you believed that I had been further down in whatever evidence you had for that and somehow you picked up my two fingers and said that those were somewhere down there. Um, and the polygraph scared me, my arm was blue, and uh, I had to be in control 'cause I was trying to cooperate and all these an, questions (pause) and trying to (pause) picture her and stuff is just.

Interrogator: Okay. But, the sum total of those four items, those four items, is what made you tell us incorrect information, is that correct?

Suspect: Um, (pause), yeah, yeah. And the, the polygraph.

Interrogator: And those.

Suspect: Yeah, all that.

Interrogator: All that. Is, is that the total.

Suspect: I was shocked. I was distraught, shocked past the belief that yes . . . there is a possibility.

Interrogator: Is that the sum total of the, of the things that played on you that . . .

Suspect: That's what convinced me, that's what convinced me that there was a possibility that I might have killed her.[187]

An Arcadia, Florida, defendant who falsely confessed described how the detectives' tactics during the first phase of questioning induced feelings of hopelessness:

Defendant: I done gave up hope on everything nor, all right, because I ain't never see, I ain't never see, I ain't never been put in no position like that, see what I'm saying? I hadn't been put in no position like that, to be answering the same questions over and over when you sit there and try to purely tell the person what you had done, and you ain't done this and that, and they say you have, see what I'm saying, saying you done this and that. I done got to the point where I just gave up hope on everything now. All right, I didn't care about myself no more, right. I

187. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 4-5.

didn't care about anything.[188]

If an investigator offers to accept a self-defense version of a crime and helps the person understand that this is his way out, the person will from then on be aware that he can escape the punishment of the interrogation by accepting the deal. A young false confessor who had witnessed a murder and was subsequently accused as the killer in a Fort Lauderdale, Florida, investigation described his experience:

Suspect: I remember just wanting to get it over with, telling him whatever he wanted. I wanted to tell him whatever he wanted to hear just so I could get the whole thing over with, so I could get out of there and just, if I was an old man, I would probably have had a heart attack. I mean that's how I felt. I just wanted to get it over with. It hurt so much, I just wanted to get it over with, no matter what it, I just wanted to get it over with and told him what he wanted to hear.[189]

A man who confessed falsely during a Clearwater, Florida, investigation described the cumulative effect of the stress of the sixteen-hour-long interrogation, the shock of finding himself accused, the despair that the several false evidence ploys created, the loss of confidence he experienced when told that he failed the polygraph, the confusion when he was told that he didn't remember the killing because he had a blackout, and the fear he felt when he was threatened with the death penalty if he did not agree with and confess to everything the interrogators demanded he say:

Suspect: The truth is and this is gonna piss you off.

Interrogator: Tom!

Suspect: The truth is, the only reason I'm telling this stuff is because you got evidence to get me. I don't believe I did it. That's why I want to talk to somebody. I'm going fuckin bananas.[190]

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188. Interview of Louis, *supra* note 148, at 26.
189. Interview of Adams, *supra* note 122, at 52.
190. Interrogation Transcript of Sawyer, *supra* note 74, at 291.

2. Step Two: Eliciting the Admission[191]

a. *Introduction*

Once the investigator has introduced all of the evidence he intends to use or invent, he shifts his attention to eliciting the admission "I did it." Most often guilty suspects have to be motivated to admit guilt, but some become so convinced that resistance is futile that they end the cat-and-mouse game by confessing at this point. For an adolescent in San Diego, California, the piece of evidence that finally broke his resistance was that his girlfriend and co-perpetrator had confessed and described his role in the crime:

Interrogator: Why are you blaming it on Ryan?

Suspect: (Crying). I'm not! I didn't do it!

Interrogator: Why wouldn't Danielle say that Jarod didn't have anything to do with it, it was all Ryan?

Suspect: (Crying).

Interrogator: Why wouldn't she tell me that? You guys are boyfriend/girlfriend.

Suspect: You guys are good. It was me and Danielle. You guys are good.

Interrogator: No, we're not good. I just, like I was saying, Jarod, I don't think.

Suspect: Me and Danielle did it.[192]

From the point at which the investigator re-focuses on eliciting the admission, the central issue of the interrogation becomes why the suspect should agree to tell the truth. This demand has entirely different meanings for guilty and innocent suspects. The investigator's meaning for the phrase "tell the truth" is that the suspect should comply, admit guilt, and make an accurate confession that confirms what the investigator believes happened. A guilty suspect easily and correctly understands what the investigator wants at the conclusion of step one, just as clearly as he did at the start of the interrogation. Given that the investigator has accomplished his goal and has succeeded in leading the suspect to reach a new appraisal of his circumstances, he will have come practically full circle from his position at the start of the interrogation. In the beginning, when he forcefully rejected the investigator's accusation and demand for an admission, he viewed the cost of confessing as high. Wanting to avoid arrest, he had everything to lose by admitting guilt and nothing to

191. In the illustrations below, the interrogators' evidence ploys are entirely fabricated in examples taken from cases in which the suspect is innocent, and may or may not be fabricated in cases in which the suspect committed the crime. The likely guilt or innocence of suspects has not been identified in all of the case illustrations. It should therefore be kept in mind that the interrogator's repeated assertions that the suspect's position is hopeless does not mean that his statements about the case evidence are accurate. In the illustrations below, this is rarely the case. A presumption that what the interrogator says is true and that the suspect is guilty will cause the reader to misperceive the situation of the person who receives the interrogator's intended persuasive communication.

192. Interrogation Transcript of Jarod, *supra* note 109, at 54.

gain. By the conclusion of step one of the interrogation process, his appraisal of his situation has almost reversed itself—now he has almost nothing to lose by admitting what has become obvious but has not yet been shown what he has to gain.

An innocent suspect at the same point in the interrogation process hears a different message. For him, the truth is what he has been saying all along and the investigator's absolute rejection of it has taught him that the investigator's "truth" is something different. He understands that the demand for the investigator's "truth" is a request for a false confession. While certainly not having come nearly full circle, his situation, too, is different from what it was a few hours earlier. His calm about speaking with the police has been replaced by distress, a fear that his life has changed, and a realization that he is about to go to jail. He has discovered that being innocent means little. The nightmare of the interrogation, however, remains as incomprehensible as it was when he was first accused.

Fundamentally, an innocent person's appraisal of his circumstances and options is similar to that of a guilty party's, except that the innocent knows that what is happening is unjust and this knowledge affects his willingness to confess. Because he knows he is innocent, both his will to resist making a confession and his distress at the prospect of being arrested are likely to be greater than what a guilty party feels. A guilty suspect will have been aware from the start of the adversarial nature of his relationship with the interrogator and of his jeopardy. Unlike the innocent who hopes that he can change the interrogator's position and avoid arrest, the guilty party is likely to realize that this will not happen. His knowledge that he committed the crime and that the evidence simply will not go away forces this realization. If the stress of interrogation becomes too intense, he knows he can terminate it.

The innocent suspect is likely to cling to the hope of bringing the situation back to normal, is likely to be adamant that he won't admit to something he did not do and may be experiencing considerable stress. Although his *Miranda* rights are known to him, invoking them does him no good since his goal is to reverse the process that is bringing him to arrest. The investigator has made him realize that once the interrogation ends he will be arrested. To alter the process, he must not only continue to resist confessing but must convince the investigator of his innocence. If he stops protesting his innocence, even if he does not confess, he will have accepted the fate the investigator has told him is certain—arrest, prosecution, and conviction.

What the innocent does not know at this point is that during the next phase of the interrogation his situation will be made to seem far worse than he has as yet imagined. The investigator will confront him with a more detailed analysis of his future—one full of reasons why he must not only confess but must do so immediately if he wants to minimize the damage he is about to sustain.

In a typical interrogation of a guilty suspect, the interrogator's task is straightforward. In order to bring a guilty suspect full circle and change denial into admission, the interrogator must now show the suspect that he has some-

thing to gain by making an admission.[193] Since the guilty suspect now perceives himself as having been caught, offering even a small benefit may lead him to reason that admitting the obvious changes the situation little, if at all, and making the admission results in some small improvement in his situation. If the suspect can be led to consider only the possible futures that the interrogator wishes him to evaluate, he is likely to conclude that confession leaves him better off than remaining silent.

Investigators have at their disposal a range of increasingly valuable incentives that can be introduced to precipitate a decision to confess. Whether they realize it or not, investigators are engaged in a rather straightforward negotiation in which they seek to *buy* the admission as cheaply as possible. The interrogators' incentives range from non-coercive, legally permissible psychological benefits to the strongest sorts of threats and offers of leniency (which presumably the investigator realizes are illegitimate). Although some interrogators are quite willing to make blatant threats and promises,[194] they usually resort to indirect methods for issuing threats and promises.

Investigators behave as if they are engaged in a negotiation. They are aware both that incentives vary in strength and that offers of a material benefit and threats of harsher punishment are prohibited and must be communicated subtly. This is illustrated in the excerpt from a San Mateo, California, child sexual abuse investigation detailed below. This interrogation was being conducted following a policy of avoiding advisement of *Miranda* by telling the suspect that he was free to leave prior to the start of the interrogation. The suspect had been picked up at his home and taken to the station to answer some questions about the sexual molestation of his niece. The investigator confronted the suspect with some false and some true evidence indicating that the offense of sexual abuse of a child could be substantiated. The evidence convinced the suspect of his imminent arrest: "What, what can I say? I'm getting charged here?"[195]

Rather than responding to the suspect's comment with the straightforward answer that he would be arrested, as the leading training manual advises interrogators to do,[196] this interrogator manipulated the situation by immediately bringing up the child's need for treatment. In using this maneuver, he avoided honestly answering the suspect's query and not only avoided informing him of the inevitability of his arrest, but also introduced the idea that the repair of the child and the family was the primary consideration. Consistent with avoiding the *Miranda* advisement, this investigator's strategy was designed to mislead the suspect about his criminal jeopardy and focus his attention on suggested non-jail resolutions. The interrogator's apparent strategic purpose was to lead the suspect to conclude that he could avoid arrest if he cooperated and made an admission. Hence, as first step, the interrogator

193. A recent observational study found that 88% of suspects are exposed to some sort of appeals to self interest. *See* Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

194. *See infra* text accompanying notes 96-130.

195. Interrogation Transcript of Domingo Villaneuva, Redwood City, Cal., Police Dep't 15 (Nov. 11, 1996).

196. *See* INBAU ET AL., *supra* note 20, at 196-97.

stressed treatment for the child and repair of the family as the primary issue:

Interrogator: Well, I'm hoping for the truth because what I've got is, I've got a family who has a five year old daughter that has been, had sex with. I mean she's okay. But the longer we drag this out, going back and forth, whether you did it or you didn't do it.

Suspect: I didn't do.

Interrogator: That's not going to help her out any. Um, best thing for the families, I've done a lot of these cases, and if there's a hope of getting the family to get reunited, you know through therapy or through, you know.[197]

In his next attempt to motivate an admission, the investigator sweetened the offer. He played down the seriousness of the crime and emphasized that no physical harm had been done to the child—her injury was easily repaired. The investigator expanded his offer of "therapy" and suggested it as a non-jail alternative for the suspect:

Interrogator: Like I said, she's okay. She's not you know, beaten up, she's not, you know, doesn't need to be hospitalized. She just maybe needs to talk to a therapist or something. And, and, uh, in time she's gonna be okay. And now what I'm looking at is whether you're gonna be okay. And you're telling me that this didn't happen when I've got everything that says it did happen. And that you're the one that was there when it, um, what, what are we gonna do here? I want to make sure that . . .

Suspect: I wasn't there, though.

Interrogator: . . . that you get help if you need it or if you want it.

In his third attempt to motivate an admission, the interrogator again reviewed the false evidence to remind the suspect of his situation and then focused his thinking on the harm associated with remaining silent at this point. The suspect asked another question about his future. This time the question allowed the investigator to answer with information that did not change the subject. But his answer differentiated between the alternatives of silence and admission. The interrogator associated silence with the prospect of the suspect appearing before a judge while the admission alternative was associated with treatment, "just being done with it," and being able to "put this stuff behind you," which did not necessarily include time in jail.

Interrogator: Well, here's some things that, that they have done at the hospital. They collected specimens from her and whether or not you did this, they're gonna be able to compare body fluids from her, they collected off of her with you.

Suspect: Uh-huh.

Interviewer: Okay. And that will be a real definitive way, you know,

197. Interrogation Transcript of Villanueva, *supra* note 195, at 15.

whether you actually did or not, regardless of whether you said you didn't do it and, um, I'm hoping that if, you'd be honest with me in the beginning and then we get a confirmation through medical science that this did happen. And that's why I got you here today, so you can tell me everything that happened. Like I said, you're not a bad person if this did happen. But if you're looking at not telling the truth from the beginning, its just gonna be all the worse later on down the road so.

Suspect: What do you mean the worse?

Interrogator: Well, what's gonna happen is we're gonna sit down in front of a judge and we're gonna have a bullshit story that you're telling me right up front, when we know different, when the evidence suggests different. That's what I'm asking you, just be honest. I mean, you got a lot inside of you that I'm sure you want to just get out and just be done with it. And the only way that you're going to be able to put this stuff behind you is by telling the truth right now. So how did this happen?[198]

As the record of the interrogation substantiates, the suspect concluded that if he confessed to some bad acts but not to the act that had been associated with jail time (i.e., sexual intercourse), he was better off since he would receive treatment instead of punishment. He admitted to sexual contact with the child weeks earlier, but maintained that he had not even touched the child earlier that day and so could not be the donor of the semen the investigator alleged was found in her vagina. In fact no semen was found in the child's vagina, and so the suspect was undoubtedly telling the truth on this point.

The investigator worked to support the delusion his tactic had created—that admitting to other acts of sexual abuse would result only in treatment, not punishment. After the suspect began making admissions to acts of sexual abuse short of intercourse, the investigator reinforced the conclusion that this could be handled privately:

Suspect: You can't go, tell my family all this shit.

Interrogator: You know, look you're nineteen years old.

Suspect: Yeah, Yeah, I gotta grow up.[199]

Still later, the suspect again expressed his concern that everything be kept private. The suspect's concern about keeping this confidential is consistent only with the expectation that he would not be charged and tried. Again, the investigator supported the suspect's deluded conclusion:

Suspect: I don't want this shit going out to (unclear) you know.

Interrogator: To, to what?

Suspect: To my friends or my family members.

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198. *Id.* at 17.
199. *Id.* at 21.

Interrogator: Well, I'm not here to bad mouth you to your friends or anybody else. But you, you think that her parents have a right to know what happened. Right, they're her parents. They have a right to know what happened in order that she can get better. And in order for you to get better, you're going to have to face them sooner or later. Okay. Its not something that you're gonna be able to hide forever, 'cause that's not something that's gonna make you get better, just by putting your head in the sand and saying this never happened.[200]

As illustrated above, a suspect who knows he is guilty and is convinced that he has been caught is likely to search for ways to better his situation and is in the market for the incentives the investigator offers. A suspect who is innocent is likely to focus on correcting the error that is happening all around him and will likely see confessing falsely as having a great cost. A guilty suspect in the same factual situation but trying to decide whether to confess truthfully will likely focus rapidly on minimizing his punishment.

If an investigator is committed to obtaining a confession but is interrogating an innocent suspect, he is likely to discover that eliciting an admission of guilt is far more difficult than what he is accustomed to having to contend with.[201] In order to get an innocent to confess falsely, an investigator will have to introduce strong threats for remaining silent and strong promises of substantial benefit for giving the false confession.

b. *Low End Incentives: Moral and Self-Image Benefits*[202]

Tactics that communicate incentives at the low end of the continuum involve reminding the suspect of the emotional benefits of truth telling versus the continuing emotional distress associated with denying guilt. For example, an investigator may emphasize the moral or self-image benefits the suspect will experience if he tells the truth, as happened to an innocent suspect in Flagstaff, Arizona:

Interrog. 1: George, you're the type of person that you're going to have to tell this to somebody. You cannot live with yourself unless you get it out and say I did not mean to do this. It's a mistake. I want to try to make right what I did wrong. And that's the type of person that you are. You have to be commended for that.

Interrog. 2: You don't want to carry this with you any longer. We

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200. *Id.* at 16.

201. The most recent observational study of interrogation found that 23% of suspects interrogated made incriminating statements and an additional 42% confessed in run-of-the-mill interrogations. Leo, *Inside the Interrogation Room, supra* note 4, at 280.

202. A recent study of interrogation in the United States observed that in 37% of cases, interrogators appealed to the importance of cooperating as part of their strategy for eliciting an admission. Interrogators appealed to the suspect's conscience 23% of the time, and used praise or flattery in 30% of the cases. *Id.* at 267.

know that. That's what you came here for. You came here to leave something here, and that's what you need to do is to leave it here, and you'll leave it.[203]

A Richmond, California, investigator emphasized the purity of truth telling:

Interrogator: Okay, just tell me this, Newell, real quick, just to let you know what we need, what we need here is we need a hundred percent truth, okay? Now I'm not saying you're giving us a hundred percent truth but what we need is a hundred percent truth. It's just like the AIDS virus. You wouldn't want just a little bit of AIDS virus, you don't want none of the AIDS virus because it taints the whole body. A little untruth taints your whole damn story, okay? So what we need here is a hundred percent truth, okay.[204]

Investigators sometimes trade on the commonplace normative prescription against lying and invoke it to motivate a suspect to tell the truth. For example, a Solano County, California, interrogator told a suspect:

Interrogator: You can't, you can't come in here and lie to me. I don't even want to talk to you if you're gonna lie to me. Okay? You gotta understand something. This is, this, the gravity of the situation is much too serious, and the only thing that, the only thing you got going for you is to tell the truth. Okay? The truth will prevail. You ever hear the term "honesty is the best policy."[205]

An investigator can capitalize on the suspect's anxiety, fear, and emotional turmoil by calling it remorse and by urging him to respond to his emotions and express his remorse by confessing. The investigator may tell the suspect that he will experience emotional relief, if not psychological health, by admitting guilt and getting it off his chest. For example, a Connecticut State Police investigator told an innocent teenage boy:

Interrogator: All right. This isn't the end of the world. I've talked to a lot of people who have been involved in a lot of serious things and they're normal individuals today. Once they got it straightened out upstairs. See?

Suspect: Mm-hm.

Interrogator: As long as you don't get it straightened out in your mind you'll never have a day of peace.[206]

Similarly, Costa Mesa, California, investigators implored a 14-year-old suspect to tell the truth:

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203. Interrogation Transcript of Abney, *supra* note 55, Interview 3, Video 3, at 18.
204. Interrogation Transcript of DePuy, *supra* note 108, at 27.
205. Interrogation Transcript of Andrew Childs, *supra* note 117, at 6.
206. Interrogation Transcript of Peter Reilly, *supra* note 75, at 99.

Interrog. 1: You say, why tell the truth, because you're going to get in the same amount of trouble, well, if that's the way you feel, why not tell the truth? For you, the same amount of trouble, why not tell the truth? Why not get it off your heart?

Suspect: Because there's nothing on there.

Interrog. 1: Yeah, there is. You killed somebody.

Interrog. 2: A guy with a family. Apparently, he's got a daughter, a wife. He's been married for like thirty-four years (inaudible) a long time.

Interrog. 1: I've killed somebody before and it haunts you and I was justified in doing mine. I mean it haunts you for a long time.

The most important reason for you to come clean, because if you come clean, your body comes clean and your soul comes clean and you don't have to live, you've gotten this off of you. Otherwise, you're walking around with this, on top of you and it's going to screw up your whole life, the rest of your life.

And believe it or not, you're only fourteen years old, okay? Fourteen is a long time, from the end of your life. You have, you have a long life to go, Okay? Things will get better. They're shit, right now, I agree. You couldn't be in much more shit than you are, right now, okay? You've got to go up from here. It doesn't get any worse than that.

My personal feeling is that, you cannot proceed down the path, the correct path, if you leave all this stuff with you, you know, so when you get if off your chest, and you get it off your shoulders and put it on ours now, you know, you don't have to deal with it anymore, other than, you know, talking about it or, or, ah, I mean, it's off your soul type of thing. I don't know if you believe that or not, but you have to, you have to like get rid of it, to get rid of it, if you know what I mean. To get rid of the pain, you have to, you have to, you know, tell us about it.[207]

San Diego, California, police emphasized how good telling the truth would make a suspect feel:

Interrogator: Right now you have to tell us. Cause believe me you'll feel better by telling us. You need to get this off your chest. . . . And this is your opportunity right now to feel

207. Interrogation Transcript of John Doe, Costa Mesa, Cal., Police Dep't 23-54 (Sept. 1, 1995). The defendant's actual name is concealed because of his age. *Id.* at 54.

really good and say what happened. You need to take responsibility. You need to feel a lot better feeling about yourself. You have to Jason.[208]

Anchorage, Alaska, interrogators reminded a suspect that confession brings harmony:

Interrogator: You know as well as I do that, uh, by denyin' the truth you're never gonna have peace with yourself.[209]

Investigators sometimes base appeals on a belief in God, imploring the suspect to confess out of religious duty or for absolution. Vancouver, Washington, sheriff's detectives brought God in on their side of the table:

Interrog. 1: What are you gonna tell God, JT? How are you gonna explain it? How are you gonna ask him to forgive you?

Interrog. 2: There's gonna come that time, JT.

Interrog. 1: How are you gonna explain it?[210]

A Boynton Beach, Florida, interrogator urged confession because whether someone is punished on earth hardly matters:

Interrog. 1: Let me tell you something. I'm a deacon in the First Baptist Church in Lake Worth, and the bottom line is this: If you're sorry and you ask the man himself for forgiveness, then you're off the fucking hook because this place here don't mean shit.

What this means is when you stand in front of the man, ask him for forgiveness, you're fine. This ain't nothing but a thing. This is a start up place for us; this ain't eternity. The only thing we can do here is do the best that we can to be the best people we possibly can. And we all make mistakes. And the thing is if you try to rectify mistakes while you're here so you don't live in eternity or fucking hell or whatever you believe in.[211]

An investigator can emphasize that he wants to help the suspect and still operate at the low and uncontroversial end of the incentive continuum. Help in this context is left vague and at most implies an undefined, better emotional state than the suspect is presently experiencing. The suspect need only confess to receive help from the investigator in attaining this better state, as implied by one investigator:

Interrogator: What you really gotta do, is you gotta help yourself now. You really have to help yourself. You really have to help yourself. You gotta get outta this thing where

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208. Interrogation Transcript of Albritton, *supra* note 99, at 76-77.

209. Interrogation Transcript of Susan Johnson, Anchorage, Alaska, Police Dep't 32 (Nov. 29, 1993).

210. Interrogation Transcript of James Thomas, Clark County, Wash., Sheriff's Office 61 (Dec. 20, 1993).

211. Interrogation Transcript of Martin Salazar, Boynton Beach, Fla., Police Dep't 49-50 (Feb. 23, 1996).

you're, you're denying even to yourself, cause it doesn't work and you know it. Now what we gotta do is get something goin' for you.[212]

Or, expressed another way:

Interrog. 1: You're putting out a request, you're putting out a cry for help, and we're here to answer it for you.

Interrog. 2: George, I think it's important for you to know that the way we look at this because, true, we have a different aspect of it, perspective than most people do, and what we're saying here basically is that a mistake was made, we want to try to make that right as much as we possibly can and that in no way, shape, or form are we judging you as a person because we don't have the right to do that. We can't do that because we've made too many mistakes ourselves. You and what goes on between you and God are two different things.[213]

While low-end incentives are unlikely to motivate a guilty suspect who still believes he can avoid punishment, they are sometimes sufficient to tip the scale when directed at someone who recognizes that his desire to avoid punishment is unrealistic. If an investigator has succeeded in framing a suspect's perception as an interaction between two cordial persons rather than as between hunter and prey, the suspect is more likely to allow himself to feel some respect for the values embodied in the appeals, and to desire to appear as someone who shares these cultural prescriptions.

c. *Systemic Benefits: Indirect Threats and Promises*

The psychological benefits of reducing guilt, doing the right thing, showing empathy for the victim's family, straightening things out with God, and appearing honorable in the eyes of the investigator or the community are not likely to elicit a decision to confess from an innocent person for a variety of reasons. One reason is that telling a lie—confessing falsely—violates all of the cultural prescriptions activated by the investigator. Low-end incentives are actually negative incentives to confess for an innocent suspect.

An investigator who is unable to motivate an admission from a suspect by offering low-end incentives has only two choices: terminate the interrogation or introduce stronger incentives. If the investigator focuses a suspect's attention on more concrete incentives, he will likely suggest that there are both systemic benefits for confessing and opposing systemic punishments for holding to denial or remaining silent. The more clearly the investigator points out the supposedly inevitable consequences of admitting responsibility versus continuing denial, the closer he moves toward introducing legally coercive threats and offers of leniency. The investigator's tactic is to paint a picture of

212. Interrogation Transcript of Wright, *supra* note 162, at 10.
213. Interrogation Transcript of Abney, *supra* note 55, Interview 3, at 14.

how the system operates that is deliberately incomplete and not necessarily accurate. It is a picture designed to communicate information that will affect the suspect's decision making in a predictable way. If the suspect were to rely exclusively on the information fed to him by the investigator, a decision to confess would be almost certain.

The investigator's strategy over the course of the interrogation is to press the suspect to rely on the investigator's analysis of reality and the future. Time is on the investigator's side. The cumulative effects of fatigue, stress, fear, confusion, and endless confrontation are likely to increase the investigator's persuasive effect. The logic of the investigator's position is unimpeachable; his task is only to get the suspect to accept his axioms.

Looking at what the investigator chooses to include and leave out of the picture, it is obvious that he is manufacturing an advertising poster for confession. For example, when an investigator describes a courtroom scene and encourages a suspect to imagine how a juror will react to his failure to *tell his side of the story now*, the interrogator leaves out the alternative scene in which a defense attorney tells the jury that the state has absolutely no physical or eyewitness evidence linking the defendant to the crime, that the investigator lied to the defendant about these matters during the interrogation, that the defendant always maintained his innocence and never confessed, and that the state has the burden of proving the defendant's guilt.

Once an investigator starts to clearly identify the benefits of confessing and makes them appear substantial, it becomes difficult to pretend that these follow in some vague, natural manner. While the investigator might begin by telling the suspect that showing remorse generally confers a benefit, he may then promise that he will write in his report that the suspect was remorseful; he may next suggest that showing remorse will influence how the district attorney charges the case; his next suggestion might be that showing remorse will allow the interrogator to be able to say valuable things to the judge and jury; and he might become so bold as to argue that showing remorse will influence the jury's decision about his guilt or innocence and the judge's decision about the amount of punishment the suspect will receive.

The importance of "speaking now" can be emphasized without necessarily linking it to a specific benefit, but it is not likely to function very well as a motivator. In this excerpt from a Salt Lake City, Utah interrogation a suspect is given the opportunity to confess but no systemic benefit was stressed:

> Interrogator: The investigation is ending with your arrest because, uh, of, uh, what you did do. We know how it happened, when it happened. We have the physical evidence, uh, from the scene. And, uh, what we'd like to do right now is give you the opportunity just to explain why it happened. Uh, that's, that's the big question in our minds right now.[214]

A San Diego, California, investigator stressed the importance of pleasing

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214. Interrogation Transcript of Adams, *supra* note 100, at 1.

the authority figure. Confessing was more clearly associated with a benefit—appreciation from the investigator because it was personally important for him to understand what happened. But the inducement of approval from the investigator was interpersonal and slight. The investigator made no link to anything that was a significant benefit for the suspect:

Interrogator: Now just, just listen to me okay? Now I've talked to an awful lot of murderer's, okay? And sometimes I can understand where they're comin' from. But people have to be truthful with me before I can even, even begin to understand it. And you know, we're, we're gettin' a little truth out of you, but we aren't gettin' the whole truth. Now, just listen to me. I can understand you bein' scared, nervous, whatever. I can understand that. That's a natural phenomenon.

But like I keep tellin' ya, the truth, the truth, and what you're tellin' us isn't jivin'. We know things! We are giving you an opportunity to tell us the truth. Ya know? Instead of bullshitin' or lyin'. Ya know. We know about you, Mr. Nance. We could write a book about you. We know almost everything there is to know about you, with the exception of Nancy White.

Suspect: Well I did not kill her.

Interrogator: Tell me about it.[215]

If merely asking for information doesn't work, then an investigator may try to delude a suspect into reasoning that confessing at this point is necessary because it is to his advantage. This progression often starts with announcing that this will be the suspect's *only* or *last* opportunity to tell his side of the story. In the following Sacramento, California, interrogation, the investigator pressured the suspect to decide whether to admit guilt by suggesting that time was running out:

Interrogator: This is a time for you to tell the whole truth, okay? Don't come part way, and don't tell me a story that I can't believe and other people won't believe. Like I told you, I can only go so far. I won't sit here and listen to you lie again and again to me and my patience will run out. And when I go out that door, you won't have anybody else to tell this story to, and who's gonna believe you? Right now I'm listening to you, I'm trying to do the thing that's right here and the thing that's right is to tell the truth and you know it.

Suspect: I only

Interrogator: Not part of the truth, not a piece of the truth, not a little bit here and a little bit there and then you change your

215. Interrogation Transcript of Nance, *supra* note 95, Tape 2, at 4-5.

> mind. Like I said, it only goes so far, I can only tell you again and again and again tell the truth, tell the truth, tell the truth. And each time you lie to me, it takes a little bit of my patience away. A little bit, and little bit, and a little bit. And I'll step out of here and I'll think about it and I'll come back in here and talk to you. But I'm not gonna be here and you're gonna have to live with what you said. Because I won't ask you anymore. She was going away from you wasn't she?[216]

This attempt to pressure an admission alluded obliquely to the advantages of acting immediately—"you won't have anybody else to tell this story to, and whose gonna believe you?"—with no reference to the advantages of being believed. In contrast, a detective in Flagstaff, Arizona, not only emphasized the time pressure on the suspect, but also unambiguously spelled out the end-of-line benefit of immediate compliance:

> Interrogator: You're in a lot of trouble, you know that.
>
> Suspect: Yes I do.
>
> Interrogator: Uh, this sit down today, right now, okay.
>
> Suspect: Uh-hum.
>
> Interrogator: Will probably be the last time you're gonna talk to both of us. You know why?
>
> Suspect: Why?
>
> Interrogator: Because you're gonna go to a judge today, right, for your initial appearance. The state of Arizona is gonna provide you an attorney. They're not, he's not gonna let you come and talk to us.
>
> This is gonna be your last chance for any type of, uh, oh when, uh, Rick talked to you yesterday, when I walked out of the room, where we could negotiate time and charges, this right now is the last chance, because if, ok I told you, I don't quite believe your story, and the investigation doesn't stop today, it starts.[217]

Few investigators are as open about the strategy of offering systemic benefits as was this detective. But the strategy is nothing more than a shell within which to conduct a negotiation and bargain about outcomes for the suspect. It must be conducted obliquely because of the legal constraints on what is permissible to use as a motivator, but it must also communicate the offer and the obligation; otherwise a bargain will never be reached. If, as in these interrogations, a recording is being made, a difficult communication problem is created. The Flagstaff investigator just ignored the recording and spoke forthrightly. The confession he obtained was suppressed.

Although investigators are presumably aware of the prohibition against

216. Interrogation Transcript of Schmitt, *supra* note 85, at 132.
217. Interrogation Transcript of Richardson, *supra* note 186, at 124.

making promises and threats, they do not always respect it. As psychological interrogation has developed over the last fifty years, so have more subtle tactics that accomplish the prohibited goal by less obvious means.

In the interrogation of an adolescent in Solano County, California, a detective laid out a subtle version of how the system supposedly worked. Before giving this speech, the detective had coerced a witness statement from another young man who had also been arrested, and then was offered a way out by changing the story of what he had seen. The young man agreed that he had witnessed his friend deliberately push another boy into a passing train, something he initially said had not happened. The coerced witness statement had already been reported to the principal suspect as the main piece of evidence that would seal his fate:

Interrogator: The way the system works is I am, you know, contact you, talk to you. I talked to everybody. Then I send the whole thing off to the um, District Attorney and the courts and they evaluate it, okay? When we're talkin' here tonight, you know, I've yet to go back to the District Attorney and tell him one of two things, alright? And that's it. I can tell him, "You know, I talked to um, to Mike tonight after having talked to ninety percent of the people you know, that were out there, including two people that were standing within ten feet of him when um, when Mr. Mockus got hit by the train and everybody tells the same story, right down to the wire.

But when I talked to Mike, you know, he told me something that was totally vague, you know, and ends didn't meet ends and there was just, you know, for whatever reason, he's, he's not being honest and you know, there must be something, you know, some deep reason why he doesn't want to be honest, you know.

In other words, he's just sayin', you know, 'screw you guys' . . . . I can go to them and I can go, "Look, you know, Mike has been in very minimal trouble. He um, came forward to me. What he told me is the truth. He understands that he made a mistake, but you know, he's ready to deal with the problem that he's created and he's been honest about it. And here's the reason why this happened and he told me what was going through his mind. Why this thing happened. You've got to understand the gravity of the situation, warrants your honesty. It warrants complete total honesty and nothing else. Because you're going to have eight other people that are going, that are going to go up and say exactly what happened and then your story, this is the only chance that I'm gonna talk to you. I'm not gonna keep coming back and talking to you. I don't need to and if this is your initial, our initial contact, first time I met

> you in my life and it looks a lot better for you if you're honest on our initial contact and I can go to the DA's office and say, "You know, he just got himself in a little deep. But he's honest about it and here's the reason this thing's happened and he explained it and it makes sense to me."[218]

In the following exchange, an Oakland, California, suspect explained how the investigator's emphasis on psychological benefits and sentence reduction was effectively communicated to him and had caused him to falsely confess a few hours earlier:

Interrogator: Could you tell us why you were telling us that—why you don't remember if you must have killed her.

Suspect: Cause you were saying that I had to search (pause) to relieve my conscience and that I would never be able to live. I'd sit in jail and rot away from the inside if I could not remember. And if, and not even remember 'cause you felt that I could—but I could not remember what had (pause) happened.

Interrogator: Did we tell, you would rot in jail for that?

Suspect: Yeah. From the inside I would, I would. Eat away from the inside.

Interrog. 1: I think the term was that we told you that something like that would gnaw at you and eat at you from the inside.

Interrog. 2: Okay, that, that is different from—rotting in jail. We are talking about it would gnaw at your insides. Is that right, or it would play on your conscience?

Suspect: But it is also, I mean, prison or jail was mentioned and (pause) the idea that there was a way out and that was by (pause) cooperating and I was cooperating. But not to what you, not the answers that you wanted. And every time I told the truth.[219]

As with every tactic that communicates an offer of a material benefit for making an admission, emphasizing the systemic consequences of admission can be done directly or indirectly. Over the course of a lengthy interrogation an investigator who is trying to get this offer across is likely to revisit the subject. With each return to the subject the investigator is likely to clarify the meaning of his suggestion that a benefit will follow admission. The following excerpts from a Sacramento, California, interrogation involve a man who had already been arrested for child sexual abuse:

Interrogator: You know, Robert, while you were in here talking to your wife, I'm talking to some of those other officers

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218. Interrogation Transcript of Johnson, *supra* note 138, at 24.

219. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 3-4.

that were talking to the kids. You know, their stories are pretty believable, and, you know, you're going to need some counseling. You really are, you know, and the way to start out is you got to be strong. Okay? You got to admit what you've done, and, and you got to start on your way to recovery. That's the only thing that's going to get you any shorter time periods or anything like that. You have to recover. You can't continue to do this. You know what I'm saying?[220]

The suspect continued to deny guilt. The interrogator responded by stressing that evidence from several children was conclusive and then emphasized again the benefits of making an admission:

Interrogator: [D]eny all this all you want. That's not going to do you any good. I mean cause those kids aren't lying. And the only thing that's going to help you . . . .

Interrogator: The thing is to talk it out. Get it out of your body now, you know, get it out, get a counselor, get your life back on track.[221]

After a few more minutes, the interrogator spoke more openly about the beneficial consequences of confessing. The suspect expressed his concern about outcomes:

Interrogator: If you want that family, you're going to have to pull yourself together. You're going to have to be strong. Okay? You can start today or else you can go sit in jail and think about it. I don't care.

Suspect: Where . . . where do I go?

Interrogator: It doesn't matter to me because it's your—you go right here. You start talking right here. You start on your way to recovery. The District Attorney knows that you're on your way to recovery. You're not putting these kids on (unclear). You're not just thinking about yourself. Okay? All right. That's how you start. And then no matter what comes of it. You know, the main thing is that you recovered. Okay? That you get that counseling. All right? All right? Okay? So you can become a productive person.[222]

The defendant apparently began to consider the value of the offer and tested whether the investigator could deliver his end of the deal. After again demanding an admission, the investigator said:

Interrogator: All right, Robert. Well . . .

Suspect: Well what am I going to say? You say you can get me

220. Interrogation Transcript of Robert Fitzsimmons, Sacramento, Cal., Police Dep't 29 (July 10, 1996).

221. *Id.* at 31.

222. *Id.* at 36.

into recovery and counseling, I guess?

Interrogator: Yeah.[223]

The interrogator clarified the advantage of the admission/counseling deal in the following exchange:

Suspect: Still have to go to court, right?

Interrogator: That's up to you.

Suspect: (Unclear) If I don't go to court there's got to be a set time.

Interrogator: A set time for what?

Suspect: For jail time.

Interrogator: For jail time? Yeah.

Suspect: Prison or wherever the hell I go.

Interrogator: That doesn't mean that you have to go to court. Of course a judge would have to send you, yeah. Or . . . put you in a program for . . . you know . . . to make sure you get your treatment that you need. All these things will be taken into consideration.[224]

During the ride to the police station, the arresting officer told the suspect that child molesters are likely to be killed in jail and that he was unlikely to survive. Not surprisingly, the suspect became leery about going to the county jail. The investigator used every mention of leaving or being with family to persuade the suspect to take the deal:

Suspect: There's no way I can leave.

Interrogator: Yeah that's true. There's only one way you can leave. One way you can only leave. One way. And that's to get yourself together. Get your life started back, get this thing behind you. That's the only way you're ever going to walk out of here. Is that true?[225]

The investigator repeatedly emphasized that the system valued rehabilitation above punishment and that rehabilitation was available once the suspect confessed:

Interrogator: Well what we're trying to do is we're trying to fix things. What happened in the past has already happened.

Suspect: Right.

Interrogator: You know. That's like in, in baseball. I mean you throw the ball, there's nothing you can do to pull that ball back. You just got to accept what happens and make the best of it. And that's what we're here to do today is make the best of this situation and try to fix it so it doesn't ever happen again. Because when you leave

223. *Id.* at 37.
224. *Id.* at 42.
225. *Id.* at 52.

> here, you want to have a clean slate. You want to start fresh.[226]

Eventually, the investigator succeeded in getting the defendant to accept the deal—his best choice was to admit to sexual contact with the children at this point and thereby get counseling and less time in jail. In a phone conversation from the interrogation room, the suspect explained to his wife what would happen if he confessed or remained silent:

> Suspect: Then they, well they'll put me on the counseling thing. . . . I just go to the jail I guess. I don't know for how long.[227]

An investigator may focus the suspect's attention on how a prosecutor, judge, or jury will review the case and determine his punishment, how they will react to the suspect's litany of denials, and how they are likely to be affected by a demonstration of remorse and/or confession. For example, a San Francisco, California, detective told a suspect:

> Interrogator: Here's the situation, I'm just here to be your conduit, to let you tell me why it happened.
>
> Suspect: Well you ain't gonna be the prosecutor.
>
> Interrogator: Well, we're gonna be the ones that talk to the prosecutor, all right, and really it's just a matter was it manslaughter, voluntary, involuntary, second degree, first degree.[228]

While working on an innocent young man who had already been persuaded of his guilt, a Connecticut State Police investigator focussed his attention on the importance of creating the right impression:

> Suspect: Do you think when this comes to the court it will be considered temporary insanity?
>
> Interrogator: Oh, Pete, don't worry about courts. All right? Don't worry about things like that.
>
> Suspect: That's all I can think of.
>
> Interrogator: The thing ah, to help yourself right now. In other words they got to present all this stuff before the judge, you know?
>
> Suspect: Mm-hm.
>
> Interrogator: If they present what they have right now, before a judge, your—there's no doubt in my mind that the judge is going to think he's got a cold blooded killer. All right.
>
> Suspect: Mm-hm.
>
> Interrogator: Instead of somebody who went off the deep end for a

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226. *Id.*
227. *Id.* at 73.
228. Interrogation Transcript of Anderson, *supra* note 114, at 3.

few minutes. Okay?

Suspect: Right.[229]

The investigator's goal is to motivate a suspect to offer an account that simultaneously admits his involvement but places him in the best possible light. By doing so, the investigator encourages the suspect to reason that he will receive prosecutorial, judicial, and/or juror leniency. Investigators studiously avoid educating suspects about the realities of the justice system. An investigator in Flagstaff, Arizona, fashioned a view of the future in which a female suspect would not be able to convince a jury to believe her story even though she became involved only after the killing and as a result of her husband's threats:

Interrogator: Trena, put yourself in a juror's shoes. I'm explaining your story to them. Are they gonna believe you? This happened at the burn scene and you were forced, you felt you were threatened that you were gonna end up in the trunk, everything is done like you explained, then you go back and have sex. That's gonna be a big, big point. That's gonna be a big point. Put yourself in the juror's shoes. Why should they believe you? I don't believe you.[230]

A San Diego, California, investigator flipped this argument 180 degrees and told the suspect that if his story was sad and compelling enough it would help. The investigator communicated the idea by referring to a case that supposedly resulted in jury nullification:

Interrogator: You better believe it counts. It does count. If you've got twelve men or twelve, yeah six women and six men in that jury box and they're listening to that what, what, what's being said. I'm gonna tell you what. It does weigh a lot. It does weigh a lot in terms of, in terms of what, of what you know, of what goes down and what they're thinking. It does weigh a lot, man. Again that's what, I, you know, that is just from past experiences of being in court and everything. I mean I've sat in court and I'm going, "God damn it, how in the hell could they not convict this guy of fucken' first degree murder." Well what happened was they ended up feeling more for the guy or the girl or whatever because of the certain factors that led up to the incident.[231]

A San Mateo, California, investigator explained that since the suspect would not be testifying at his trial, now was the time to get his account on the record. The interrogator invited the man to give any self-serving story that he wanted to tell:

229. Interrogation Transcript of Reilly, *supra* note 75, at 283.
230. Interrogation Transcript of Richardson, *supra* note 186, at 126.
231. Interrogation Transcript of Nimblett, *supra* note 137, at 32.

Interrogator: I got a question to ask you. A few months from now when you're sitting in front of a jury, the man that saw you in the morning and the night before comes up and tells the truth of what he saw. You're sitting there, now, that's what happened, but he didn't, he's not telling the reason why. You think a jury is going to listen to that.

Now, is your time to bring up that reason. Now is your time to tell your side of the story, so that everybody's gonna know that you're not gonna be talking, you know, just from what this guy has to say, this witness. Get it on the books now, so that, you know, they're gonna know. "Hey, wait a minute, okay. I made a mistake, but this is the reason for the mistake. I'm willing to tell the truth to as exactly what took place and why. Yeah, I shot him." It might have been defensive, it might have been an accident. Do you think that a jury's gonna listen to an excuse six months from now?[232]

In a Jackson Hole, Wyoming, investigation, an interrogator told a defendant who had just been arrested for child molesting the following:

Interrogator: You recall you had a problem. You knew you had a problem, when you were at the Triangle X. That's why you are no longer at the Triangle X. What it boils down to is we want to get to the root of the problem, exactly what happened as far as what you did with those, those three or four girls, or whatever.

The details need to be brought out. And if you're not going to bring out the details, what I have to go do is go back and tell the judge, tell the prosecutor that he doesn't—he knows he had a problem there. You want to—you're starting to get some help. I mean, tell me, tell Bret, tell the judge that you are telling the truth. Tell the prosecutor that you're telling the truth and we don't have to deal with it anymore . . . [233]

The investigator went on to suggest that the results of an admission at this point would be beneficial:

Interrogator: Tell us a little bit about, about the number of times, the number of kids that were involved here, so that I've got some way to go back to the, to tell the people that I'm dealing with, that, you know, the prosecutors and the judges, so that I can say; yeah, this is it, there's no more, there's not going to be any more surprises, and I

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232. Interrogation Transcript of Bernard Knight, East Palo Alto, Cal., District Attorneys' Investigators 26-27 (Sept. 24, 1992) (Case No. E92-11302).

233. Interrogation Transcript of Russell Stone, Salt Lake City, Utah, Police Dep't 46 (Dec. 5, 1995).

believe that Russ is telling us the truth. And I want to be able to go to them and tell them that they're telling us the truth, that you're telling us the truth. That will, that will clear the whole issue for them, and we're not going to — you know, as far as what's going to happen with you, you've got to figure in your, in your own mind.

If you've got a guy on one hand that's being truthful, and another guy that you think's holding something back, how are you going to deal with this person? If you got, if you've got somebody that's truthful and somebody that's deceitful, how are you going to deal with people coming from different angles, different directions? And that's, that's one way you're going to have to consider for yourself as to how you're going to deal with the case. Do you understand.[234]

It would be difficult to defend any implication from these remarks other than that a contrite, remorseful defendant admitting guilt and asking for mercy and help from the prosecutor and judge will receive it. Although the investigator did not guarantee the result, his tactic was likely to lead the defendant to conclude that a benefit would almost certainly follow.

An investigator might attempt to effect a suspect's decision making by leading him to believe that the jury is going to be harsher on him if he continues lying. For example, Vallejo, California, investigators told a suspect:

Interrog. 1: It's over, we gotcha, but what ya gotta understand is the way the system works. We're doing the investigation. I wanta be able to set forth the complete investigation now in front of the District Attorney, and say these are the people involved, these are what their involvement was, and make your decisions on what you file, and we'll go to court.

But like it is now, they're saying Eugene's doing this, this and that, but Eugene's sitting back saying no I didn't do nothin, and it makes themselves, it makes them sound like they're being truthful, and to be quite honest with ya, there's more there than they're telling us, and you can tell us what's really there.

Interrog. 2: Eugene, Eugene, don't you know, I mean I know you're smart enough to realize that if you lied to us, we can prove you're lying. That's just as bad if not worse than standing up like a man and admitting what you did.

Interrog. 1: Absolutely.

Interrog. 2: Because people are gonna sit in judgement of you one

234. *Id.* at 50.

> day on this crime, and they're gonna look at the fact that you lied, and what are they gonna say about why Eugene lied. There's no reason he would lie if he wasn't covering up for something, and unfortunately those people are not gonna know for sure what you're covering up, only you know that, cause it's in your mind. They don't know if you're covering up just your participation in the robbery. They don't know if you're covering up the fact that you ordered the hit. They don't know how much you're covering up. They just know that you're lying and you're covering up, and then it's just as damning if not more damning than the fact that you sat right there and tell us exactly what happened.[235]

A Maricopa County, Arizona, sheriff's detective told an innocent Temple murder suspect to consider how the judge would treat an admission and expression of remorse. The investigator's strategy was apparently designed to lead the suspect to believe that some self-serving account of what was an execution-style mass murder and robbery would garner leniency:

> Interrogator: Remember what I told you judges are pretty reasonable people ya know they weigh facts and they examine things and they try to be unbiased and they weigh all the evidence . . . What do you think their decision would be in a situation like that as opposed to ya know hey what happened here? I messed up I was some place I shouldn't been ya know something happened I didn't know it was gonna happen I'm sorry for what happened and I didn't have any control over it. What do you think the outcome in a situation like that's gonna be then opposed to the other where the guy just don't care? . . . You know the key factor in all this is hey, I'm sorry, I'm sorry.[236]

d. *More or Less Explicit Threats and Promises*

If thinly veiled suggestions about how to manipulate the system do not work, an investigator may decide to more openly communicate that certain harms follow from continued denial and that there are benefits available for confessing. The investigator may suggest that he has the power to deliver the outcome implied in his comments or that it will certainly be delivered down the line by other criminal justice officials. Either way, the suspect is expected to conclude that he is certain to receive one or the other of the two alternatives that the investigator associates with the decision to confess or to remain silent. If an investigator decides to shift to these more direct methods of com-

235. Interrogation Transcript of Livingston, *supra* note 113, at 79-80.
236. Interrogation Transcript of Nunez, *supra* note 54, Tape 3, at 12-13.

municating threats and promises, his tactics will appear straightforwardly coercive.

For example, Vallejo, California, interrogators made the consequences of admission versus denial clear:

Interrog. 1: Again we're right back into a first degree murder situation, where you just walked in, premeditated, I'm gonna get that son-of-a-bitch, what you told Vance, and then it looks like to us that you just went back there the next day, opened up, walked in and got a man, he was probably sleepin on the couch, cause he's on the couch, lying on the couch, and started bangin his head in.

Interrog. 2: From the outside, from our side looking in, it just looks like cold blooded murder, and it doesn't have to be that way.[237]

San Diego, California, interrogators told a adolescent female who was suspected of murder that failing to confess would leave her in big trouble:

Interrogator: You're, you're in trouble. Okay?

Suspect: I know.

Interrogator: And you're in big trouble and, and the—You're in such big trouble that this is the only time you can help yourself. Cause if you don't tell me, you know, what this situation is or what happened over there, you're in big trouble.

Suspect: (Sigh).

Interrogator: And, you know, you're, you're, it's only your bacon you're saving right now. It's nobody else's.[238]

Sometimes interrogators suggest that the crime was obviously committed by someone in need of psychiatric care rather than imprisonment. They lead the suspect to understand that if he admits guilt, he will receive hospitalization and care but that if he continues to deny guilt he will receive prison and punishment. For example, a Connecticut State Police investigator told a teenager who had no memory of murdering his mother:

Interrogator: Don't be afraid to say, "I did it." (garbled).

Suspect: Ya, but I'm incriminating myself by saying I did.

Interrogator: We have, right now, without any word out of your mouth, proof positive.

Suspect: That I did it?

Interrogator: That you did it.

Suspect: So, okay, then I may as well say I did it.

Interrogator: Yes.

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237. Interrogation Transcript of Vince Yarborough, Vallejo, Cal., Police Dep't 20 (1994) (Case No. 94-02881).

238. Interrogation Transcript of Danielle Barchers, San Diego, Cal., Police Dep't 493 (Sept. 24, 1995).

Suspect: Okay.

Interrogator: And by so doing, we take the first step towards getting you the kind of help you need. That's all.[239]

Later, the investigator made clear that the offer of help meant keeping the young man out of prison:

Interrogator: Now, let's get the problem solved. Let's, I mean, let's take some positive action to get you some help. I'm telling you I don't want to see you hurt. I don't want to see you in Somers. I don't want to see you in prison. That's not what I get paid for. I don't get paid by the number of people I put in jail. Neither does he. And, neither does Sgt. Kelly or Sgt. Schneider. Or anybody on our whole State Police Department. That's not our (garbled). If we can help you or any other citizen or any kid, that's what we're paid for and that's what we're trying to do. Now somebody is dead. You are responsible, we know. We can prove it with extrinsic evidence. Now, we're telling you that we are offering you our hand, take it. Does that make sense to you?[240]

Flagstaff, Arizona, interrogators told an innocent suspect that because he was abused as a child, he was more likely to grow up to be criminal and thus needed help, not punishment:

Interrogator: That's basically one of the things that we always try to tell people who are involved in molestation, as well as children, they must talk about it, they must get counseling, they must get it out because if they don't, what happens is what happened to you. You didn't get the help you needed on that. And I truly believe that you are telling me that. And I know this for a fact because I have seen statistics that people who are molested as children have a higher percentage rate of becoming involved in a negative way with law enforcement later down the road. In other words, they commit crimes. Because they have got all this great, great, great, great mental turmoil inside of them.[241]

Shortly after this exchange, the investigator reported the following:

Interrogator: My superiors did not agree with the way that I wanted to handle this thing. You can believe.

Suspect: They want you to book me and charge me.

Interrogator: That was discussed. And I told them no, I was not going to arrest you, and I haven't arrested you, that I wanted

239. Interrogation Transcript of Reilly, *supra* note 75, at 191.
240. *Id.* at 250-51.
241. Interrogation Transcript of Abney, *supra* note 55, Interview 3, at 16.

> to give you the opportunity at this point to tell me things like you have already told me. You know, who could sit on a jury and say that, yeah, this man committed a crime, but look at what he was a victim of. Look what happened to him when he was a child, and look at all the times he's cried out for help you know.[242]

A Palmer, Alaska, police investigator offered psychiatric help to a woman whose infant son had just died for not yet determined reasons. But first she had to agree to the investigator's demand to confess that she killed her infant son.

> Interrogator: I want to see if I can get you whatever help I can get you and this is the lady right there that might be able to help you. But you got to tell me the truth now. Okay?[243]

Investigators control and limit the *reasonable* alternatives the suspect will likely consider by defining the problem as a simple two-choice situation. An investigator may ask a suspect whether he is a cold-blooded murderer or just a person who made a mistake and accidentally caused the underlying event. This technique depends on ordinary human information processing and reasoning capabilities.[244] By framing a suspect's alternatives as admitting to either a premeditated crime or an accident, an intellectually normal individual would infer that two different levels of sentencing will follow.

Even when it makes no difference whether the killing was planned or unintended, as in felony murder cases, interrogators lead suspects to believe that accidental homicides are a lower level of offense and therefore less severely punished. For example, Vallejo, California, police told the following to a suspect in the investigation of a robbery in which three guards were executed:

> Interrog. 1: Eugene, as we were saying before, now this, this person here is, is going to testify to what he told us, and what he told is, is something that we went and looked into. In other words we're not gonna sit there and just take his word for it. We're gonna look into this, and we're gonna see if we can prove through other means what he is telling us is true. We've done that Eugene. We've done that through other people's statements. We've done that through some physical evidence at the crime scene, okay. As you saw when we first started this interview out with him, uh Mr. Highsmith and uh Mr. Young and his attorney sat down and went over some legalities. Uh, Young realized that he's going to come straight up

242. *Id.* at 19.

243. Interrogation Transcript of Beverly Huckstep, Palmer, Alaska, Police Dep't 5 (Dec. 21, 1992).

244. *See* Kassin & McNall, *Police Interrogations*, *supra* note 6; Nisbett & Wilson, *supra* note 39; Harris & Monaco, *supra* note 39.

truthful with us.

We believe he's being truthful until we can prove differently. We proved a lot of the things that he said is true, and as we told you from the beginning, Eugene we did search warrants at a lot of houses. We did a search warrant at your house. We did search warrants to your van. Your phone number is in his roladex. He has your phone number. We can show that association. We, we will talk to James. James knows you. James has your phone number. James is willing to testify to that. We have that on uh video tape as we're talkin to you. We've talked, we've talked to Victor.

What we're trying to tell you here Eugene is whatever happened that night, whatever involvement you were in that night, whatever intentions you had, we don't know, but sitting here and talking to you in the last two years, and the interviews we've did with you, I don't believe that you necessarily knew that this was gonna happen, or end up the way it ended up. I don't think that was the last thing on the minds. And unfortunately it did, but now we're at a situation where the only way we can get this settled once and for all, and get this off your mind, off your chest, off your shoulders, and everybody else's, cause as you can see we're not grasping for straws, like we did when we first interviewed you. We've corroborated a lot of things Mr. Young said.

This is your opportunity now to tell us exactly your side of what happened. What was the plan? Why did it go bad? And as you can see, he's puttin everything off. You're the mastermind, you planned it, you did this, you did that.

Interrog. 2: Not only that, but the big thing Eugene here is that he's saying that you ordered the killing, at least the first guards, you said it may be necessary to kill that first guard in order to cover up how you got in, okay.

Now we are not so naive. We been doing this job a lot of years. We're not so naive to think that when we talk to someone that there's not a good chance that he may slant what he says a little bit to make himself look a little bit better. Now there's no doubt this man was in there and did the crime. He's gonna plead guilty to first degree murder. He knows a lot about the inside layout. He knows about the doors. He knows a lot of other stuff that I cut out of that tape. There's gonna be absolutely no doubt to the jury or to the judge that this man participated in the crime, and he's telling the truth about

that.

The real issue here that we're hoping to get from you, and the only thing that you can tell us in your own welfare here, is there's not gonna be any doubt that you set up this robbery. The question is, did you intend for those guards to get killed, or did you intend it to be a straight out robbery? You're the man that has to tell us that on your behalf, cause you've seen what this man said.

Defendant: Exactly.

Interrog. 2: And if you don't tell us, nobody else is going to speak up for you Eugene, and this is your opportunity to, to do that. Now it's one thing in today's day and age to set up a robbery. We know that you were having financial problems, okay, a lot of money there, a lot of temptation, a lot of people get themselves into a position in life to where they feel desperate enough to do something as far as stealing. Not a lot of people get so desperate that they're willing to kill people for it. There's thieves and there's murderers. Thieves are not good people. They're a hell of a lot better people than murderers.

Now you need to tell us were you gonna be a thief that day, or did you intend to be a murderer? Did you intend for those guards to get killed Eugene, or did you just want it to be a robbery?[245]

e. *High End Threats and Promises*

If a suspect fails to understand or act on the choice before him, an investigator may use even heavier-handed tactics to communicate an expectation of significant differential punishment outcomes for silence and confession. Some boldly assert that the suspect will be charged with the most serious offense possible if he does not confess, but if he admits guilt he will receive a lesser punishment. Presenting these alternatives to a suspect who already believes that there is sufficient evidence to arrest and convict him will coerce confessions from the guilty and false confessions from the innocent.[246] It makes no difference if the evidence exists or is fabricated, as long as the suspect believes that the police have it. It makes very little difference whether the suspect knows he is guilty or knows he is innocent. If the tactics of the interrogation have their expected effects, his attention will be focused on the choices the investigator has placed before him, and he is likely to confess if he would rather avoid the death penalty and receive less, rather than more, punishment.

With this degree of clarity and at this level of threat and/or promise, the

245. Interrogation Transcript of Livingston, *supra* note 113, at 36-38.
246. Leo & Ofshe, *Consequences*, *supra* note 1.

coercive nature of the interrogation is fully revealed. No one knows how often threats of this sort are delivered in unrecorded interrogations because there is typically no way to absolutely resolve the swearing contests that arise between suspects and investigators. Sometimes, however, it is possible to establish that a death threat and/or offer of leniency was made during the unrecorded portion of an interrogation because the suspect makes a reference to it in the recorded portion. When this happens, an embarrassed investigator is likely not to challenge the remark, realizing that to do so while the tape is running only makes matters worse.

For example, in a largely unrecorded Pompano Beach, Florida, investigation, two detectives threatened a suspect with the electric chair if he did not accept the deal they offered. Only the final portion of the interrogation (i.e., the confession statement) was recorded. The recording captured the suspect making two separate remarks that confirmed the deal and the death threat. Both interrogators ignored his comments when he brought up these subjects. Early in the recorded portion of the interrogation, the suspect made reference to the offer that the investigators had made off-tape:

Interrogator: Okay and you're freely talking to us today.

Suspect: Yes.

Interrogator: Okay. Uh, okay. We're talking about a robbery that turned into a homicide that happened at the, uh, at the foodmart.

Suspect: Yeah.

Interrogator: Okay.

Suspect: I think I'll plea bargain, right? I'll plea bargain.

Interrogator: Well, you tell us the truth. That's all we're interested in right now and what occurred here.[247]

At the conclusion of the interrogation, one of the detectives made the mistake of asking the suspect why he confessed:

Interrogator: Why you giving this statement? Is it the truth?

Suspect: It's the truth.

Interrogator: OK.

Suspect: This man had me frightened of the electric chair.

Interrogator: Excuse me.

Suspect: Frightened of the electric chair and all of that.[248]

Due to the significance of the Phoenix Temple murder investigation, Maricopa County, Arizona, sheriff's detectives decided to record their interrogations. The interrogating detectives nevertheless relied on death threats despite the recording:

Interrog. 1: You've been sentenced before . . . you've been sen-

247. Interrogation Transcript of Shandy Huggins, Pompano Beach, Fla., Police Dep't 3 (Feb. 10, 1995).

248. *Id.* at 14.

tenced before for little things and you know that if that judge gets pissed off at you it's a lot different than if he's not. And you right now you can make a decision to make a difference about how the judge feels about you and you need to take it.

Interrog. 2: What if he might send you to the gas chamber, and I don't say that to scare you, Dante, but in this situation that's a real possibility and I'm not gonna sit here, Wayne's not gonna sit here and lie to you about these things cause that's not gonna serve us any purpose.

Interrog. 1: So you're sitting here thinking it's us against you, that's not the case. We're here to help you out.

Interrog. 1: You need to think ahead to that sentencing time and have you walk before that judge, that's something to think about. Because you've been there before, think about how it was, think about how it's gonna be.[249]

The detectives followed immediately with the suggestion that the nine murders could be characterized as an accident, which would supposedly benefit the suspect. Eventually he falsely confessed to all nine murders.

Interrog. 1: You've heard about premeditated murder?

Suspect: No.

Interrog. 2: Have you heard about that?

Suspect: No. What's that?

Interrog. 2: You know first degree murder, second degree murder?

Suspect: Yeah.

Interrog. 1: Premeditated murder is the worst kind, I planned it, I went in and killed 'em. You're the only one that can say that's not how it happened. You're the only one that can help yourself out and say no hey wait a minute, yeah I was there but hey it wasn't planned and that is (inaudible) truth from me was it planned or not, alright? You understand the difference, I know you do. Cause you're a smart person (inaudible).

But we don't think it went down the way you planned it, that's the key for you. I don't want to see you, because you know, you probably don't trust police, you know, you grew up on the streets, you've been in prison you probably don't trust us, okay, that's natural for you. But you've got to believe me when I'm tellin' ya, the difference between premeditation, go in there to do this and go in there and it happens, are bigger then, I'm sure you understood. If you understood that you'd come clean you really would (inaudible) and you're

249. Interrogation Transcript of Parker, *supra* note 54, Tape 2, at 13-14.

gonna feel better once you do.

Suspect: Oh I understand but there's nothing to come clean with.

Interrog. 1: No doubt in my mind, no doubt in his mind and we have the exact same facts that the jury's gonna have. Okay? Exact same facts. They're gonna get everything we've got. And they're gonna know the answers just like we do. The only thing that they're not gonna know is did he plan it, did he plan to kill 'em or did it just happen. And . . . and we've been in enough juries to know they think the worst unless somebody says no that's not how it happened.[250]

Sometimes guilty suspects can be coerced into confessing in order to save an uninvolved relative. In the investigation of a high profile gang-related freeway shooting in Los Angeles, California, a young man had been identified as the shooter by another gang member. During his interrogation, he refused to admit to the crime when confronted with both true and false co-perpetrator eyewitness evidence. The investigator's response was to threaten the suspect with arresting his brother if he did not admit responsibility for the murder. The suspect's brother was not a gang member and had not been in the van at the time of the shooting.

Interrogator: [T]hey've implicated your brother. They've implicated you. You telling your mom for a fact Avan didn't do anything. That only leaves one other person and that is you.

Suspect: Then book me.

Interrogator: Oh, I am. What I'm trying to avoid is having to book your brother too.

Suspect: Why do you have to book him? Just book me.

Interrogator: I can't, I have a guy who says he was there, says your brother was there.

Suspect: What if I tell you he wasn't there?[251]

The interrogator continued:

Suspect: No. You even said yourself all the people in the van are in the same boat or whatever.

Interrogator: Yeah.

Suspect: Whatever.

Interrogator: Yeah. You guys are, but the thing is, is that so is your brother, you know. And he might not have to be—

Suspect: How?

Interrogator: —Is what I'm saying.[252]

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250. *Id.* Tape 3, at 3.

251. Interrogation Transcript of Leo Burgos, Compton, Cal., Police Dep't 45 (Apr. 4, 1996).

252. *Id.* at 46.

The interrogation kept returning to the subject of the younger brother's fate:

Interrogator: It's like I tell you. You were there. I know you were sitting in the van. I know you shot. I know where you got the gun. I got some of those guys in jail. If I didn't have all that, Leo, I wouldn't be here with you. You wouldn't be in here with me. You know what I mean? And you're holding out for the wrong reason, because these guys didn't hold out. No, they told the truth.

Suspect: You sure my brother will go home tonight?

Interrogator: Okay. If the truth is that your brother has nothing to do with it, yes, your brother will go home, okay. Because, first of all, I want to believe your brother, and to be honest with you I want to believe you.

No, no. See? I'm telling you if you tell me the truth and it makes sense to me I will believe it.[253]

The suspect wanted to be absolutely certain the deal was in place—that if he admitted responsibility his uninvolved brother would indeed go home.

Interrogator: So, um, like I tell you, you know. It's just the truth I'm after. I'm not asking you to roll anybody out. I'm not asking you to say, "Hey man you know it was so and so's gun. I got it from —," because I know that already. I just want to know what you did. I want to hear it from you. I want to hear.

Suspect: Just want to know if my brother's gonna go home.[254]

The interrogator followed up:

Interrogator: What happened that night, Leo? You guys are coming down the freeway on the one hundred, right? By Manchester? Right? Kid is driving? Huh? Like I tell you make that other guy a liar, and if he's a liar and your brother goes home and if you're responsible for something.

Suspect: Man to man, my brother will go home tonight.

Interrogator: Man to man, if you

Suspect: Right now?[255]

The suspect then went on to admit being in the car and shooting at someone he believed to be a rival gang member. His target turned out to be a ten year old child who was leaving Dodger Stadium with his family.

One of the innocent Temple murder suspects resisted confessing despite the threat of the death penalty and constant pressure for hours. What finally

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253. *Id.* at 48.
254. *Id.* at 50.
255. *Id.* at 51.

caused him to comply were threats against a friend and a family member. It is unlikely that promising to humiliate and harm others by harassing and interrogating them would normally cause an innocent person to confess to mass murder. Taken alone, out of the context of the entire interrogation, almost no single psychological threat or promise would likely have this effect. But interrogation is a time-sequenced and cumulative process in which each new element, like the proverbial straw that broke the camel's back, adds to the weight of what is already in place.

Interrog. 1: Dante, if T.C.'s not involved in this man, give it up.

Interrog. 2: Make some right out of it, Dante.

Interrog. 1: We need to get that stopped.

Interrog. 2: Everybody's here Dante, the game's up. All I need to know is Dante.

Suspect: Leave T.C. out of it. T.C. don't have anything to do with this.

Interrog. 2: Peter either.

Suspect: Peter either.

Interrog. 2: He's being brought in. What happened Dante, did you pull the trigger?

Suspect: I didn't pull no trigger.

Interrog. 1: We're gonna . . .

Interrog. 2: Right?

Interrog. 1: We're gonna be in Tucson, Dante.

Interrog. 2: This is not a game my man, this is your one chance. I mean that, like Larry told you I just want to know if you're a killer Dante.

Interrog. 1: They're gonna hit that house big time. T.C.'s gonna go down right in front of his kids.[256]

Once this man broke and started to make admissions, seven investigators worked on him for hours and pressed him for information about the crime. When he was unable to supply them with the information they wanted, they repeated the same threats and promises that provoked his first decision to confess.

An adolescent in a Fort Lauderdale, Florida, murder investigation described the coercive threats used in the unrecorded portion of his interrogation. The investigators sought to induce him to agree to the story of the crime that would lessen his punishment:

Suspect: He's telling me that I'm lying that who knows what happened, that if I keep lying, I'm going to be in prison for the rest of my life. He said that they'll like me in prison with my pretty eyes and stuff. He said I'm going to be in prison for the rest of my life. I'm going to get

256. Interrogation Transcript of Parker, *supra* note 54, Tape 7, at 9-10.

> the electric chair if I keep lying about this—if I keep lying to him because he knows what happened. . . . He's telling me that he knows what the story is, he knows what happened.
>
> And that I'm over here lying, and if, he knows, he's saying, "I know you're lying and you keep, if you keep lying, "and he's standing up now, put his finger in my face, "if you keep lying, you're going to be in prison for the rest of your damned life." I'm telling you what really happened. I know what the fuck happened. "You're going to go to prison for the rest of your life. They're going to like you with your pretty eyes. And if you don't go to prison, you're going to get the electric chair. . . . " So I was, I didn't know what to do, so I told him, I just decided to tell him what he wanted to hear. I said, "all right."[257]

Another young male defendant in South Carolina described a portion of his interrogation as follows:

> Suspect: And that's when David told me about his feelings he couldn't put in the report and everything. And he told me I could spend the rest of my life in jail. And um, so at that point, I said "You mean I'm going to die in jail. And um, David, he was the smart one, you know, and he made, you know, the smart comment "if you don't fry." You know, and when he said that I said "What do you mean, the electric chair?" And he said this could be an electric chair case. And um, so um, they talked about, you know, they told me that and then um, you know, after he told me about his feelings and stuff he told me that and um, but he said we can avoid all of that if you'll just help us out, tell us something.
>
> Interviewer: That can avoid all of that?
>
> Suspect: Uh hum.
>
> Interviewer: Exactly what did he say about that?
>
> Suspect: He said, um, that you know again about talking with the judge, you know, he said that he could talk with the judge, you know, to get me out of it. And he just had to have something for his report.
>
> Interviewer: Did that make any sense to you at the time?
>
> Suspect: Well at the time I was real scared, and I thought, hey if I do what he wants me to do, you know, the man's told me I'll be leaving.[258]

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257. Interview of Adams, *supra* note 122, at 35-38.
258. Interview of Register, *supra* note 105, at 29-30.

While innocent and guilty suspects comprehend and react differently to an interrogator's accusations of guilt and claims about incriminating evidence, both experience growing certainty of arrest and conviction. As one suspect told the following to a prosecutor who interviewed him hours after he falsely confessed to Oakland, California, police:

Suspect: Am I, am I going to get myself hung for this? I mean because I, the part they said finally that I was going to go to jail as a murderer, and that the only way that I would have a chance and that I could continue my life to do those things that I find worthwhile, is if I could recall the section before when I saw BiBi and the time that I would actually have struck her, and I mean, there's none of that. Everything they said is just because they leaned on me until, I mean they scared me to death. They said I was going to spend the rest of my life . . .

Prosecutor: Okay.

Suspect: . . . in jail, in prison.

They said that I must have, that I was lying and they put a lot of pressure on me and I said that if it's not lying, it's what I believe that I did not drive down there. They said they have witnesses and they saw my car there and had all the proof and I felt like, well, I'm already found guilty for that and now, what's next, you know. And they said I'd spend the rest of my life in prison for that, so yes, that's my comment to my cognitive, my cognition is that no, I never did, I tried to make that clear on the tape, that this is all, just that I want to close my eyes and dream and think of, whatever, and then they's mention something like over there in the bushes and all of a sudden I can, bushes are imagined, and then I was trying to save myself because they had found me guilty, they had found me guilty. And they said they were my friends and if I couldn't, and if they were here to help me and if I couldn't get them to not, to. . . .[259]

Sometimes interrogators are so explicit in their offer that they engage in open plea bargaining: offering a suspect a specific promise of prosecutorial and judicial leniency in exchange for an admission. For example, Flagstaff, Arizona, investigators offered a woman less punishment in exchange for telling them the location of the body of a victim they believed her deceased husband had killed:

Interrogator: When we walk out of here today, there's no more deals. Period. And we already know, Gil and I already know

259. Interrogation Transcript of Page, *supra* note 76, Tape 3, at 3, 5.

what you just said that we can get the whole truth. And maybe, maybe, we can drop something, but until we find out what everything is, we're not gonna tell you that we can do it. Okay. So you tell us every bit of the truth right now.

Suspect: (Crying). Is it gonna help me or make it worse.

Interrogator: Oh yeah. It's gonna help you a lot. Alright.

Suspect: I'm sorry. I'm just so scared (crying).[260]

Interrogator: We get Jason's body. Twenty-five years. We don't get a body, it's life.

Suspect: I didn't kill nobody. I didn't do anything wrong, Rick.

Interrogator: Didn't say you did.

Suspect: So why am I being arrested? I didn't do anything.

Interrogator: Twenty-five years, we get a body. Life if we don't get a body. You decide which one you want.

Suspect: I didn't do nothing.

Interrogator: We're out here today to find the body.

Suspect: The only.

Interrogator: You provide it and, and, you provide it and we'll go from there.

Suspect: I don't know.

Interrogator: Plain, plain and simple. Okay? . . . We're not here, we're not, we don't want to hear I don't know, I don't know, I don't know. We want to hear it's here. And we're gonna out and find it and then we're gonna go on with life. But we're not going on with life until we find it. So, you want on hold again, that's fine.[261]

Suspect: What do you guys want from me?

Interrogator: I want Jason and I want him today.

Suspect: I don't know where he is.

Interrogator: I want to know where he is today. If you tell me where he is and I go find him, we'll deal. But I want Jason. I want to cut this crap out and I want to have another person, because I'm tired of this, Gil's tired of this, our families are tired of this, the Sheriff is tired of this, we want.

Suspect: I'm tired of this.

Interrogator: Jason. Or whoever the hell he is. Dead or alive, we want him. That's the only way you're gonna get something out of this.

Suspect: What do you mean?

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260. Interrogation Transcript of Richardson, *supra* note 186, at 24.
261. *Id.* at 78-79.

Interrogator: I guarantee you. Do you wanna be in prison for life?

Suspect: No. I don't want to even go to prison for one day.[262]

This woman eventually fabricated a story to satisfy the interrogator's immediate demand. Since she had no idea whether the person they sought was alive or dead, her confabulated statements were subsequently proven wrong.

While interrogating a recently arrested man who had been maintaining his innocence, Vallejo, California, police, in conjunction with a prosecutor and an FBI agent, explicitly offered a promise of prosecutorial leniency in exchange for a confession. Prior to formally presenting their deal, the interrogator had informally threatened the suspect with the death penalty if he did not confess. When he became desperate, the prosecutor formally offered the suspect a deal so he could avoid the informally-threatened death penalty:

Interrogator: I'm gonna have Jim Highsmith talk to you from the Solano County DA's Office.

Prosecutor: Okay Mr. Livingston, uhm the uh prosecution, I'm, I represent the District Attorney in Solano County. My name is Jim Highsmith. I've been sitting here uh during this interview today and listening to your uh responses to the questions to the detectives. We are prepared to uh offer you one thing in exchange for your truthful testimony, and that is that we will not seek the death penalty, and I want to recite to you what the agreement is, and I want you to listen very carefully to what this agreement will be. Okay, you ready?

Suspect: Yes sir.

Prosecutor: You will agree truthfully, completely, and fully reveal to the prosecution agents, that is to these detectives, uh by this interview all that you know concerning the Loomis robbery of November the 13th, 1991, uh in which three people were murdered. You will agree to provide all of the information that you know about these crimes, including but not limited to information concerning the part that you claim, and all people who were involved in the planning and the execution of the, of the robbery and the murders.

Uh, and uh in exchange for this truthful testimony, the prosecution, that is the Solano County DA's Office will not seek the death penalty against you in connection with the charges which we have brought against you. Uh in the event, however, that you, you do not give us a truthful statement, uh we will file a complaint, that is, strike that, we will seek the death penalty. In other words, you have to give a truthful statement as to all as-

262. *Id.* at 91-92.

pects of the case. Do you understand that?

Suspect: Yeah.

Prosecutor: Okay, uhm you understand that uh you will receive no immunity for perjury, if we find later on uh that you perjured yourself. Another thing, okay, have we coerced you in any other way? Uh has, has, is this, will this be your free and voluntary statement?

Suspect: Yes.

Prosecutor: Okay, and uh no other promises have, have been made to you. You understand that?

Suspect: Yeah.

Prosecutor: The only thing that we've agreed to is that we will not seek the death penalty. You understand that?

Suspect: Yeah.

Prosecutor: Do you agree to tell us truthfully everything that you know about the Loomis homicide?

Suspect: Yes, uh I got a question.

Prosecutor: Yes.

Suspect: If you're not seeking the death penalty, what you be seeking, life?

Prosecutor: We will, we will seek all, all other, everything up to and including uh life, yes, and it could be life without parole. Uh I'm not saying that's what it'll be, but that's, I'm not making any other promises. All this is, is that we will not seek the death penalty. Do you agree to that?

Suspect: Life without parole.

Prosecutor: That could be a possibility, because we have charged special circumstances in this case. But, but that's all we're willing to do at this point. Do you understand that?

Suspect: Where's the light at?[263]

Prosecutor: Well let me, I, I don't want any wavering on your part. You have to understand that we are giving up a considerable thing. There are three people that died, and that that's all we're willing to give up. We will not seek the death penalty in exchange.

Suspect: But I didn't kill these people.

Prosecutor: That's true, but I'm, I, again telling you that we will not seek the death penalty. That's all we're willing to give up, and that you will, you will give a truthful statement.

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263. This is a reference to an earlier conversation in which the interrogators told the suspect that cooperating was his "light at the end of the tunnel." Interrogation Transcript of Livingston, *supra* note 113.

Do you agree to that? If not, say so, because we'd be wasting our time. Do you, uh, agree to these conditions?

Suspect: Yeah, but is, is it possible it might change?

Prosecutor: Anything's possible, but I'm not gonna promise you that. All I'm saying is we will not seek the death penalty. That's all I can tell you. Any other questions.

Suspect: No.

Prosecutor: Okay, do you, do you agree to give us an honest statement?

Suspect: To the best of my knowledge.[264]

After agreeing to the deal, the suspect attempted to make up a confession based on what he knew about the crime, that is, what the interrogators had told him and what was common knowledge. When pressed for specific information, he broke down and admitted he was making up the answers to avoid a death sentence. At this point the video recorder was turned off; when it was turned back on, the suspect attempted again to satisfy the interrogators. His second attempt also failed because he still could not answer their specific questions correctly. He then reasserted his position prior to being offered the deal—that he was not involved in the robbery/murders. The interrogators revoked his "deal," the prosecutor charged him with capital murder, and the confession he had given was used at trial.[265]

f. *The Accident Scenario Technique*[266]

i. Introduction

Interrogators use the accident scenario technique or the maximization/minimization strategy to deliver threats and promises in a way that is more sophisticated than simply placing the alternatives before the suspect.[267] When directed at innocent persons or at guilty parties who realize that they are negotiating a reduction in their punishment in exchange for confessing, the tactic is usually made progressively more transparent. If the suspect is not motivated to comply or does not realize what is required of him, the investigator can become more explicit both as to the consequences of accepting or rejecting the deal and what the suspect needs to do to carry out his end of the bargain.

The investigator implements the accident scenario technique in its most subtle form by suggesting that some sort of accident, outburst, struggle, or unintentional turn of events caused a criminal event or changed the ending of

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264. *Id.*

265. Even though his so-called confession was obviously both involuntary and unreliable, it was nevertheless allowed into evidence at trial. The jury acquitted him of the triple murder charges.

266. In most of the illustrations below, the interrogators' references to incriminating evidence are erroneous and/or false.

267. A recent observational study found that investigators attempted to minimize the seriousness of the crime in 22% of their interrogations. *See* Leo, *Inside the Interrogation Room*, *supra* note 4, at 267.

a crime. Done this way, the investigator leaves it up to the suspect to invent the story of how the crime happened. A suspect must be aware, or have been made aware, that certain stories take away premeditation or reduce the seriousness of the crime.

If a suspect doesn't understand that explaining what happened as an accident leads to a lesser punishment or doesn't want to admit even to being involved in an accident, the investigator can clarify what the story needs to involve by formatting it and/or making the benefit clear. An investigator can even explicitly lay out the elements of the accident for a suspect and require only a series of one word answers to signal agreement.

Under the circumstance of either an unformatted or a formatted accident scenario, a suspect shifts from denial to agreement because he understands that he will either avoid a harm and/or realize a benefit by making the change. When a person makes this shift, he is doing nothing more complicated than maximizing his expected utility. While he may be operating on information that has been deliberately distorted, and in a situation in which every effort has been made to limit the alternatives he considers, he is nevertheless making a choice among the alternatives he perceives and so can be expected to act rationally under these constraints.

Investigators will use this tactic in the formatted form even when the crime scene facts clearly indicate a premeditated murder and directly contradict any possibility that an accident or a self-defense event occurred. When used in this fashion, the tactic is intended to first elicit a false confession by offering a benefit for adopting the story. As the tactic is supposed to play out, the investigator next attacks the statement because it does not fit the crime facts, and finally obtains an accurate account of the crime. The three fundamental problems with this approach are that: 1) it relies on coercion—promises of leniency and/or threats of harm—to elicit the initial agreement to the false confession; 2) while it may be possible to lead a guilty suspect to produce an accurate description of the crime, innocent suspects will never be able to do this unless they are informed of the crime's facts, e.g. contaminated; and 3) since guilty suspects know how the crime happened, some will realize that the interrogator's suggestion of an impossible accident version of the crime facts is a trap.

Because guilty suspects can often see through the tactic, it may generally be more effective when directed at the innocent. In order for a guilty suspect to go for this ploy, he must either ignore the fit of the scenario and the crime facts or believe that the detective is so corrupt that he is willing to undercharge the crime in order to close the file. The innocent suspect is more likely to be taken in by the tactics because he doesn't know how the crime really occurred.

ii. The Unformatted Accident Scenario

The interrogator can progressively expose both the motivational components and the story requirements of the accident scenario technique. The interrogator can offer the suspect the opportunity to tell a self-serving story with

little fanfare and without explicitly mentioning the benefit of choosing this option. Reno, Nevada, investigators suggested to a fourteen year-old that the robbery and killing he had done might have been caused by the victim:

Interrogator: It's our job to find out, exactly what happened, and in this particular situation, one of the people was dead and you're the only one that knows exactly, exactly what happened (inaudible). A body was found. You're responsible for that guy laying out there. We don't really know, exactly, what happened. I mean, it could be a whole bunch of things. Maybe the guy was some kind of weirdo and he tried to pick up on you. Maybe, who knows. It's just a lot of possibilities that we don't have the answers to.[268]

In a partially recorded Pasco County, Florida, interrogation, the adult suspect immediately comprehended the meaning of an interrogator's offer of help:

Interrogator: Listen to me, a lot of crazy things go on in this world. The only thing right now you've got is you, that's all, listen to me, things happen my man that we don't have no, no control over. I've been with my wife before when I'm tellin' ya, and I know, alright. Jeff, help me, help you. You hear me?

Suspect: Mean it.

Interrogator: I mean it man. I'm not shittin' ya. You hear me? Jeff, don't carry this thing around with you. God damn, don't do it. You hear me, huh, look at me, hear me man? I've been around too long. He has too. We told so many people, their loved ones are dead and there's always a reason. People down the street may not understand it. May have been an accident and it just may have been an accident.

Suspect: Wasn't blaming themselves.

Interrogator: You hear me?

Suspect: Well maybe an accident? Yeah.

Interrogator: What I mean is an accident. I don't think you meant to kill your wife. I really don't, I mean it, I'm tellin' ya, you wouldn't do it, you've been married to her too long.[269]

In the following example, a San Diego, California, investigator laid out two alternatives before the suspect: having the jury regard him as a premeditated murderer or as something less serious. The investigator then suggested how the suspect can realize his preference, openly stressing the central element of the story he wanted the suspect to invent:

268. Interrogation Transcript of Doe, *supra* note 207, at 32.
269. Interrogation Transcript of Crouch, *supra* note 92, at 27-28.

Interrogator: Would you rather, and hear me out Elmer okay, would you rather, let's give you a situation. For you to be charged with this, with this murder, would you rather be looked upon on the eyes of the jury, and hear me out please, as a cold-blooded killer. Or, or as a person that did something that just got out of hand and did not intend, did not intend. Which, if you were in that situation, which would you prefer? And I'm asking you Elmer? I'm asking you which would you prefer to be looked upon as. As somebody that was just cold-blooded, just flat out went ahead and killed a young girl or somebody that was in a situation that just went haywire and did not intend. And that's the magic word. Did not intend.[270]

A Sacramento, California, investigator made clear to an adolescent that he would be charged either with murder or a less serious offense. He suggested an accident in the following:

Interrogator: We don't know exactly what happened. We don't know if somebody intentionally killed her or if this, this was an accident. If somebody did something that they didn't mean to do. Something that happened and things got out of hand. I don't know. I don't know. I think you're involved in her death.

Suspect: I don't know how.

Interrogator: And I think you need to take this opportunity now, Shane, to explain to us so that we don't think it's a murder. Because if it's a murder, you're gonna wanna cover it up and hide it. Now, if something happened then you need to explain it to us. Now is this the time to do it. . . . If it was an accident, people will understand. If something happened, things got out of hand, if she fell, I don't know, but you need to explain that. Because we can't explain it for you. If people had an opportunity to explain that for you when you could've done it yourself, they're gonna explain it as a murder. And it wasn't, was it?[271]

A detective in Solano County, California, manipulated another adolescent using a false witness evidence ploy coupled with an accident scenario invitation:

Interrogator: Both Andy and Josh told me not more than two or three hours ago, that when you're all running up at the train, they both said that you pushed him into the train.

270. Interrogation Transcript of Nance, *supra* note 95, Tape 3, at 3.
271. Interrogation Transcript of Schmitt, *supra* note 85, at 37.

Straight up. Now my question to you, when you pushed him into the train, was it an accident or was it intentional?

That is very important. Because they're gonna tell their story and it don't make you look good unless you've got an explanation and I can't say it for you, "Hey it was, you know, an accident or it was intentional or whatever." Not reached up to grab him or pull him away. Shoved him. And he fell into the train. Straight up. That's what they told me. I'm just tellin you what I know. Alright. Was it an accident?[272]

San Francisco, California, police educated a suspect as follows:

Interrog. 1: Hey Robert, we know you killed the guy, the only question is why, and if you don't want to tell us that that's fine, but I mean that's to your advantage, I mean, right now we're thinking you went to the guys house, and you planned on killing him, and that's how you did it, you planned it from the beginning, and that's first degree murder. The only question is why you did kill him, was there some reason? Was there a fight, what happened, did, uh, is there some kind of circumstances that lead up to it that'll help explain it, and modify it, that's the only issue, that's the only question.

Interrog. 2: The only question is, in this situation is why? Did he threaten you? You told me no, he didn't threaten you, that no homosexual ever threatened you. Did he make you angry, did he throw you out, uh, did, you know, what was the reason, and that's all we need to hear, uh, you know, the rest of this stuff you're just fixating on things that aren't important and the question really is why, uh, it's not a matter of whether you.[273]

San Mateo, California, detectives made clear that an appropriate story would result in a benefit:

Interrogator: Sometimes things happen, you know, it could be an argument, it could be a fight, he could have come at you. You know, instead of a murder, this might be an accident. It could be a manslaughter situation in the heat of passion. But he's not gonna know until you tell him the truth. You were there.

Suspect: I was not there.

Interrogator: Well, we're, we're a little bit past that, Bernard. Bernard, we're a little bit past that. Okay. Right now you're

272. Interrogation Transcript of Johnson, *supra* note 157, at 68.
273. Interrogation Transcript of Anderson, *supra* note 114, at 21.

in the driver seat. You can help yourself. And, uh, if it's the truth that's, you know, can help you, if there's, if it was an accident or something like that, or it was a fight, who knows?[274]

When the investigator presents the suspect with a beneficial option, he may tell the suspect only about the advantage of admission and how the suspect might frame it, as in a Sacramento, California, interrogation:

Interrogator: I know that you're the one that pulled the trigger. Now there's no need if you're gonna continue to deny it, you and I have nothin' else to say but now, if you wanna tell me the truth, if you wanna tell me that the gun went off accidentally, the gun was a malfunctioning weapon, whatever, but I don't want to hear no more lies about that you didn't pull the trigger because that's just not the case. . . . All I want out of you is the truth.

I want to help, I can help you, you can help me, you can help your dad, you can set the whole thing straight, but you're not gonna do it with these lies, because nobody, nobody's gonna believe you because you are a liar. You shot him, the witnesses say you shot him, the polygraph says you shot him. There's nothin at all to tell me that you didn't do it. Nothing. Absolutely nothing.

The only thing you might convince me of is that the gun malfunctioned or it went off, whatever. Maybe you didn't intentionally shoot him but you had the gun in your hand when it went off. That's the only thing you're gonna convince me of. Cause none of the rest of it's the truth. Do we have anything to talk about?[275]

One strategy for offering a suspect leniency is to run him through the various degrees of a crime and their respective consequences and then invite him to choose the crime level at which he prefers to be charged, as in the following Boynton Beach, Florida, interrogation of an innocent man:

Interrogator: Do you know the difference between first-degree murder and second-degree murder?

Suspect: Uh-huh.

Interrogator: Okay, first-degree murder entails life in prison without parole or the electric chair. Okay. Second-degree murder, first-degree murder is like a premeditated murder; second degree murder is a, a passion crime, you know, somebody gets mad. It's a lesser, it's lesser than first-degree, okay? What you need to think to yourself is, okay, if you were there tonight, okay, you need to tell

274. Interrogation Transcript of Knight, *supra* note 232, at 18.
275. Interrogation Transcript of Wright, *supra* note 162, at 35.

us, because we'll know if you were there or not.

Suspect: I was not there.

Interrogator: If you killed her, just help yourself out, because this will be your one and only shot.[276]

To insure that a suspect "gets it," police may give him a short course in the finer points of criminal law and sentencing guidelines, as in the following San Diego, California, interrogation:

Interrog. 1: Do you know the difference between first and second degree? First degree murder in comparison to manslaughter? What is that ah, you know a little bit better than I do in terms of years? You know, in terms of years.

Interrog. 2: First degree murder's ah life. Second degree murder you can get twenty-five years. Manslaughter you can get probation. Involuntary manslaughter, it just depends on the circumstances. We got to know the story.[277]

Interrog. 1: What is the worst possible scenario if this gets adjudicated in court and what is the worst possible? Okay, you end up getting, getting convicted of first degree with special circumstances. You know, you're looking at, you're looking at um, you're looking at life with no possibility for parole. That's what you're looking at man. I mean I'm just letting you know. I'm just putting the cards out on the table here. If she consented, then it's not rape. If she went crazy on you, I mean you put her out. Granted you put her out but your intent was not to kill this lady. I mean you're not stupid man. You wouldn't come back to a God damn campsite if you thought you'd killed somebody.[278]

The point is I'm interested in why it happened okay. I'm interested in why it happened and I don't feel in my mind that it was premeditated, that you intended to. I just don't. I knew your condition. I knew her condition at the time and you ended up coming back. That's the point. The point is, is do you eventually want to end up getting tried for first degree murder? You know what I'm saying? I mean that's all, that's the only point is where I'm, where I'm coming from. And I'm just giving you these, these options here because this is not a cold, malicious, cold blooded, you know, 'I'm gonna, I'm gonna kill you' type of thing.[279]

During an unrecorded interrogation in New Brunswick, New Jersey, an

276. Interrogation Transcript of Salazar, *supra* note 119, at 50-51.
277. Interrogation Transcript of Nimblett, *supra* note 137, at 36.
278. *Id.*
279. *Id.* at 46.

investigator went so far as to pull a statute book off the shelf and read the penalty associated with each level of homicide.[280] The suspect described this part of the interrogation as follows:

Suspect: I remember the one guy talking to me telling me about this is the detective in there, he was telling me you know, well you know, how he had the book, so he was telling me the different types of murder charges and stuff.

Interviewer: He was reading from the book?

Suspect: Yes, he was reading from the book all right and telling me you know, how it could be murder one and stuff you know, he was going for the whole nine yards, you know. I remember him saying that, you know, they could charge me all right, they were going to charge me with capital murder. He says do you understand what capital murder is? I said no not really. He says well, he says a capital murder he says you know, they can give you lethal injection, you know.

Then I believe it was somewhere around that point that he picked up the book and he says look, this is what capital murder is. You know and then he turns around and says, well you know, if you two were just in the car and you were arguing because of Randy you know, and you know, things got out of hand you know and ah, you know you accidentally hit her or she went to hit you and you know you might have grabbed the knife and killed her or something. He said that would be like an involuntary manslaughter or a provocation passion you know.

Then he started reading what they carry. You know but ah, I remember him explaining, I mean he went through the book and explained all of them to me all right and what time each one carried. It might have been about five minutes or so after that, he turned around and says to me, says well why don't you just talk to Kerwin you know and see what Kerwin has to say you know maybe we can get these charges dropped down to something lesser you know.

Kerwin came in all right and him and Kerwin were saying something you know and then Kerwin comes over and said well you know if you tell us that you know you two were arguing and that you know Tree was, you know, got mad and stuff and told me about Randy and this, that and the other thing you know, you

280. The police confirmed their discussion of sentencing options with the suspect during this unrecorded interrogation.

could help yourself, you can get your sister out of all this.

Interviewer: Now let me see if I got this straight. The first detective sitting at the desk starts telling you about the different penalties starting with death penalty and running down to overtime parking?

Suspect: Right.[281]

iii. The Formatted Accident Scenario

By the time an innocent person undergoing interrogation has reached the point at which he realizes that cooperating with the police is his only hope, he will appreciate the special meaning the investigator has attached to the word "truth." For the innocent suspect, the investigator's demand for truth has always been a request for a lie. When the formatted accident scenario is put into play, the interrogator and the suspect finally arrive at equivalent working definitions of "truth." Presuming the subject's guilt, the interrogator understands that what he wants from the suspect is a lie and so does the suspect, but each pretends that the truth is finally being spoken.

After the conclusion of an interrogation in Oakland, California, a young man told the truth to the detectives who had elicited his false confession a few hours earlier:

Interrogator: Have we asked you to tell us anything but the truth?

Suspect: You wanted me to (pause) tell you what I had done to cause that was an accident.[282]

Inbau, Reid, and Buckley's training manual for police interrogators[283] promotes the practice of formatting an account of the crime that turns the event into an accident, a reasonably provoked response, or an act of self-defense. This tactic communicates that there is a way out of the suspect's predicament with little or no punishment. In the following passage, the manual demonstrates how to transform a first degree murder into an act of self-defense. The implication is that once the interrogator classifies the crime in this way other criminal justice officials will accept his conclusion that this is how the crime happened, and thus the suspect will be charged accordingly.

> "Joe, you probably didn't go out looking for this fellow with the purpose of doing this. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was—no good. Then when you met him, he probably started using foul, abusive language, and he gave some indication that he was about to pull a gun on you. Then you had to act to save your own life. That's about it, isn't it, Joe?"[284]

281. Interview with John Chew, Toms River, N.J. 24, 27-29 (Aug. 9, 1994).

282. Interrogation Transcript of Page, *supra* note 76, Tape 4, at 27.

283. *See* INBAU ET AL., *supra* note 20.

284. *Id.* at 104.

After the investigator has elicited this false confession to the less serious crime, the manual advises that he obtain an accurate account of what happened, thereby transforming the false confession into a true confession and returning the crime to its factually proper description as a premeditated murder. The coerciveness of this technique is simply ignored by the manual authors.[285] In an appendix to the text, they attempt to rationalize this approach by arguing that the manipulation of a suspect's perceptions about how much punishment he will receive is permissible because no real threats or promises were issued:[286]

> During a legal interrogation, reality can not be changed. A confession will be inadmissible as evidence if the interrogator takes away the consequences of the confession (promises), or physically adds anxiety (threats, abuse) during the interrogation. However, the interrogator can legally change the suspect's *perception* of the consequences of confessing or the suspect's *perception* of the anxiety associated with deception through influencing the suspect's beliefs.[287]

This rationalization makes about as much sense as saying that a person who brandishes a weapon and asks for money is not committing armed robbery if there are no bullets in the gun.

San Mateo, California, police suggested a false confession to self-defense that appears to be modeled after the Inbau, Reid, and Buckley text example.

> Interrog. 1: You're doing nothing, absolutely nothing to help yourself. You know, if it's, if it's an accident or there was something, there was some type of provocation to make you believe, you know, you might have been afraid of this guy. Maybe he had a gun. Maybe he pulled it, I don't know. Did he? Right now is the time and opportunity to go for this. You only get one time. That's the way I work. I don't know how Tom works it. I got to a guy and if he don't want to help himself, the heck with him.[288]
>
> Interrog. 2: I can see the two of you to on Clarke [Street]. Jerry trying to get big, flex his muscles, do whatever. Either he pulled a gun on you or whatever, and somehow you got the gun away from him or you had your own gun and you were trying to defend yourself and then you shot him.[289]

A Connecticut State Police investigator suggested to an innocent young man that he killed his mother in self-defense:

285. *See* Kassin & McNall, *Police Interrogations*, *supra* note 6.
286. *See* INBAU ET AL., *supra* note 20, at 327-47.
287. *Id.* at 333.
288. Interrogation Transcript of Knight, *supra* note 232, at 24-25.
289. *Id.* at 25.

Interrogator: Is this what happened last night, Pete, that you came home and because, as you said, you're tied to your mother's apron strings, she flew off the handle and went at you or something and you had to protect yourself? Is this how it came down?

Suspect: It's still not coming out. It's still not coming through. I still can't remember and I want to.

Interrogator: I mean, this could be the whole thing here.

Suspect: Ya.

Interrogator: She could have went at you. And, this is strictly a self-defense thing where you had to protect yourself against her.[290]

During an investigation in Orange County, California, a police officer passing as an interpreter tried to convince the suspect that if she claimed that she acted in self-defense, the killing was not a crime, and therefore she would not be punished:

Officer: My feeling was that this Miss Chi right? This is my own opinion. This, this, this I am sure of it you know? This was not indicated by that police officer you know? My feeling was that whoever had that knife first, was that, my feeling was that it was Miss Chi. I think you were trying to defend yourself. So you bit to get her to drop the knife you know? So you did it out of the sudden urge then accidentally stabbed her a few times. The result was this was how she die. Do you agree with what I had said?

Officer: If-if-if you knew that you were connected to Miss Chi's murder then you better surrender?

Officer: If you killed Miss Chi out of self defense—Chi, Jen-Bing—by law you will get some leniency you know? It would be found not guilty. But if you planned the killing then you could be facing the death penalty. Otherwise you could be facing severe penalty or, Mrs. Peng, are you connected to Chi, Jen-Bing's murder? Then earlier, if you didn't understand I will explain the law to you again right? For self-defense, not guilty. To planned to kill someone, guilty. In court they would not give any leniency to people who killed someone out of sudden urge you know?[291]

Vallejo, California, police used the technique in an attempt to lead a suspect to reason that a self-defense killing in the course of committing a burglary was to his advantage. To prepare him to see it this way, the investigators first informed him about the consequences of remaining silent:

Interrogator: Since I don't know how to explain it to you any better,

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290. Interrogation Transcript of Reilly, *supra* note 75, at 121-22.
291. Interrogation Transcript of Peng, *supra* note 116, at 81-82.

> uhm right now we're prepared to, to book you for first degree murder, uh murder during the commission of a burglary, first degree. Uh, cause we don't know of any right way to do it, because we're not hearing from you what happened in there.
>
> If the woman came at you with a skillet, there were some bolt cutters on the ground, if the woman came at you with the bolt cutters because you got in an argument or something, it could explain what happened in there, but right now we're led to believe that you went in there and banged on a woman for no reason at all, and then took her property, and we don't we're not, can't believe that that's the case, cause I've know ya, and you're just not the type of person I would think to go in there and bang the woman, take her stuff, somethin' happened inside the house. She called you names, she called you a thief, she did somethin' to you that, she was fightin with ya or somethin'. Somethin' happened, ya know, and that's what we're, we're tryin to find out, to get a story from you about what happened in there so we don't have to look at it as you're just a guy that went in there and bashed her on the head and took her TV.[292]

A detective in Sacramento, California, not only formatted the story and pointed out the suspect's jeopardy, but also offered to deliver the message to the jury for him. The investigator said that the suspect's best opportunity to save himself would be gone when the interrogation ended. If the suspect did not confess to the accident story, the interrogator would not be able to help him at his murder trial:

Interrogator: Now, I guarantee you that as long as you continue to lie to me, just like myself, the twelve men and women on that jury, they're gonna put me on the stand, "Detective Reed tell us about Cheval Wright? Did you interview him here, did you interview him, did you interview him here. When did he finally start telling the truth?" and I'm gonna say, "Eight twenty of ninety-three at 13:35 hours, after confronting him for the final time that he's still lying to me, he told me the truth."[293]

> The only thing that you can do from this point forward is do something for your self, which is to tell the whole truth so that people can believe that when the gun was handed to you it was cocked and it went off accidently. Nobody's gonna buy into this about you handing it to him then he, so okay, even if they buy into

292. Interrogation Transcript of Yarborough, *supra* note 237, at 9.
293. Interrogation Transcript of Wright, *supra* note 162, at 41.

> it, it still makes you the murderer, so you're better off to go with the truth and to convince the jury through me, because your attorney probably will never let you take the stand. I'm gonna be you settin' up there. I'm the only one that's gonna be tellin' that twelve men and twelve women on that jury what really happened.
>
> It's gonna be me and them other dirt bags. Them other dirtbags are gonna get up, they're gonna make you look as bad as they can. "Oh ya, he wanted us to stop, he wanted us to rob these people, and he's just an asshole, he wants to shoot people, that's the way Cheval Wright has always been."
>
> Well you and I know that's not true. I know that, you know that, and I think your dad knows that from the way he acted yesterday cause we was truly sincere. Now I'm your mouth piece, Cheval, I'm the one that's gonna be up in front of the jury tellin' em what you said.[294]
>
> We're still down to that point where we get on the stand and me, as a professional witness, the question from the prosecutor's gonna be after I get done testifyin' about this story you just give me, did I believe you're tellin' me the truth? And I'm gonna say no. And then those other guys are gonna get up on the stand and they're all gonna say the same thing. And then say "Ya, he was over here acting bad, talkin (inaudible)" or whatever was said like that and it's gonna go on and on, and they're just gonna bury you.[295]

After this session, the investigator administered a questionnaire about the interrogation. The suspect's answers confirmed that he decided to confess after realizing the extent of his jeopardy and directly in response to the investigator's offer to deliver the fraudulent accident scenario to the jury.[296]

> Interrogator: Could the interviewer have said or done anything different that would have made it easier for you to tell the truth?
>
> Suspect: Yes.
>
> Interrogator: What?
>
> Suspect: You know, told me something like um, you know, told me maybe, give me some idea what was going to happen to me.
>
> Interrogator: Gee, that's something that all interviewers have trouble

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294. *Id.* at 42-43.

295. *Id.* at 44.

296. The suspect said that he had seen the gun in the hand of one of his acquaintances and had physically tried to stop the robbery shortly before the other man shot the victim. The suspect's account was confirmed by the statement of a surviving victim of the crime.

with because you never really know.

Was anything said or done during the interview that prompted you to hold back the truth for a while?

Suspect: Yes. Like when you told me that, the rest of my life was going to be spent in jail.

Interrogator: What was the most significant thing the interviewer said or did that led you to tell the truth?

Suspect: You would tell the jury something that they wouldn't believe from me.[297]

During the investigation of a premeditated murder, in which the perpetrator viciously beat, strangled, robbed, and probably raped the victim, a Boyton Beach, Florida, interrogation specialist recast the death using the accident scenario technique. He suggested that the accident happened because the victim requested "rough sex." Using the threats and promises inherent in this technique, the interrogation specialist elicited the suspect's agreement to this grossly inaccurate account. Subsequently, two other detectives took over and tried to obtain a confession by confronting the suspect with facts that negated the accident scenario. The innocent suspect[298] broke down and admitted that he lied about his involvement, and that he had only agreed to the accident scenario because he feared receiving the death penalty:

Suspect: The guy acted like if I said it was an accident, everything would be fine. Just forget about all this shit. I don't want to put my parents through this shit.

Interrog. 1: Well.

Suspect: I ain't got no choice. I mean everything's pointing towards me, I just didn't fucking do it, but.

Interrog. 2: Marty, let me ask you this.

Suspect: I did it just to try to get off. You know, just, I don't want to get a first degree murder charge.

Interrog. 2: Okay.

Suspect: I have no choice. I mean if that's what you have to do, you have to do.[299]

I mean like I said, you know, you guys telling me about, you know, we're going to book you on first-degree murder, and if I just come out and say it was an accident, you know, everything will be just fine, you know, just.

297. Interrogation Transcript of Wright, *supra* note 162, at 76.

298. Martin Salazar's innocence was established shortly before trial. A fingerprint in the victim's blood had been discovered on the socket end of the extension cord used to strangle her. The print was neither the victim's nor Martin Salazar's. After the defense discovered that the prosecution had hidden this exculpatory evidence, the prosecution dropped all charges against Salazar. After charges were dismissed, the detective who elicited the coerced confession refused to accept the state attorney's dismissal. He located a forensic expert who would report that Salazar's fingerprints could not be excluded. The state re-indicted Salazar. At this time, Salazar is awaiting trial.

299. Interrogation Transcript of Salazar, *supra* note 211, at 41-42.

Interrog. 1: Who said that?

Suspect: An officer I was talking to.

Interrog. 1: Said that everything would be fine if you.

Suspect: Well, my future would be (inaudible) I'd have a future. But if I got booked for first-degree murder I might as well just forget about everything.

Interrog. 2: Were you ever told tonight you were under arrest for first-degree murder?

Suspect: I was told I was going to be. As soon as he walked out of here.

Interrog. 2: Okay.

Suspect: And that I would never see the fucking sun again. And I just got scared and I told him, you know—god damn. I lied to you guys and said I did it just to try to get a lesser charge so I could get a, just.

Interrog. 1: I don't understand that at all.

Suspect: I mean it's just, he scared the shit out of me.[300]

When interviewed prior to trial, this man described how the interrogator implemented the accident scenario technique during the unrecorded portion of the interrogation:[301]

Suspect: He said "Them assholes out there want to charge you with second degree, or first degree murder." He goes, "Their intentions are just to hang you." He goes, "But I told them to give me a chance to talk to you and see what we can come up with." I believe this is when he starts, he was like, "If it was an accident, just," you know, "if it was an accident, like say you all were having rough sex or something and you just happened to," you know, "get into bondage and stuff and you accidentally strangled her," you know, "not meaning to, then it's all right." You know, "It's," you know, "it's happened before," you know . . .

He goes, "Do you want them guys to come in here and charge you with first degree murder?" And he goes, " And then they'll have to tell your mom that you're a killer, a cold-blooded killer. How would your mom feel about that? How would you feel putting your mom through this?" He goes, "If they come in here and charge you with first-degree murder, it's going to be a

300. *Id.* at 43-44.

301. Although the detective denied explicitly threatening the suspect with the death penalty, he described how he formatted a crime scenario that could not possible have been true, educated the suspect to the various levels of homicide and their components, explained the penalties for each, and pointed out that the suspect was the only person who was in the room and therefore the only one who could really say what happened. The detective had been trained to use the Inbau, Reid, and Buckley method.

long time before you see the fucking sun again." He said, "But if you say it was an accident, your future's looking so much brighter already." He goes, "What you need to start thinking right now is just accident. Accident. Just think accident."[302]

Even though this man told the two detectives that he confessed falsely in response to the threat of a death penalty charge, the detectives continued the interrogation, calmed him and then coerced the same false confession a second time:[303]

Suspect: What's going to happen to me?

Interrog. 1: Depends on what you tell me. If you tell me that you planned on going over there and killing her and you did all this planning and all that good stuff, well, then that is first-degree murder. But I don't think you're that kind of guy.

Interrog. 2: I don't think you're that. I don't think you're that cold-blooded murderer, that premeditative murderer, the kind of guy that's stalking these people and going out and killing on purpose. Like Ray said, it was an accident. We think it was an accident, but we need to hear you tell us it was an accident. But we need to know in your words what happened.[304]

It is not uncommon for a suspect—even in murder cases—to report that an interrogator said he could go home once he confessed. This seems so bizarre and improbable that it is difficult not to think that the suspect is lying. If, however, the investigator used the maximization/minimization technique, the suspect might quite reasonably come to believe that once he agrees to the investigator's suggested story, he will be able to leave the police station. Because the maximization/minimization technique works to transform the actual offense into a low level crime or a non-criminal act of self-defense, the interrogator can plausibly intimate that the suspect will be released if he confesses. The false confessor in the Boyton Beach, Florida, investigation recounted the following:

Suspect: He goes, "If you'd just say it was an accident," he said "you all were having rough sex," you know, "and just got carried away and you accidentally killed her, they won't charge you with first degree. They will charge you with second-degree murder and then," you know, "your future looks so much brighter," you know, he goes," because you're a clean-cut, respectable man from what I see. Your bosses think highly of you, and so do

302. Interrogation Transcript of Salazar, *supra* note 211, at 68-70.

303. The detectives had to have known that the death threat reports were true since they watched the specialist do his work via hidden video recording and monitoring systems. The tape of the specialist's session with the suspect has never been given to the defense.

304. Interrogation Transcript of Salazar, *supra* note 211, at 50-51.

> all the people I've talked to." He goes, "Now why would you throw your life away for some drunken coke whore who is nothing but a piece of white trash," you know. And he goes, "Well, if you say it was an accident I think I can possibly talk to these guys into letting you go home. That's up to them, but," you know, "I can probably get them to let you go."[305]

The above-mentioned false confessor in Arcadia, Florida, reported that the interrogator led him to believe that by agreeing to the minimized version of the crime he'd be able to go home:

Suspect: All right. And I said, okay, I said, now, if I sit here and lie in yall's face, yall going to think I'm telling you the truth. But if I sit here and tell yall the truth, yall think I'm lying, right? He didn't say nothing. I say, you know what, man, I'm tired of you people, now, I'm fixing to go and tell yall what yall want to hear, right? So, because I got to the point where I was mad, frustrated, I know I didn't do nothing, right? But they can't accept no for an answer, right?

So now I got to the point where I felt, if I just tell them I did it, you know what I'm saying, maybe they'd leave me alone. That's all I want them to do, is just to leave me alone. I was fixing to go crazy, right? I ain't never been put under pressure before. I been put under pressure, but I always found when I get in front of a person, I keep telling them, saying things, I always get found true to what I'm saying, right? But them, they didn't want to go, they kept saying I did it, I did it, I did it, I did it, you did it, you did it, you did it, you did it, that's all I been hearing, you did it, right?[306]

So I figured, well, I'm mad now, either way it went—this the way I started thinking, either way it went, I tell them the truth, I can't go nowhere, if I tell them what they want to hear, maybe I can go somewhere. Maybe I can go home, right? He told me I can go home, if I tell them what they wanted to hear.[307]

During the unrecorded interrogation of a mentally handicapped suspect, Seattle, Washington, police threatened life imprisonment if the suspect did not confess but suggested that they could help him out once he confessed. When interviewed, he described this experience:

Interviewer: Did, at any time when you were talking to the police, did they tell you about how serious or not serious the

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305. Interview of Salazar, *supra* note 165, at 70-74.
306. Interview of Louis, *supra* note 171, at 84.
307. *Id.* at 95.

punishment might be for whatever happened in connection with Miriam?

Suspect: They told me that this is a small matter, um, we can't help you until you admit it. And then they stated.

Interviewer: How were they going to help you?

Suspect: I don't know. They just said that. And then ah, they stated it would get a lot worse if I didn't admit it. They stated ah, I could get.

Interviewer: How was it going to get worse?

Suspect: I could get in a lot of trouble if I didn't admit it, where I could go to prison and on and on.

Interviewer: So if you didn't do it, you were going to go to prison and what else?

Suspect: And they mentioned that I could get, basically, they just mentioned mainly that I could go to prison for life if I didn't admit it, and it would be a harsher punishment. And if I admitted it, they could help me.

Interviewer: If you admitted it, was there any particular way you were supposed to admit it that would allow them to help you?

Suspect: No, they just stated that we think you're lying. You really need to tell the truth. This would help us.[308]

A young man in South Carolina similarly described his interrogation experience:

Interviewer: OK. What was it, if you remember, that finally got you to the point where you said OK. What was your thinking?

Suspect: It was, after being there so long that day, I was literally thought, cause they been telling me, I mean if you tell us something we'll help you. So I literally thought if I tell them something they were gonna help me. You know, hey, I figured if I go and tell them something now, you know, today, that I would be home, you know, shortly.

Interviewer: Did it occur to you that, that all of their offers to help presumed that you had actually done the killing?

Suspect: No, I just, the only thing I was thinking about is, you know, telling them what they want to hear when I could get home.

Interviewer: So the, what did you think the consequences were going to be?

Suspect: I thought I was going to get out of it. Thought they,

308. Interview of Kris Howe by Richard Ofshe in Seattle, Wash. 23 (Oct. 28, 1994).

> they told me when, you know, they'd go talk to the judge. You know it wasn't like you were saying, you know, I thought once I told them what they wanted to hear, then it would be over.[309]

The false confessor in Arcadia, Florida, spent nearly four and one-half years in pre-trial detention before his coerced and demonstrably false confession was suppressed. He described his interrogation experience as follows:

Defendant: This is what I told him, though. I told him I did tell yall everything, because I don't know nothing about it, right? He said, no, that ain't good enough. So like I said, now, I been in this place all day long, all right, I'm tired, I'm sleepy, I'm hungry, right? I'm getting sick to my stomach, right? Now, the thing about it was, in my mind I know I didn't do it, right? But I been there all day and they was telling me what happened and all this kind of stuff, right?

Interviewer: Wait a minute, when was that? You mean, during the day?

Defendant: Yeah, all day long they was telling me what happened and you did this and you did that, and by the, it was like a video camera coming in my mind that was putting all these pieces together, right. Everything they tell me, I was putting together, okay? Now I'm starting to, in my head, they was running on me so much, I'm starting to think, you did it which I know I didn't do it, right? And I kept telling myself I didn't do it, and my mind knew I didn't do it, but it's the way they kept saying you did this, you did this, you know, I was under pressure. I was being, other words, I felt I was being pressured. All right, and I couldn't get out of it, so that's, that's when I started thinking, I, ain't no other way, this what I started thinking, ain't no other way I can get out of this. I can keep telling them I didn't do it, tell them the truth, right, I didn't do it. Then I told them, and I said it just like this, I asked them, okay, am I under arrest? No.

Interviewer: He said that then.

Defendant: Yeah. And then I asked him, if I tell yall what yall want to hear, can I go home? And he said yes.[310]

309. Interview of Register, *supra* note 105, at 45.
310. Interview of Louis, *supra* note 171, at 81-82.

3. Persuaded False Confessions

a. *Introduction*

The tactics that yield coerced-compliant false confessions were illustrated above. Because these confessions are elicited by threats of harm and offers of leniency, they are simple to comprehend. Persuaded false confessions are more complicated, but no more difficult to understand. Their cause is not the illegitimate use of interrogation methods relying on threat and promise, but rather the inappropriate and uninformed use of powerful influence techniques. If applied in a certain manner, psychological interrogation procedures are capable of confusing an innocent person about his culpability, leading him to become temporarily convinced of his guilt and yielding a false confession even though the person has no actual knowledge of committing the crime. Persuaded false confessions occur because the person has formed the opinion that it is *more likely than not* that he is guilty.

Persuaded and compliant false confessors have similar interrogation experiences up to the point at which the suspect concludes that his situation is hopeless. The turn of events that leads to a persuaded false confession is a small matter. Confronted with supposedly conclusive evidence of his guilt and told that his alibi is contradicted by other facts, an individual may realize that his only basis for claiming innocence is that he has no memory of having committed the crime. Since virtually everyone assumes that he would remember committing a complicated crime, or for that matter even a simple murder, an innocent person may verbalize the defense "I know I'm innocent because I don't remember doing it." If he says this, he draws the investigator into an attack on this denial—just as surely as the investigator was drawn to attack every previous denial. This time the attack focuses on the reliability of the suspect's memory.

Claiming no memory of committing the crime is not a response exclusively available to the innocent. Indeed, guilty parties make the equivalent claim often enough that it is unlikely to surprise an experienced interrogator.[311] Investigators counter this claim by proposing a seemingly plausible explanation for the suspect's ignorance, typically that the suspect suffers from some sort of amnesia. An investigator can usually brush aside the disingenuous lie of a guilty suspect since his claim of no memory is at best a weak defense and is likely to be made late in the game. However, this tactic may lead a genuinely confused innocent to adopt an amnesia explanation for his lack of memory of having committed the crime. The task is especially easy if a suspect has had alcoholic blackouts, amnesia caused by a head injury, or believes in the existence of repression or multiple personality disorder.

Once an investigator shatters a suspect's confidence in the belief that he would remember committing the crime if he did it, the suspect will likely reason that the only way he can know his own conduct is by relying on objective evidence.[312] Working with this logic, he can only rely on the false evi-

311. *See* INBAU ET AL., *supra* note 20, at 47, 143.

312. *See* Darryl J. Bem, *Self-Perception Theory*, 6 ADVANCES IN EXPERIMENTAL SOCIAL PSY-

dence that the investigator has created and will therefore conclude, as would most similarly situated persons looking at the damning evidence, that he probably committed the crime. As one innocent suspect in a Connecticut investigation put it:

Suspect: I would say that you're right, but I don't remember doing the things that happened. That's just it. I believe I did it now.[313]

Relying on the false evidence, the person will conclude, in effect, that it is more likely than not that he committed the crime. An individual who infers his conduct from the alleged evidence rather than by relying on his memory will express neither certainty of his guilt nor certainty of his innocence. The person does not simply conclude that "I did it," as a matter of fact, but makes an admission in tentative language that reflects and expresses his genuine uncertainty. An innocent man who was led to believe that he had a "dry blackout"[314] and confessed falsely to Clearwater, Florida, interrogators put it this way: "I still can't believe I did it. I guess all the proof's in."[315] He explained additionally: "The only reason I believe I did it is if my hairs were in her car and on her body and in her apartment."[316] Another individual wrote in the second of three statements he signed during an interrogation by Manchester, Connecticut, police: "If the evidence shows I was there and that I killed her, then I killed her, but I don't remember being there."[317]

During the post-admission narrative phase of interrogation, an investigator will be unable to elicit the kind of straightforward admission that can be obtained from a guilty party. Despite proposing the amnesia ploy, the investigator probably assumes that the suspect is fully knowledgeable of his involvement and uses amnesia to overcome what he sees as the suspect's ignorance ploy. Therefore, when the investigator begins collecting the post-admission narrative of the crime he is unprepared for what follows. Although the suspect has willingly admitted guilt, he is still unable to corroborate his actual knowledge of the crime. As a result, an investigator may retreat from an open-ended questioning style and start making suggestions. The investigator may prompt the suspect to guess about how and why he committed the crime. For example, Clearwater, Florida, interrogators prompted a suspect to conjure up mental images of how he could have accomplished a "dry blackout":

Interrog. 1: What do you see?

Suspect: I don't, but I still say to myself, "No, you didn't do it."

Interrog. 2: That's alright, but you got a picture, so you must have done it, right?

CHOLOGY 1 (1972).

313. Interrogation Transcript of Reilly, *supra* note 75, at 129.

314. The investigator told him that someone who had once been an alcoholic might be subject to "dry blackouts"—equivalents to a blackout caused by alcohol but supposedly affecting a person who has no alcohol in his system.

315. Interrogation Transcript of Sawyer, *supra* note 74, at 204.

316. *Id.* at 217.

317. Second signed statement of Richard Lapointe, Hartford, Conn., Police Dep't. (Mar. 8, 1987); *see also* Ofshe, *supra* note 36.

Interrog. 1: Is that what you're looking at when you describe it? Are you looking at a picture and describe what you see?

Suspect: Yea, but I see it in my house.

Interrog. 1: Could it have happened in your house?

Suspect: I don't know how I'd get her over to her place?

Interrog. 1: Right out the door and into her place.

Interrog. 2: It's right there. It's the same cement slab. One door to one door. It's only a couple feet.

Suspect: I don't remember anything what's inside her house.

Interrog. 1: Were the lights on?

Interrog. 1: Maybe that's why. Maybe the fuckin' lights were off and you couldn't see nothing inside her house. Did you ever think of that?

Suspect: No.

Interrog. 1: How did it start in your house? From the couch?

Suspect: That's the picture I get.

Interrog. 2: On the couch? Describe the picture.

Suspect: See I don't know if I'm making this up or not.

. . . .

Interrog. 2: We want you to tell us.

Interrog. 1: Alright, you want to make this story up. Let the pictures roll and let's hear the story. Let's hear the story. Let's hear the story and then we'll ask at the end is this something that you remember.

Interrog. 2: One, two, three, go. Let's go, Tom.

Interrog. 1: Make up a story. Let's hear the story. You're at the front door?[318]

Unlike voluntary or compliant false confessors, persuaded false confessors couch their admissions of guilt in an inflated use of grammar that expresses their uncertainty. Their expressions of guilt are tentative, speculative, and hypothetical, such as "I would have done," "I probably did," "I could have done," "I must have done," "Most likely I did," and "I guess I did."[319] For example, Oakland, California, investigators obtained the following post-admission narrative from a university student who had falsely confessed:

Interrogator: As she came out, uh, did you see her?

Suspect: I guess I must of . . .

Interrogator: Did you actually see her or did you drive down and see her, could you see her from the road there.

Suspect: I think I saw her from the road . . .

318. Interrogation Transcript of Sawyer, *supra* note 74, at 206-07, 211.

319. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1, at 218.

Interrogator: Was she walking toward you or was she walking away from you?

Suspect: I think she saw me and continued walking away . . .

Interrogator: Did you talk to her at that point?

Suspect: I must have said something, I don't know . . .

Interrogator: What happened then?

Suspect: I think she tried to kinda go away and I (long pause) and I kinda pulled her around or something and it's, think I backhanded her or something.

Interrogator: What did, what'd she do at that point? Did she fall or what?

Suspect: I think she fell down on her side, around the backside, kinda around the tree. She fell by the tree.

Interrogator: Could you tell if she hit the tree at all?

Suspect: I think she just barely, I think she fell right about the side of it. I don't think she

Interrogator: All right. As, as you saw her there, did she appear injured?

Suspect: I picture her unconscious there.

Interrogator: Did you see any injuries like blood or anything like that?

Suspect: (Sighs) She mighta had a bloody nose.[320]

Despite agreeing to a memory blackout and concluding that he is guilty, the false confessor lacks personal knowledge of the crime and therefore is unable to volunteer previously unknown or accurate details of the crime. Persuaded of his guilt but ignorant of the crime facts, one suspect said, "I mean I'm sure by what you've shown me that I did it, but, what I'm not sure of is how I did it. It's still not all coming to me."[321]

b. *Edgar Garrett's False Confession*

The interrogation of Edgar Garrett[322] illustrates how persuaded false confessions arise. Though police in Goshen, Indiana, had no evidence suggesting that Garrett was guilty, they believed that he killed his sixteen-year-old daughter, Michelle Garrett, who had disappeared one Sunday morning. During Garrett's interrogation, detectives repeatedly confronted him with false evidence: that multiple witnesses had seen him with his daughter shortly before she disappeared; that they had provided statements implicating him and were willing to testify; and that shoeprints, hairs, and blood evidence linked him to his daughter's murder. The investigators also suggested that Garrett acted suspiciously following his daughter's disappearance, and that he had given po-

320. Interrogation Transcript of Page, *supra* note 76, Tape 2, at 2-4.
321. Interrogation Transcript of Reilly, *supra* note 75, at 199.
322. *See* OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1.

lice inconsistent statements. Finally, one detective informed Garrett that he had failed a polygraph test "worse than anybody I've ever seen,"[323] a test that he said was "100% reliable."[324] The evidence that Garrett murdered his daughter was conclusive: "There's no question in anybody's mind about what happened,"[325] they insisted.

Though he denied the accusations for hours, Garrett eventually became confused and distressed. He resisted the false evidence until a detective suggested that Garrett, who had previously experienced alcohol-induced blackouts, may have suffered a blackout on the morning of his daughter's disappearance.[326]

Interrogator: Let me talk about something else here. Now, we know you were far enough, now you might have had a blackout, right? It's possible.

Garrett: Possible.

Interrogator: Possible that you were down, well, we know that, you were down at the river bank, down at the river bank.

Garrett: Looking for my daughter.

Interrogator: Right, okay. The only question is what day were you down at the river bank? Well, maybe you were in a blackout. Maybe you were down there with your daughter at the river bank because you're in a blackout. I don't know. But before I leave this room today there's one thing that you and I are going to know, I'm going to help you remember this shit so we can be done.[327]

As his belief that he did not see his daughter the morning she disappeared came under attack, Garrett's confidence in the certainty of his memory began to break down, and he began to express doubts about what he knew.

Garrett: But I just don't remember if I went out, if I did talk to Michelle Sunday morning or not.

Interrogator: You did.

Garrett: I just don't, don't remember.[328]

Continuing to confront Mr. Garrett with fabricated incriminating evidence, the investigator suggested the outline of the police theory of the case that had been developed prior to commencing Garrett's interrogation:

Garrett: I can't remember fighting with Michelle on Sunday.

Interrogator: You did. Not only did you fight but you thumped her. You didn't mean to hurt her.

Garrett: What did I thump her with?

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323. Interrogation Transcript of Garrett, *supra* note 53, at 25.

324. *Id.* at 50.

325. *Id.* at 44.

326. Garrett had not consumed any alcohol for more than 24 hours prior to his daughter's disappearance.

327. *Id.* at 319.

328. *Id.* at 327.

Interrogator: I don't know.

Garrett: I don't know either.

Interrogator: But you thumped her.

Garrett: Well, I killed my own daughter?

Interrogator: Yeah.[329]

Garrett continued to insist that he knew nothing of the killing, until the investigator revisited the question of his memory and again suggested the possibility that he had amnesia. By emphasizing the blackout hypothesis, by exerting intense pressure to comply with their demands and by neutralizing Garrett's belief in his innocence, the investigators convinced Garrett that he may have killed his daughter.

Interrogator: Tell me about hitting her. Now, you remember that part of it and I know that and you know that and you know that I know that.

Garrett: Maybe I did thump her on top of the head.

Interrogator: Okay. Where did this happen at?

Garrett: Oh, man, I don't know.

Interrogator: Yes, you do. Yes, you do. You know exactly where it happened at.

Garrett: Well, apparently this happened out at Studebaker Park.

Interrogator: Tell me exactly where it happened at. There's, I know there's, remember you're talking to a drunk. You're talking to a guy that's blacked out himself. Okay. I know how them damn things work. Because I am one. I'm just like you, and that's why you and I are connected. Do you understand that?

Garrett: It must have been on that road there. I don't know where, that's where most of the blood is, I guess.[330]

Lacking knowledge of these circumstances, Garrett fed back to the police what they knew about the location where Michelle's body had likely been dumped in the river and accepted the investigator's wild speculation that Michelle had been killed by a blow to the head. Once police laid out the narrative, Garrett guessed answers to their specific questions (such as the location of the murder weapon) and confabulated an account of the crime story (such as why he argued with his daughter and what was said).

Because he had accepted as possibly true that he committed the crime, Garrett confessed in language that was conditional, tentative, and conjectural. He parroted back information that the investigator had introduced and inferred from his leading questions and suggestions the investigator's theory of the crime:

Interrogator: How did you cross the river?

329. *Id.*
330. *Id.* at 332-33.

Garrett: I must have went all the way to that school lot over there. That must have been the only way I could have gotten around, over there to get to the other side of the river.

Interrogator: Okay, then what happened next?

Garrett: I must have just left her there.

Interrogator: Okay.

Garrett: And I must have went home.

Interrogator: All right. What did you do with the stick.

Garrett: It's in the house. I must have took it back to the house.[331]

Pressing for details of the murder, the investigators had to manage Garrett's uncertain belief in his guilt, counter his frequent backsliding, and keep him convinced that he probably did murder his daughter. In response to his denials and attempts to recant earlier admissions, the investigators forcefully restated the evidence against him. When he fed back the investigators' speculative theory of the murder and the few publicly known facts, they expressed approval. Since Garrett was unable to volunteer crime details, the investigator suggested the correct answers through leading questions or simply told him what they believed to be the crime facts. The investigator often asked Garrett to answer questions that might have proven his guilt and led to corroborating evidence, but his answers were apparent guesses, and none of them ever produced corroboration.

Interrogator: I'm going to give you another hint. Detectives don't ask questions unless they have pretty good reasons for asking that. You thought about blood being on your clothes, right? Right?

Garrett: Yeah.

Interrogator: Okay. Where was the blood on your clothes?

Garrett: Probably on my jeans somewhere.[332]

The hallmark of a persuaded false confession is the suspect's uncertainty in his conclusions. The persuaded false confessor typically alternates between expressing minimal certainty in his guilt and minimal confidence in his innocence. Confused and distressed at one moment, Garrett struggled to supply the interrogators with the details they were seeking:

Interrogator: So you think you may have carried her to the other side of the river? How did you get across the river?

Garrett: I don't know (inaudible). I can't swim anyways (inaudible) that day old grass, lot between the school, and Studebaker Park, there's a soccer field there.

Interrogator: Yeah. And then what?

331. *Id.* at 344-45.

332. *Id.*

Garrett: I must have walked around (inaudible) trees or something. I don't know.

Interrogator: And where did you, where did you put her at?

Garrett: On the ground, I guess.[333]

Yet at the next moment he declared that he had no memory of the crime and probably was innocent:

Interrogator: It's real important that you put everything together.

Garrett: I don't know if I even did this.

Interrogator: Listen to me.

Garrett: (Inaudible) admitting to things that I didn't even know if I did, and I'm going to prison for something I probably didn't even have nothing to do with it to begin with.[334]

Exhausted, frightened, and unsure of himself, Garrett repeatedly told the interrogators that he did not know or was not certain of his answers. By the end of the fourteen-hour interrogation, Garrett had signed four increasingly detailed statements describing how he murdered his daughter. Shortly after the interrogation, Garrett recanted his confession statements, and eventually a jury acquitted him of capital murder.[335]

IV. CONCLUSION

Because the law requires that confessions be voluntary, a contradiction lies at the heart of all psychological interrogation procedures. If police obtain a confession by overbearing a suspect's will or impairing his rational decision-making ability, the law requires it to be excluded from admission into evidence at trial. However, if a suspect wishes to avoid arrest and punishment, it is never in his rational self-interest to voluntarily confess.[336] Depending on what information and experience a suspect brings with him into an interrogation room, he will be more or less well informed about the nature of the criminal justice system and the case against him. A person with relatively complete and accurate information about his circumstances would know the state of the evidence against him, that a confession almost always leads to arrest, prosecution, and conviction, and that it inevitably weakens a defense attorney's position in any plea bargaining negotiation.

Because it is not in a person's rational self-interest to admit guilt if he understands his situation correctly, in order to obtain a confession from someone who prefers to avoid responsibility for an offense, investigators try to determine the information available to the suspect, manipulate his perception

333. *Id.* at 355.

334. *Id.* at 356.

335. *See supra* text accompanying note 60.

336. As David Simon points out, "The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation. It is a fiction propped up against the greater weight of logic itself." SIMON, *supra* note 22, at 201. *See also* Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259-88 (1996).

of his situation, and usually offer some form of incentive to elicit the decision to confess. Because of the importance of controlling crime and because guilty suspects typically seek to evade detection, courts permit investigators to lie to suspects about the evidence against them, to manipulate their perception of the significance of acknowledging culpability, and to emphasize the moral and self-image benefits of confessing. Investigators are permitted to emphasize the advantages of telling the truth and to express their desire to help the suspect. Sometimes, however, in order to overcome a suspect's reluctance to confess, investigators make statements that an intellectually normal individual would reasonably conclude constitute an offer that, if accepted, will lead to significantly less punishment but, if rejected, will lead to the most severe possible punishment. Sometimes this is accomplished boldly and directly, but often it is done indirectly and relies on human information processing and reasoning abilities.

It appears impossible to satisfy the requirement that a confession be entirely voluntary unless strict standards are imposed that limit an interrogator's freedom to manipulate a suspect, and requirements of fairness and accuracy are placed on what the police can tell a suspect. If such requirements were imposed on the interrogation process and police were obliged to fairly and accurately apprise a suspect of his situation and the consequences and relative merits of the alternative they advocate, it is unlikely that someone who initially denied responsibility would reverse his choice and confess.

In the age of psychological interrogation, the situation of an innocent citizen mistakenly exposed to modern interrogation procedures raises some very troubling questions. Because psychological interrogation is an influence process—each next step building on what has already been accomplished up to that point—it is difficult, if not impossible, to identify the single procedure that should be proscribed. Although physical coercion is prohibited, psychological coercion is more difficult to detect because it does not leave marks on the body. The modern equivalents to the third-degree practice of threatening harm and finding ways to injure the person without leaving marks have also developed. The modern equivalent to the rubber hose is the indirect threat communicated through pragmatic implication.

Because false confessions come about from the inept and/or improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent. Because the impulse to deviant conduct by some citizens and some police is as immutable as the survival ability of the cockroach, it is unlikely that deviance in the interrogation room will soon disappear. How then can the danger of eliciting and acting upon false confessions from the innocent be diminished without damaging the ability of the police to obtain reliable confessions from the guilty, and without changing what is presently accepted as a tolerable degree of departure from the ideal of an entirely voluntary confession?

The constitutional law of criminal procedure provides police with general guidelines about the line between permissible and impermissible practices.

Currently, the Fourteenth,[337] Sixth,[338] and Fifth amendments[339] provide little protection against the admission of unreliable or false confessions into evidence at trial.

Although the Fourteenth Amendment due process test may have once focussed on the reliability of a confession in determining its voluntariness, this is no longer the case.[340] The Fourteenth Amendment due process test protects a suspect from coercive and/or fundamentally unfair police questioning methods. If an unreliable confession is excluded under the Fourteenth Amendment due process test, it is only because the confession is judged to be involuntary or because police tactics are judged to be so unfair as to shock the judicial conscience. In the event that standard interrogation methods or procedures are not judged to be legally coercive or fundamentally unfair, the Fourteenth Amendment due process test does not prevent unreliable or false confessions from being admitted into evidence.

The Sixth Amendment's entirely procedural concern with post-indictment questioning also offers little or no protection against the admission of false confessions since virtually all police interrogations occur prior to indictment. Like the Fourteenth Amendment due process test, the Sixth Amendment is concerned entirely with the procedural fairness that occurs during *the process* of police interrogation, but not at all with the substantive reliability of the confession statement that is *the outcome* of police interrogation.

The Fifth Amendment also offers little or no protection against the admission of unreliable statements. For all its fanfare, *Miranda* is concerned only with the procedural fairness of the interrogation process—whether a suspect retains his rational and voluntary decision-making ability in the face of inherently compelling police pressures—not with the substantive truth of the interrogation outcome. While it may prevent some suspects from speaking to police or allow suspects to terminate an intolerable inquisition, *Miranda* offers little or no protection against the elicitation of false confessions from innocent suspects or their admission into evidence. Typically innocent suspects waive *Miranda* before the accusatory phase of interrogation begins. Once police issue warnings and obtain a waiver, *Miranda* is virtually irrelevant to the problem of

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337. According to current interpretations of the Fourteenth Amendment due process clause, a confession is inadmissible if police interrogation methods overbear the suspect's will and thus cause him to make an involuntary confession. Rogers v. Richmond, 365 U.S. 534, 544 (1961). Under this standard, the voluntariness (and hence admissibility) of a confession is evaluated case-by-case based on the totality of the circumstances (i.e., the facts of the case, the suspect's personality characteristics, the specific police interrogation methods, etc.). Davis v. North Carolina, 384 U.S. 737, 741-42 (1966). The Fourteenth Amendment due process clause additionally permits courts to exclude as "involuntary" confessions obtained by fundamentally unfair police methods, regardless of the confession's voluntariness. *See* Rogers v. Richmond, 365 U.S. 534 (1961); *see also* Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid's* CRIMINAL INTERROGATIONS AND CONFESSIONS, 17 RUTGERS L. REV. 728-59 (1963).

338. According to the Sixth Amendment, a confession may be excluded from evidence if *after a suspect has been indicted* he is questioned outside the presence of a lawyer. Massiah v. United States, 377 U.S. 201 (1964).

339. The Fifth Amendment privilege against self-incrimination permits judges to exclude confessions from evidence if police did not properly recite the *Miranda* warnings or if they did not obtain a knowing and voluntary waiver. Miranda v. Arizona, 384 U.S. 436 (1966).

340. *See* White, *supra* note 5.

false confessions[341] since few suspects subsequently invoke their *Miranda* rights.[342] At the moment when an innocent suspect is most likely to feel the inherently compelling pressures of police questioning, he is least likely to invoke his constitutional right to end interrogation. If he has been exposed to improper threats and promises, he is likely to believe that terminating the interrogation will result in his arrest, while continuing to interact with the interrogator may correct the mistake in which he is trapped. When the innocent suspect reaches the point at which he recognizes that continuing to resist is futile, the choices before him reduce to silence coupled with the most serious charge versus false confession and minimizing his punishment.

Oddly, the constitutional law of criminal procedure has no substantive safeguards in place to specifically prevent the admission of even demonstrably false confessions.[343] But, the more general problem is that the constitutional law seems concerned only with the procedural fairness of police questioning, so much so that it currently lacks any rules to guarantee the reliability of confession statements. Yet it is not uncommon for suspects—especially highly suggestible ones such as the mentally handicapped, juveniles, and individuals who are unusually trusting of authority—to give false confessions in response to police inducements that do not legally qualify as coercive or fundamentally unfair.[344]

There are two types of false confessions that interrogators may elicit without relying on threats of the most extreme punishment and promises of prosecutorial leniency: the stress-compliant false confession and the non-coerced persuaded false confession.[345] Some psychologically vulnerable individuals, such as the intellectually impaired or phobic, will knowingly give a stress compliant false confession to escape an interrogation experience which for them is aversive and punishing, but not necessarily legally coercive.[346] Similarly, a psychologically and intellectually normal individual can be equally motivated to end an interrogation if it is allowed to become too punishing in its intensity or duration or through some other facet of the process. And some suspects give a non-coerced persuaded false confession after they have been convinced that it is more likely than not that they committed an offense despite no memory of having done so.[347] Since neither type of false confession is elicited in response to coercive or "fundamentally unfair" police methods, the law currently offers little or no protection against their admission into evidence.

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341. *See generally* Richard A. Leo, *Miranda and the Problem of False Confessions*, *in* RICHARD A. LEO & GEORGE C. THOMAS III, THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING (forthcoming 1998).

342. *See* Cassell & Hayman, *supra* note 26; Leo, *Inside the Interrogation Room*, *supra* note 4.

343. The Supreme Court has recently stated that assessing a confession's lack of reliability "is a matter to be governed by the evidentiary law of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986). *See generally* White, *supra* note 5.

344. *See* GUDJONSSON, *supra* note 5; OFSHE & LEO, SOCIAL PSYCHOLOGY, *supra* note 1; Leo & Ofshe, *Consequences*, *supra* note 1.

345. For a discussion of the various types and logic of police-induced false confession, see *supra* Parts II.F.1-3.

346. *See id.*

347. *See supra* Part III.B.3.

The most common type of false confession is elicited through tactics that depend on communicating obvious or implied threats of harm or promises of leniency. Since investigators understand that such coercive tactics are impermissible, they are more likely to employ them when the interrogation is not being recorded or in an indirect and subtle manner that may slip by judicial scrutiny. When this occurs, the interrogator is likely to deny any wrongdoing, while the suspect insists that he was threatened harm and/or promised leniency. State actors typically prevail in such "swearing contests,"[348] and when this occurs, a coerced false confession may be admitted into evidence.

To prevent the admission of false confessions (regardless of how they were elicited) courts should evaluate the reliability of confession statements. To accomplish this courts need not create any new rules or rely on any cumbersome procedures. Rather, consistent with the judge's role as a gatekeeper responsible for excluding untrustworthy evidence that has a strong tendency to mislead the jury, the judge should not admit confessions without finding that the confession meets minimal standards of reliability. For example, judges routinely apply a minimum standard of reliability when deciding whether to admit hearsay testimony. It has been shown that placing a confession before a jury is tantamount to an instruction to convict, even when the confession fails to accurately describe the crime, fails to produce corroboration, and is contradicted by considerable evidence pointing to a suspect's innocence.[349] Even a demonstrably unreliable confession is likely to greatly confuse, mislead, and prejudice jurors against a defendant and should not be admitted into evidence.

Interrogations that fail to produce a good fit between the post-admission narrative and the crime facts are highly suspect because they may have been induced from an innocent party. When no complete record of the interrogation is available, it is impossible to objectively demonstrate that the confession has not been coerced or produced by extraordinary persuasion. The suspect's "I did it" admission has little to no trustworthy probative value absent independent corroborating evidence, a confirming confession, or a record demonstrating that the admission was made voluntarily.

Both admissions and confession statements are nothing more than two pieces of proposed evidence that, correctly interpreted, point either to a suspect's guilt or innocence. No piece of evidence really speaks for itself, and even a photograph can be doctored. Answering the question of whether a piece of evidence is valid and appropriate for the purpose for which it will be used by a juror is fundamental to the reasoning behind rules governing the exclusion of potential evidence. A judge would never knowingly admit into evidence a doctored photograph that is the product of modern computer graphic techniques and depicts a scene that never happened. A false confession is analogous to a doctored photograph. The mechanism for creating it is the ancient technology of human influence carried forward into the interrogation room.

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348. Stephan v. State, 711 P.2d 1156, 1159 n.6 (Alaska 1985) (noting that "[w]hile [this] observation may be an overstatement in absolute terms, it is probably generally valid") (citing Harris v. State, 678 P.2d 397 (Alaska App. 1984)).

349. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

It is possible to establish a standard of minimum reliability for a confession so that true confessions, like real photographs, can be separated from the doctored frauds constructed through the techniques of psychological interrogation. Police can be better trained to obtain statements that satisfy the legal definition of the word confession. Most investigators currently operate within legal constraints, but all could be trained to elicit more reliable confessions. A confession that fully describes the circumstances of a crime should and could be crafted to always permit the confession to be corroborated. Corroboration is the key to erecting a standard of minimum reliability for confession evidence.

Assuming that it is possible to control for the contamination that arises when an interrogator suggests crime fact information previously unknown to a suspect, the reliability of a confession statement can usually be objectively determined by evaluating the fit between a post-admission narrative and the crime facts. A guilty confessor necessarily has personal knowledge of the crime, while an innocent confessor (who did not witness the crime) will be ignorant of the crime facts unless educated by the press, community gossip or the police. The guilty confessor will be able to supply information that only the police know, to provide dramatic and mundane crime scene information that the offender should know, and to provide an explanation for unusual and anomalous crime scene facts. His post-admission narrative should match the crime scene details and will very often corroborate the crime facts by reporting provable facts that the police did not know, thus verifying his actual knowledge of the crime and his guilt.

By contrast, the innocent confessor lacks personal knowledge of the crime facts. As a result, he can only repeat information given to him or provide guesses to the interrogators' questions. A well-developed post-admission narrative by a false confessor is likely to be riddled with demonstrable factual errors, and thus casts substantial doubt on the validity of the confession. If a suspect's post-admission narrative fits poorly with the facts of the crime, produces no corroboration, and is disconfirmed by the suspect's wrong answers to questions about major issues (such as the weapon used, how the victim was kept silent, etc.), the confession should be considered inadmissible because it lacks sufficient indicia of reliability. By focusing on the substantive accuracy of the suspect's statement rather than exclusively on the procedural fairness of the interrogation process,[350] courts can test for a minimum standard of reliability before admitting a confession into evidence.

If the courts did this, police would improve their practices and false confessions would be far less likely to occur. Those that did occur would be far less likely to be admitted into evidence, and there would be far fewer instances of the costly, lengthy, and unjust deprivations of liberty and miscarriages of

350. Although the constitutional law of criminal procedure currently offers no substantive safeguards against the use of false confession evidence at trial, the Fourteenth Amendment due process clause could be interpreted to forbid the admission of unreliable confession evidence independent of the interrogation procedures used to elicit confessions. For more general suggestions about possible constitutional safeguards against the admission of unreliable confession evidence, see White, *supra* note 5.

justice that false confession needlessly spawn.[351]

Training police to obtain adequately corroborated, reliable confessions would both improve the fact-finding practices of criminal justice officials and save scarce judicial resources. If police and prosecutors recognized that the mere admission "I did it" is not necessarily a true statement, they would be far less likely to arrest and prosecute suspects who give false confessions. As a result, the time and expense associated with the trials and incarcerations of the innocent would diminish. Moreover, if police were trained to make certain that all confessions included detailed descriptions of the crime and thereby produced a basis for evaluating their internal reliability and the possibility of locating new corroborating evidence, guilty defendants would be more likely to plead out rather than require the state to prove its case in costly and sometimes drawn-out trials. If judges had the advantage of working with a clearly articulated standard to help them to decide whether to suppress or admit a confession, miscarriages of justice arising from police-induced false confessions would diminish greatly in the American criminal justice system.[352]

To further improve interrogation practices and the truth-finding function of the criminal justice system, mandatory taping of interrogations should be adopted. The supreme courts of Alaska and Minnesota have already established this requirement.[353] As many commentators have pointed out,[354] recording requirements create an objective and reviewable record of the interrogation process that enhances the truth-finding function of the criminal process; that protects custodial suspects from potential police abuses; that protects interrogators from potentially frivolous claims of misconduct; that helps the prosecutor, defense attorney, judge, and jury carry out their tasks more efficiently and effectively; and that saves precious judicial time and resources.[355]

This article has demonstrated an additional reason why police should be required to record all interrogations. In little more than fifty years, American interrogation practices have undergone a remarkable evolution: where once police routinely relied on third-degree practices, today interrogation tactics are more psychological. As American investigators have abandoned the use of force, they have articulated, developed, and refined increasingly subtle and sophisticated interrogation methods and strategies.[356] Although police are

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351. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

352. When judges do in fact suppress false confession statements, prosecutors almost always dismiss all charges against the innocent suspect because they lack any other evidence linking him to the crime. *See* Leo & Ofshe, *Consequences*, *supra* note 1.

353. *See* State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); Stephan v. State, 711 P.2d 1156 (Alaska 1985); Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980).

354. *See* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980); Heather S. Berger, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165; Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Leo, *Miranda Revisited*, *supra* note 79; White, *supra* note 5; Glanville Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6; 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); Geller, Police Videotaping *supra* note 11.

355. *See* Leo, *Miranda Revisited*, *supra* note 79; Geller, Police Videotaping, *supra* note 11.

356. *See* Leo, *From Coercion to Deception*, *supra* note 14.

trained in the constitutional law of criminal procedure, they have developed and implemented strategies that circumvent the well-established legal prohibitions against the use of threats and promises to motivate statements against a suspect's self-interest. Investigators communicate promises of prosecutorial leniency and threats of greater punishment through maximization and minimization strategies that vary in their degree of explicitness. Rather than relying on overt threats and promises, investigators have discovered, or have been taught, how to communicate promises of leniency and/or threats of harm by "pragmatic implication."[357] As Kassin and McNall have demonstrated with laboratory data,[358] and as this article has demonstrated with field data, maximization and minimization techniques reliably communicate that a suspect will receive substantially less punishment if he confesses to the version of the facts an interrogator suggests but will be punished most severely if he continues to deny guilt.

Because maximization and minimization strategies are so subtle that they depend on a reasonable inference from an investigator's words, and because human memory is reconstructive, suspects cannot reasonably be expected to recall the exact words with which police communicated differential sentencing expectations. A suspect's inference may be completely justified and the inference may, in fact, be precisely the one that the investigator intended him to make. The suspect's inference may be reasonable even if manual writers, police trainers, and investigators do not realize that these strategies can coerce false confessions from the innocent. If a suppression hearing does not occur until months after an interrogation, suspects will certainly not be able to remember the precise language through which an investigator implemented the maximization/minimization strategy. The investigator will be equally unable to recall exactly what he said. Because of the subtlety of the language used to deliver maximization and minimization strategies and the limitations of human memory, neither investigators nor suspects can reasonably be expected to accurately recall the entire sequence of questions and answers that happened during an interrogation. The only way to insure that potentially crucial evidence is not lost forever is for it be collected and preserved.[359]

Not only is it beyond human ability to remember just what happened during an interrogation, there is also the problem of bias. Investigators are often committed team players whose desire to win is overriding, and the best evidence will sometimes show investigators to be acting improperly. It is therefore foolhardy to assume that any procedure that leaves the decision about what evidence to collect to police will always produce a complete and fair record of the interrogation.[360] To decide whether an investigator directly

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357. *See* Kassin & McNall, *Police Interrogations*, *supra* note 6.

358. *See id.*

359. Interrogators are trained to make no notes while extracting a confession statement. *See* INBAU ET AL., *supra* note 20, at 173. They are also advised to engage in activities that will contaminate innocent suspects' knowledge of crime facts. *See id.* at 171, 189.

360. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995). The court was addressing a prosecutor's "responsibility for failing to disclose favorable evidence rising to a material level of importance . . . ." *Id.* The state's defense was that the prosecutor did not withhold—he did not know, because the police did not tell him. The court noted that "no one doubts that police investigators some-

or indirectly elicited a coerced statement or whether he obtained a voluntary and uncontaminated admission, it is imperative to have the entire record of questioning available.

The protection of the innocent is paramount in a criminal justice system whose ideology and rules are predicated on the belief that there can be no worse harm than wrongful conviction and incarceration. Researchers have repeatedly documented the existence of numerous and inexcusable miscarriages of justice arising from police-induced false confession.[361] We need not tolerate these injustices. If courts institutionalized a reasonable standard of confession reliability and required police to record the entirety of all felony interrogations, the suppression hearing would offer significant protection against the admission of false confessions into evidence and the number of miscarriages of justice attributable to false confession would be significantly reduced.

times fail to inform *a prosecutor* of all they know." *Id.* at 438 (emphasis added).

361. *See* GUDJONSSON, PSYCHOLOGY OF INTERROGATIONS, supra note 5; HUFF ET AL., *supra* note 2; WRIGHTSMAN & KASSIN, *supra* note 5; YANT, *supra* note 2; Bedau & Radelet, *supra* note 2; Kassin, *supra* note 3; Leo & Ofshe, *Consequences*, *supra* note 1; Ofshe, *supra* note 36; Radelet et al., *supra* note 2.

BALANCED APPROACHES TO THE FALSE CONFESSION PROBLEM: A BRIEF COMMENT ON OFSHE, LEO, AND ALSCHULER

PAUL G. CASSELL*

The editors have offered me a chance to provide a brief comment on two disparate but intriguing papers on coercion during policy interrogation—one by Professors Richard Ofshe and Richard Leo,[1] the other by Professor Albert Alschuler.[2] A short comment cannot possibly do justice to all of the valuable insights in these articles or tie all their divergent strands neatly together. The papers undeniably offer important perspectives on, respectively, the psychological processes involved in police questioning and the legal doctrine surrounding it. No doubt they will be—and should be—widely read and discussed. But the expected role of a commentator is not to praise articles but critique them, so my observations will be confined to the most important practical strand of the arguments: that police questioning should be restricted to prevent frequently occurring miscarriages of justice from false confessions.

At least as presented here,[3] a gap in the articles' arguments is that they appear to reason "dramatically, not quantitatively," as Justice Oliver Wendell Holmes once put it.[4] Proceeding from a few dramatic examples of false confessions that led to wrongful convictions, the authors suggest substantial changes in current confession doctrine. Those inclined to oppose such proposals, however, will suggest that policy reforms must be justified with more careful thinking about both the frequency of false confessions and any offsetting—and potentially larger—costs that might follow from the restrictions. After all, devising appropriate rules governing the coerciveness of police interrogation requires striking a balance between the competing concerns of protecting suspects and securing public safety. In assessing the Supreme Court's

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1. Richard Ofshe and Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

2. Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997).

3. Professors Ofshe and Leo have another paper on this subject that will be published shortly. Richard A. Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997) (paper presented at the Annual Meeting of the Law and Society Association, St. Louis, Missouri, May 30, 1997) [hereinafter Leo & Ofshe, *Consequences of False Confessions*].

4. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 293 (1920).

decision in *Miranda v. Arizona*,[5] for example, Professor Wertheimer chides both Chief Justice Warren's majority opinion and the views of the dissenting Justices for failing to forthrightly discuss the conflicts between the rights of suspects to be free from improper coercion and society's "interest in security."[6] Perhaps in recognition of such critiques, in later opinions the Court has been more candid about the tradeoffs. The Court now openly describes the *Miranda* doctrine as a "carefully crafted balance designed to fully protect *both* the defendant's and society's interest."[7] While doubts have been raised about whether the Court has really undertaken such balancing[8] and whether its proper role is to do so,[9] academic commentators proposing restructuring of police interrogation on normative grounds should certainly consider such factors. Moreover, these calculations involve largely empirical judgments. Again, as Professor Wertheimer has demonstrated, the moral problem involved in unintentionally punishing the innocent is one to be resolved on utilitarian judgments, rather than *a priori* considerations of justice: "The numbers do count, and in virtually all moral problems in which we sense a conflict between justice and utility, we are prepared to concede that there is some point at which utility will take precedence."[10]

To prevent misunderstandings before going any further, let me make clear my personal view that each miscarriage from a false confession is a grave tragedy; indeed, I am on record pushing for measures to reduce their incidence.[11] But in the public policy world, concern about miscarriages from false confessions is no substitute for logical thinking about their frequency and about any offsetting costs that might stem from restrictions on police interrogation. Failing to think carefully about such issues creates, as I suggest below,[12] the grave danger of inhibiting reform, by producing politically infeasible suggestions while overlooking more realistic and cost-beneficial alternatives. Without close attention to what Professor Wertheimer calls "the numbers," the articles' policy suggestions will not be taken seriously by those who actually have the power to implement them.

The first question that comes to mind while reading these articles is whether wrongful convictions from false confessions are pervasive or isolated? To briefly set the stage, recall that Professor Alschuler recommends at least

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5. 384 U.S. 436 (1966).

6. ALAN WERTHEIMER, COERCION 113 (1987).

7. Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986).

8. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 921 (1996).

9. *See* 18 U.S.C. § 3501 (1994) (replacing *Miranda* with voluntariness test); JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW (1993) (attacking *Miranda* as an "illegitimate" decision).

10. Alan Wertheimer, *Punishing the Innocent—Unintentionally*, 20 INQUIRY 45, 61 (1977).

11. *See, e.g.*, Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U L. REV. 1084, 1121 (1996); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. L. REV. 299, 311 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda's *Effects on Law Enforcement*, 50 STAN. L. REV. (forthcoming 1998); Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 488-89 (1996) [hereinafter Cassell, *Social Costs*].

12. *See infra* notes 66-72 and accompanying text.

one additional restraint on police interrogation. While the bulk of his paper is a superb demonstration that constitutional "voluntariness" doctrine must focus on police methods—not the psyches of criminal defendants[13]—Alschuler detours briefly into the conclusion that courts "should forbid falsifying evidence and misrepresenting the strength of the incriminating evidence against a suspect."[14] Alschuler would have the courts adopt this rule as a matter of constitutional principle,[15] relying on a cross reference to his brilliant article about the historical origins of the Fifth Amendment.[16] This recommendation stems not (at least as I understand it) from any overarching moral queasiness about police deception. Alschuler keenly observes that American law on confessions "sometimes seems to rest on an etiquette more refined than Mrs. Astor's."[17] Given the pressing need for police to develop evidence to support criminal convictions, he suggests that police perhaps "should be allowed to express false sympathy for the suspect, blame the victim, [and] play on the suspect's religious feelings,"[18] among other things. But misrepresentations about evidence stand in a different category largely because of Alschuler's empirical premise such tactics are "likely to generate false confessions," especially "when suspects are retarded or easily suggestible."[19]

Ofshe and Leo take a similar tack. After developing a detailed psychological model of the decision to confess (with fascinating and generally unavailable insights into what really happens during modern policy interrogation), they conclude with policy proposals. Based on the premises that "false confessions still occur regularly,"[20] that psychological police interrogation tactics are "apt to cause an innocent suspect to confess,[21] and that false confessions are "likely to cause the wrongful conviction and imprisonment of an innocent person,"[22] Ofshe and Leo recommend a series of reforms: including judicial screening of the "reliability" of confessions,[23] greater police training to avoid eliciting false confessions,[24] and videotaping of police interrogations.[25] The important point, for present purposes, is that the recommendations in both articles hinge directly on the empirical claim that certain police tactics are apt to produce false confessions leading to miscarriages of justice.

My reading of these articles is that the empirical linchpin for their propos-

13. Alschuler, *supra* note 2, at 960-967.

14. *Id.* at 974.

15. *Id.* at 957 (noting that the article focuses on "constitutional" requirements).

16. *See* Alschuler, *supra* note 2, at 958 n.6 (citing Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996)).

17. Alschuler, *supra* note 2, at 971.

18. *Id.* at 973.

19. Alschuler also relies on several other alleged consequences of police misrepresentations in support of his proposal. These appear to be of less importance in his argument and are discussed *infra* note 57).

20. Ofshe & Leo, *supra* note 1, at 983.

21. *Id.* ("interrogation manual writers . . . persist in the self-serving and misguided belief that contemporary psychological methods are not apt to cause an innocent suspect to confess—a fiction that is flatly contradicted by all of the scientific research on interrogation and confession").

22. *Id.* at 984.

23. *Id.* at 1117.

24. *Id.* at 1119.

25. *Id.* at 1120.

als is simply missing. Professor Alschuler reports little evidence on this point, relying primarily on a few general references to Professors Ofshe and Leo's articles to support the claim.[26] Ofshe and Leo, in turn, argue that wrongful convictions from false confessions are "numerous."[27] But burrowing through the footnotes attached to these claims, it appears that their primary empirical support is a soon-to-be published paper where these matters are discussed at greater length.[28] The reader of the current article is essentially left a promissory note that this proof will be supplied in the future. Because that future paper will be published shortly in another journal where I will be writing a detailed response,[29] I will not address the frequency of miscarriages from false confessions any further here. But it should be noted that the frequency claim is not proven in Ofshe and Leo's current article. While bearing the title "The Decision to Confess Falsely," the article turns out (on reading of the footnotes) to discuss not solely the dramatic subject of those who confess falsely. The reader will have difficulty knowing which topic is under discussion as Ofshe and Leo explain that "[w]e *often* choose *not* to indicate whether the quoted material was taken from the interrogation of an innocent or a guilty party."[30] The article thus cannot be cited (as Professor Alschuler may have uncritically done[31]) to support propositions about *false* confessions, because Ofshe and Leo have chosen—rather unhelpfully, in my view—not to separate the two here.

Even apart from the issue of the frequency of false confessions, however, Ofshe, Leo, and Alschuler's justification of their proffered remedies appears incomplete. Ofshe and Leo's centerpiece proposal is that courts should carefully evaluate the reliability of a confession by ensuring that it fits with the facts of the crime and is otherwise credible. Rather than "create any new rules or

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26. *See* Alschuler, *supra* note 2, at 969 n.60 (citing Leo & Ofshe, *Consequences of False Confessions*, *supra* note 3); Richard Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUDIES IN LAW, POLITICS & SOC'Y 185, 198 (1997) [hereinafter cited as Ofshe & Leo, *Social Psychology of Interrogation*]). Alschuler also cites Professor White. Alschuler, *supra*, at 26 n.66 (citing Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 108-09 & nn.26 & 30 (1997)). White, however, concedes that a determination of the frequency of false confessions "is difficult to make accurately"; White will venture only (without any further definition of terms) that false confessions are "likely in a small but significant number of cases." White, *supra*, at 109, 111. Alschuler also refers to the dubious "study" by Professors Bedau and Radelet. *See* Alschuler, *supra*, at 26 n.66 (citing Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN L. REV. 21 (1987)). *Cf.* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 128 (1988) (concluding that article gives the impression "it is more an argumentative tract than a fair-minded inquiry"). The reference to Bedau and Radelet seems misplaced, because they most frequently discuss "coerced" false confessions, Bedau & Radelet, *supra*, at 57 tbl.6, produced by physical brutality or police perjury, not the psychologically-induced false confessions that form the basis for the policy recommendations of Alschuler and Ofshe-Leo.

27. Ofshe & Leo, *supra* note 1, at 1121.

28. *See, e.g.*, *id.* at 983 n.16 (citing Leo & Ofshe, *Consequences of False Confessions*, *supra* note 3).

29. Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

30. Ofshe & Leo, *supra* note 1, at 984 n.32 (emphasis added).

31. Alschuler, *supra* note 2, at 969 n.60.

rely on any cumbersome procedures,"[32] they propose that courts should conduct this review under existing rules.

The examples in the article must be put into some perspective. Ofshe and Leo discuss transcripts of police interrogation of roughly 35 different suspects—both innocent and guilty—primarily from a ten-year period, 1987 to 1997,[33] although some of the examples are nearly a quarter of a century old.[34] Even looking solely to the last ten years, police officers around the country interrogated approximately 23 million suspects for index crimes.[35] The 35 interrogations discussed in the Ofshe-Leo paper are quite literally a few drops in this very large bucket.

Evaluating the proposal is quite difficult because Ofshe and Leo do little to explain how it would work in practice. For example, a regrettable omission from the article is even a single illustration of how their proposed test would have applied to any of the confessions they discuss. Their proposal may, therefore, either have too little "bite" or too much—that is, it may do nothing to solve any false confession problem or it may "solve" that problem at the expense of producing more serious unintended consequences.

Turning to the first possibility, Ofshe and Leo seem unaware that evidence rules conventionally admit relevant evidence and cannot be used as a basis for courts to screen out evidence they find to lack credibility.[36] A typical case is *Ballou v. Henrie Studies, Inc.*[37] There the Fifth Circuit reviewed a district court decision excluding a blood alcohol test in a civil case alleging negligent driving.[38] The district court had viewed the test result skeptically, excluding it because it lacked credibility.[39] The Fifth Circuit, following what is clearly the conventional approach in these matters,[40] would have none of it

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32. Ofshe & Leo, *supra* note 1, at 1118.

33. Ofshe & Leo, *supra* note 1, at 981 n.1.

34. *See, e.g., id.* at 1000 n.75 (discussing interrogation of Peter Reilly in 1973).

35. Each year during the period, police arrested roughly 2.9 million persons for the FBI index crimes of non-negligent homicide, forcible rape, robbery, aggravated assault, burglary, vehicle theft, and larceny. *See, e.g.*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1995, at 208 tbl.29 (1996) (reporting 1995 arrest totals). About 80% of these arrestees will be interrogated. *See* Cassell & Hayman, *supra* note 8, at 854 (finding 79% of suspects in sample questioned); *see also id.* (collecting evidence from other studies that about 80% of all suspects are questioned). This produces a total of about 2.3 million interrogations per year (2.9 million x 80%), for a ten-year total of 23 million. Looking behind index crimes to all crimes would produce a total number of interrogations about five times as high. *See* FED. BUREAU OF INVESTIGATION, *supra*, at 208 tbl.29 (reporting estimated total arrests five times higher than arrests for index crimes only).

36. *Cf.* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 833–36 (discussing effect of Utah rules of evidence on court-created exclusionary rules).

37. 656 F.2d 1147, 1154 (5th Cir. 1981).

38. *Id.* at 1149-50.

39. *Id.*

40. *See, e.g.*, 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5214, at 265-66 (1978 & 1996 Supp.) ("It seems relatively clear that in the weighing process under Rule 403 the judge cannot consider the credibility of witnesses."); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence*, 41 VAND. L. REV. 879, 886-87 (1988) ("[T]he overwhelming majority of courts asserts that a judge cannot pass on credibility in assessing probative value.").

and *reversed* the district court's decision to exclude.[41] The Fifth Circuit explained that credibility determinations are *not* permitted under the rules, discussing Rule 403 (the best "hook" for the Ofshe-Leo proposal):

> [W]e have recently held that Rule 403 *does not permit exclusion of evidence because the judge does not find it credible.* Weighing probative value against unfair prejudice under Rule 403 means probative value with respect to a material fact *if the evidence is believed, not to the degree the court finds it believable.* Rather than discounting the probative value of the test results on the basis of its perception of the degree to which the evidence was worthy of belief, the district court should have determined the probative value of the test results *if true*, and weighed that probative value against the danger of unfair prejudice, leaving to the jury the difficult choice of whether to credit the evidence.[42]

Applying this reasoning to disputed confession evidence, it is clear that Rule 403, among other rules, can virtually never serve as the basis for exclusion. The confession "if true" (as the Fifth Circuit put it) provides powerful evidence of guilt and therefore has high "probative value." Rule 403 permits exclusion only if this high probative value is "substantially" outweighed by unfair prejudice, a balance that weighs heavily in favor of admitting evidence. Moreover, the unfair prejudice the rule refers to does not mean the effect on the jury from hearing evidence that might be untrue. Such concerns, as the Fifth Circuit and many other courts have phrased it, go "to the weight and not the admissibility of the evidence."[43] In short, the rules—as conventionally interpreted—offers little chance for a defendant to exclude disputed confession evidence.

Perhaps Ofshe and Leo could reformulate their proposal by devising something other than existing approaches as the basis of exclusion—although this would involve creating (in their words) "new rules" and "cumbersome procedures." But even if the courts could somehow be empowered to substitute their own credibility determinations for that of jurors, Ofshe and Leo will surely need to further develop their argument. They do not discuss how judges should decide cases in which the prosecution and defense legitimately view the confession differently. They instead focus on the almost trivial case of a "demonstrably unreliable confession," arguing it is likely to confuse the jury.[44] But if a confession is truly "demonstrably" unreliable, one would assume that this "demonstration" could be made for the benefit of the jury, which (given the proof beyond a reasonable doubt standard) would promptly acquit the defendant, particularly where there was no other evidence against the defendant. Juries do not automatically convict defendants who have reportedly "confessed"—even looking solely at the cases featured here by Ofshe and Leo.[45]

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41. *Ballou*, 656 F.2d at 1150.
42. *Id.* at 1154 (internal citations omitted) (first emphasis added).
43. *Id.* at 1154.
44. Ofshe & Leo, *supra* note 1, at 1118.
45. *See, e.g.*, *id.* at 996 (noting acquittal of Richard Bingham after false confession); *id.* at

To make their argument fly, Ofshe and Leo need to demonstrate both that courts can accurately exclude false confessions while properly admitting the true ones and, further, that it is appropriate to divest juries of decisionmaking power on such a critical issue. If Ofshe and Leo attempt such a demonstration, they will need to confront the argument nicely made by Professor Alschuler, who in general sees little reason to take the reliability issue from the jury. As he explains, in our system "the trial of all Crimes . . . shall be by Jury,"[46] and therefore "permitting a jury rather than a judge to assess the evidentiary value of an appropriately obtained confession seems fully compatible with due process."[47] Indeed, the idea of allowing the judge to exclude supposedly incredible evidence would, leading authorities have commented, be "a remarkable innovation"[48] and "invade the jury's province and usurp its function."[49]

Professor Alschuler would seemingly abandon this long-standing general principle, however, when police resort to false claims to obtain a confession. Unlike Ofshe and Leo (who would allow "credible" confessions obtained through such tactics to go to the jury), Alschuler would require the courts to exclude all confessions obtained through police deception about incriminating evidence, even when the confessions are indisputably truthful. Given that Alschuler would create yet another exclusionary rule for defendants, he needs to explain specifically how courts across the country would adjudicate what are sure to be numerous claims that police questioning involved some sort of "false" evidence, a cost that in itself promises to be considerable.[50] For instance, the leading police interrogation manual recommends that, at the start of each interrogation, "the interrogator should finger though the case folder to create the impression that it contains material of an incriminating nature . . . ."[51] Is that a prohibited "misrepresentation" of the strength of the evidence? Nor is it clear that Alschuler's proposed rule would do much to solve any false confession problem that might exist. Ofshe and Leo (who provide what empirical support exists for Alschuler's recommendations) specifically disclaim any such approach, explaining that because false confessions come from the "improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent."[52]

Alschuler also fails to explore how many truthful confessions would be lost or later suppressed under his proposal in the quest to prevent a false one.

1024 (noting arrest of women who was apparently not tried).

46. U.S. CONST. art. III, § 2.

47. Alschuler, *supra* note 2, at 3; *see also* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("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") (internal quotation omitted).

48. 22 WRIGHT & MILLER, *supra* note 40, at 266.

49. Imwinkelried, *supra* note 40, at 887.

50. *Cf.* Fred E. Inbau & James P. Manak, Miranda v. Arizona—*Is it Worth the Costs? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 1 CAL. W.L. REV. 185 (1988) (discussing consumption of court time as the result of *Miranda* issues); Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (same).

51. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 84-85 (3d ed. 1986).

52. Ofshe & Leo, *supra* note 1, at 1115.

The available data raise some concern on this point. Professor Leo's interesting study is the only recent observational research on what actually happens during police interrogation in this country. In 30% of the interrogations he watched, police confronted suspects with "false evidence of guilt."[53] If we can generalize from his sample, three out of every ten police interrogations in this country would have to be restructured to comply with Alschuler' proposal. Moreover, the Leo data strongly suggest that this restructuring would be costly to society. Leo found that, while confronting suspects with false evidence was apparently not among the most successful tactics in every case,[54] for suspects with prior felony records or below middle class status such tactics led to confessions at rate higher than the norm.[55] While Leo's figures do not permit exact quantification, they plainly suggest that such tactics are particularly useful in obtaining truthful confessions when dealing with hardened criminals or lower social class suspects.

This conclusion is supported by one of the few existing observational studies of police interrogation in Britain. The study reported that while officers generally tried to stick "as close to the truth as possible, . . . [i]nformational bluffs are understood and used in a more sophisticated manner than any other single kind of interviewing tactic. When properly used their effectiveness in obtaining confessions is beyond doubt, and much of the preparation for an important interview is aimed at providing a basis for their use."[56] As the proponent of change (indeed, a virtually unprecedented change), Alschuler has yet to meet his burden of explaining why the benefits of his proposal outweigh the tangible costs of preventing police from using this valuable questioning technique.[57] Indeed, even focusing exclusively on innocent suspects, it is not clear whether the restriction would be justifiable. Any restraint that reduces the

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53. Richard A. Leo, *Inside the Interrogation Room: A Qualitative and Quantitative Analysis of Contemporary American Police Practices*, 86 J. CRIM. L. & CRIMINOLOGY 266, 279 (1996).

54. Such a tactic was associated with a confession or admission in 83% of the cases where it was used, a result that was no a statistically significant improvement over that base success rate of 76%. *Id.* at 294 tbl.14.

55. For these groups, confessions resulted at rates of 96% and 88%, respectively. *Id.* at 295 tbl.15.

56. BARRY IRVING, ROYAL COMM'N ON CRIM. PROC., POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE 145 (1980) (Research Study No. 2).

57. Perhaps recognizing that the prevention of false confession cannot alone justify a ban on police trickery, Alschuler also justifies his proposal with other intrinsic and empirical consequences from such representations. Alschuler, *supra* note 2, at 974. However, it is not clear that these factors add much support for his proposal. With respect to the intrinsic evil of lying, even the philosopher that Alschuler relies upon most heavily (Sissela Bok) provides no justification for a ban on misrepresentation. *See* Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by Police*, 76 OREGON L. REV. (forthcoming 1997) (analyzing police deception from a framework "[r]elying principally on the work of noted moral philosopher Sissela Bok" and concluding that "under Bok's framework . . . a good case can be made for the proposition that post-arrest trickery [of suspects] is permissible"). With respect to more pragmatic concerns, it is clear that a balancing of interests is called for. Yet Alschuler, having not discussed at any length the possible harmful consequences from his proposal, is in a weak position to claim that the balance of advantage tips in its favor. Indeed, Alschuler concedes in a disarmingly candid sentence that "[a]dmittedly, many of the harmful consequences produced by misrepresenting the strength of the evidence are also produced by deceptive interrogation practices that I do not disapprove" and "[t]hese troublesome consequences are in fact risked by every form of undercover investigation." Alschuler, *supra*, at 975 n.88. Alschuler seems to simply leave these pregnant observations hanging.

number of confessions from guilty criminals creates the risk that innocent persons might be erroneously charged in their stead.[58]

Professors Ofshe and Leo similarly fail to consider offsetting costs in arguing that courts should undertake "credibility" determinations of confessions. If their proposal is fleshed out to frequently prevent the admissibility of "false" confessions, then it may have too much "bite"—that is, it may exclude so many truthful confessions that it would be undesirable. Again, a thorough assessment of this possibility is difficult because Ofshe and Leo spend virtually no time discussing any possible negative effects from their proposal and citations to explanatory legal authorities are few and far between. Yet courts no less than police investigators can err and, when the errors involve the admissibility of evidence critical to the prosecution of criminal cases, costs to society are sure to follow in train. If their proposal is to make any real inroads on false confessions, it seems likely that a good number of truthful confessions would have to be excluded as well. Some sense of the potential risks comes from a study by Britain's Royal Commission on Criminal Justice. The Commission concluded that a rule requiring corroboration of a confession for a conviction would reduce convictions of apparently guilty defendants by as much as 3.1%.[59] If Ofshe and Leo hope to have policy proposal seriously considered, they will have to explicitly address such concerns.

The apparent failure of Professors Ofshe, Leo, and Alschuler to consider offsetting costs to their proposals[60] seems to be a common feature of suggestions from academics that police interrogation needs to be reined in. In the law reviews and psychological journals, one can read a veritable stream of new ideas for restricting—or even eliminating—police interrogation.[61] Academics

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58. *See* Cassell, *supra* note 29 (developing at length the argument about truthful confessions protecting the innocent); *see also* AKHIL R. AMAR, THE CONSTITUTIONAL AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 48 (1997) (criticizing current doctrine because "courts cripple innocent defendants while the guilty wrap themselves in the self-incrimination clause and walk free"); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680-81 (1968) (criticizing the Fifth Amendment because "[a] man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . . ."); William J. Stuntz, *Lawyers, Deceptions, and Evidence Gathering*, 79 VA. L. REV. 1903, 1931 (1993) (concluding "it seems likely that making government investigation easier improves the welfare of innocent defendants").

59. *See* ROYAL COMM'N ON CRIMINAL JUSTICE, CORROBORATION AND CONFESSIONS: THE IMPACT OF A RULE REQUIRING THAT NO CONVICTION BE SUSTAINED ON THE BASIS OF CONFESSION EVIDENCE ALONE 86 (1993) (deriving this estimate although cautioning that it might be too high for several reasons).

60. In fairness to Professor Alschuler, it should be noted that a good part of his article is devoted to defending the current doctrine that confessions should only be excluded if caused by offensive *government* conduct, a proposition leading to greater admissibility of confessions. On balance, however, his proposals would most likely produce a net reduction in the admissibility of confessions. *See supra* note 53 and accompanying text (concluding that 30% of all confessions in America would need to be restructured to comply with Alschuler's proposals).

61. *See, e.g.*, Margaret L. Paris, *Faults, Fallacies, and the Future of our Criminal Justice System: Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 44 (1995) (proposing a rule against police lies in interrogation because, *inter alia*, "the community will have lost a valuable opportunity to teach the very value that it finds so objectionably lacking in the suspect"); Slobogin, *supra* note 57 (proposing restrictions on non-custodial police interrogations because of lack of judicial determination of appropriateness for interview); White, *supra* note 26 (proposing restrictions to prevent false confessions); Deborah Young, *Unnecessary Evil: Police Lying in In-*

generally advance such suggestions not from historically-based constitutional principles, but rather policy-based normative ones.[62] But persuasive normative argument requires attention to not only the pros and but also the cons and striking a reasonable balance between contending interests. Modern academics give the impression of having little time to tarry over mundane concerns that guilty criminals might escape justice; most academics prefer to move immediately to a one-sided assessment of the risks that innocent persons might be convicted or defendants treated unfairly.[63] Professor Caplan's observation about the police interrogation literature ten years ago continues to ring true today, with regard to the articles in this Symposium and many others elsewhere: "Unlike the discussions of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat."[64]

Perhaps the academics will be successful in advancing such one-sided policy proposals for reforming police interrogation, but I have my doubts. This fact can be confirmed by the actions of the elected representatives of the people, who seem to be more interested in freeing the police from restrictions than imposing new ones.[65] Indeed, even unelected and unaccountable judges (frequently drawn from the ranks of the academics) seem generally reluctant to impose the wisdom of the law journals on everyday police operations.

While the failure of scholarly proposals to advance is no novelty, there is something troubling about the failure in this area. If wrongful convictions from false confessions are frequently occurring, then something should be done about it. Yet the one-sided approach of academics gives short shrift to more balanced suggestions that have a more realistic chance of adoption. For example, there seems to be virtual unanimity among those who have reviewed the problem that videotaping interrogations is an effective solution to the false confession problem.[66] But videotaping as a "stand-alone" proposal is unlikely to get far.[67] Rather than piling it on top of existing rules, videotaping should be imposed as a *substitute* for other restrictions on police—both to make it

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terrogations, 28 CONN. L. REV. 425, 477 (1996) (proposing elimination of lying in police interrogations to allow to help police regain the trust of "the people"); *see also* Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) (proposing that all suspects should receive a lawyer before any custodial questioning is allowed, a proposal that would effectively end most custodial police interrogation). For refreshing exceptions to the rule, see AMAR, *supra* note 58; GRANO, *supra* note 9.

62. Modern day academics, indeed, seem to invariably conflate the two. *See* GRANO, *supra* note 9, at i.

63. Even here, the academics' analysis is decidedly incomplete. *See* Cassell, *supra* note 29.

64. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1426 n.47 (1985).

65. *See, e.g.*, 18 U.S.C. § 3501 (1994) (overruling *Miranda* and substituting pre-*Miranda* voluntariness test); Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (concluding that § 3501 "is a provision of law . . . . reflecting the people's assessment of the proper balance to be struck between concern for persons interrogated in custody and the needs of effective law enforcement"); *see also* ARIZ. REV. STAT. ANN. § 13-3988 (1978) (adopting statute modeled on § 3501).

66. *See, e.g.*, Cassell, *Social Costs, supra* note 11, at 488-89 (recommending videotaping to prevent false confessions); Ofshe & Leo, *supra* note 1, at 1118; Alschuler, *supra* note 2, at 977; White, *supra* note 26, at 153-54.

67. *See* Alschuler, *supra* note 2, at 977 (concluding "most police departments resist" videotaping); Cassell, *supra* note 38.

attractive to police and legislators and to reasonably accommodate society's interests in effective police interrogation. Previously I have explained such a plan at length, arguing for videotaping of custodial police interrogations coupled with abolition of *Miranda's* waiver and questioning cutoff requirements.[68] This proposal has the virtue of *both* reducing false confessions from the innocent and increasing truthful confessions from the guilty. Videotaping is the best remedy for the false confession problem because it allows reconstruction of what happened during interrogation and identification of suspects who have been induced to spout back information supplied by the police.[69] At the same time, relaxing the *Miranda* requirements eliminates very real costs from the decision.[70] The relaxation will not enlarge any false confession problem as exists. Persons susceptible to false confessions are particularly unlikely to be helped by the *Miranda* rules because they trust the police[71] and are very likely to waive their *Miranda* rights to convince the police of their innocence.[72] If anyone doubts this point, recall that *all* of the false confessions cited by Ofshe and Leo occurred under the *Miranda* regime.

As Justice Holmes might have put it, the videotaping and scaled-back *Miranda* proposal has both dramatic *and* quantitative appeal—which is what academic suggestions need to actually become real world policy reform. Ofshe, Leo, and Alschuler should support this balanced idea or, at the very least, explain where they stand on its merits. But instead they maintain a studious silence on the idea, focusing single-mindedly on their own plans to eliminate such false confessions may exist. Time will tell whether their proposals will go anywhere, but my sense is that they will languish. Without much of a nod to competing concerns, the proposals simply will not advance in fora concerned not only about the treatment of criminal suspects but also about the conviction of guilty criminals. If this prediction is accurate, then the innocent persons at the heart of the Ofshe-Leo and Alschuler articles will not be helped. The innocent, of course, would support my more balanced proposal (and others like it) over the status quo. Why won't the academics?

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68. *See* Cassell, *Social Costs, supra* note 11, at 486-98.

69. *See id.* at 488-89; *see also* Ofshe & Leo, *supra* note 1, at 1118; Alschuler, *supra* note 2, at 977.

70. *See* Cassell, *Social Costs, supra* note 11, at 492-97.

71. *See* GISLI H. GUDJONSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 232 (1992) (noting common personality factor of false confessors of "good trust of people in authority").

72. *See, e.g., id.* at 226 (discussing case of Peter Reilly, who did not exercise his *Miranda* right to a lawyer because "I hadn't done anything wrong"); Roger Parloff, *1993: False Confessions*, AM. LAW., Dec. 1994, at 33, 34 (reporting that suspect who would later give false confession waived rights because "I had nothing to hide"). *See generally*, Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1194-98 (arguing that *Miranda* rules have limited utility in preventing false confessions).

MISSING THE FOREST FOR THE TREES: A RESPONSE TO PAUL CASSELL'S "BALANCED APPROACH" TO THE FALSE CONFESSION PROBLEM

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In his Comment,[1] Paul Cassell ignores what our article[2] is about: the development and illustration of a decision model that analyzes and explains how modern methods of psychologically-based interrogation lead both to true confessions from the guilty and false confessions from the innocent. Our central point is that false confessions come about when commonplace interrogation methods are used improperly, inappropriately or ineptly. Rather than address the subject of our article, Cassell narrowly limits his commentary to the last eight pages of our 143 page paper, principally criticizing the assertion that wrongful convictions based on false confessions are numerous and declaring our policy recommendations unsound.

In this brief response, we will argue (1) that it is presently not possible to quantify the number and frequency of false confessions or the rate at which they lead to miscarriages of justice; and (2) that Cassell misunderstands our suggestions for improving the quality of contemporary interrogation practices and increasing the reliability of confession evidence. We commend Cassell for endorsing mandatory taping of interrogations,[3] and we agree with him that each miscarriage of justice arising from a false confession is a grave tragedy.[4] However, the bottom line for Cassell appears to be that if the pervasiveness of false confessions cannot be demonstrated, then it is really not that important of a policy problem. Consequently, Cassell need not address the content of our article or worry about the predictable effects of psychological coercion inside contemporary interrogation rooms.

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1. Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123 (1997).

2. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

3. Cassell, *supra* note 1, at 1133.

4. *Id.* at 1124.

I. ARE FALSE CONFESSIONS PERVASIVE OR ISOLATED?

Because Cassell's comments can be insightful, we are disappointed that he chose not to address the substance of our article. Our aim was to explicate with unimpeachable data (i.e., excerpts from recorded interrogations) how modern interrogation tactics influence the decision-making of the guilty and the innocent. By illustrating our theoretical analysis with excerpts from interrogations that produced both true and false confessions, we sought to analyze the methods of modern psychologically based interrogation in a manner that has never before been done. Our goal here was to describe how interrogations in America today are conducted and to explain why they sometimes produce false confessions.[5]

Instead of addressing the topic we chose to analyze, and instead of correcting any mistakes or developing the argument in ways that we may have missed, Cassell first criticizes us by fastening onto the fringe question of whether false confessions are pervasive or isolated and then criticizes our policy recommendations. Accusing us of "reason[ing] dramatically, not quantitatively,"[6] Cassell asserts that we do not adequately support our statement that wrongful convictions stemming from false confessions are numerous. Cassell declares that "the frequency claim is not proven,"[7] even though our article did not seek to establish any frequency claims.[8] While we will take these issues up with Cassell in more depth in another forum,[9] several points are worth emphasizing here.

There are at least three reasons why at present it is not possible to devise an empirical study to measure, quantify or estimate with any reasonable degree of certainty the incidence of police-induced false confessions or the number of wrongful convictions they cause.

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5. *See* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L. & SOC'Y, 189 (1997). We have also sought to examine the consequences of false confessions on the administration of justice. Examining 60 cases occurring after June 13, 1966, we have documented that: (1) contemporary American interrogation methods are sufficiently powerful to induce false confessions from the factually innocent; (2) confession evidence is sufficiently powerful to produce arrests and convictions, even when there is no corroboration evidence of a suspect's guilt and there is compelling evidence of his innocence; (3) police-induced false confessions often lead to unjust deprivations of liberty and miscarriages of justice. Of the false confessors whose cases proceeded to trial, 73% were convicted and only 27% were acquitted—despite the absence of any credible evidence supporting the confession. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

6. *See* Cassell, *supra* note 1, at 1123.

7. Cassell, *supra* note 1, at 1126.

8. Cassell's implication that we fail to think carefully about the numbers is a non sequitur since our article did not address the incidence or prevalence of false confessions. Elsewhere we have discussed this issue. *See* Ofshe & Leo, *supra* note 5, at 191-194. Cassell's assertion that a failure to think carefully about the numbers risks "the grave danger of inhibiting reform by producing politically infeasible suggestions while overlooking more realistic and cost-beneficial alternatives" is merely speculative because Cassell fails to identify any "grave dangers" linked to our policy proposals or that our proposals are "politically infeasible" or that any other proposals are more "realistic" or "cost-beneficial."

9. For more articles and exchanges between us and Cassell, see 88 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

First, American police typically do not record interrogations in their entirety. When they do record, only the confession statement is likely to be memorialized. Without a record of the interrogation process, it is difficult to evaluate how an initially resistant suspect was motivated to confess. It is also difficult to assess the reliability of a confession statement because of the possibility that a careless investigator educated the suspect about the facts of the crime. Any attempt to reconstruct what occurred during an interrogation and what a suspect independently knew is necessarily undermined by the lack of a record: human memory for conversation is limited and recall is selective due to the position bias of the participant. In many disputed confession cases, then, it may not be possible ever to ascertain whether the confession was voluntary and/or reliable with any reasonable degree of certainty.

Second, because no criminal justice agency keeps records or collects statistics on the number or frequency of interrogations in America, no one knows how often suspects are interrogated or how often they confess, whether truthfully or falsely. It is untenable to randomly sample interrogations to find out how many lead to false confessions not only because it is currently not possible to identify the universe of cases under study, but also because it may not be possible to determine the ground truth (i.e., what really happened) in a particular case. Nor is it possible to extrapolate the number of interrogations occurring annually from a single non-random study in one non-representative jurisdiction. Unless and until a criminal justice agency begins to collect such statistics, it simply will not be possible to estimate or provide an answer even to the elementary question of how often interrogations occur, much less how often they lead to false confessions.

Third, many cases of false confession are likely to go entirely unreported and therefore unacknowledged and unnoticed. There are no central databanks or yearly criminal justice handbooks documenting the annual numbers even of detected false confessions. Typically the only public record is in local court papers and perhaps in the local press, sources not easily accessible to most scholars. Even when such records documenting a disputed confession case are available, it is often difficult to unequivocally establish the ground truth about the crime, especially since most confessors will be arrested, charged, prosecuted and/or convicted.[10] Because it is not possible to reach valid or reliable estimates of the incidence of false confessions, it is also not possible to estimate how often false confessions lead to wrongful convictions.

Nevertheless, the empirical record does not caste doubt on the likely occurrence of false confessions. Rather, there is compelling and abundant evidence that false confessions occur regularly. Cassell overlooks much of the empirical record when he suggests that readers of our article are "left with a promissory note that this proof will be supplied in the future."[11] In fact, social scientists, researchers and journalists have documented numerous cases of psychologically induced false confession in recent years.[12] They have also

10. *See* Leo & Ofshe, *supra* note 5.
11. Cassell, *supra* note 1, at 1126.
12. For a partial list of case examples of the numerous false confessions that have been

documented in this decade alone, see EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Research Report: National Institute of Justice, 1996); KEVIN DAVIS, THE WRONG MAN: A TRUE STORY (1996); RONALD C. HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); JIM FISHER, FALL GUYS: FALSE CONFESSIONS AND THE POLITICS OF MURDER (1996); GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY (1992); STEVEN LINSCOTT, MAXIMUM SECURITY (1994); ROBERT MAYER, THE DREAMS OF ADA (1991); PAUL A. MONES, STALKING JUSTICE (1995); ROGER PARLOFF, TRIPLE JEOPARDY: A STORY OF LAW AT ITS BEST—AND WORST (1996); ROBERT PERSKE, UNEQUAL JUSTICE: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL SYSTEM (1991) LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM (1993); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991); CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" (Donald Connery ed., 1996); Paul T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471 (1995); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719 (1997); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997); Leo & Ofshe, *supra* note 5; Mickey McMahon, *False Confessions and Police Deception: The Interrogation, Incarceration and Release of An Innocent Veteran*, 13 AM. J. OF FORENSIC PSYCHOLOGY 5 (1995); Ofshe & Leo, *supra* note 5; Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992); Michael L. Radelet et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996); T.N. Thomas, *Polygraphy and Coerced-Compliant False Confession: 'Serviceman E' Redevivus*, 35 SCI. & JUST. 133 (1995); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); June Arney, *Joseph M. 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demonstrated that police-induced false confessions often lead to lengthy and unjust deprivations of liberty and miscarriages of justice.[13] Because false confessions are likely to go unnoticed, however, it is reasonable to assume that the reported cases represent only the proverbial tip of the false confession iceberg.

In sum, it is presently not possible to know, estimate or quantify the frequency of false confessions or the annual rate or number of miscarriages of justice they cause. It appears, however, that police induced false confessions occur often and are highly likely to lead to the wrongful arrest, prosecution, conviction, and/or incarceration of the innocent.[14] In some instances, police-induced false confessions have led to the execution of the innocent, the ultimate miscarriage of justice.[15]

Even if it were possible to quantify the rate at which police-induced false confessions occur and the rate at which they lead to wrongful conviction, Cassell does not provide any meaningful theoretical context within which to understand the importance of such figures. Because not all facts are created equal, social scientists typically work from paradigms that order and give meaning to the facts. Without a paradigm, though, it is not possible to ascertain from which base population the rates of false confession and confession-driven miscarriages of justice should be computed and how they should be interpreted. Should the base population, for example, be the number of interrogations police conduct annually? The number of index crimes? The most serious index crimes, such as murder and rape? And what would such figures tell us? Without a theory or paradigm to inform us which numbers are important and why, it may not be worth the effort and expense necessary to overcome the formidable barriers to quantification, especially since there appears to be widespread agreement that false confessions and miscarriages of justice occur sufficiently often to warrant the abiding concern of legal scholars, jurists, and legislators.

Our experience with a few hundred cases of false confession leads us to conclude that it is far more important to study the conditions under which they occur, the characteristics of such cases and why they lead to deprivations of liberty and miscarriages of justice than it is to attempt to quantify what currently cannot be known. Our research indicates that the phenomenon of false confession in America today is, for the most part, explained by the inappropriate, inept and/or illegal use of contemporary interrogation methods, not the dispositions or attributes of particular individuals. In virtually all of the cases

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den, *Guilty Until Proven Innocent: The Criminal Justice System Does Not Protect the Innocent*, CHI. TIMES MAG., January/February 1990, at 34; *Confession at Gunpoint?* (ABC News 20/20 broadcast, Mar. 23, 1991).

13. *See* Leo & Ofshe, *supra* note 5.

14. *See id.*

15. *See id.*; Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) [hereinafter cited as Bedau & Radelet, *Miscarriages of Justice*]. *But see* Stephen Markman & Paul Cassell, Comment, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). *See also* Hugo Bedau & Michael Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) [hereinafter cited as Bedau & Radelet, *The Myth of Infallibility*].

we have studied, the crime under investigation was murder; the police were under enormous pressure to solve it; they had not been able to identify a suspect based on solid detective work or forensic evidence, but instead relied on pseudoscientific interpretations of behavior, gut hunches, and/or the suspect's relationship to the victim (e.g., spouse, boyfriend, etc.); there existed little or no credible evidence against the suspect, either before or after the confession; and police resorted to inappropriate and/or illegal interrogation methods such as the *maximization/minimization* technique to elicit the false statement(s).[16]

If our analysis is correct, then the important question is not whether false confessions are pervasive or isolated. Rather, it is: In high profile murder cases, why do police investigators so often select the wrong suspect, resort to inappropriate and illegal interrogation tactics, and automatically consider a case closed once they have elicited a confession? Why do police, prosecutors, judges and juries so readily assume that a confession must be true when it was obtained by psychologically coercive methods, is internally inconsistent, does not lead to corroboration and/or is contradicted by the facts of the case? Why do police, prosecutors, judges and juries so readily presume a suspect's guilt based on a questionable confession statement when the sum of evidence should lead them to conclude that the suspect is innocent beyond any reasonable doubt? And what can be done to prevent police-induced false confessions in high profile cases and their admission into evidence?

Legal scholars, jurists and legislators seeking answers to these questions will be disappointed by Cassell's "balanced approach" to the false confession problem.

II. ARE THE PROPOSED REMEDIES SOUND PUBLIC POLICY?

Cassell appears to misunderstand our suggestions for improving contemporary interrogation practices and the quality of confession evidence. He states that we advocate that "police questioning should be restricted to prevent frequently occurring miscarriages of justice from false confessions"[17] and suggests that we fail to consider "a carefully crafted balance designed to fully protect *both* the defendant's and society's interest."[18] These assertions are incorrect.

While we have argued for better police training, better pre-interrogation selection procedures and better analysis of the probative value of post-admission narratives, we have not suggested any restrictions on police interrogation procedures. Cassell recognizes this when criticizing Professor Alschuler for suggesting prohibitions on interrogators' ability to lie to and trick suspects,[19]

16. *See* Ofshe & Leo, *supra* note 5; Ofshe & Leo, *supra* note 2; Saul Kassin & Karlyn McNall, *Police Interrogation and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUMAN BEHAVIOR 233 (1991).

17. Cassell, *supra* note 1, at 1123.

18. *Id.* at 1124 (quoting Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986)).

19. "Ofshe and Leo . . . specifically disclaim any such approach, explaining that because false confessions come from the 'improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent.'" *See* Cassell, *supra* note 1, at 1129.

something we do not propose. A careful reader of our article will be hardpressed to find any suggestion that the Fifth, Sixth or Fourteenth Amendments—the current doctrine's regulating American interrogation practices—be employed to restrict the investigative powers of police.

Cassell also suggests that we fail to take into account society's interest. This too is incorrect. It goes without saying that police interrogation is an important and legitimate criminal investigation strategy in America. Cassell does not fully appreciate that our research here is neutral with respect to whether the rules of interrogation should be modified to advantage the state or the suspect. Our analysis of the causes and consequences of false confessions should not be misconstrued as either pro-prosecution or pro-defense. Instead, we take the existing legal rules as given, and suggest how police can improve the quality of interrogation practices, obtain more reliable confession evidence, and detect false confessions early on while staying within these rules. We also empirically illustrate the dangers of violating prescriptions that were written into law to reduce false confessions and protect the innocent. For example, we have criticized the *maximization/minimization* technique as inherently coercive because, as laboratory and field researchers have demonstrated,[20] it relies on threats of harm and promises of leniency for its efficacy and is likely to elicit false confessions.

We make two simple policy recommendations: mandatory electronic taping of the entirety of the interrogation process in all felony cases,[21] and a requirement that a confession demonstrates its reliability before being admitted into evidence.[22] These are hardly controversial proposals. Indeed, Cassell has also recommended taping interrogations, though he suggests that this will be acceptable to law enforcement only if it is coupled with scaled back *Miranda* warnings (i.e., eliminating waiver and questioning cut-off requirements).[23] While we neither endorse nor reject Cassell's proposal, a taping requirement is logically independent of whether to keep, scale back or eliminate *Miranda*'s warning and waiver requirements. The two issues need not be conflated and should not be confused. Cassell offers this proposal as a kind of political horse trade[24] that, he believes, represents a reasonable compromise to all sides.[25] There is no evidence, however, that the law enforcement community and criminal justice policy-makers will accept taping requirements *only* if pitched as an alternative to *Miranda*.[26]

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20. *See supra* note 16.

21. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 2, at 1118.

22. *Id.* at 1114.

23. Cassell, *supra* note 1, at 1133.

24. *See* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556-60 (1996).

25. Cassell criticizes us for failing to state where we stand on his "balanced" proposal to swap *Miranda* for recording requirements, Cassell, *supra* note 1, at 1133, but our article was not about Paul Cassell's policy proposals.

26. When the Supreme Courts of Alaska and Minnesota mandated recording requirements, there were no reports of massive police resignations, unrest or protest. *See* State v. Scales, 518 N.W.2d 587 (Minn. 1994); Stephan v. State, 711 P.2d 1156 (Alaska 1985). Nor did this happen in England after the legislative mandating of recording requirements. *See* Police and Criminal Evidence Act, 1984 (Eng.). A significant number of American police departments have voluntarily

Cassell also misunderstands our second policy recommendation: that confession statements should be evaluated with respect to their degree of reliability before they are admitted into evidence. We are not suggesting that confession statements should be admitted only if they are corroborated by independently obtained evidence. Rather, we are suggesting that since a suspect's admission that "I did it" can be either true or false, the confession that follows may turn out to be either evidence of guilt or evidence of innocence. To determine which, courts should examine the fit of the details (both dramatic and mundane) of the suspect's post-admission narrative with the facts of the crime to make an evaluation of whether the suspect appears to possess or lack the personal knowledge that would be expected from the true perpetrator. If the confessor's description of the crime fits the verifiable crime facts and is not inconsistent with the physical evidence, the confessor must possess the personal knowledge that would be known to the perpetrator and thus his post-admission narrative provides sufficient indicia of reliability to warrant its admission into evidence. If, however, the suspect's answers fit poorly with the known crime facts and therefore demonstrate an apparent ignorance of the crime (e.g., his answers about missing evidence are proven wrong, he inaccurately describes verifiable crime facts, etc.), then the post-admission narrative has failed to provide sufficient indica of reliability to warrant its admissibility.

In making this recommendation we are not suggesting that judges decide whether a particular confession is true or false. Rather, because confession evidence is so exceptionally persuasive—so prejudicial—it should be assessed to determine whether its probative value outweighs its immense prejudicial effect.[27] No evidence can be judged to have probative value if it lacks reasonable indicia of reliability. We propose that there should be a standard of demonstrable reliability below which no confession statement should be admitted into evidence. To possess sufficient indicia of reliability, a confession statement must fit the facts of the crime to a reasonable degree. Indeed, American law enforcement routinely acts on this principle when screening volunteered confessions; judges routinely act on this principle when deciding whether to admit hearsay testimony. If it is not sufficiently reliable, a confession's prejudicial effect will likely be high and may greatly confuse and mislead the jury.[28] Accordingly, consistent with the judge's traditional role as gatekeeper to exclude untrustworthy evidence that has a strong tendency to mislead the jury, the judge should not admit confessions without finding that the confession meets a minimum standard of reliability.

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chosen to record interrogations. *See* WILLIAM GELLER, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS (Report to the National Institute of Justice, 1992).

27. False confessions have such a biasing effect on juror's decisions that introducing one into evidence at trial is tantamount to an instruction to convict. *See* Leo & Ofshe, *supra* note 5.

28. *See* JOHN WIGMORE, EVIDENCE, vol. 3 (1970); G.R. Miller & F.J. Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* B. SALES, PSYCHOLOGY IN THE LEGAL PROCESS 16 (1977); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); Leo & Ofshe, *supra* note 5.

III. CONCLUSION

Paul Cassell's Comment avoids the heart of our article and instead criticizes our assertions about the frequency of false confessions and our policy recommendations. These criticisms are unwarranted. It is well-established that false confessions occur regularly and thus with troubling, if unquantifiable, frequency. The policy recommendations that Cassell attacks would not restrict interrogation practices or disadvantage police investigators. Rather, the mandatory taping of interrogations in their entirety and the minimal reliability requirements that we propose should improve the quality of police practices and therefore result in better confession evidence. These proposals would benefit both law enforcement and innocent defendants.[29] More importantly, they would improve the truth finding function of the criminal process.

It is well-documented that false confessions lead to significant deprivations of liberty and miscarriages of justice.[30] In some instances, false confessions have even led to the wrongful execution of innocents.[31] The conventional wisdom that people do not confess to crimes they did not commit and that the American criminal justice system does not wrongfully convict innocents permits these injustices to occur. The first step toward preventing wrong-

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29. As one of the authors has noted elsewhere:

> By creating a record of the entire interrogation session, videotaping improves the ability of police to assess the guilt or innocence of a suspect. Videotaping, for example, allows detectives to review the entire interrogation as the case unfolds and in light of subsequent evidence; videotaping also preserves the details of a suspect's statement that may not have been initially recorded in a detective's notes but may subsequently become important; and videotaping permits other officers to evaluate the plausibility of statements made by a suspect. In addition to aiding police in their assessment of guilt and innocence, detectives may use videotaped admissions against co-conspirators more effectively than written statements, which suspects (especially ex-convicts who are likely to be well aware of deceptive physical evidence ploys) might otherwise think are fabricated.
>
> Not surprisingly, according to Geller, police departments already using videotaping reported that videotaped interrogations and confessions led to more guilty pleas by suspects. [*See* GELLER, *supra* note 26, at 263-64]. They did so not only by undermining false claims of police coercion during interrogation, but also by demonstrating the questionable moral character and demeanor of the suspect to a judge and jury, according to the officers surveyed.
>
> The salutary effects of videotaping custodial interrogation on effective crime control extends beyond the police. Prosecutors reported that by capturing details that would otherwise remain missing from written interview notes or reports, videotaped interrogations provided them with a more complete record with which to better assess the state's case against the accused, to make more informed charging decisions, and to prepare for plea bargaining and trial more effectively. Because videotaped interrogations provided them with better knowledge of the case—including the demeanor and sophistication of the suspect—prosecutors believed that videotaping assisted them in negotiating a higher percentage of guilty pleas and obtaining longer sentences . . . Geller further reports that judges and juries favor videotaping because it allows them to determine more accurately a defendant's state of mind as well as the sincerity of his remorse for any wrongdoing. In short, videotaping interrogations can only assist the cause of crime control and, not surprisingly, is widely favored by virtually all criminal justice practitioners.

Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 683-84 (1996).

30. *See supra* note 12.

31. *See* GUDJONSSON, *supra* note 12; Bedau & Radelet, *Miscarriages of Justice*, *supra* note 15; Leo & Ofshe *supra* note 5.

ful deprivations of liberty and miscarriages of justice is to acknowledge that the conventional wisdom is wrong. Rather than dispel this myth, Paul Cassell's "balanced approach" to the false confession perpetuates it.

COERCION AND MENTAL HEALTH TREATMENT*

BRUCE J. WINICK†

I. INTRODUCTION: UNDERSTANDING COERCION

Any discussion of coerced mental health treatment must begin with a definition of the term "coercion." In its most basic meaning, the term coercion connotes force or duress, or at least the threat of force. In the context under consideration, civil commitment and court-ordered treatment are the paradigm cases. But coercion extends beyond the use of overt legal compulsion. Coercion may occur when individuals experience a loss of control over decisions that they would like to make for themselves through threats, pressure, persuasion, manipulation, or deception on the part of another.[2] Much coercion occurs in the shadow of the law. People impaired by mental illness may be especially vulnerable to suggestiveness and to official and familial pressures that those without such impairment would be better able to resist.[3] Clinicians and family members often pressure patients with mental illness to accept voluntary admission to the hospital or needed treatment, sometimes threatening to invoke civil commitment, court-mandated treatment, and even criminal arrest if they decline.[4] In addition, in the mental health context, as in other legal contexts—contract law and plea bargaining, for example—proposals or offers may sometimes be regarded as coercive.[5]

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* Copyright © 1997 by Bruce J. Winick. This article was prepared for a Symposium on Coercion and Exploitation at the University of Denver College of Law held on March 14-15, 1997, and presented to the Bioethics and Health Law Working Group at the University of Miami School of Law in April of 1997. I appreciate the helpful comments of colleagues at the presentations, and the research assistance of Alina Perez, Alphus Harris, and Tricia Shackelford.

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2. *See* John S. Carroll, *Consent to Mental Health Treatment: A Theoretical Analysis of Coercion, Freedom, and Control*, 9 BEHAV. SCI. & L. 129, 131-36 (1991) (analyzing types of coercion applied in the mental health process).

3. BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW 401 (1997).

4. *See, e.g.*, SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 179-80 (3d ed. 1985); RALPH SLOVENKO, PSYCHIATRY AND THE LAW 202-04 (1973); John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Assertive Treatment in the Community*, *in* COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW 251 (Deborah L. Dennis & John Monahan eds., 1996) [hereinafter A NEW FRONTIER]; WINICK, *supra* note 3, at 395-96 n.108; Janet A. Gilboy & John R. Schmidt, *"Voluntary" Hospitalization of the Mentally Ill*, 66 NW. U. L. REV. 429, 433 (1971); David B. Wexler, *The Structure of Civil Commitment: Patterns, Pressures, and Interactions in Mental Health Legislation*, 7 LAW & HUM. BEHAV. 1, 5 (1983); Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, 14 INT'L J.L. & PSYCHIATRY 169, 209-10 (1991).

5. *See* ALAN WERTHEIMER, COERCION 202-41 (1987); Alan Wertheimer, *A Philosophic Examination of Coercion for Mental Health Issues*, 11 BEHAV. SCI. & L. 239, 244-46 (1993);

The term coercion is not an entirely descriptive one, and it does not have an entirely objective and universally applicable meaning. Rather, it is a "contextually dependent, moralized phenomenon."[6] In many respects, coercion has a significant normative content. Coercion is a pejorative label that judges invoke to condemn behavior that they find objectionable or to permit the invalidation of choices that they deem unfair or unreasonable in the circumstances.[7]

Moreover, coercion may have a significant subjective component. Although the law tends to define coercion based exclusively on the actions of the person who applies pressure to another, ignoring the subjective response of the recipient, this exclusive focus on the coercer seems artificial. The same actions may be perceived as coercive by one patient, but as not coercive by another. Significant numbers of patients who are involuntarily committed to psychiatric hospitals perceive their commitment to have been voluntary, whereas significant numbers of voluntary patients perceive coercion in the admission process.[8] Thus patient perceptions of coercion are often incongruent with their official legal status. Furthermore, patient perceptions of coercion often differ from the perceptions of others who observe the patient in the hospital admission process, such as clinical staff and family members.[9]

What constitutes coercion, in short, may lie largely in the eye of the beholder.[10] This subjective character of coercion does not argue that the law should avoid reliance on an objective definition of the term. People who are coerced in a legal sense may mistakenly believe that they were not coerced, and those whose actions were not coerced as a matter of law may feel coerced. But the law should take account of what makes people feel coerced in fashioning legal standards and procedures in this area.

Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737 (1991) (discussing behavioral contracting).

6. WERTHEIMER, *supra* note 5, at 206; Monahan et al., *supra* note 4, at 13; Charles W. Lidz et al., *Perceived Coercion in Mental Hospital Admission*, 52 ARCHIVES GEN. PSYCHIATRY 1034 (1995); Wertheimer, *supra* note 5; Charles W. Lidz et al., The Validity of Mental Patients' Accounts of Coercion Related Behaviors in the Hospital Admission Process (1996) (unpublished manuscript on file with the author).

7. *See* David B. Wexler, *Reflections on the Regulation of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 132, 133 (1975); Bruce J. Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331, 391-92 (1981). For a discussion of the normative nature of coercion, see JOSEPH RAZ, THE MORALITY OF FREEDOM 148-57 (1986); WERTHEIMER, *supra* note 5, at 211-17; Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1443, 1446 (1989).

8. Nancy S. Bennett et al., *Inclusion, Motivation, and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993); Deborah L. Dennis & John Monahan, *Introduction*, *in* A NEW FRONTIER, *supra* note 4, at 3; William P. Gardner et al., *Two Scales for Measuring Patients' Perceptions for Coercion During Mental Hospital Admission*, 11 BEHAV. SCI. & L. 307 (1993); Gilboy & Schmidt, *supra* note 4, at 433; Virginia A. Hiday et al., *Patient Perceptions of Coercion in Mental Hospital Admission*, 20 INT'L J.L. & PSYCHIATRY (1997); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249 (1995); Monahan, *supra* note 4, at 23-27; Anne Rogers, *Coercion and Voluntary Admission: An Examination of Psychiatric Patient Views*, 11 BEHAV. SCI. & L. 259 (1993).

9. Bennett et al., *supra* note 8, at 300-01; Gardner et al., *supra* note 8, at 308; Hiday et al., *supra* note 8; Monahan, *supra* note 8, at 252.

10. *See infra* Part VI (discussing research on patient perceptions of coercion).

Absent fraud or mistake, when people subjectively experience their choices as voluntary, the issue of coercion ordinarily will not be raised. People who do not feel coerced are unlikely to commence legal proceedings to complain about the actions of others that might have contributed to their choice, nor to seek judicially to void choices they have made. When people feel coerced, however, they are more likely to complain about it, and it is more probable that judges will need to resolve the issue.

In cases in which patients raise the issue of coercion, courts are faced with the question of whether to characterize the actions of governmental officials or others as coercive or to characterize patient choices as coerced. In such cases courts will need to decide that either there was coercion or there was not. Although courts therefore will view coercion as a dichotomous inquiry—in which the patient is either coerced or not—coercion can be better understood as existing on a continuum—"from friendly persuasion to interpersonal pressure, to control of resources to use of force."[11] Very few choices in life are wholly free of at least some degree of coercion.[12] In addition to the compulsion of the law, a variety of economic, social, familial, occupational, and psychological pressures inevitably impinge on individual decision making, sometimes leading individuals to experience their choices as coerced.

There are degrees of coercion falling along a continuum, and where the law chooses to place the dividing line between coercion and voluntariness is essentially a normative judgment.[13] Once this normative character of the concept of coercion is recognized, we should strive to identify and weigh the various values that might be affected by differing legal standards defining the category and procedures governing its determination. These values include respect for individual autonomy and self-determination, our notions of the limits of governmental power over the individual, the desire to protect individuals from harm or unfair treatment, and in the case of medical and mental health treatment, the desire to foster the efficacy of such treatment. This last concern—the therapeutic—focuses attention on the relationship between perceived coercion and treatment outcome, a question that remains substantially unexplored empirically.[14] Although our knowledge concerning this relationship remains incomplete, psychological theory would suggest that coercion may undermine treatment success and that its opposite—voluntary choice—may serve to promote it. After briefly examining the asserted justifications for coercion in the mental health context and considering some special problems raised by the application of coercion standards to the situation of institutionalized patients, this article will analyze this relationship and explore

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11. Ronald J. Diamond, *Coercion and Tenacious Treatment in the Community: Applications to the Real World*, *in* A NEW FRONTIER, *supra* note 4, at 55. For a discussion of coercion as involving a continuum, see JOEL FEINBERG, HARM TO SELF 255-56 (1989); *see also* Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169, 1172 (1997).

12. Winick, *supra* note 5, at 770; *see also* Robert D. Miller, *supra* note 11, at 1170-71.

13. *Id.*

14. BRUCE J. WINICK, THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT (1997); WINICK, *supra* note 3, at 78; *see* Virginia A. Hiday, *Coercion in Civil Commitment: Process, Preferences and Outcome*, 15 INT'L J.L. & PSYCHIATRY 359, 359 (1992).

how legal rules governing coercion and its determination, and the application of those rules, might affect therapeutic values.

II. WHEN THE LAW PERMITS INVOLUNTARY HOSPITALIZATION AND COERCIVE TREATMENT

All jurisdictions permit the civil commitment to psychiatric hospitals of those suffering from mental illness.[15] Commitment of those dangerous to themselves or others is a traditional exercise of the state's police power.[16] Commitment of those who are incompetent to engage in rational hospitalization decisions for themselves and who otherwise would be gravely disabled is an application of the state's historic *parens patriae* power.[17] Although voluntary hospitalization is encouraged, those who refuse it and who meet statutory criteria may be hospitalized involuntarily.[18]

When patients are subjected to civil commitment, and sometimes even when they are not, they may be treated on an involuntary basis. Although the law has increasingly recognized a qualified right of mental patients to refuse various types of mental health treatment,[19] the courts have recognized situations in which the government's interests in compelled treatment may outweigh the individual's right to refuse it.[20] For example, when an institutionalized patient or prisoner is dangerous to institutional staff, other patients, or inmates as a result of mental illness, the state may involuntarily administer psychotropic medication as long as it is medically appropriate for the individual and (in non-prison contexts) the least intrusive means of dealing with the problem.[21] Similarly, courts have permitted forced treatment under the state's *parens patriae* power when mental illness has rendered patients incompetent to make treatment decisions for themselves.[22] Another example involves criminal defendants found to be incompetent to stand trial who may be administered involuntary treatment designed to restore and maintain their competence, as long as it is medically appropriate and the least intrusive means of accomplishing this goal.[23]

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15. *See, e.g.*, BRAKEL ET AL., *supra* note 4, at 34, 76-81 (table 2.1); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (1989); Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). For an analysis of the mental illness requirement for civil commitment, see WINICK, *supra* note 3, at 93-199.

16. *See* BRAKEL ET AL., *supra* note 4, at 375; 1 PERLIN *supra* note 15, at 37-45; WINICK, *supra* note 3, at 162-66; Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968) (discussing the public policy justifications for involuntary commitment); Note, *supra* note 15, at 1222-45.

17. *See* BRAKEL ET AL., *supra* note 4, at 428-29; 1 PERLIN, *supra* note 15, at 37-45; WINICK, *supra* note 3, at 166-71; Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 16-18 (1991); Note, *supra* note 15, at 1207-22.

18. *See* BRAKEL ET AL., *supra* note 4, at 24; WINICK, *supra* note 3, at 201-13.

19. *See* WINICK, *supra* note 14.

20. *Id.* at 269-309.

21. Riggins v. Nevada, 504 U.S. 127, 135-36 (1992) (dictum); Washington v. Harper, 494 U.S. 210, 225 (1990); WINICK, *supra* note 14, at 285-88, 294-308.

22. *See, e.g.*, Rennie v. Klein, 653 F.2d 836, 845 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982); Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom.* Mills v. Rogers, 457 U.S. 291 (1982); WINICK, *supra* note 14, at 289-94.

23. *Riggins*, 504 U.S. at 127; WINICK, *supra* note 14, at 276-83; Bruce J. Winick, *Psycho-*

In addition to contexts involving institutionalized mental patients and criminal offenders, coercive mental health treatment has increasingly been applied in the community.[24] Such treatment has been mandated as part of involuntary outpatient commitment, preventive commitment, conditional release, and as a condition of parole, probation, or diversion from the criminal process.[25] Also, court-ordered treatment may be imposed in a variety of criminal and family court contexts.[26] Other than to offer the above brief outline of when the law authorizes involuntary psychiatric hospitalization and mental health treatment, this article does not attempt an analysis of the conditions under which coercion in the mental health context should be justified.[27]

III. LEGAL STANDARDS OF COERCION AND THE POSSIBILITY OF THEIR SATISFACTION BY THOSE WITH MENTAL ILLNESS

A number of situations thus exist in which involuntary commitment is permitted and in which clinicians in public facilities and in the community will be authorized to administer mental health treatment coercively. In those circumstances in which the law authorizes coercive mental health intervention, the usual requirements of the informed consent doctrine will not need to be followed. Indeed, in these situations, clinicians will rarely discuss hospitalization and treatment options with their patients, but will make treatment decisions unilaterally and order that hospitalization and treatment be imposed involuntarily, even over objection. Although some judicial and legislative clarification has occurred concerning when patients have a right to refuse treatment and when they do not, many issues remain unresolved.[28]

In situations in which involuntary hospitalization or coercive treatment is not permitted, the law will need to define the concept of coercion. Typical definitions incorporate the standard of coercion adopted in the Nuremberg Code, requiring "the knowing consent of an individual or his legally authorized representative, so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion."[29] Patients institutionalized because of mental illness may be particularly vulnerable to coercive pressures, and their consent to treatment delivered within the institution cannot always be accepted at face value. It would be a mistake, however, to conclude that the fact of

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tropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada, 10 N.Y.L. SCH. J. HUM. RTS. 637, 646-51 (1993).

24. *See* A NEW FRONTIER, *supra* note 4.

25. *Id.*

26. For extensive treatment of this issue, see WINICK, *supra* note 14 (involuntary treatment); WINICK, *supra* note 3, at 93-199 (involuntary hospitalization and treatment).

27. *Id.*

28. *See* WINICK, *supra* note 14.

29. *The Medical Cases, in* 1 & 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS (1948), *reprinted in* JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS 292, 305-06 (1972). The principles set forth in the judgment of the Nuremberg Military Tribunal in the case of *United States v. Karl Brandt*—the trial of twenty-three German physicians for war crimes involving experiments with prisoners of war and civilians—have come to be known as the Nuremberg Code. *See also* 45 C.F.R. § 46.116 (1996) (U.S. Dep't of Health and Human Services regulations concerning the protection of human subjects).

institutionalization *per se* renders treatment choices involuntary.[30]

Prisoners face similar institutional pressures, and it is useful to consider the related question of whether prisoners should be considered able to make free choices. In its report entitled *Research Involving Prisoners*, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research considered "whether prisoners are, in the words of the Nuremberg Code, 'so situated as to be able to exercise free power of choice'"—that is, whether prisoners can give truly voluntary consent to participate in research.[31] Some of the commissioners argued that prisons, by their very purpose and character, make sufficiently free consent to research impossible.[32] Similarly, several participants at a National Minority Conference on Human Experimentation held under the auspices of the National Commission objected in principle to the notion of truly voluntary consent by prisoners.[33] The National Commission, however, ultimately rejected the idea that prisons are so inherently coercive that voluntary consent is impossible, and concluded that at least some prison research could be undertaken with appropriate safeguards.[34] The Commission proposed a number of requirements to ensure "a high degree of voluntariness on the part of the prospective participants," including "adequate living conditions, provisions for effective redress of grievances, separation of research participation from parole considerations, and public scrutiny."[35] The U.S. Department of Health and Human Services regulations, initially adopted as a result of the Commission's work, include an additional protection for prisoners subjected to biomedical and behavioral research. The regulation requires an assurance that parole boards not take into account a prisoner's participation in such research in making parole decisions, and that prisoners be "clearly informed in advance that participation in the research will have no effect on his or her parole."[36]

In the *Kaimowitz* Michigan psychosurgery case,[37] the court considered the impact on voluntariness of institutionalization and of the inducement created when release is tied to consent. The court held that involuntarily confined mental patients are unable as a matter of law to consent to experimental psychosurgery. The court's analysis has broad implications for the ability of all

30. The analysis that follows is drawn in part from my discussion of the requirement of voluntariness under the informed consent doctrine contained in WINICK, *supra* note 14, at 363-68.

31. NATIONAL COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, RESEARCH INVOLVING PRISONERS 5 (1976) [hereinafter RESEARCH].

32. Roy Branson, *Prison Research: National Commission Says "No, Unless . . ."*, HASTINGS CENTER REP. Feb. 1977, at 15, 17 (quoting remarks of Commissioner King).

33. RESEARCH, *supra* note 31, at 42, 44. This was also the view of the American Correctional Association. *See* American Correctional Ass'n, *Position Statement: The Use of Prisoners and Detainees as Subjects of Human Experimentation, Feb. 20, 1976, in* RESEARCH, *supra* note 31, at 22-1 to 22-2 app.

34. Larry I. Palmer, *Biomedical and Behavioral Research on Prisoners: Public Policy Issues in Human Experimentation, in* RESEARCH, *supra* note 31, at 14-21 app.; *see* Branson, *supra* note 32, at 16.

35. RESEARCH, *supra* note 31, at 16.

36. 45 C.F.R. § 46.305(a)(6) (1996).

37. Kaimowitz v. Michigan Dep't of Mental Health, No. 73-19434-AW (D. Mich. July 10, 1973), *reprinted in* ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 902, 913-14 (1974).

institutionalized mental patients to provide informed consent, and therefore deserves careful analysis. The court stated that:

> Although an involuntarily detained mental patient may have sufficient I.Q. to intellectually comprehend his circumstances . . . the very nature of his incarceration diminishes the capacity to consent to psychosurgery.
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> . . .
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> The fact of institutional confinement has special force in undermining the capacity of the mental patient to make a competent decision on this issue, even though he be intellectually competent to do so.
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> . . .
>
> It is impossible for an involuntarily detained mental patient to be free of ulterior forms of restraint or coercion when his very release from the institution may depend upon his cooperating with institutional authorities and giving consent to experimental surgery.
>
> Involuntarily confined mental patients live in an inherently coercive institutional environment. Indirect and subtle psychological coercion has a profound effect upon the patient population. . . . They are not able to voluntarily give informed consent because of the inherent inequality of their position.[38]

The sweeping approach of *Kaimowitz*, however, has not been followed by other courts. The *Kaimowitz* court sought to limit its holding to experimental psychosurgery by stating that consent could be given to conventionally accepted procedures.[39] The logic, however, of the court's approach to coercion goes considerably beyond experimental treatment.

Although the *Kaimowitz* court may have reached the right result on the facts of that case,[40] the potential breadth of the court's holding concerning the effects of institutionalization and the promise of release on the capacity to give informed consent could give rise to absurd and constitutionally dubious results. Institutionalization may substantially diminish the ability of some patients to decide freely on therapy, and the lure of release or of avoiding hospitalization may be so potent that, for at least some patients, refusal to consent is virtually impossible. These factors, however, should not preclude all patients from being considered capable of making these decisions voluntarily. If institutionalization *per se* diminishes decision-making abilities so that patients are incompetent to elect psychosurgery, how can patients be considered competent to make other important decisions? Can they decide to have elective surgery or other medical treatment when needed, to choose particular recreational or therapeutic opportunities, or to agree to accept certain conditions of conditional release? Moreover, if the prospect of release renders confined individuals

38. *Kaimowitz*, No. 73-19434-AW, slip op. at 25-29; BROOKS, *supra* note 37, at 913-15.

39. *Kaimowitz*, No. 73-19434-AW, slip op. at 40; BROOKS, *supra* note 37, at 920.

40. *See* Robert Burt, *Why We Should Keep Prisoners From The Doctors*, HASTINGS CENTER REP., Feb. 1975, at 25.

incompetent to elect psychosurgery, how can patients be permitted to elect the variety of other hospital programs that are likely to result in early release?

The absurdity of a *per se* rule based upon the impact of institutionalization or the lure of release is demonstrated by its extraordinarily sweeping effect. An example drawn from the analogous context of the prison illustrates the difficulties with the *Kaimowitz* approach. A common example of use of the early release lure to modify prisoner behavior is the virtually universal practice of providing "good time" credit. As the Supreme Court noted in *McGinnis v. Royster*,[41] "the granting of good-time credit toward parole eligibility takes into account a prisoner's rehabilitative performance."[42] The state statute involved in *Royster* authorized such good time credit "for good conduct and efficient and willing performance of duties assigned."[43] Under a U.S. Bureau of Prisons rule, an award of "extra good time" may be made for, among other things, "[v]oluntary acceptance and satisfactory performance of an unusually hazardous assignment."[44] Under the *Kaimowitz* approach, these common and largely unobjectionable features of prison life would be deemed coercive. Although the lure of release from institutional confinement may make the voluntary choices made by patients in favor of treatment suspect, it would be a mistake to regard all such choices as inherently coerced even though they predictably may bring about earlier release from the hospital.

In the analogous situation of plea bargaining, the courts have rejected the notion that the opportunity or even the assurance of a shorter sentence necessarily renders a guilty plea involuntary. In *Brady v. United States*,[45] the defendant attacked the validity of his guilty plea, arguing that it was entered to avoid the possibility of the death penalty. Under the statute involved, the death penalty could be imposed following a jury determination of guilty but could not be imposed when a defendant waived trial and pled guilty. Stressing that "[t]he voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it,"[46] the Court rejected the coercion claim:

> Even if we assume that Brady would not have pleaded guilty except for the death penalty provision . . . , this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act. . . .
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> Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this

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41. 410 U.S. 263 (1973).
42. *McGinnis*, 410 U.S. at 271.
43. *Id.* at 266-67 n.5 (quoting Royster v. McGinnis, 332 F. Supp. 973, 974-75 (S.D.N.Y. 1971)).
44. 28 C.F.R. § 523.16 (1996); *see also* 28 C.F.R. § 2.60(a), (b) (1996) (rule of U.S. Parole Commission permitting advancement of presumptive release date for "superior program achievement" in "educational, vocational, industry, or counselling programs").
45. 397 U.S. 742 (1970).
46. *Brady*, 397 U.S. at 749.

> case. . . . Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possible higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.
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> . . .
>
> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty. . . . [47]

Not all pressures that succeed in inducing a plea will be deemed coercive. The *Brady* Court adopted as its standard of voluntariness the rule that a guilty plea "must stand unless induced by threats . . . misrepresentation . . . , or perhaps by promises that are by their nature improper," such as bribes.[48] The Court thus recognized that while certain plea offers could be coercive, an offer of leniency alone, however enticing, would not be deemed coercive. Even an offer that is difficult to refuse will be permitted absent improper threats or promises or some form of misrepresentation. Under the standard adopted by the Court, "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."[49]

If avoidance of the possibility of a death sentence is not so inherently coercive as to invalidate a guilty plea, then it is difficult to see how the possibility or promise of early release from the hospital could be considered so inherently coercive as to invalidate a patient's choice of therapy. There was no suggestion in *Brady* that the prosecutor acted in bad faith, using his charging discretion improperly to lodge a baseless charge against Brady of an offense carrying the death penalty in order to engineer a guilty plea. Offering to dismiss a baseless charge in exchange for a guilty plea would have been an "improper" promise, and hence coercive.[50] Similarly, if the conditions of institutional confinement that would be avoided by the agreement of a hospitalized patient to accept treatment are inconsistent with the minimum standards mandated by the Constitution,[51] an offer of potential release also would constitute an improper promise that would be coercive under the *Brady* standard.

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47. *Id.* at 750-51.

48. *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). *Brady* did not actually involve plea bargaining. The statute under which Brady was charged made the death penalty unavailable in the case of a guilty plea. The pressure that Brady asserted had induced his plea was a product of the statutory scheme itself. The Supreme Court, however, subsequently applied the *Brady* standard in the context of plea bargaining. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). Indeed, *Brady's* concept of offers or proposals as coercive only when improper has emerged as a general legal approach to considering when offers are coercive. *See* WERTHEIMER, *supra* note 5, at 172, 267-68, 287, 301, 308; Winick, *supra* note 5, at 770 & n.107; *see also* RESTATEMENT (SECOND) OF CONTRACTS §§ 174-76 (1981) (standard of duress limited to physical compulsion or improper threats).

49. *Brady*, 397 U.S. at 755.

50. *See supra* note 48 and accompanying text.

51. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

Either case—the offer to dismiss a baseless charge or to remove legally inadequate conditions of confinement in exchange for a guilty plea—would constitute a coercive offer which would render unenforceable the defendant's plea made in response. Such an offer is objectionable because the conditions from which the individual is offered relief if he or she accepts the proposal are themselves improper. If rejected, the individual would be worse off than he or she has a right to be. The offer thus violates the individual's moralized baseline, rendering the pressures it creates coercive.[52] By contrast, if the conditions of institutional confinement are not unconstitutional or otherwise improper, the promise of future release conditioned on acceptance of treatment would seem no different than a promise not to seek the death penalty or to dismiss capital charges that are appropriate in the circumstances in exchange for a guilty plea.

Of course, there may be cases in which the forces of institutionalization render a particular patient incapable of making truly voluntary choices. And there may be cases in which threats or promises are so potent that the particular patient's consent is virtually assured. Nevertheless, this does not mean that institutionalization or the opportunity of early release or of avoidance of confinement renders voluntary consent impossible.

Virtually no choice is totally free of at least some degree of psychological coercion.[53] Psychologist Israel Goldiamond has performed a useful behavioral analysis of voluntariness and coercion, defining situations of coercion and noncoercion through the use of a contingency analysis.[54] In this model, coercion is most severe when there are no genuine choices and the consequences contingent on behavior are critical.[55] Certainly plea bargaining is coercive under this model,[56] sometimes extremely so. Nevertheless, courts have accepted the basic legitimacy of plea bargaining, deeming this degree of coercion constitutionally tolerable.[57] The psychological pressures inherent in a particular situation will not alone render choices coerced for legal purposes. It is only

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52. *See* WERTHEIMER, *supra* note 5, at 210.

53. Israel Goldiamond, *Protection of Human Subjects and Patients: A Social Contingency Analysis of Distinctions Between Research and Practice, and its Implications*, 4 BEHAVIORISM 1, 27 (1976) ("Coercion is not absolute; there are degrees of coercion as well as of freedom."); *see* Louis L. Jaffee, *Law as a System of Control*, *in* EXPERIMENTATION WITH HUMAN SUBJECTS 203, 216 (Paul A. Freund ed., 1969). For philosophical analyses of the concept of coercion, see RAZ, *supra* note 7; WERTHEIMER, *supra* note 5; REPRESENTATION: YEARBOOK FOR THE AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 1-328 (J. Roland Pennock & John W. Chapman eds., 1968); Jeffrie G. Murphy, *Consent, Coercion and Hard Choices*, 67 VA. L. REV. 79 (1981); Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE AND METHOD 440 (Sidney Morgenbesser et al. eds., 1969); Wertheimer, *supra* note 5; Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889 (1997).

54. Goldiamond, *supra* note 53, at 20-34; Israel Goldiamond, *Singling Out Behavior Modifications for Legal Regulation: Some Effects on Patient Care, Psychotherapy and Research in General*, 17 ARIZ. L. REV. 105, 121-25 (1975).

55. Goldiamond, *supra* note 53, at 23.

56. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 675-78 (1980).

57. *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 222-23 (1978); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977). The Supreme Court even has suggested that plea bargaining, properly conducted, is worthy of encouragement. *See* Santabello v. New York, 404 U.S. 257, 260 (1971).

when improper pressures are brought to bear that courts will find coercion.

Most patients should be deemed, in principle, capable of consenting to even the most intrusive of treatment programs—programs that they otherwise would have a constitutional right to refuse. Because the inherent psychological pressures faced by institutionalized patients choosing treatment are simply not avoidable, courts should seek only to protect against additional or related pressures that are unfair or improper.[58] An analogy to plea bargaining is again useful. The inherent coerciveness of plea bargaining is mitigated by the presence and advice of counsel during the plea bargaining process,[59] and by the practice of giving pleas in open court where the judge is required to conduct a review of the extent of the defendant's knowledge of the rights about to be waived and the voluntariness of their waiver.[60] Similar protection could easily be fashioned in the context of consent to at least the more intrusive forms of mental health treatment. Indeed, some type of pretreatment hearing and independent review may be required by the guarantee of procedural due process.[61] With these procedural qualifications, it seems likely that courts would uphold the validity of consent given by patients in connection with mental health or correctional therapies. Although institutionalization and the lure of release may provide pressures that render some choices made in response legally coerced, most patients will be able to satisfy the requirement of voluntariness notwithstanding these pressures, and to provide informed consent to treatment.

IV. A THERAPEUTIC JURISPRUDENCE APPROACH TO COERCION

Although the pressures inherent to institutionalization or the potent lure of release from hospital confinement will not by themselves render treatment choices coerced, in those contexts in which the law prohibits coerced hospitalization or treatment, there is need for further clarification concerning when persuasion and pressure to accept voluntary hospitalization or treatment cross the line into coercion. This is not an easy line for the law to draw, particularly in the mental health treatment context where persuasion and coping with patient resistance to change are essential parts of the therapeutic process. In this connection, it is important to understand the kinds of persuasion and pressure that patients perceive as coercive and offensive and those that they perceive as noncoercive and acceptable. Moreover, it is important to understand the relationship between these patient perceptions of coercion and noncoercion and therapeutic success or failure.

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58. WINICK, *supra* note 14, at 363-68; Jeffrie G. Murphy, *Total Institutions and the Possibility of Consent to Organic Therapies* 5 HUM. RTS. Q. 25, 38 (1975); David B. Wexler, *Reflections on the Legal Regulation of Behavior Modification in Institutional Settings*, 17 ARIZ. L. REV. 132, 133 (1975).

59. *See Brady*, 397 U.S. at 758. *Compare* Tollett v. Henderson, 411 U.S. 258, 265 (1973), *and* McMann v. Richardson, 397 U.S. 759, 771 (1970), *with* Fontaine v. United States, 411 U.S. 213, 215 (1973).

60. *See Brady*, 397 U.S. at 758; Boykin v. Alabama, 395 U.S. 238, 241-44 (1969); McCarthy v. United States, 394 U.S. 459, 467 (1969); Fed. R. Crim. P. 11.

61. *See* WINICK, *supra* note 14, at 371-89.

Even when mandatory treatment or hospitalization is permitted by the law, it is important for both legal actors and clinicians involved in the treatment process to understand when patients subjectively perceive coercion, and the relationship between such perceptions and treatment outcome. Because the purpose of treatment delivered on an involuntary basis is to ameliorate the patient's psychopathology, it is crucial to inquire concerning what kinds of persuasion and pressure are conducive to the therapeutic mission and those which may undermine it. Legal actors and clinicians functioning within the coercive treatment context should therefore view the question of coercion through the lens of therapeutic jurisprudence.[62]

Therapeutic jurisprudence is the study of the law as a therapeutic agent. Whether we appreciate it or not, the law is a social force that frequently imposes therapeutic or antitherapeutic consequences on the people it affects. Therapeutic jurisprudence is an interdisciplinary approach to the study of law that calls for a theoretical and empirical analysis of the impact of law on individuals' psychological health and functioning. By examining law in this way, therapeutic jurisprudence can generate a wide array of empirical and policy issues, many of which have not previously been raised, that can enrich our understanding of law and identify new and creative law reform proposals.[63] Law's therapeutic consequences are not the only ones worth studying or considering, of course, but they should not be neglected in any sensible policy analysis of law. When legal rules or procedures or the roles played by various legal actors (such as judges, lawyers, and clinicians) create antitherapeutic consequences, we should consider whether changes in law or in the way law is applied can be accomplished in a manner that will minimize these consequences consistent with considerations of justice and other relevant normative values.

Applying the therapeutic jurisprudence approach to the context of coercive mental health treatment allows us to identify a number of issues that are ripe for empirical research, the results of which will be crucial to legal decision making in this area. When the law permits coercive treatment in various contexts, it does so based on the assumption that such treatment is effective. But is such treatment effective when imposed coercively? Can coercion impose negative effects on the treatment process? How should clinicians deal with their patients when coercive treatment is authorized? How can legal rules permitting coercive treatment be structured in order to further and not diminish the potential for a successful treatment outcome? Even in the absence of empirical research on these issues, the need exists to apply psychological theory to speculate about the effects of coercion in the mental health process. The

62. *See generally* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991) (analyzing and illustrating law's role as a therapeutic agent); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996) (illustrating application of therapeutic jurisprudence to a wide spectrum of legal issues and containing commentary on this emerging approach to legal policy analysis) [hereinafter LAW IN A THERAPEUTIC KEY]; WINICK, *supra* note 3 (applying the approach of therapeutic jurisprudence to analyze the field of mental health law); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. (forthcoming 1997).

63. *See* LAW IN A THERAPEUTIC KEY, *supra* note 62 (anthology of therapeutic jurisprudence of theoretical and empirical work on a wide variety of legal issues).

remainder of this article will address these issues, conducting a therapeutic jurisprudence analysis of legal and clinical approaches to coercive treatment. The first question for analysis is whether coercive treatment works.

V. DOES COERCIVE TREATMENT WORK?

To the extent that the law permits involuntary treatment in order to improve mental health or restore a level of functional capacity, there is a need for social scientists to examine whether the law's objectives are accomplished. There have been various anecdotal reports of successful treatment in coercive situations.[64] There is a paucity of empirical research exploring the efficacy of involuntary treatment, however.[65] An extensive review of the literature on psychotherapy and psychotropic medication, the two most prevalent forms of treatment for those suffering from mental illness, found no persuasive evidence that coercive application of these two techniques to involuntarily committed patients was effective.[66] In recent years, there has been increased interest in the efficacy of aggressive community-based treatment.[67] Several researchers have conducted quasi-experimental studies of outpatient civil commitment, and have concluded that it is effective in reducing the length and number of hospitalizations, and in increasing patient continuance in treatment.[68] These studies, however, are preliminary and suffer from serious methodological difficulties—small sample sizes, use of retrospective data, lack of control groups, and failure to control for potential confounding variables, including the selection criteria used and the effects of informal coercion.[69] Some of these methodological difficulties may be inherent to the task of studying the efficacy of coerced treatment. A true experiment employing random assignment of patients thought to be in need of coerced treatment raises ethical dilemmas and may not be feasible.[70] Moreover, there is lack of agreement concerning proper outcome measures for judging the efficacy of treatment. For example, such factors as rehospitalization or recidivism, or increased continuation in treatment, may not adequately capture the effectiveness of treatment.

64. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, FORCED INTO TREATMENT: THE ROLE OF COERCION IN CLINICAL PRACTICE 22-24, 81, 99-101 (1994) (including anecdotal reports of successful treatment in coercive situations, including treatment of children and adolescents, sex offenders, and employees treated for alcoholism or drug addiction when coercion is perceived by patient as fair and appropriate).

65. Phyllis Solomon, *Research on the Coercion of Persons with Severe Mental Illness*, *in* A NEW FRONTIER, *supra* note 4, at 129, 142-43.

66. Mary L. Durham & John Q. La Fond, *A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill*, 40 RUTGERS L. REV. 303, 351-56, 367-68 (1988).

67. A NEW FRONTIER, *supra* note 4, at 2-3.

68. *See, e.g.*, Virginia A. Hiday & Theresa L. Scheid-Cook, *A Follow-Up of Chronic Patients Committed to Outpatient Treatment*, 40 HOSP. & COMMUNITY PSYCHIATRY 52 (1989); Robert A. Van Putten et al., *Involuntary Outpatient Commitment in Arizona: A Retrospective Study*, 39 HOSP. & COMMUNITY PSYCHIATRY 953 (1988); Guido Zanni & Leslie de Veau, *Inpatient Stays Before and After Outpatient Commitment*, 37 HOSP. & COMMUNITY PSYCHIATRY 941 (1986).

69. Solomon, *supra* note 65, at 135; M.S. Swartz et al., *New Directions in Research on Involuntary Outpatient Commitment*, 46 HOSP. & COMMUNITY PSYCHIATRY 381, 382 (1995).

70. Monahan et al., *supra* note 8.

VI. THE PERCEPTION OF COERCION

We thus know very little about the efficacy of coerced treatment. More research plainly is needed.[71] However, before we can properly study coercion as an independent variable in treatment outcome, a significant prior issue must be examined—coercion as a dependent variable, that is, what makes people feel coerced.[72] As indicated earlier, the concept of coercion has a significant subjective component.[73] The issue of when people feel coerced—the determinants and correlates of perceived coercion—has been the subject of important recent research conducted under the auspices of the MacArthur Research Network on Mental Health and the Law.[74] This research examined attitudes of patients at the time of admission to mental hospitals. The preliminary results indicated that patient perceptions of coercion do not necessarily correlate with whether they have been subjected to formal legal compulsion, such as occurs in civil commitment, and that it is possible to study patients' perceptions of coercion independent of the formal legal status of voluntary or involuntary admission.[75]

The MacArthur coercion study concluded that a number of important variables correlated with patient perceptions of coercion.[76] One of these was the motivation of the clinician or state actor—the extent to which the treatment provider was perceived as acting out of concern for the patient's wellbeing. Another was respect—the degree of respect with which the treatment provider dealt with the patient. Others included what in the psychology of procedural justice has come to be known as voice—the extent to which the patient was afforded an opportunity to express his or her opinion on the admission decision—and validation—the extent to which what the patient had to say was taken seriously.[77] Patients desire to be included in the process of determining whether they will be admitted to the hospital, and experience coercion to the extent they are excluded from that process.

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71. Solomon, *supra* note 65.
72. A NEW FRONTIER, *supra* note 4, at 14; Bennett et al., *supra* note 8; Gardner et al., *supra* note 8.
73. *See supra* Part I.
74. A NEW FRONTIER, *supra* note 4; Bennett et al., *supra* note 8, at 297-99; Gardner et al., *supra* note 8.
75. A NEW FRONTIER, *supra* note 4; Lidz et al., *supra* note 6.
76. A NEW FRONTIER, *supra* note 4.
77. *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 26-34 (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Hiday et al., *supra* note 8, at 229-30; Stephen LaTour, *Determinants of Participation and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531 (1978); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolutions of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643, 652-53 (1980); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes*, 18 LAW & HUM. BEHAV. 361 (1994); John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, (1992); *see also* Tom E. Hughes & Lon N. Larson, *Patient Involvement in Health Care: A Procedural Justice Viewpoint*, 29 MED. CARE 297 (1991).

Another important variable was the patient's perception of fairness—whether he or she was treated fairly and whether trickery or deception was used in the admission process. Finally, the extent to which pressure was applied in the admission process was deemed significant, that is, the degree of persuasion, inducement, threats, or force. Very high levels of perceived coercion were present when treatment providers used the negative pressures of threats and force, whereas positive approaches involving persuasion and inducement were associated with no increase in perceived coercion.[78]

Patients in the admissions process who reported that others acted out of concern for them, treated them fairly, in good faith, with respect, and without deception, provided them with an opportunity for voice, and took what they said seriously were much less likely to experience coercion.[79] When these moral norms reflecting patient attitudes about how they should be treated are adhered to, many apparently coercive acts seem to be accepted by the patient as morally legitimate.[80] In any future research on the efficacy of coercive treatment, these findings must be taken into account in designing studies to measure the relationship between perceived coercion and treatment outcome. But they also should be taken into account in considering how clinicians should act toward their patients in involuntary hospitalization and treatment contexts.

VII. BALANCING THE POSITIVE AND NEGATIVE EFFECTS OF COERCION

To the extent that coercive treatment is effective, it must count, of course, as a positive therapeutic consequence of legal rules permitting coerced treatment. At least in some circumstances, coercion can improve the quality (or at least stability) of a client's life.[81] Undoubtedly some patients who otherwise would reject treatment needed to reduce suffering and promote healthy functioning may benefit immensely from treatment provided on an involuntary basis.

Against these potentially positive effects of coercive treatment, however, must be weighed its potentially negative consequences. Patients may experience feelings of alienation and disaffection if they feel improperly coerced, with potentially negative effects on treatment compliance and efficacy.[82] Even if patients comply with treatment when coerced to do so, long-range therapeutic outcomes may become tenuous because patients may be unlikely to adhere voluntarily to needed medication or psychosocial therapy once coercive conditions are removed.[83] Treatment imposed over objection reveals a failure of the therapeutic relationship that can produce negative effects on the therapeutic process that may be long-lasting.[84] Moreover, if coerced treatment is permit-

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78. A NEW FRONTIER, *supra* note 4, at 23.
79. *Id.* at 24.
80. Bennett et al., *supra* note 8, at 304.
81. Diamond, *supra* note 11, at 59-60.
82. A NEW FRONTIER, *supra* note 4, at 14; Bennett et al., *supra* note 8, at 296; Hiday et al., *supra* note 8, at 237-38; Rogers, *supra* note 8.
83. Hiday et al., *supra* note 8, at 237-38.
84. Andrea K. Blanch & Jacqueline Parrish, *Reports of Three Roundtable Discussions on In-*

ted, the patient, as well as other patients, might be deterred from seeking treatment voluntarily out of fear that they might be committed.[85] Indeed, studies show that fear of involuntary hospitalization has kept patients from seeking treatment voluntarily at least once when they thought it was needed.[86]

Because coercion diminishes and sometimes even negates choice, a therapeutic jurisprudence analysis of coercive treatment should probe the relationship between patient choice and therapeutic outcome. My own theoretical work on the psychology of choice suggests the existence of considerable psychological value in allowing individuals to exercise choice concerning a wide variety of matters, including decisions affecting their health.[87] Treatment imposed over objection may not work as well. In general, unless people themselves see the merits of achieving a particular goal, they often do not pursue it or do so without the degree of commitment necessary to attain it.

Research in the area of medical treatment generally suggests that when physicians do not allow patients to participate in treatment decisions and do not explain treatment to them, patients often do not comply with medical advice.[88] In general, treatment adherence increases when the patient is given choice and the ability to participate in the selection of treatment alternatives and goals.[89] Coerced hospitalization and treatment may make it less likely that the client will be willing to stay connected with the treatment system or continue to take medication after discharge from the hospital.[90] When patients exercise choice in matters of treatment, this may bring a degree of commitment, which mobilizes the self-evaluative and self-reinforcing mechanisms that facilitate goal achievement.[91] A patient given the freedom to refuse hospitalization or treatment has a corresponding ability to choose to accept it. To the extent that a patient's agreement to accept a course of treatment recom-

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voluntary Interventions, 1 PSYCHIATRIC REHABILITATION AND COMMUNITY SUPPORT MONOGRAPH 1 (1993); Diamond, *supra* note 11, at 61; *see also* DONALD MEICHENBAUM & DENNIS C. TURK, FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDE-BOOK 20, 76-79 (1987); Hiday et al., *supra* note 8, at 236.

85. LAW IN A THERAPEUTIC KEY, *supra* note 62, at 146-47; A NEW FRONTIER, *supra* note 4, at 14; Monahan et al., *supra* note 8.

86. Hiday et al., *supra* note 8, at 236; Lidz et al., *supra* note 6; Alicia Lucksted & Robert D. Coursey, *Consumer Perceptions of Pressure and Force in Psychiatric Treatments*, 46 PSYCHIATRIC SERVICES 146 (1995);

87. WINICK, *supra* note 3, at 87-91; WINICK, *supra* note 14, at 327-44; Winick, *supra* note 17 at 46-52; Winick, *supra* note 4; Bruce J. Winick, *The MacArthur Treatment Competency Study: Legal and Therapeutic Implications*, 2 PSYCHOL. PUB. POL'Y & L. 137 (1996); Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1755-68 (1992).

88. PAUL S. APPELBAUM ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 28 (1987); MEICHENBAUM & TURK, *supra* note 84, at 20, 76-79; BILL D. MOYERS, HEALING AND THE MIND 50 (1993); *see* Paul S. Appelbaum & Thomas Gutheil, *Drug Refusal: A Study of Psychiatric Inpatients*, 137 AM. J. PSYCHIATRY 340, 341 (1980).

89. MEICHENBAUM & TURK, *supra* note 84, at 157, 159, 175; Fredrick H. Kanfer & Lisa Gaelick, *Self-Management Methods*, *in* HELPING PEOPLE CHANGE 334-47 (Fredrick H. Kanfer & Arnold P. Goldstein eds., 1986).

90. Diamond, *supra* note 11, at 63.

91. ALBERT BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY 338, 363, 368, 468-69, 470-71, 475-76, 478-79 (1986); SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 301 (1981); MEICHENBAUM & TURK, *supra* note 84, at 156-57; Carroll, *supra* note 2, at 137-38.

mended by a therapist constitutes an affirmative expression of choice by the patient in favor of treatment, such choice itself may be therapeutic. Compliance with a treatment regimen may be indispensable to treatment success.[92] Yet compliance may be negatively correlated with coercion.

For many types of mental health treatment in particular, the effectiveness of treatment "is proportional to the degree of cooperation that is present. . . ."[93] Several strands of psychological theory help to explain why patient choice in treatment decision making is likely to increase treatment efficacy. A conscious, voluntary agreement to accept a course of treatment constitutes the setting of a goal. The goal-setting effect, a well-accepted psychological principle, posits that the setting of explicit goals is itself a significant factor in their achievement.[94] Indeed, the setting of a goal may be indispensable to the achievement of change.[95] When patients voluntarily agree to treatment recommended by a therapist, their agreement constitutes the setting of a goal that both they and their therapist predict can and will be accomplished. The setting of a goal that seems achievable sets up expectancies of success that themselves help to bring about favorable treatment outcomes.[96] Predictions and expectations of goal achievement stimulate feelings of self-efficacy in the patient, which in turn spark action and effort in furtherance of the goal.[97]

Psychological theory therefore would support the prediction that choice in matters of treatment and hospitalization will work better than coercion. Self-determination promotes commitment, intrinsic motivation, satisfaction, and effective functioning.[98] By contrast, if the individual feels coerced to accept hospitalization or treatment that is not truly desired, motivation to succeed is likely to be reduced. Indeed, imposing treatment over objection may produce feelings of resentment and psychological reactance that reduce patient compliance and the likelihood of treatment success.[99]

A persistent criticism of the mental hospital is that it fosters a form of

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92. MEICHENBAUM & TURK, *supra* note 84.

93. Council of the Am. Psychiatric Ass'n, *Position Statement on the Question of Adequacy of Treatment*, 123 AM. J. PSYCHIATRY 1458, 1459 (1967).

94. Donald J. Campbell, *The Effects of Goal-Contingent Payment on the Performance of a Complex Task*, 37 PERSONNEL PSYCHOL. 23, 23 (1984); Vandra L. Huber, *Comparison of Monetary Reinforcers and Goal Setting as Learning Incentives*, 56 PSYCHOL. REP. 223 (1985); Daniel S. Kirschenbaum & Randall C. Flanery, *Toward a Psychology of Behavioral Contracting*, 4 CLINICAL PSYCHOL. REV. 598, 603-09 (1984); Edwin A. Locke et al., *Goal Setting and Task Performance 1969-80*, 90 PSYCHOL. BULL. 125, 125-31 (1981); James R. Terborg & Howard E. Miller, *Motivation, Behavior, and Performance: A Closer Examination of Goal Setting and Monetary Incentives*, 63 J. APPLIED PSYCHOL. 29, 30-31 (1978).

95. BANDURA, *supra* note 91, at 469.

96. *Id.* at 412-13, 467; Edward L. Deci & Richard M. Ryan, *The Empirical Exploration of Intrinsic Motivational Processes*, 13 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 39, 59 (1980).

97. BANDURA, *supra* note 91, at 413; Albert Bandura, *Self-Efficacy: Toward a Unifying Theory of Behavior Change*, 84 PSYCHOL. REV. 191 (1977).

98. EDWARD L. DECI, THE PSYCHOLOGY OF SELF-DETERMINATION 208-10 (1980); *see also* CHARLES A. KIESLER, THE PSYCHOLOGY OF COMMITMENT: EXPERIMENTS LINKING BEHAVIOR TO BELIEF 164-67 (1971) (finding that the most effective method for behavior therapists to obtain desired results with patients was to give patients the perception that they had freedom and control).

99. JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966); BREHM & BREHM, *supra* note 91, at 300-01.

institutional dependence that may prevent future adjustment in the community.[100] Mental hospitals too often have conditioned passivity and helplessness by reinforcing it and by discouraging assertiveness and autonomous behavior. Mental patients have been infantilized by the treatment they received from institutional clinicians and staff. Treating patients as incompetent objects of paternalism may strongly reinforce feelings of incompetency and hopelessness, destroying intrinsic motivation and feelings of self-efficacy, and even producing the syndrome of learned helplessness.[101] When decisions that significantly affect the individual, such as those relating to treatment, are made by others without the individual's participation, the resulting disuse of decision-making powers may lead to further degeneration of existing capabilities and behaviors.[102] Coercion undermines feelings of self-efficacy, which may be essential to the recovery process.[103]

Treating patients as incompetent to make hospitalization or treatment decisions for themselves, which legal rules that permit coercion rather than requiring voluntary choice reinforce, therefore actually may promote psychological dysfunction. Exercising self-determination is a basic human need.[104] Studies show that allowing individuals to make decisions for themselves is intrinsically motivating, whereas denying choice "undermines [their] motivation, learning, and general sense of organismic well-being."[105] Indeed, the stress of losing the opportunity to be self-determining may cause "severe somatic malfunction and even death."[106] For a number of reasons, therefore, coercion may produce dysfunctional effects and other antitherapeutic consequences.

The above analysis of the psychological value of voluntary choice and the potentially dysfunctional and countertherapeutic effects of coercion, although consistent with much clinical experience, is based largely on principles of psychological theory derived from studies with more "normal" populations. More research is needed concerning the effects of choice and coercion on treatment outcome. This is particularly true for individuals suffering from serious mental illness, such as schizophrenia. A patient in a florid state of schizophrenia, for example, who is disoriented and hallucinating, may not possess a sufficient degree of competence to make a meaningful choice in favor of treat-

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100. *See generally* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 3-74 (1962); CHARLES A. KIESLER & AMY E. SIBULKIN, MENTAL HOSPITALIZATION: MYTHS AND FACTS ABOUT A NATIONAL CRISIS 148 (1987); WINICK, *supra* note 2, at 35 n.81; Richard Cole, *Patients' Rights vs. Doctors' Rights: Which Should Take Precedence?*, *in* REFUSING TREATMENT IN MENTAL INSTITUTIONS: VALUES IN CONFLICT 59 (A. Edward Doudera & Judith P. Swazey eds., 1982); Edmund G. Doherty, *Labeling Effects in Psychiatric Hospitalization: A Study of Diverging Patterns of Inpatient Self-Labeling Process*, 32 ARCHIVES GEN. PSYCHIATRY 562 (1975).

101. ELLEN J. LANGER, MINDFULNESS 53 (1989); MARTIN E.P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT AND DEATH (1975); HUMAN HELPLESSNESS: THEORY AND APPLICATIONS (Judy Garber & Martin E.P. Seligman eds., 1980); WINICK, *supra* note 3, at 28-36.

102. Bruce D. Sales & Lynn R. Kahle, *Law and Attitudes Toward the Mentally Ill*, 3 INT'L J.L. & PSYCHIATRY 391, 392 (1980).

103. Diamond, *supra* note 11, at 61-63; Solomon, *supra* note 65, at 143.

104. DECI, *supra* note 98, at 208-09.

105. *Id.* at 209.

106. *Id.*

ment.[107] How much understanding and volition are necessary to engage the psychological mechanisms discussed earlier that can contribute to positive treatment response? Will choice by such a patient have the effect of producing the positive expectancies and intrinsic motivation that seem to be related to favorable treatment outcome? Because theoretical explanations for the relationship between patient choice and treatment success are based on studies with significantly less impaired populations, we should ask whether these findings can be generalized to more impaired patients suffering from at least severe cases of major mental illness. These questions remain largely unexamined empirically.

Even if many patients suffering from mental illness do not possess sufficient competence to enable their choices to trigger these positive psychological effects, however, allowing them as great a degree of choice as circumstances permit may still be therapeutic. The aim of treatment interventions for acutely psychotic patients is to ameliorate severe symptomatology and restore the patient to as great a degree of competence as is possible. After a brief period of medication, for example, most seriously disturbed patients will be sufficiently competent that their choices about future treatment presumably will have positive therapeutic value. Even if coercion is necessary for a patient suffering acute symptoms, whose mental illness might prevent rational decision making about treatment and who otherwise would refuse it, once the patient can participate in decision making and experience the psychological value of making treatment choices, the justifications for coercion will cease. Even when the law allows clinicians to impose treatment coercively, they should proceed in a manner that is sensitive to the psychological value of allowing patients to exercise the maximum degree of decision-making authority of which they are capable. Although there are situations in which coercive treatment may be both legally permissible and therapeutically appropriate, clinicians should be aware that too much coercion, and coercion applied after it is no longer necessary, may be antitherapeutic.

Apart from the psychological value of allowing patients to participate in treatment decision making to the maximum extent to which they are capable, legal rules in this area will have an inevitable effect on the therapist-patient relationship in ways that itself can have either positive or negative therapeutic consequences.[108] Will legal rules permitting coercive treatment be more or less conducive to the therapeutic mission of the therapeutic relationship than those that require the patients' voluntary informed consent? How should therapists act in regard to the issue of coercive treatment so as to maximize the professional relationship's potential as a therapeutic agent in its own right?

There is increasing recognition that, at least in psychotherapy, the therapeutic relationship itself plays an essential role in producing positive out-

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107. *See* Zinermon v. Burch, 494 U.S. 113 (1990) (finding patient with schizophrenia assenting to voluntary admission to hospital incompetent to consent to hospitalization). For a detailed analysis of *Zinermon* and of the concept of competence to consent to voluntary hospitalization, see Winick, *supra* note 17.

108. *See* WINICK, *supra* note 3, at 83-90 (discussing effect of a right to refuse treatment on the therapeutic relationship); WINICK, *supra* note 14, at 338-42.

comes.[109] The effectiveness of psychotherapy is heavily dependent on the quality of the therapeutic relationship.[110] The most effective therapeutic relationships are those in which mutual trust and acceptance are established and maintained, and in which the patient perceives that the therapist cares about and is committed to pursuing his or her interests.[111] Patients improve as a result of therapeutic relationships that generate the perception that the therapist is interested in and dedicated to the patient's well-being.[112] To succeed, the therapist must establish his or her credibility and trustworthiness at an early time in the relationship. A relationship in which the therapist is permitted to treat the patient as an object of paternalism whose participation in therapeutic decision making is unnecessary and undesirable will not inspire such trust and confidence and therefore may be counterproductive. Indeed, a relationship in which the therapist ignores the patient's expressed wishes concerning treatment may produce the perception that the therapist is more concerned with the welfare of the institution than with that of the patient, and is not truly committed to the patient's best interest. Rather than producing trust and confidence, a coercive approach by the therapist, particularly if not perceived as benevolently motivated, can inspire resentment and resistance.

Therapists, particularly those in public institutions, too often seem to misperceive the importance of the therapist-patient relationship. Not only do these therapists thereby forego therapeutic opportunities, but by their actions they may actually create a harmful division between therapist and patient. Too often, there is not a real connection or sense of community between therapist and patient. As a result, no real sense of trust and confidence develops on the part of the patient. Yet such trust and confidence may be a prerequisite for engaging those positive attitudes and expectancies that play an important role in producing a successful treatment response. The therapist-patient relationship is especially important in the context of psychotherapy, but it also may play a significant role in all areas of medical practice.[113]

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109. BREHM & BREHM, *supra* note 91, at 151-55, 300-01; WEXLER & WINICK, *supra* note 62, at 173; WINICK, *supra* note 3, at 83; Deci & Ryan, *supra* note 96, at 70; Michael L. Lambert et al., *The Effectiveness of Psychotherapy*, *in* HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE (Sol E. Garfield & Allen E. Bergin eds., 1986) [hereinafter HANDBOOK OF PSYCHOTHERAPY].

110. WINICK, *supra* note 3, at 83.

111. *See supra* note 107.

112. BREHM & BREHM, *supra* note 91, at 151-52, 300-02; WEXLER & WINICK, *supra* note 62, at 173; Larry E. Beutler et al., *Therapist Variables in Psychotherapy Process and Outcome*, *in* HANDBOOK OF PSYCHOTHERAPY, *supra* note 109, at 280-81; David E. Orlinsky & Kenneth I. Howard, *Process and Outcome in Psychotherapy*, *in* HANDBOOK OF PSYCHOTHERAPY, *supra* note 109, at 311.

113. NORMAN COUSINS, HEALTH FIRST: THE BIOLOGY OF HOPE AND THE HEALING POWER OF THE HUMAN SPIRIT (1990); Appelbaum & Gutheil, *supra* note 88, at 341; *see also* Stephen. A. Eraker & Pam Polistser, *How Decisions are Reached: Physician & Patient*, 97 ANNALS INTERNAL MED. 262 (1982); Hughes & Larson, *supra* note 77, at 302; Edward J. Speedling & David N. Rose, *Building an Effective Doctor-Patient Relationship: From Patient Satisfaction to Patient Participation*, 21 SOC. SCI. MED. 115 (1985). A 1983 longitudinal study demonstrated a relationship between patients' sense of personal control over their health, fostered by the doctor-patient relationship that encouraged patient participation, that correlated with positive treatment outcomes. Melvin Seeman & Teresa E. Seeman, *Health Behavior and Personal Autonomy: A Longitudinal Study of the Sense of Control in Illness*, 24 J. HEALTH & SOC. BEHAV. 144, 144 (1983). Patients

Legal rules that broadly authorize coercive treatment will shape the therapist-patient relationship quite differently from those that generally require voluntary and informed consent. Legal rules requiring voluntariness will inevitably increase the likelihood that therapists will respect the dignity and autonomy of their patients, and recognize their essential role in the therapeutic process. Legal rules emphasizing voluntariness compared to those that broadly authorize coercion can reshape the therapists' role so as to increase the potential for a true therapeutic alliance in which therapists treat their patients as persons.[114] The result can be more patient trust, confidence, and participation in decision making in ways that can cause patients to internalize treatment goals. A therapeutic relationship that stresses voluntariness—one in which the patient sees the therapist as his agent, assisting him to accomplish goals that the two of them define—rather than as a paternalistic director of the process or as the agent of the institution in which the patient is held—is more likely to create the atmosphere of trust and openness that is necessary for the therapeutic relationship to bring about healing and change.

A legal system in which the therapist needs the informed and voluntary consent of the patient is thus more conducive to allowing the relationship itself to realize its potential as a therapeutic agent. An informed consent requirement, by encouraging a therapist-patient dialogue, can create a significant therapeutic opportunity. Discussion and negotiation about a patient's objections to treatment can provide an important context for probing conscious and unconscious resistance, for forming a positive transference, and for earning the patient's trust and confidence.[115]

These considerations favoring therapeutic relationships based on voluntariness rather than coercion obviously have special force in the context of verbal psychotherapy.[116] They also seem applicable, however, in the context of behavior therapy, many of the techniques of which, in order to succeed, require patient cooperation and involvement as well as trust and confidence in the therapist.[117] Moreover, although to a considerably lesser extent, these considerations may apply as well even in the context of administration of psychotropic medication.[118] Choosing the appropriate medication, for example, and maximizing the potential that it will be used appropriately, will often require communication with the patient and a high degree of cooperation.[119] In addition, psychotropic drugs are not administered in isolation, but are part of an integrated treatment program that involves verbal psychotherapy as well as psychosocial therapy approaches. Even if psychotropic medication would be effective in reducing severe symptomatology when administered coercively,

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with "a low sense of control [are] significantly associated with (1) less self-initiated preventive care; (2) less optimism concerning the efficacy of early treatment; (3) poorer self-rated health; and (4) more illness episodes, more bed confinement and greater dependence upon the physician." *Id.* at 152.

114. PAUL RAMSEY, THE PATIENT AS PERSON: EXPLORATIONS IN MEDICAL ETHICS (1970).

115. WINICK, *supra* note 3, at 85-88.

116. *See* WINICK, *supra* note 14, at 29-40 (discussing psychotherapy).

117. *See id.* at 41-59 (discussing behavior therapy).

118. *See id.* at 61-85 (discussing psychotropic medication).

119. Appelbaum & Gutheil, *supra* note 88, at 341.

the verbal therapy that should follow the reduction in symptoms would seem to be more effective to the extent that the individual chooses it voluntarily. Whatever the treatment approach, therefore, allowing the patient to exercise choice will predictably enrich and improve the quality of the treatment decision-making process and the treatment program.[120] Successful treatment planning and implementation require a thorough analysis of the patient's problems, of the social context that often perpetuates them, and of the patient's strengths and weaknesses. Patient trust, cooperation, and full and open communication are essential if the therapist is to obtain this information from the patient.

For several reasons, therefore, involuntary hospitalization and coercively imposed treatment may have antitherapeutic effects. Voluntary approaches in general would seem more conducive to long-range treatment success and to greater patient satisfaction. Although empirical investigation is needed to further explore the relationship between coercion and treatment outcome, a considerable body of theoretical work supports much clinical experience suggesting that coercion does not work as well as treatment undertaken voluntarily.

VIII. APPLYING THE LAW THERAPEUTICALLY IN COERCIVE CONTEXTS

Although there undoubtedly are situations in which a degree of coercion is both therapeutically appropriate and legally acceptable, clinicians should use coercion sparingly and involve the patient in the decision-making process to the fullest extent possible. Even when coercion is necessary, clinicians should seek to apply it in ways that minimize the patient's perception of coercion. In this respect, the research on coercion performed under the auspices of the MacArthur Research Network for Mental Health and the Law described earlier has special significance.[121]

Although empirical research has not as yet extensively probed the relationship between the perception of coercion and treatment outcome, the theoretical analysis contained in this article strongly suggests that patients who feel coerced do not respond as well as those who do not feel coerced. Therefore, clinicians who find it necessary to impose treatment coercively should heed the admonitions of the MacArthur research and interact with their patients in ways that minimize patients' subjective perceptions of coercion even though, in an objective sense, coercion is being applied. The MacArthur research suggests that positive approaches such as persuasion be used as a strategy of choice to attempt to convince people to accept treatment.[122] Negative approaches such as threats should be used "only as a last resort to secure needed care."[123] Furthermore, in all circumstances (but especially when negative pressure has been used), patients should be given a sense of inclusion in the

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120. *See* COUSINS, *supra* note 113, at 55 ("[F]ull communication between the patient and physician is indispensable not just in arriving at an accurate diagnosis but in devising an effective strategy for treatment."); JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 102-03 (1984) (analyzing the informed consent doctrine as furthering the doctor-patient relationship).

121. *See supra* Part VI.

122. A NEW FRONTIER, *supra* note 4, at 26.

123. *Id.*

hospital admission and treatment decision making processes and afforded as much process—"voice" and "validation"—as possible.[124] Clinicians should convey to their patients the notion that they are acting out of concern for their well-being. They should treat their patients fairly, with respect and without deception, give them an opportunity to tell their side of the story, and seriously consider their views in the hospitalization and treatment decision-making processes.[125] Clinicians finding it necessary to impose treatment coercively who heed these admonitions can thereby minimize the risk that coercion will have antitherapeutic effects.

IX. CONCLUSION

Coercion may sometimes be necessary, particularly in the treatment of severely ill patients. However, in light of the potential antitherapeutic consequences of coercion, clinicians should resort to it only when truly necessary and should involve the patient in the hospital admission and treatment decision-making processes to the greatest extent possible. As soon as coerced treatment has had the hoped-for effects, the clinician should cede to the patient increasing measures of treatment decision-making autonomy. Whenever possible, clinicians should use persuasion, education, negotiation, and inducement in preference to coercion, threats, negative pressure, and deception. Even when coercion is deemed necessary, clinicians should act toward their patients in ways that minimize the perception of coercion and maximize the patient's sense of voice and inclusion and the patient's appreciation that the treatment imposed is benevolently motivated and administered in good faith.

While more research is needed on the issue of the effectiveness of coercive treatment, we know enough to reshape clinical practice in the imposition of involuntary hospitalization and treatment to reduce coercion's antitherapeutic consequences. In defining "coercion" for legal purposes, and in specifying the procedural due process protections that must be accorded before coercion may be applied, the law also should take these findings into account. The civil commitment hearing and hearings relating to involuntary treatment, for example, should be reshaped to foster patient perceptions that involuntary hospitalization or treatment is being proposed by clinicians for benevolent reasons and to provide the patient with a sense of "voice" and participation.[126] Involuntary hospitalization and treatment can be structured and implemented in ways that permit many patients to "feel like they have voice and validation" and to "avoid force even in the absence of choice."[127] Even when hearings may not be required as a matter of procedural due process, there may be therapeutic value in providing them as a means of increasing patient perception of choice and participation in treatment decision making, with likely positive therapeutic effect.[128] "The challenge is to try to extend to all patients at the

124. *Id.* at 27.
125. *Id.*
126. *See* Tyler, *supra* note 77.
127. Hiday et al., *supra* note 8, at 235.
128. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (stating that one of "the central

time of their admission [or involuntary treatment] a demonstration in word and action that they are persons with opinions, desires, rights and dignity, and not just mental patients in an acute crisis."[129] Even when a hearing seems pointless because the criteria for involuntary hospitalization or treatment seem clearly met, the process values of providing patients with "voice", and their likely impact on therapeutic response, alone argue for affording the patient a hearing.[130]

Apart from legal rules governing coercion and the application of coercive treatment and hospitalization, the codes of professional ethics of clinicians engaging in the treatment process should also reflect these insights. Because such professional ethics are based on principles of beneficence and nonmalfeasance,[131] clinicians should recognize that the way they act in applying the authority that the law may give them has an inevitable impact on the health and welfare of their patients and the clinical professions should develop appropriate guidelines in this area.

Legal rules governing coercion should protect individual autonomy regarding matters that vitally affect the individual, including health care decision making. Individual autonomy is at the root of our political and philosophical traditions,[132] but in addition, the psychological value of self-determination should help to shape law and policy in this area.[133] Although autonomy and therapeutic values may at times conflict, they often will converge. To achieve the full promise of individual autonomy, legal rules and clinical practices relating to involuntary hospitalization and coercive mental health treatment thus should reflect a therapeutic jurisprudence orientation.

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concerns of procedural due process" is "the promotion of participation and dialogue by two affected individuals in the decision making process"); Codd v. Velger, 429 U.S. 624, 636 (1977) (Stevens, J., dissenting); Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 177-80 (1985) (discussing "the claim that the dignity and self-respect of the individual can be protected only through processes of government in which there is meaningful participation by affected interests"); John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 J. PSYCHIATRY & L. 5 (1978).

129. Hiday et al., *supra* note 8, at 225.

130. *See* Tyler, *supra* note 77 (discussing the therapeutic value of civil commitment hearings); Jack Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence*, 22 J. PSYCHIATRY & L. 107 (1994). Even when the result of the hearing does not appear to reflect what the individual had to say, the opportunity for voice alone may have therapeutic value. *See* Tyler, *supra* note 77, at 440 & nn.64-65.

131. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 106 (3d ed. 1989); TOM L. BEAUCHAMP & LEROY WALTERS, CONTEMPORARY ISSUES IN BIOETHICS 28 (2d ed. 1982); RUTH FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 10 (1986); WINICK, *supra* note 14, at 400.

132. Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707-55 (1992).

133. *See id.* at 1755-68.

THE CONTINUUM OF COERCION: CONSTITUTIONAL AND CLINICAL CONSIDERATIONS IN THE TREATMENT OF MENTALLY DISORDERED PERSONS

ROBERT D. MILLER*

One dictionary defines coercion as the use of restraint, hindrance, compulsion, or force, but does not differentiate between internal and external coercion.[1] Furthermore, this definition does not resolve the differences between critics from the legal and mental health communities, the extreme (and typically most vocal) members of which tend to simplify the issues to the point that no meaningful dialogue is possible.

Coercion does not exist in a vacuum; it exists on a continuum upon which bright lines are arbitrarily placed to delineate acceptable uses of physical or psychological force. The perception of coercion by the various parties involved in the mental health and legal systems is similar to the fable of the elephant and the blind men: one's concept of coercion depends on one's perspective.

This article discusses coercion in the context of the public system of mental health care. While most law review articles limit their discussion of coercion to external physical control, this article considers both external *and* internal coercion from various sources as it affects all the actors in the system, and argues that all aspects of coercion must be considered before appropriate policy decisions can be made.

The introduction discusses the traditional legal rights driven concept of coercion. The second part discusses coercion experienced by mentally disordered persons, beginning with external clinical coercion, the most common subject of concern. A discussion follows of external legal coercion on patients (Part III), and then a discussion of external social coercion on patients (Part IV). The last section addressing patient issues discusses internal coercion experienced by mental patients (Part V).

The sixth part explores coercion of mental health professionals, a subject virtually ignored, at least in those terms, in the literature. The categories listed are somewhat arbitrary, in the sense that considerable overlap exists among them. Nevertheless, I believe that teasing them apart is essential if we are to develop a more comprehensive understanding of those overlaps, and of the

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1. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 351 (1979).

(often unintended) effects of pressures brought to bear on all the actors in the mental health system. This article attempts to do so, albeit briefly, in Part VII.

I. INTRODUCTION

This discussion begins with the assumption that ours is a nation founded on principles of individual liberty and autonomy, with a Constitution and laws crafted to protect those individual legal rights from infringement by government. As Stephen Morse states, courts today demonstrate "a preference for liberty,"[2] but the problem comes in defining "liberty." John Stuart Mill's virtual anthem for civil libertarians, if taken at face value, seems to say it all.

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[3]

But in the next paragraph Mill continues:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties . . . . Those who are still in a state to require being taken care of by others must be protected from their own actions as well as against external injury.[4]

Another passage often cited in support of the libertarian position with little recognition of the necessary correlation between rights and competence is Benjamin Cardozo's 1914 decision in *Schloendorff v. Society of New York Hospital*:[5] "Every human being of adult years *and sound mind* has a right to determine what shall be done with his own body . . . ."[6]

Coercion, and its perceived inverse, liberty, are not absolutes to be divined through abstract ideological dialogues but, rather, concepts that lack meaning out of context. Procedures evaluated in isolation reveal little about their potential as real alternatives in any given person's situation, taking all factors into account. These factors include prevailing cultural, social, and economic forces, in which homelessness, abuse, and suicide are very real possibilities.

Arguably the most important liberty speech in this nation's history was Patrick Henry's exhortation to the Virginia Assembly in 1775 to "[g]ive me liberty or give me death!"[7] Fewer may know, though, that as Henry spoke those words, his mentally disordered wife was chained in his attic, as was the prevailing custom in Revolutionary America.[8] Similarly, while Abraham Lin-

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2. Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 55 (1982).

3. JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapappport ed., 1978) (1859).

4. *Id.*

5. 211 N.Y. 125 (1914).

6. *Schloendorff*, 211 N.Y. at 129 (emphasis added).

7. *See* HENRY MAYER, A SON OF THUNDER: PATRICK HENRY AND THE AMERICAN REPUBLIC 245 (1991).

8. *Id.* at 171.

coln is hailed as the signer of the Emancipation Proclamation, few remember that after his death, Lincoln's son, Robert, had Mary Todd Lincoln committed in a proceeding which included the testimony of two doctors who had never met the woman.[9]

Today we do not routinely chain mentally disordered persons in attics: involuntary civil commitment procedures entail complex economic and legal restrictions which have significantly changed the number and character of mentally disordered persons hospitalized or treated against their professed wishes.[10] Libertarians widely hail legal protections as victories for the rights of the mentally disordered, but are they victories in a larger sense? The increasing legalization of the way society deals with the mentally disordered may appear to be in conflict with the clinical needs of the patient.

The law governing the mentally disordered, both civil and criminal (and the distinction between the two is becoming increasingly blurred[11]), is based on constitutional theories and implemented by attorneys trained in the criminal defense model.[12] The criminal justice model is a poor fit for cases involving mentally disordered persons.[13] Criminal defense attorneys are trained to represent the express wishes of their clients, and not to second guess those wishes unless they appear so irrational that competency to proceed must be questioned. Attorneys need not consider the consequences of their actions, either for their clients or for others. Their roles are clearly defined as adversarial, rather than as acting in the best interests of their clients.

This adversarial role of the criminal defense attorney has been crafted over centuries, but is based on several assumptions that are not always correct, even when applied to defendants who are not mentally disordered. First, the criminal defense model assumes that defendants will wish to avoid punishment for their actions.[14] More generally, the adversarial system assumes the participation of opposing attorneys, each vigorously arguing their positions, with "justice" the goal of the process.

While criminal prosecutions generally satisfy these assumptions, they rarely apply in civil cases involving mentally disordered persons. Most criminal defendants do in fact want to "get off," but the motivations of mentally disordered persons are much more complex. Clinicians are trained to look for every motivation in their patients, while attorneys are not. In addition, the

9. Carol D. Rasnic, *America's First Woman Lawyer: The Biography of Myra Bradwell*, 4 TEX. J. WOMEN & L. 231, 236-37 (1995) (book review).

10. *See generally* ROBERT D. MILLER, INVOLUNTARY CIVIL COMMITMENT OF THE MENTALLY ILL IN THE POST-REFORM ERA (1987).

11. *See infra* Part III.C.

12. Few law schools have courses in mental health law, and most of the courses that do exist are taught by legal professionals who lack any direct experience in the provision of mental health care.

13. ALAN A. STONE, *Psychiatric Abuse and Legal Reform: Two Ways to Make a Bad Situation Worse*, *in* LAW, PSYCHIATRY, AND MORALITY 133 (1984).

14. *See generally* Kenneth Appelbaum, *Criminal Defendants Who Desire Punishment*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 385 (1990); Robert D. Miller & Edward J. Germain, *Evaluation of Competency to Stand Trial in Defendants Who Do Not Want to Be Defended Against the Crimes Charged*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 371 (1987).

criminal defense attorney model ignores the consequences of a "successful" defense to persons other than the defendant, and also ignores the problems facing an acquitted defendant. This narrow scope of representation is not a luxury afforded clinicians. The criminal justice system, while vigorously protecting client privilege to ensure "justice," is only minimally concerned with continuity of care, while mental health professionals must ensure that treatment continues once a patient leaves a treatment facility.[15] Clinicians, particularly in inpatient settings, must provide a safe and therapeutic environment for all their patients, and cannot ignore the effects of a given patient's behavior on other patients.

There are other significant differences in the ways in which legal and clinical professionals approach problematic situations. Since constitutional law typically deals with principles rather than individuals, it is often a crude instrument with which to deal with individual mentally disordered persons. The law frequently abolishes a procedure or system, but rarely will the law attempt the difficult task of modifying or establishing new and more effective systems. In addition, legal thinking and decision-making are much more influenced by "horror stories;"[16] legal arguments tend to be ideological while clinicians tend to be concerned with all the effects of actions, and to rely more on scientific data than on anecdotal evidence.[17] A further distinction, particularly between legal and clinical writing, is that authors in the legal literature tend to criticize by comparing the practices of systems they do not like with the principles of systems of which they approve.[18]

The following discussions attempt to illuminate the different sources of coercion, types of coercion, and effects of coercion, so that the legal and clinical communities can better see how to collaborate and improve the system.

II. EXTERNAL CLINICAL COERCION EXPERIENCED BY THE MENTALLY DISORDERED

A. *Hospitalization*

The most often discussed aspect of the coercion of mentally disordered persons is that of external coercion by mental health professionals. Despite the fact that clinicians who hospitalize or treat mentally disordered persons against their express wishes do so under color of authorizing statutes,[19] and the fact

15. *See generally* STONE, *supra* note 13; *see also* Leona L. Bachrach, *Continuity of Care for Chronic Mental Patients: A Conceptual Analysis*, 138 AM. J. PSYCHIATRY 1449 (1981); Nicholas Stratas et al., *The Future of the State Mental Hospital: Developing a Unified System of Care*, 28 HOSP. & COMMUNITY PSYCHIATRY 598 (1977).

16. For a collection of "horror stories," see generally BRUCE J. ENNIS, PRISONERS OF PSYCHIATRY (1972); JONAS B. ROBITSCHER, THE POWERS OF PSYCHIATRY (1980); and Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461 (1977).

17. *See generally* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

18. *See* STONE, *supra* note 13.

19. For a detailed (if now somewhat out-of-date) review of the provisions of state civil commitment statutes, see SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW (3d

that most states empower law enforcement officers to initiate involuntary hospitalization without clinical involvement, many still perceive the process as a clinical one. Involuntary hospitalization or treatment takes place in clinical facilities, and judicial authority is delegated to clinicians to carry out court orders.

The perception of commitment as a primarily clinical function is valid. Clinicians, for all practical purposes, had the sole authority for confining and treating mentally disordered persons until the 1970s, when courts assumed control of the process.[20] Despite the provision of most of the protections and procedures of the criminal justice system, in practice trial court judges continue to defer to clinical judgment in many cases.[21] Courts serve as gatekeepers for involuntary commitments of mentally disordered persons in both civil and criminal systems, but once they have determined that a person meets the commitment criteria, judges relinquish day-to-day control over the conditions faced by patients to the treating clinicians.

Historically, clinicians paid relatively little attention to the effects of clinical coercion, other than to acknowledge that an adversarial relationship between clinicians and patients interfered with the trust necessary for successful psychotherapy.[22] More recently, however, the MacArthur Foundation has sponsored a series of studies on patients' perceptions of the coerciveness of their hospitalizations.[23] At a number of sites, researchers asked newly admitted patients a series of questions about their experiences. Not surprisingly, involuntary patients were more likely to feel coerced, but a significant number of legally voluntary patients expressed similar feelings.[24] A major and somewhat surprising conclusion of the studies was that many of the study subjects expressed more concern with their perceived treatment than with the outcome

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ed. 1985).

20. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979).

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Id.; *see also* MILLER, *supra* note 10.

21. In one case in which I testified, the trial judge opined, on the record, that competency to proceed was a clinical decision, and became upset that I wouldn't answer the difficult question in that case for him.

22. *See generally* WILFORD OVERHOLSER, THE PSYCHIATRIST AND THE LAW (1953); Marc Amaya & W. V. Burlingame, *Judicial Review of Psychiatric Admissions: The Clinical Impact on Child and Adolescent Inpatients*, 20 J. AM. ACAD. CHILD PSYCHIATRY 761 (1981); Henry Davidson, *Mental Hospitals and the Civil Liberties Dilemma*, 51 MEN. HYGIENE 371 (1966).

23. *See generally* Nancy S. Bennett et al., *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993); Steven K. Hoge et al., *Patient, Family, and Staff Perceptions of Coercion in Mental Hospital Admission: An Exploratory Study*, 11 BEHAV. SCI. & L. 281 (1993); Charles W. Lidz et al., *Coercive Interactions in a Psychiatry Emergency Room*, 11 BEHAV. SCI. & L. 269 (1993); Charles Lidz et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCHIVES GEN. PSYCHIATRY 1034 (1995); John Monahan et al., *Coercion and Commitment: Understanding Involuntary Mental Hospital Admission*, 18 INT'L J.L. & PSYCHIATRY 249 (1995); John Monahan et al., *Coercion to Inpatient Treatment: Initial Results and Implications for Aggressive Treatment in the Community*, *in* COERCION AND AGGRESSIVE COMMUNITY TREATMENT: A NEW FRONTIER IN MENTAL HEALTH LAW (Deborah L. Dennis & John Monahan eds., 1996).

24. *See supra* note 23.

of the commitment proceedings.[25] The central thesis of the procedural justice approach, as demonstrated in the studies reported, is that participants in formal decision-making processes are often more concerned with the perceived fairness of the processes than with the results. The more active a part they are permitted to play in the decision making, the more satisfied participants are with the outcome.

One problem with generalizing from most of these studies is that they involved newly admitted patients who presumably still suffered from acute and untreated mental disorders. Positive perceptions may have resulted, in part, from what Alan Stone has called the "thank-you" theory of treatment. According to Stone, patients, once treated (even against their stated wishes), acknowledge that they had been sick, and thank those who had treated them.[26] Stone based his theory on clinical experience, but others—both clinicians and sociologists—have tested it, and found that the great majority of successfully treated patients do in fact agree that involuntary hospitalization and treatment best served their interests.[27] The majority of patients who did not respond well to treatment[28] continued to feel negatively about their experiences.[29]

Voluntary hospitalization appears to be the consensus choice to avoid coercive hospitalizations, but a number of authors argue that to describe any such hospitalization as "voluntary" is at best misleading and, at worst, fraud. For instance, Reed and Lewis describe the situation that arose in Chicago's state hospitals when staff felt pressured to avoid involuntary commitment to ensure rapid patient turnover.[30] In 1985, involuntary admissions to four area hospitals constituted only one percent of total admissions, in part because staff usually persuade patients admitted involuntarily to sign in voluntarily before their court hearings.[31]

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25. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); E. Allan Lind et al., *Voice, Control and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 20 J. PERSONALITY & SOC. PSYCHOLOGY 952 (1990); Tom Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

26. *See generally* ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975).

27. Sociologist Weinstein reviewed 18 quantitative studies of retrospective patient satisfaction with treatment. A rather large majority of patients voiced favorable attitudes toward mental hospitals in general as well as their own institution, and claimed that they had benefitted from treatment. *See generally* Raymond Weinstein, *Patient Attitudes Toward Mental Hospitalization: A Review of Quantitative Research*, 20 J. HEALTH & SOCIAL BEHAV. 237 (1979). Subsequent authors have confirmed these findings. *See, e.g.*, Virginia Aldige Hiday, *Coercion in Civil Commitment: Processes, Preferences, and Outcome*, 15 INT'L J.L. & PSYCHIATRY 359 (1992); Thomas Kalman, *An Overview of Patient Satisfaction with Psychiatric Treatment*, 34 HOSP. & COMMUNITY PSYCHIATRY 48 (1983); J. Toews et al., *Patients' Reactions to Their Commitment*, 26 CANADIAN J. PSYCHIATRY 251, (1981).

28. Bad responses typically involved treatment with psychiatric medications, which can be effectively administered involuntarily.

29. *See* Hiday, *supra* note 27.

30. *See generally* Susan C. Reed & Dan A. Lewis, *The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals*, 18 J. PSYCHIATRY & L. 137 (1990).

31. *Id.* at 143. Staff use persuasion/coercion (threatening commitment, despite statutory pro-

Anne Rogers reports that "voluntary" patients in England can be retained after requesting discharge if staff file commitment petitions, with the result that nearly half the patients who signed in voluntarily stated that they did not feel that their admissions were truly voluntary.[32] While some patients reported that they felt internally coerced by their disorders, others said that they signed in "voluntarily" after being threatened with commitment, and/or were threatened with commitment if they tried to sign out before the staff thought that they were ready. Gilboy and Schmidt report that in a majority of cases studied, voluntary admission was used to hospitalize persons already in some type of official custody. They argued that voluntary procedures were used primarily for the convenience of the professionals, and enforced by threats of commitment. Because of staffing shortages, the admitting clinician did not have time to go through the required procedures for involuntary admission for all patients.[33] The most extreme view is that of Thomas Szasz, who argues simply that hospitalization is not voluntary when patients are forced to sign in under threat of commitment, or when they are not free to leave the hospital on demand.[34]

While these critics argue that legally voluntary hospitalizations are in reality coerced, they do not consider the inverse—that some legally involuntary admissions may in fact be voluntary: some patients have found that getting themselves committed presents advantages. Many hospitals have been forced to reduce the rate of voluntary admissions, and the lengths of stay for those patients admitted voluntarily, frequently for purely economic reasons. Indeed, a little-noted result of dangerousness criteria and reductions in voluntary admissions is that some patients now have to deliberately do something dangerous in order to be hospitalized.[35] If patients commit "dangerous" acts that satisfy the criteria for involuntary hospitalization, they are assured admission, and get free transportation to the hospital and longer stays. Sometimes the motivation to get oneself committed is unconscious; at other times it is quite conscious.[36] In addition, some patients recognize their need for hospital-

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hibitions against such coercion); bartering (promising privileges for signatures), and stalling (asking the court for continuances to stall so that persuasion, coercion, and bartering have longer time to work—sometimes long enough so that the patient can be discharged). "Voluntary" patients can be retained if they request discharge by filing commitment petitions.

32. *See generally* Anne Rogers, *Coercion and "Voluntary" Admission: An Examination of Psychiatric Patient Views*, 11 BEHAV. SCI. & L. 259 (1993).

33. *See generally* Janet A. Gilboy & John R. Schmidt, *"Voluntary" Hospitalization of the Mentally Ill*, 66 NW. U. L. REV. 429 (1971).

34. *See, e.g.*, Thomas Szasz, *Voluntary Mental Hospitalization: An Unacknowledged Practice of Medical Fraud*, 287 NEW ENG. J. MED. 277 (1972).

35. *See generally* John Monahan et al., *supra* note 23. In my experience as an admitting clinician, I have seen patients commit crimes deliberately in order to gain hospital admission. One patient, realizing that her borderline personality disorder was deteriorating, arranged for herself to be committed to prevent her from harming herself and to ensure effective treatment. Her adversarial attorney argued with her to "fight" her commitment at her hearing, but (fortunately, from the clinical from the clinical standpoint) she was still in sufficient control to reject that advice. Such situations have been likened to "Ulysses contracts." *See generally* Robert Miller, *Voluntary "Involuntary" Commitment: The Briar Patch Syndrome*, 8 BULL. AM. ACAD. PSYCHIATRY & LAW 305 (1980).

36. *See, e.g.*, Miller, *supra* note 35. I have received calls from mentally disordered persons asking what crimes they should commit in order to be hospitalized.

ization, but also realize that if their conditions deteriorate, they are likely to demand discharge and may not meet the state's criteria for commitment. I have had patients arrange for involuntary hospitalization as a "Ulysses contract,"[37] to ensure that they receive the required treatment. Finally, some persons will use hospitalization to avoid criminal arrest, or to build a case for mitigation if they are arrested.

B. *Seclusion and Restraint*

Another major form of external coercion on mentally disordered persons involves seclusion and restraint. Seclusion (also called "isolation") is the removal of a patient from the general milieu on a ward, into a single room, with or without a locked door. Restraint is physical restriction of movement; it is most commonly used to restrain limbs on a specially designed bed ("four-point" or "five-point" restraint), but can also be used to restrain a person to a chair, or to limit movement of arms or legs ("ambulatory restraint").

The American Psychiatric Association's Task Force on Seclusion and Restraint lists three indications for using seclusion and restraint together: 1) to prevent imminent harm to the patient or other persons where other means of control are not effective or appropriate; 2) to prevent serious disruption of the treatment program or significant damage to the physical environment; and 3) to assist in treatment as part of ongoing behavior therapy. Two additional indications exist for seclusion alone: 1) to decrease the stimulation a patient receives; and 2) to comply with a patient's request.[38] Once a patient's behavior is well known to staff, restraint and/or seclusion may be used to prevent loss of control, rather than waiting until the patient has become actively aggressive.[39] The Task Force cautions that seclusion should not be used when medical conditions exist that require close monitoring, organic conditions exist that would be exacerbated by sensory deprivation, or merely for the convenience of staff.[40] Full (four- or five-point) restraint should not be used without seclusion, to protect a patient's dignity and safety.[41]

Seclusion and restraint may also be used as part of a carefully designed individualized treatment plan, to weaken or eliminate inappropriate aggressive

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37. When Ulysses sailed past the Sirens, whose songs no man could resist, he had his men bind him to the mast so that he could not be enticed. *See* THE ODYSSEY OF HOMER 186 (Richmond Lattimore trans., 1965). The name "Ulysses contract" has come to refer to situations in which persons subject themselves to coercion in advance, to prevent themselves from acting against their interests.

38. Thomas Gutheil & Kenneth Tardiff, *Indications and Contraindications for Seclusion and Restraint*, *in* THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT 12 (Kenneth Tardiff ed., 1984).

39. Patients often recognize at some level that they are out of control and need to have external controls administered, but because of their disorders are unable to articulate those realizations. One patient that I treated kept destroying curtains in the ward day room. After each episode, the staff secluded and briefly restrained him, which quickly calmed him down. When this pattern became apparent, I suggested to the patient that he felt out of control at those times. He readily agreed, and thereafter was able to ask to be secluded briefly when those feelings came on him again.

40. *See generally* Gutheil & Tardiff, *supra* note 38.

41. *Id.*

behaviors.[42] They are used in conjunction with reinforcing strategies for appropriate behaviors, and along a continuum of less restrictive approaches. Clinicians refer to this as "time out" rather than seclusion. In addition, physical restraint is used to prevent debilitated patients from harming themselves, by falling out of beds or chairs, for instance. Such physical support should not be confused with the use of restraints for behavioral control.

Since the character of the inpatient populations (particularly in public hospitals) has changed with the dangerousness criteria,[43] the commitment process now selects for dangerous persons. Therefore a higher proportion of hospitalized patients is likely to be aggressive or out of control, and thus require some type of physical restraint. Although clinicians continue to feel that seclusion is necessary, both for physical control and as part of treatment, several studies indicate that the majority of patients who have been secluded and/or restrained did not feel that the experience was beneficial.[44] Those studies must be evaluated in light of the fact that many committed patients deny illness and, thus, would also deny the need for restrictions to prevent behavior caused by those illnesses.

Critics of the use of seclusion and restraint argue that they are used chiefly for the convenience of the staff or to intimidate patients. It has been demonstrated[45] that when staffing is increased to more adequate levels, when staff are given appropriate training in behavioral techniques,[46] and when facility policies and external regulations are made stricter,[47] the use of seclusion and restraint decreases, generally without a concomitant increase in aggression or other behavioral problems. The fact that seclusion and restraint can (and certainly have been) abused does not mean, however, that they are not appropriate when less restrictive techniques have failed. Again, one must evaluate their use in the context of the realistic alternatives. For example, ambulatory restraints are still restrictive and may reduce the wearer's sense of dignity,[48]

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42. *See* Robert P. Liberman & Stephen E. Wong, *Behavior Analysis and Therapy Procedures Related to Seclusion and Restraint*, *in* THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT 35 (Kenneth Tardiff ed., 1984).

43. *See infra* note 67 and accompanying text.

44. *See generally* Renee Binder & Susan McCoy, *A Study of Patients' Attitudes Toward Placement in Seclusion*, 34 HOSP. & COMMUNITY PSYCHIATRY 1052 (1983); Kathleen Hammill et al., *Hospitalized Schizophrenic Patient Views About Seclusion*, 50 J. CLINICAL PSYCHIATRY 174 (1989); Robert Plutchik et al., *Toward a Rationale for the Seclusion Process*, 166 J. NERVOUS & MENTAL DISEASE 571 (1978); Stanley Soliday, *A Comparison of Patient and Staff Attitudes Toward Seclusion*, 173 J. NERVOUS & MENTAL DISEASE 282 (1985); Harriet Wadeson & William Carpenter, *Impact of the Seclusion Room Experience*, 163 J. NERVOUS & MENTAL DISEASE 318 (1976).

When allowed to speak directly, ex-patients have been particularly negative about having been secluded. *See, e.g.*, Judi Chamberlain, *An Ex-Patient's Response to Soliday*, 173 J. NERVOUS & MENTAL DISEASE 288 (1985).

45. *See* Paul H. Soloff, *Historical Notes on Seclusion and Restraint*, *in* THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT 5 (Kenneth Tardiff ed., 1984).

46. *See* Gary Maier et al., *A Comprehensive Model for Understanding and Managing Aggressive Inpatients*, 2 AM. J. CONTINUING EDUC. NURSING 89 (1987).

47. *See, e.g.*, STATE OF COLO. DEP'T OF HUMAN SERV., RULES AND REGULATIONS NOS. 108, 109 (setting forth several pages of restrictions on the use of seclusion and restraint).

48. Ambulatory restraints consist of belts attached with adjustable length leather straps leading to padded wrist cuffs. Ankle hobbles can also be used. *See, e.g.*, Gregory Van Rybroek et al.,

but they certainly permit more freedom and autonomy than seclusions and four-point restraints.

C. *Involuntary Administration of Psychotropic Medications*

A third treatment approach for both voluntary and committed patients involves the use of psychotropic medications. Before the civil rights reforms of the late 1960s and 1970s, involuntarily hospitalized patients had no say about their treatment with medications. As one federal judge said, "Nonconsensual treatment is what commitment is all about."[49] Before the reforms, committed psychiatric patients automatically lost virtually all their civil rights. They could not marry, divorce, enter into contracts, vote, or make treatment decisions.[50] In the 1970s, however, a series of courts began to recognize that a decision that patients met criteria for involuntary hospitalization (i.e., lacked competency to make decisions about hospitalization) did not also determine that they lacked competency to make decisions about treatment in the hospital.[51]

While patients already had, at least in theory, a right to refuse nonpsychiatric medications, with the reforms, courts identified a qualified right for involuntarily hospitalized patients to refuse psychiatric medications as well. Courts differed on the constitutional basis for the right, but they agreed that patients competent to make treatment decisions could not be forced to take psychotropic medication.[52] A few states[53] acknowledge patients' rights to refuse antipsychotic medication, but permit clinicians to determine patients' competency.

Although these court decisions and the legislative enactments that codified them would appear to provide significant protections for involuntary patients (voluntary patients have an absolute right to refuse treatment, absent an emergency[54]), in practice judges are extremely reluctant to second guess

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Preventive Aggression Devices (PADS): Ambulatory Restraints as an Alternative to Seclusion, 48 J. CLINICAL PSYCHIATRY 401 (1987). In fact, in the author's experience some patients wear ambulatory restraints as badges of how "tough" they are.

49. Stensvad v. Reivitz, 601 F. Supp. 128, 131 (W.D. Wisc. 1985) (Shabaz, J.).

50. *See, e.g.*, Note, *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1198-99 nn.19-28 (1974).

51. In two early cases, Rennie v. Klein, 462 F. Supp. 1131, 1145 (D. N.J. 1978), and Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), federal district court judges found that competent patients had a constitutional right to give informed consent before being treated with antipsychotic medications, although they differed on the constitutional bases for the new right, and on the procedures required to override refusal. *See* Paul Appelbaum & Thomas Gutheil, *"Rotting with Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 306 (1979).

52. With the exception of the Supreme Court's decision in *Washington v. Harper*, 110 S. Ct. 1028 (1990), the overwhelming majority of state and lower federal courts have found a constitutional right for competent patients to refuse nonemergent treatment. *See* Rogers, 478 F. Supp. at 1368. The Supreme Court, in a case involving mentally disordered prison inmates, however, held that even competent inmates could be involuntarily medicated for their own good or for the security needs of the prison, as long as professional judgment had been exercised (i.e., that they had been prescribed by a physician). Washington v. Harper, 494 U.S. 210 (1990).

53. *See* Opinion of the Justices, 465 A.2d 484 (N.H. 1983); *Rennie*, 462 F. Supp. at 1131; Large v. Superior Ct., 714 P.2d 399 (Ariz. 1986).

54. See Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979), which not only recognized a

psychiatrists' decisions and permit involuntary patients to refuse prescribed treatment.[55] Interestingly, contrary to the protestations of civil libertarians that clinicians cannot make unbiased decisions in such cases,[56] one study from a jurisdiction that permitted clinical decisionmaking revealed that clinicians allowed significantly more patients to refuse medications than did tribunals in jurisdictions requiring judicial hearings.[57]

In addition to the purely constitutional bases for decisions to permit patients to refuse medications under certain circumstances, many legal scholars (and some nonmedical mental health professionals as well) are convinced that medications are unnecessary at best and poison at worst; and their views have found their way into many court opinions.[58] Much of the heat that this debate has generated stems from erroneous concepts of what the medications do, and from horror stories of their inappropriate use.[59] A second (and also erroneous) assumption underlying many legal criticisms of forced medication is that patients refuse medication chiefly because of the medications' side effects; the research data demonstrate, however, that the majority of patients who refuse medication do so because they deny that they are ill, rather than because of side effects or for other reasons.[60]

A final legal question concerning the involuntary administration of medication is whether medications are more or less restrictive than seclusion and restraint. There is no judicial or legislative consensus on this question, and legal scholars also disagree.[61] What is clear, unfortunately, is that few courts

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constitutional right for voluntary patients to refuse medications in nonemergency situations, but explicitly held that the hospital could not discharge voluntary patients merely because they refused treatment considered essential by their treaters. *Rogers*, 478 F. Supp. at 1368.

55. Studies report that in between 90% and 100% of cases, judges override patients' refusals. *See* Robert D. Miller et al., *The Impact of the Right to Refuse Treatment in a Forensic Patient Population: Six-month Review*, 17 BULL. AM. ACAD. PSYCHIATRY & L. 107 (1989).

56. In *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976), the court opined that "the diagnosis and treatment of mental illness leave too much to subjective choices by less than neutral individuals" to serve as the basis for the loss of liberty involved in civil commitment. *Id.* at 1135.

57. Julie M. Zito et al., *The Treatment Review Panel: A Solution to Treatment Refusal?*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 349 (1984). The Minnesota Supreme Court, in *Price v. Sheppard*, 307 Minn. 250, 262-63 (1976), ultimately rejected clinical decision-making and required judicial hearings. Fewer patients were then permitted to refuse medications. Personal Communication with William H. Routt, M.D. (Apr. 24, 1984).

58. *See* Plotkin, *supra* note 16; Thomas Zander, *Prolixin Decanoate: Big Brother by Injection?*, 5 J. PSYCHIATRY & L. 55 (1977).

59. For an antidote to the misinformation that characterizes much of the legal literature on the subject, see generally Thomas G. Gutheil & Paul S. Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77 (1983).

60. *See generally* Xavier Amador et al., *Awareness of Illness in Schizophrenia and Schizoaffective and Mood Disorders*, 51 ARCHIVES GEN. PSYCHIATRY 826 (1994); William Michaux, *Side Effects, Resistance and Dosage Deviation in Psychiatric Outpatients Treated with Tranquilizers*, 133 J. NERVOUS & MENTAL DISEASE 203 (1961); Allen Raskin, *A Comparison of Acceptors and Resistors of Drug Treatment As an Adjunct to Psychotherapy*, 25 J. CONSULTING CLINICAL PSYCHOL. 366 (1961); Harold I. Schwartz et al., *Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication*, 39 HOSP. & COMMUNITY PSYCHIATRY 1049 (1988); Theodore Van Putten et al., *Drug Refusal in Schizophrenia and the Wish to Be Crazy*, 33 ARCHIVES GEN. PSYCHIATRY 1443 (1976); Theodore Van Putten, *Why Do Schizophrenic Patients Refuse to Take Their Drugs?*, 31 ARCHIVES GEN. PSYCHIATRY 67 (1974).

61. Law professor George Dix feels that medication is the more restrictive. George Dix,

have considered the therapeutic effects of either treatment modality. Clinicians, as well as the majority of patients, prefer medications unless the time necessary for them to become effective is too long to manage an acute crisis. There is a correlation between the two approaches, however; studies demonstrate that when patients are granted the right to refuse medication, the use of seclusion and restraint goes up, at least initially.[62]

III. EXTERNAL LEGAL COERCION ON PATIENTS

The types of coercion discussed in the previous section exist under the authority of law, but in these cases, courts delegate the implementation of the law to clinicians, the majority of whom accept the responsibility in order to be able to provide treatment for severely disordered patients. This section discusses situations in which social and/or economic pressures, as implemented through laws, coerce mentally disordered persons. As the coercion is indirect, it generally goes unnoticed, particularly by libertarians, who focus chiefly on direct governmental coercion. And unlike the types of clinically motivated coercion discussed in Part II above, mental health professionals do not support much of this coercion, considering it antitherapeutic.

A. *Involuntary Commitment*

As discussed above, mental health professionals have utilized involuntary hospitalization, and more recently involuntary commitment to outpatient treatment,[63] to provide effective treatment to patients whose mental disorders prevent them from seeking treatment on their own. But there are a growing number of situations in which the law coerces mentally disordered persons in non-therapeutic ways which clinicians generally oppose.

The first such change was the advent of dangerousness requirements for involuntary hospitalization. In reaction to the perception that clinicians exerted too much control over the involuntary commitment process—which utilized clinical criteria—courts and legislatures in the 1970s added a requirement that patients be dangerous to themselves or to others before they could be hospitalized against their stated wishes.[64] Immediately, critics of involuntary hospital-

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Legal and Ethical Issues in the Treatment and Handling of Violent Behavior, in CLINICAL TREATMENT AND MANAGEMENT OF THE VIOLENT PERSON 178 (Loren Roth ed., 1984). Clinician Paul Soloff disagrees. Paul Soloff, *Physical Control: The Role of Seclusion and Restraint in Modern Psychiatric Practice, in* CLINICAL TREATMENT AND MANAGEMENT OF THE VIOLENT PERSON, 119 (1984).

62. *See* Paul S. Appelbaum & Thomas G. Gutheil, *Drug Refusal: A Study of Psychiatric Inpatients*, 137 AM. J. PSYCHIATRY 340 (1980); Miller et al., *supra* note 55.

63. *See generally* ROBERT MILLER, ET AL., AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE REPORT NO. 26, INVOLUNTARY COMMITMENT TO OUTPATIENT TREATMENT (1987); *see also* Gustavo A. Fernandez & Sylvia Nygard, *Impact of Involuntary Outpatient Commitment on the Revolving-Door Syndrome in North Carolina*, 41 HOSP. & COMMUNITY PSYCHIATRY 1001 (1990); Virginia Aldige Hiday & Teresa L. Scheid-Cook, *The North Carolina Experience with Outpatient Commitment: A Critical Appraisal*, 10 INT'L J.L. & PSYCHIATRY 215 (1987); Robert Miller, *Outpatient Civil Commitment of the Mentally Ill: An Overview and an Update*, 6 BEHAV. SCI. & L. 99 (1988).

64. *See generally* MILLER, *supra* note 10. While no final court has required dangerousness as

ization or treatment, who had been notably responsible for the added criteria, reacted by attacking mental health professionals for their lack of ability to predict future dangerousness.[65]

The advent of dangerousness criteria has had an impact on the character of persons committed, but not necessarily in the way intended by their creators. While a number of mentally disordered persons who would previously have been committed no longer are,[66] a number of demonstrably dangerous but questionably mentally disordered persons, who would not have been committed before the "reforms," are now being committed. With commitment based largely on dangerousness, psychiatric facilities, particularly public hospitals, are filling up with aggressive and frequently untreatable "patients."[67] Not only do such persons require more restrictive measures that take staff time away from treatable patients, but they frequently intimidate the more traditional psychiatric patients and directly interfere with their treatment. Thus, the laws that were intended to protect mentally disordered persons have actually forced many of them to be hospitalized in facilities that are less safe and less therapeutic than prior to reforms.

Another unforeseen complication introduced by the dangerousness criteria was noted by the Supreme Court in a 1990 case, *Zinermon v. Burch*.[68] In considering the necessity for informed consent for voluntary psychiatric hospitalization, the Court majority held in dicta that "[p]ersons who are mentally ill

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a criterion for involuntary commitment, a number of judges have rejected the existing need-for-treatment criteria as being too vague and too broad, and have approved dangerousness criteria. *See, e.g.*, Paul Appelbaum, *Is the Need for Treatment Constitutionally Acceptable as a Basis for Civil Commitment?*, 12 LAW, MED. & HEALTH CARE 144 (1984).

65. The most colorful of such attacks is Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974). A more balanced assessment can be found in the writings of Professor Monahan. *See, e.g.*, JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981). Monahan points out that dangerousness cannot be accurately predicted without considering the context in which the person acts. *See generally*, John Monahan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Reconsideration*, 135 AM. J. PSYCHIATRY 198 (1978). Most early studies involved predicting community behavior of patients who had been hospitalized for years; those studies demonstrably overpredicted violent behavior. The American Psychiatric Association, in its *amicus* brief to the Supreme Court in *Estelle v. Smith*, 451 U.S. 454 (1981), argued that while psychiatrists could accurately predict short-term dangerousness, they could not predict the type of very long-term behavior called for in capital sentencing hearings. *Id.* at 472 (citing, among others, brief for the American Psychiatric Association as Amicus Curiae 11-17). The Supreme Court rejected this argument on policy grounds, ignoring the research data presented. *Id.* at 472-73. More recently, short-term studies during the initial period of hospitalization have proved significantly more accurate. *See generally* Jeffrey S. Janofsky et al., *Psychiatrists' Accuracy in Predicting Violent Behavior on an Inpatient Unit*, 39 HOSP. & COMMUNITY PSYCHIATRY 1090 (1988); Dale E. McNiel & Renee L. Binder, *Predictive Validity of Judgments of Dangerousness in Emergency Civil Commitment*, 144 AM. J. PSYCHIATRY 197 (1987); Dale E. McNiel & Renee L. Binder, *Relationship Between Preadmission Threats and Later Violent Behavior by Acute Psychiatric Inpatients*, 40 HOSP. & COMMUNITY PSYCHIATRY 605 (1989); Steven P. Segal et al., *Civil Commitment in the Psychiatric Emergency Room: I. The Assessment of Dangerousness by Emergency Room Clinicians*, 45 ARCH. GEN. PSYCHIATRY 748 (1988); Kenneth Tardiff, *A Model for the Short-term Prediction of Violent Potential*, *in* CURRENT APPROACHES TO THE PREDICTION OF VIOLENCE (David A. Brizer & Martha Crowner eds., 1989).

66. *See supra* notes 64-65 and accompanying text.

67. *See generally* John Oldham & Andrew E. Skodol, *Personality Disorders in the Public Sector*, 42 HOSP. & COMMUNITY PSYCHIATRY 481 (1991).

68. 494 U.S. 113 (1990).

and incapable of giving informed consent to admission would not necessarily meet the statutory standard for involuntary placement."[69] Under the current rule of law, patients seeking hospitalization, but incapable because of their mental disorders of giving truly informed consent and not dangerous enough to satisfy the revised criteria, are barred from receiving the treatment which they request.[70]

B. *Criminalization*

Marc Abramson coined the term "criminalization of the mentally ill" in 1972.[71] He observed that as a result of more restrictive civil commitment laws, more mentally disordered persons are arrested and placed in the criminal justice system. Some have used the term to refer to the application of the procedural protections of the criminal justice system to persons at risk for civil commitment.[72]

Taking the latter definition first, in addition to the grafting of dangerousness criteria onto the substantive criteria for involuntary hospitalization, the same reforms addressed procedural issues as well. Commitment hearings, although held in court, rarely provided any of the protections afforded other groups facing loss of liberty. Federal courts required that respondents facing involuntary hospitalization be provided with all the protections provided to criminal defendants who also face loss of liberty.[73] The most significant component of these changes was the requirement for active, adversarial attorneys representing respondents.

Concerning the first definition, there continues to be controversy about whether, in fact, mentally disordered persons are increasingly likely to be processed through the criminal justice system rather than the mental health system.[74] One problem is that most studies lack a baseline—i.e., most reports of

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69. *Zinermon*, 494 U.S. at 133.

70. *See* Robert Miller, Zinermon v. Burch: *No Entrance?*, 15 NEWSL. AM. ACAD. PSYCHIATRY & L. 37 (1990).

71. Marc Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side Effect of a New Mental Health Law*, 23 HOSP. & COMMUNITY PSYCHIATRY 101, 101 (1972).

72. *See generally* John Monahan, *The Psychiatrization of Criminal Behavior: A Reply*, 24 HOSP. & COMMUNITY PSYCHIATRY 105 (1973) (responding to Abramson's article).

73. The first major decision was *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wisc. 1972). Another decision highly critical of the existing clinical dominance in involuntary hospitalization was *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976).

74. Sociologist Linda Teplin has done much of the methodologically sound research in this field; her data support the hypothesis that more mentally disordered persons were being arrested after passage of reform commitment laws, although not to the extent reported by others. *See generally* Linda A. Teplin, *The Criminalization of the Mentally Ill: Speculation in Search of Data*, 94 PSYCHOL. BULL. 54 (1983); Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794 (1984) [hereinafter Teplin, *Criminalizing Mental Disorder*]; Linda A. Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 AM. J. PSYCHIATRY 593 (1985); *see also* Jennifer C. Bonovitz & Jay S. Bonovitz, *Diversion of the Mentally Ill into the Criminal Justice System: The Police Intervention Perspective*, 138 AM. J. PSYCHIATRY 973 (1981); M. Borzecki & J. Wormith, *The Criminalization of Psychiatrically Ill People: A Review with a Canadian Perspective*, 10 PSYCHIATRIC J. U. OTTAWA 241 (1985); Darold A. Treffert, *Legal "Rites": Criminalizing the Mentally Ill*, 3 HILLSIDE J. CLINICAL PSYCHIATRY 123 (1979). *But see* Virginia A. Hiday, *Civil Commitment and Arrests: An*

significant numbers of mentally disordered persons in jails and prisons do not have data predating the advent of restrictive civil commitment laws. Regardless of etiology, however, large numbers of mentally disordered persons are in fact being jailed, often for misdemeanors which would have led to hospitalization rather than arrest before commitment required overt dangerousness.[75] Police officers, frustrated at the refusal of the mental health system to accept responsibility for mentally disordered misdemeanants, have learned to "go straight to jail," rather than even taking such persons to hospital emergency rooms.[76] As a result of these policies, the largest collection of incarcerated mentally disordered persons in history is now the Los Angeles County Jail system, with nearly 20,000 such admissions a year, far more than the largest state hospital ever held.[77] Table One demonstrates the distribution of mentally disordered persons who are currently involuntarily detained in Colorado.

TABLE ONE

COMMITTED/INCARCERATED MENTALLY ILL ADULTS IN COLORADO

Site	Legal Status	Census
Colo. MHI Ft. Logan	Civil Certification	91
Denver General	Civil Certification	22
Univ. of Colorado	Civil Certification	24
Colo. MHI Pueblo	Civil Certification	107
Colo. MHI Pueblo	Forensic	308
Jails	Correctional	980
Dep't of Corrections	Correctional - SMI	734*
Dep't of Corrections	Correctional - on meds	945

* based on projected increases since 1993 Fuller-Torrey report of 534.

When the mentally disordered break the law and their arrests and convictions involve the full panoply of procedural protections, their incarcerations

Investigation of the Criminalization Thesis, 180 J. NERVOUS & MENTAL DISEASE 184 (1992). Professor Hiday's data, from following 1,226 involuntarily hospitalized patients, demonstrated that those patients who were arrested were not generally charged with the minor crimes that the criminalization hypothesis predicts. *Id.*

75. *See* Abramson, *supra* note 71; *see also* H. Richard Lamb & Robert William Grant, *The Mentally Ill in an Urban County Jail*, 39 ARCHIVES GEN. PSYCHIATRY 17 (1982); Steve Stelovich, *From the Hospital to the Prison: A Step Forward in Deinstitutionalization?*, 30 HOSP. & COMMUNITY PSYCHIATRY 618 (1979). Several authors have explained the increased arrest rates for mentally disordered persons on the basis of overrepresentation by a small number of patients with prior histories of arrests. *See* Larry Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 AM. J. PSYCHIATRY 33 (1978); Henry Steadman et al., *Explaining the Increased Arrest Rate Among Mental Patients: The Changing Clientele of State Hospitals*, 135 AM. J. PSYCHIATRY 816 (1978).

76. *See* Teplin, *Criminalizing Mental Disorder*, *supra* note 74.

77. In 1955, there were 559,000 patients in state mental hospitals (virtually the only hospitals for involuntarily committed patients at that time). It has since fallen to under 100,000, although many psychiatric patients are in general hospitals or in nursing/rest homes. *See* GERALD N. GROB, MENTAL ILLNESS AND AMERICAN SOCIETY 1875-1940 316 (1983).

appear justified under the state's police power. Civil libertarians would seemingly have little cause for concern. But what is the effect on the mentally disordered persons themselves of this "protection"? Despite the evidence that at least some prefer jail to hospitals,[78] few jails have the resources with which to provide adequate treatment for mental disorders.[79] Patients in prisons fare somewhat better than their counterparts in jails, chiefly as a result of law suits, and because larger systems can provide more resources. But mentally disordered inmates are at a significant disadvantage in correctional facilities. Their behavior exposes them to ridicule at best and abuse at worst, from both other inmates and from guards. They are more frequently placed in maximum security facilities, are systematically denied placements at minimum security facilities, and are denied the opportunity to reduce their sentences significantly by participation in boot camp programs.[80]

Placement in correctional facilities drastically compromises continuity of care for such persons. The majority of community mental health centers do not, as a matter of policy, provide mental health services to inmates in local jails, although there is evidence that this situation is changing gradually.[81] When mentally disordered persons are released from jails and, especially, from prisons, local treatment facilities frequently refuse to provide aftercare services for them. This refusal, in turn, often delays release, because parole boards are reluctant to release such inmates unless effective treatment is available to control mental disorders, and thus minimize recidivism.

An apparent paradox should be noted here. The criminal justice system is antitherapeutic for most patients whose serious mental disorders prevent them from being able to control their behaviors. However, patients with personality disorders are able to exercise such control, albeit with more difficulty than nondisordered persons. Several authors have argued that prosecuting or credibly threatening to prosecute such persons is actually therapeutic, by setting external limits that reinforce the appropriate assumption of responsibility.[82] When clinicians, particularly those practicing in hospitals, attempt to use this approach, however, they are typically met with massive resistance from the

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78. Most preferences for jail are due to denial of illness, but some are due to realistic estimates of the time that will be spent incarcerated. See *infra* note 89 and accompanying text.

79. For a methodologically detailed survey of selected jails, see generally HENRY J. STEADMAN ET AL., THE MENTALLY ILL IN JAIL: PLANNING FOR ESSENTIAL SERVICES (1989). For a more polemic account that reports data from every state, see E. FULLER TORREY ET AL., CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS (1992).

80. *See, e.g.*, Robert D. Miller & Jeffrey Metzner, *Psychiatric Stigma in Correctional Facilities*, 22 BULL. AM. ACADEMY PSYCHIATRY & L. 621 (1994).

81. *See generally* STEADMAN ET AL., *supra* note 79.

82. *See* Kenneth L. Appelbaum & Paul S. Appelbaum, *A Model Hospital Policy on Prosecuting Patients for Presumptively Criminal Acts*, 42 HOSP. & COMMUNITY PSYCHIATRY 1233 (1991); S. Kenneth Hoge & Thomas G. Gutheil, *The Prosecution of Psychiatric Patients for Assaults on Staff: A Preliminary Empirical Study*, 38 HOSP. & COMMUNITY PSYCHIATRY 44 (1987); Robert D. Miller & Gary J. Maier, *Factors Affecting the Decision to Prosecute Mental Patients for Criminal Behavior*, 38 HOSP. & COMMUNITY PSYCHIATRY 50 (1987); Linda Phelan et al., *Prosecuting Psychiatric Patients for Assault*, 36 HOSP. & COMMUNITY PSYCHIATRY 581 (1985); Leonard I. Stein & Ronald J. Diamond, *The Chronic Mentally Ill and the Criminal Justice System: When to Call the Police*, 36 HOSP. & COMMUNITY PSYCHIATRY 271 (1985).

criminal justice system. Many prosecutors apparently believe acting out patients are "right where they belong" and decline to press charges.[83]

C. *Forced Evaluation and Treatment in the Criminal Justice System*

The public perceives that criminal defendants who "plead" incompetence to proceed, or plead insanity, have gotten away with something,[84] and the tensions between legal and therapeutic interests are quite evident in three settings within the criminal justice system. First, criminal defendants may be incompetent to proceed, in which case the appropriate length of commitment presents problems. Second, the relationship between the insanity defense and the length of commitment or imprisonment has not been resolved. Third, recent attempts to tie incarceration to the successful completion of treatment programs raised even more questions.

The criminal law permits (indeed requires) defendants whose competency to proceed is in question for any reason to be psychiatrically evaluated before trial. Historically, defendants found incompetent to proceed could be (and frequently were) hospitalized indefinitely, regardless of the nature of the criminal charges against them; as a result, the issue of incompetence was generally raised by prosecutors rather than defense attorneys. After the Supreme Court's 1972 decision in *Jackson v. Indiana*,[85] most states limited the length of confinement to the maximum term of imprisonment for the crime(s) charged. With prosecutors charging the most severe crimes, and given no opportunity to plea bargain charges until a defendant is found competent to proceed, the maximum period of commitment is typically tied to that of the most serious crime charged.[86] In addition, the majority of pretrial forensic evaluations are still carried out in inpatient facilities, so that defendants who would otherwise be free on bond are incarcerated during the evaluation period, which can be a number of months. That incarceration, in most states, is effected in maximum security forensic hospitals, in which the environment and clientele are largely indistinguishable from those found in jails, in spite of the fact that the staffing reflects a hospital rather than a correctional facility.[87]

Insanity is conceptualized legally as an affirmative defense in those forty-

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83. *See supra* note 82.

84. *See generally* HENRY J. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL (1979).

85. 406 U.S. 715 (1972)

86. For this reason, Professor Norval Morris, among others, has argued that when significant procedural issues exist, or when a defense on the merits has a high probability of success, states should permit incompetent defendants to proceed to trial. If convicted, then the trial judge should conduct a retrospective determination of the effects of the defendant's incompetency on the conviction. *See generally* Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972). The American Bar Association (ABA) does not go so far, but has recommended that "[t]he fact that the defendant has been determined to be incompetent to stand trial should not preclude further judicial action, defense motions or discovery proceedings which may fairly be conducted without the personal participation of the defendant." AMERICAN BAR ASSOC., CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.12 (1984).

87. *See generally* Robert D. Miller & Edward J. Germain, *Inpatient Evaluation of Competency to Stand Trial*, 9 HEALTH L. IN CANADA 74 (1989).

seven jurisdictions in the United States that retain the defense.[88] While other affirmative defenses, such as duress, must in practice be entered by competent defendants on their own behalves, at least seventeen jurisdictions permit insanity defenses to be entered over the active objections of defendants; in twelve of those jurisdictions it can be imposed on defendants who are judged competent to proceed.[89] Since, contrary to popular belief, commitment of defendants found insane frequently exceeds the terms of imprisonment which would have been imposed with a guilty verdict,[90] such legal coercion, which by definition can only be imposed on mentally disordered defendants, sacrifices the rights and autonomy of competent defendants to protect the dignity of the law.

While mental health professionals are of necessity involved in the evaluation and treatment of defendants found incompetent to proceed and not guilty by reason of insanity, these systems were created by the law, not by mental health professionals, who have opposed the use of mental health commitments for purposes other than the provision of treatment. Unlike the situation with involuntary hospitalization, in which clinicians have the authority (and often are required) to discharge patients when they no longer require hospitalization for treatment, patients hospitalized under the criminal laws can generally be discharged only by courts, who are under increasing political pressure not to release mentally disordered persons who have committed serious crimes, regardless of the current mental status of the perpetrator.[91]

Another legal innovation, crafted in response to public outrage at the insanity defense, is the verdict of guilty but mentally ill (GBMI). Under this verdict, defendants adjudged mentally ill at the time of commission of the criminal act, but not sufficiently ill to meet the criteria for the insanity defense, can be found GBMI. Such defendants are sentenced to criminal punishment, just like any other convicted person. These defendants are supposed to

88. *See, e.g.*, Barbara A. Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI.-KENT L. REV. 1057, 1057 (1980).

89. *See* Robert D. Miller et al., *Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law*, 24 J. PSYCHIATRY & L. 487 (1996).

90. The research data conflict on this point. The earliest studies, before due process reforms affected the commitments of insanity acquittees, indicated that insanity acquittees and felons convicted of the same crimes spent comparable periods of time incarcerated. *See generally* MARK PANTLE ET AL., COMPARING INDIVIDUAL PERIODS AND SUBSEQUENT ARRESTS OF INSANITY ACQUITTEES AND CONVICTED FELONS (1980) (analyzing data from 1965-1971). Later studies, after the libertarian reforms, indicated that convicted felons were locked up longer; *see, e.g.*, Richard A. Pasewark et al., *Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons*, 139 AM. J. PSYCHIATRY 892 (1982) (analyzing data from 1971-1973); Betty L. Phillips & Richard A. Pasewark, *Insanity Plea in Connecticut*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 335 (1980) (analyzing data from 1970-1972). As the "law and order" mentality gained ascendancy, the trends in many states changed back to longer commitments for insanity acquittees. *See generally* Grant T. Harris et al., *Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders*, 14 INT'L J.L. & PSYCHIATRY 223 (1991) (analyzing data from 1975-1981); Mark Pogrebin et al., *Not Guilty by Reason of Insanity: A Research Note*, 8 INT'L J.L. & PSYCHIATRY 237 (1986) (analyzing data from 1980-1983).

91. *See generally* Abraham L. Halpern et al., *New York's Insanity Defense Reform Act of 1980: A Forensic Psychiatric Perspective*, 45 ALB. L. REV. 661 (1981); *see also* Robert D. Miller et al., *Judicial Oversight Over Release of Patients Committed After Being Found Not Competent to Proceed or Not Guilty by Reason of Insanity of Violent Crimes*, 28 J. FORENSIC SCI. 839 (1983).

receive mental health treatment, but courts have held that they are entitled to no more treatment than any other inmate.[92]

Michigan initially created the GBMI verdict in response to a state court decision that freed a number of insanity acquittees.[93] The verdict was specifically designed as an alternative to the insanity defense, with the hope that many mentally disordered defendants would be imprisoned rather than hospitalized (and subsequently released sooner than if they had gone to prison).[94] Eleven other states followed suit, most following the *Hinckley* verdict.[95] Although there is some evidence that the verdict has in fact reduced the number of insanity defenses in two states,[96] the overwhelming majority of the data indicate that there is little change in the overall number of insanity acquittals. Most authors have been critical of the defense, reporting that it does not reduce insanity defenses, and disadvantages those found GBMI relative to those simply found guilty.[97]

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92. *See* INGO KEILITZ ET AL., THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY 1-50 (1984).

93. In *People v. McQuillan*, 392 Mich. 511 (1974), the Michigan Supreme Court held that the state must release defendants found not guilty by reason of insanity unless they met criteria for involuntary hospitalization at the time of sentencing. After that ruling, trial courts determined that a number of acquittees did not meet this requirement, and thus released them. *See* Lynn Blunt & H. Stock, *Guilty but Mentally Ill: An Alternative Verdict*, 3 BEHAV. SCI. & L. 49 (1985).

94. Many authors have been critical of the Michigan experience. *See, e.g.*, Lynn W. Blunt & Harley W. Stock, *Guilty but Mentally Ill: An Alternative Verdict*, 3 BEHAV. SCI. & L. 49 (1985); John Klofas & Ralph Weisheit, *Pleading Guilty but Mentally Ill: Adversarial Justice and Mental Health*, 9 INT'L J.L. & PSYCHIATRY 491 (1986); Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty but Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77 (1982). These authors report that insanity defenses did not decrease, that GBMI inmates did not receive increased mental health services (and indeed did not need them), and that GBMI inmates were not paroled as early as defendants convicted of the same crimes without the GBMI label.

Petrella and his colleagues criticized these conclusions, pointing out that the *McQuillan* decision, and the change from *McNaghten* to ALI criteria for insanity, might have combined to increase the number of insanity pleas and, therefore, the fact that the actual number of successful pleas remained constant after introduction of the GBMI plea indicates that the number would have gone up but for the new verdict. These detractors acknowledge Smith and Hall's observation that the guilty but mentally ill inmates did not resemble insanity acquittees, but attempt to explain it away by noting that no data indicate what percentage of those pleading guilty but mentally ill would have pled insane in the absence of the alternative verdict. *See* Russell C. Petrella et al., *Examining the Application of the Guilty but Mentally Ill Verdict in Michigan*, 36 HOSP. & COMMUNITY PSYCHIATRY 254 (1985).

95. *See* ALASKA STAT. § 12.47.030 (Michie 1992); CONN. GEN. STAT. § 53a-47 (Supp. 1983) (repealed 1983); DEL. CODE ANN. tit. 11, §§ 401(b), 408 (1987); GA. CODE ANN. § 17-7-131 (Supp. 1993); 38 ILL. COMP. STAT. § 5/115-2(b) (West 1993); IND. CODE § 35-36-2-3 (Supp. 1982); KY. REV. STAT. ANN. § 504.120 (Michie Supp. 1982); N.M. STAT. ANN. § 31-9-3 (Michie Supp. 1983); S.C. CODE ANN. § 17-24-20 (Law Co-op 1985); S.D. CODIFIED LAWS § 23a-7-2 (Michie Supp. 1983); UTAH CODE ANN. § 77-13-1 (Supp. 1983). Nevada recently abolished its insanity defense and replaced it with a GBMI statute. NEV. REV. STAT. ANN. § 174.041 (Michie 1995).

96. *See generally* R.D. MacKay & J. Kopelman, *The Operation of the "Guilty but Mentally Ill" Verdict in Pennsylvania*, 16 J. PSYCHIATRY & L. 247 (1988). Insanity defenses in Alaska dropped from six to one in the year following enactment of a GBMI statute, but at the same time the insanity criteria were made more restrictive. *See, e.g.*, INGO KEILITZ ET AL., THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY (1984).

97. *See generally* KEILITZ ET AL., *supra* note 96, Linda C. Fentiman, *"Guilty but Mentally Ill": The Real Verdict is Guilty*, 26 B.C. L. REV. 601 (1985); Klofas & Weisheit, *supra* note 94; Donald W. Morgan et al., *Guilty but Mentally Ill: The South Carolina Experience*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 41 (1988); Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An*

Recently, there has been a resurgence of interest in another state method of incarcerating allegedly mentally disordered persons—the mentally disordered sex offender (MDSO) laws. In the 1950s, a number of states passed MDSO laws, but as alternatives to criminal imprisonment. Commitment under these laws was initially indeterminate, because it was tied to treatment rather than to an arbitrary fixed term of punishment. The laws were attacked in the 1970s on civil rights grounds, as well as because of lack of evidence of treatment effectiveness, and most were repealed or fell into disuse.[98] In the late 1980s, however, public fears about criminals in general and sex offenders in particular resulted in the passage of new MDSO laws in several states.[99]

Unlike the previous laws, however, the new wave of statutes provides for "civil" commitment of sex offenders *after* they have served criminal sentences for the same crimes that serve as the basis of predictions that they will commit future sex crimes. Two of these laws are currently before the federal courts. Washington State's Sexually Violent Predator statute was upheld by its state supreme court,[100] but found to be unconstitutional by the federal district court.[101] Kansas' Sexually Violent Predator law[102] was found unconstitutional by its state supreme court,[103] but on appeal, the U.S. Supreme Court reversed.[104] The third, Wisconsin's Sexual Predator Law, was upheld by its state supreme court, and the U.S. Supreme Court denied *certiorari* to hear the case.[105]

Unlike the insanity defense and commitments for treatment to restore competency to proceed, mental health professionals have opposed sexual predator laws, recognizing them for what they are: a return to indefinite commitments in a (not so) covert attempt to alleviate public fear of sex offenders, not to provide adequate time for treatment;[106] an incapacitation of offenders, cloaked in the appearance of beneficence. The American Psychiatric Association and its district branches have provided *amicus* briefs to the courts in all three states opposing the laws.[107] If the duty to protect third parties turns clinicians into cops, sexual predator statutes turn them into gaolers,[108] and ultimately the system selects for the kinds of clinicians who are comfortable in *being* gaolers.

Idea Whose Time Should Not Have Come, 53 GEO. WASH. L. REV. 494 (1985); *The Insanity Defense: ABA and APA Proposals for Change*, 7 MENTAL DISABILITY L. REP. 136 (1983).

98. *See* Barbara A. Weiner, *Sexual Psychopath Laws*, *in* THE MENTALLY DISABLED AND THE LAW 739-43 (Samuel Jan Brakel et al. eds., 3d ed. 1985).

99. John G. LaFond, *Washington's Novel Sexual Predator Commitment Law*, 18(1) NEWSL. AM. ACAD. PSYCHIATRY L. 4 (1993).

100. *In re* Young, 122 Wash. 2d 1(1993).

101. Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995).

102. KAN. STAT. ANN. §§ 59-29(a)(01) to 29(a)(15) (1995).

103. *In re* Hendricks, 259 Kan. 246 (1996).

104. Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

105. State v. Carpenter, 197 Wis. 2d 252 (1995), *cert. denied sub nom.*, Schmidt v. Wisconsin, 117 S. Ct. 2507 (1997); State v. Post, 197 Wis. 2d 279 (1995), *cert. denied sub nom.*, Post v. Wisconsin, 117 S. Ct. 2507 (1997).

106. The Kansas statute *defines* MDSOs as untreatable. KAN. STAT. ANN. § 59-29a01 (1995).

107. *See, e.g.*, Kansas v. Hendricks, 117 S. Ct. 2072 (1996).

108. The obsolete form of this word is used here on purpose, to suggest the regressive thinking that supports sexually violent predator laws.

D. *Paternalistic Advocates and Attorneys*

Mental health professionals have been (accurately) accused of being paternalistic towards their patients,[109] believing that the provision of effective treatment[110] justifies temporary restriction of external physical liberty for those patients incompetent to make treatment decisions.[111] Less discussed in the literature, however, is that many self-appointed advocates for the mentally ill are just as paternalistic, valuing liberty and due process at the expense of treatment.[112]

Just as clinicians utilize the existing laws to impose treatment on patients, these advocates frequently use their authority to undermine it. Many advocates, particularly when hospital-based advocacy programs were in their infancies, took the position that clinicians were their enemies, and adopted a strictly adversarial posture toward hospital staffs. Appalled at the conditions in some hospitals, concerned only that their clients—who had no more choice about their advocates than about their treaters—be granted "freedom" from physical restraint, and rejecting the proposition that psychiatric treatment conferred any benefit, many argued against the use of involuntary hospitalization or treatment under any circumstances.[113] Few of these early advocates had any clinical training or sophistication, and they operated from the criminal defense attorney model, which teaches concentration on one client at a time, to the exclusion of all others. As a consequence, protection of the legal rights of one patient often resulted in loss of the same rights for others. Mental health professionals do not have the luxury of such tunnel vision; they are responsible for the safety and treatment of all their patients.

Patricia Wald and Paul Friedman have classified advocates into "rights-oriented" and "treatment-oriented."[114] The former are those who concentrate only on patients' legal rights (as interpreted by the advocates), while the latter use their advocacy skills to improve patients' access to effective treatment. The rights-oriented advocates would prefer to abolish all involuntary treatment,

109. *See generally* Robert D. Miller, *Involuntary Civil Commitment: Legal Versus Clinical Paternalism*, *in* LEGAL ENCROACHMENTS IN PSYCHIATRIC PRACTICE, NEW DIRECTIONS FOR MENTAL HEALTH SERVICES (Stephen Rachlin ed., 1985).

110. A plethora of studies have demonstrated the effectiveness of antipsychotic medication. Most significant, several studies demonstrate that this efficacy is the same for voluntary and involuntary patients. *See* Donald R. Gorham & Lewis J. Sherman, *The Relation of Attitude Toward Medication to Treatment Outcomes in Chemotherapy*, 118 AM. J. PSYCHIATRY 830 (1961); Gerard Hogarty & Solomon Goldberg, The NIMH Collaborative Group, *Drug and Psychotherapy in the Aftercare of Schizophrenic Patients: One-Year Relapse Rates*, 28 ARCHIVES GEN. PSYCHIATRY 54 (1973); National Inst. of Mental Health Psychopharmacology Serv. Ctr. Collaborative Study Group, *Phenothiazine Treatment in Acute Schizophrenia*, 10 ARCHIVES GEN. PSYCHIATRY 246 (1964).

111. *See supra* notes 51-52; *see also* Miller, *supra* note 109. The sociological data reported *supra* note 27 also supports the view that after effective treatment, the majority of patients feel that the temporary restriction of their rights was justified.

112. *See generally* Morse, *supra* note 2.

113. *See generally* H. Richard Lamb, *Securing Patients' Rights—Responsibly*, 32 HOSP. & COMMUNITY PSYCHIATRY 393 (1981); Alan Stone, *The Myth of Advocacy*, 30 HOSP. & COMMUNITY PSYCHIATRY 819 (1979).

114. *See generally* Patricia Wald & Paul Friedman, *The Politics of Mental Health Advocacy in the United States*, 1 INT'L J.L. & PSYCHIATRY 137 (1978).

but understanding that they are unlikely to accomplishing this goal, they frequently use litigation as a means to implement their covert agendas. A leading example can be found in the landmark "right-to-treatment" law suit, *Wyatt v. Stickney*,[115] in which lead counsel for the plaintiff made it plain that he was not particularly interested in improving treatment in Alabama's substandard hospitals for the mentally ill and mentally retarded, but rather hoped to force the state to discharge as many "inmates" as possible.[116] Activist attorneys have not only tried to close hospitals, but also to prevent mentally disordered persons from seeking to stay in them voluntarily or to gain access to them.

The majority of attorneys who actually represent persons facing civil commitment in court do not share the activist agenda of the hospital-based advocates and members of the national mental health bar.[117] In fact, many are quite reluctant to adopt a full adversarial stance with respect to their clients, preferring a "best interests" role because of the obvious mental disorders from which their clients suffer.[118] One example of this paternalism is the use of plea bargaining techniques learned from criminal defense work. Many attorneys, convinced that their clients will be hospitalized as a result of their hearings, argue for a less restrictive alternative—commitment to outpatient treatment—even if neither their clients nor the hospital staff approve of that alternative. Unlike the situation in criminal court, such attorneys frequently enter such compromise pleas over the strenuous objections of their clients.[119] Some advocates have actually filed suit to prevent their "clients" from receiving potentially effective treatment.[120]

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115. 325 F. Supp. 781 (M.D. Ala. 1971).

116. The lead plaintiff's attorney in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), wrote:

> Indeed the strategy in a case like *Wyatt* is to make it too expensive to run large mental institutions and encourage the development of non-institutional alternatives. . . . In recent years, right-to-treatment litigation has emerged as a potent new tool to attack the system by which the mentally ill are confined against their will and incarcerated indefinitely.

Lawrence Schwartz, *Litigating the Right to Treatment:* Wyatt v. Stickney, 25 HOSP. & COMMUNITY PSYCHIATRY 460, 461 (1974).

117. *See* Lawrence P. Galie, *An Essay on the Civil Commitment Lawyer: Or How I Learned to Hate the Adversary System*, 6 J. PSYCHIATRY & L. 71 (1978). Norman Poythress, an experienced forensic psychologist, attempted to train attorneys to represent commitment respondents effectively, but reported that his efforts had little impact on their "best interests" philosophy. Norman G. Poythress, *Psychiatric Expertise of Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 LAW & HUM. BEHAV. 1 (1978).

118. In *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wisc. 1982), a federal district court held that individuals facing commitment were constitutionally entitled to counsel acting in an adversarial role and as advocates for freedom. *Id.* at 1090 ("[T]he interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses.") One attorney has expressed his frustration with the adversarial role in civil commitment hearings in print. *See* Lawrence P. Galie, *An Essay on the Civil Commitment Lawyer: Or How I Learned to Hate the Adversary System*, 6 J. PSYCHIATRY & L. 71 (1978).

Poythress and colleagues have attempted to train attorneys to represent respondents facing commitment in an adversarial fashion, but found little change from the usual "best interests" role after the training. Norman G. Poythress Jr., *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 LAW & HUM. BEHAV. 1 (1978).

119. *See generally* Robert D. Miller, *The Use of Plea Bargaining in Involuntary Civil Commitment*, 7 INT'L J.L. & PSYCHIATRY 395 (1984).

120. In *Kaimowitz v. Michigan Dept. of Mental Health*, 42 U.S.L.W. 2063 (Cir. Ct. Wayne

Recently, David Wexler and Bruce Winick, two law professors experienced in both mental health law and practice, have been advocating a concept they call "therapeutic jurisprudence."[121] Professor Wexler has written that "[t]he task of therapeutic jurisprudence is to identify—and ultimately to examine empirically—relationships between legal arrangements and therapeutic outcomes."[122] He goes on to state that it involves four overlapping areas of inquiry: 1) the role of the law in producing psychological dysfunction; 2) the therapeutic aspects of legal rules; 3) the therapeutic aspects of legal procedures; and 4) the therapeutic aspects of judicial and legal roles. He assumes that the law seeks expressly to promote therapeutic objectives, such as a meaningful right to treatment, but that the law often does not recognize the antitherapeutic aspects of even that concept in practice.[123] It would seem that this approach, which continues to be rejected by extremists in both the legal

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Cty., Mich. 1973), a mentally disordered sex offender gave consent to experimental psychosurgery, in order to help him control his violent behavior. He had been told that he would never be released from maximum security as long as his aggressive behavior continued, and he had not responded to any other treatment. A libertarian attorney filed suit, without support from his "client," to block the treatment. The trial court held that because the treatment was experimental, irreversible, and affected the brain, no incarcerated person was capable of giving informed consent.

Although this decision has no technical precedential value, it has been cited by attorneys to prevent willing patient/clients from accepting nonstandard treatment. For example, when the author developed a voluntary treatment procedure for committed sex offenders involving the use of anti-androgen medication to reduce (but not eliminate) abnormally high sex drive, the attorney for a state advocacy program objected, citing *Kaimowitz* to support her contention that no incarcerated person could give consent to the experimental (and reversible) use of an FDA-approved medication. Letter from Dianne Greenley, Project Director, Advocacy for Institutionalized Persons, Wisconsin Coalition for Advocacy, to Robert D. Miller (May 3, 1985) (on file with the author). Had her objections been voiced in court, they might well have prevented patients from receiving the only treatment that would permit them to gain sufficient control over their sexual arousal to be released.

Another example of overreaction to past abuses involves research with institutionalized populations. There is no question that such populations have been abused in the past—the Tuskeegee syphilis experiments come to mind. But the current guidelines of the American Correctional Association, the standards for practices in prisons and jails, prohibit *all* medical research with inmates, whether the treatment may be life-saving or not. "Written agency policy prohibits inmates/juveniles/residents from participating in medical or pharmaceutical testing for experimental or research purposes." AMERICAN CORRECTIONAL ASSOC., STANDARDS FOR ADULT CORRECTIONS/INSTITUTIONS, Std. 2-CO-1F-14 (Mar. 1, 1996).

121. *See, e.g.*, DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991); David B. Wexler & Bruce J. Winick, *The Potential of Therapeutic Jurisprudence: A New Approach to Psychology and the Law*, *in* LAW AND PSYCHOLOGY: THE BROADENING OF THE DISCIPLINE 211 (James R.P. Ogloff ed., 1992); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

122. David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, *in* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 8 (1991).

123. *See, e.g.*, David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, *in* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE 17 (1991). Attorneys can tell patients the same things that their treaters tell them, but are heard differently. *See generally* Robert D. Miller et al., *Litigiousness as a Resistance to Therapy*. 14 J. PSYCHIATRY & L. 109 (1986). This approach requires treatment-oriented advocates who can see the whole picture and who know something about mental disorder. Since few attorneys receive adequate experience with mentally disordered persons in law school, and the legal literature is heavily biased against psychiatric treatment, I am not arguing here for co-option of attorneys, but for attorneys operating based on accurate information rather than ideology.

and mental health camps, represents the best hope for reconciliation, which would remove the supposed clients of both from the current crossfire between them.

E. *Coercion in Correctional Facilities*

This article has discussed the increased incidence of mentally disordered persons in the criminal justice system. Rights-oriented advocates have not complained vociferously about this situation, in part because the civil rights of criminal defendants are scrupulously protected. Unfortunately, however, most advocates lose interest once defendants are convicted and incarcerated.[124] Of course, correctional systems are all about coercion; what concerns us here are the additional problems that exist for inmates *because* they are mentally disordered. For example, although correctional inmates are the only population in this country that have a constitutional right to treatment,[125] including mental health treatment,[126] inmates are also the only group of mentally disordered persons officially and openly discriminated against because of their status. Courts have required correctional systems to develop effective screening[127] and tracking systems for their mentally disordered inmates[128] and to provide adequate treatment for those with serious mental illnesses.[129] But those inmates so identified are concomitantly disadvantaged by their very classification.

In a national survey of all state correctional systems,[130] forty-eight of fifty-one responded that they use psychiatric diagnosis in placement decisions; twenty of fifty-one states use maximum security placements for seriously mentally ill inmates, regardless of their actual behavior. Some states bar seriously mentally ill inmates from many, if not all, minimum security facilities. Twenty-two of the thirty states that have them prohibit inmates with major mental disorders, or those who are taking psychotropic medications, from participating in boot camp programs, perhaps the most significant advantage a

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124. Most of the legal advocacy programs concentrate their efforts in the civil system, and correctional systems—especially prisons—have been more successful in fending off attempts to place advocates or ombudspersons in their facilities. The chief exception is the National Prison Project, affiliated with the American Civil Liberties Union, that directs all its efforts toward state prison systems. Since it is a private organization, it is not subject to the cutbacks and restrictions that have increasingly prevented federally-funded advocacy programs from filing class action suits, and its efforts have led to major improvements in over half the nation's prison systems. It does not restrict itself to mental health issues, but those issues are invariably litigated as part of class action suits. *See* Robert D. Miller, *Current Status of Prison Mental Health Litigation*, 20 NEWSL. AM. ACAD. PSYCHIATRY L. 57 (1995).

125. Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." (citation omitted)).

126. Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

127. Jeffrey Metzner et al., *Mental Health Screening and Evaluation Within Prisons*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 451 (1994).

128. *See, e.g.*, Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437, 1451, 1457, 1460 (E.D. Pa. 1995).

129. *See Bowring*, 551 F.2d at 47.

130. *See generally* Robert D. Miller & Jeffrey Metzner, *Psychiatric Stigma in Correctional Facilities*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 621 (1994).

corrections system can confer on an inmate. Many of these policies, to be sure, are based on lack of mental health resources to monitor the effects of medication at many facilities. Not discrimination per se, but the effect is the same. At a time when the incidence of mentally disordered inmates is growing rapidly,[131] such discrimination is particularly problematic.[132]

IV. External Social Coercion on Patients

A. *Stigma*

In addition to the legal coercion discussed above, mentally disordered persons are increasingly exposed to more diffuse social pressures which are more difficult to protect against. Despite a plethora of educational programs aimed at the general public, the stigma associated with being mentally disordered continues unabated. Since the effects of social coercion are often not direct acts of the state, legal advocates tend to ignore them, except to list the existence of stigma as a factor militating keeping mentally disordered persons out of the mental health system altogether. But because of the stigma, mentally disordered persons have difficulty obtaining the specialized housing that they require,[133] and also have difficulty in obtaining employment.[134]

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131. *See generally* Henry J. Steadman & Stephen A. Ribner, *Changing Perceptions of the Mental Health Needs of Inmates in Local Jails*, 137 AM. J. PSYCHIATRY 1115 (1980). Approximately 670,000 mentally ill inmates are admitted to jails each year, or nearly eight times the number admitted to state mental hospitals. *See* CENTER ON CRIME, COMMUNITIES & CULTURE, RESEARCH BRIEF: MENTAL ILLNESS IN U.S. JAILS: DIVERTING THE NONVIOLENT, LOW-LEVEL OFFENDER (1996).

132. In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), inmates challenged a California prison's blanket policy of prohibiting HIV-positive inmates from working in food service. The trial court held that the policy violated section 504(a) of the Rehabilitation Act of 1973. The Ninth Circuit reversed, holding that while HIV-positive status was a disability under the ADA and, therefore, the Rehabilitation Act, *Id.* at 1446, and the prison's acceptance of federal funds placed it under the Act, *Id.*, the Rehabilitation Act was not specifically designed to apply to prisons, and inmates do not possess the same rights as noninmates. *Id.* at 1446-47. It accepted the prison's argument that because of the fact that many inmates believed (however falsely) that they would be placed at risk by having to eat food prepared by HIV-positive inmates, the prison had a legitimate security reason to deny food service jobs to HIV-positive inmates. *Id.* at 1447-48.

133. Since zoning laws are governmental actions, the courts have been willing to address their alleged discrimination against the mentally disabled. The Supreme Court ruled in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), that Edmonds' zoning ordinance requiring occupants of a single-family dwelling to be "persons related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons," violated the 1988 Fair Housing Act (FHA), which prevents housing discrimination based on disability. The Court held that since an unlimited number of related people could live together under the ordinance, it was intended to discriminate against unrelated people, and thus did not fall under the "maximum occupancy" exception to the FHA. *Id.* at 1781-82.

Lower courts have subsequently denied housing permits for facilities for disabled persons, however, when the ordinances in question were more carefully crafted to avoid the problems found in *City of Edmonds*. A federal district court in Maryland, *see* Bryant Woods Inn, Inc. v. Howard Cty., Md., 911 F. Supp. 918, 931 (D. Md. 1996), and the Eighth Circuit, *see* Oxford House v. St. Louis, 77 F.3d 249, 252 (8th Cir. 1996), both held that maximum occupancy ordinances expressed legitimate governmental interests in regulating traffic and other problems.

134. This article does not discuss the burgeoning literature on the application of the Americans with Disabilities Act to mentally disordered persons in the workplace. It is interesting to note, however, that at least two federal courts have held that questions concerning past mental disorder on applications to take bar examinations may constitute impermissible discrimination. *See*

Perhaps the most telling example of the stigma associated with being mentally ill comes as the result of a 1966 Supreme Court case, *Baxstrom v. Herold*.[135] That decision led to the discharge or transfer of 989 patients hospitalized in a New York maximum security correctional facility.[136] Henry Steadman and his colleagues followed the patients' progress for ten years. As part of the study, researchers collected newspaper articles about the patients, all of whom were both ex-mental patients ("mad") and ex-convicts ("bad"). In every one of the hundreds of articles Steadman reviewed, the subject was described as an ex-mental patient—never an ex-convict.

B. *Economic Coercion*

Economic factors have been inadequately studied as indirect but powerful sources of coercion upon mentally disordered persons. When asylums were first built in this country in the 1800s, a major argument in legislatures for hospitalizing mentally disordered persons was that the facilities would be self-sustaining and, in fact, many were in those early years. The larger institutions grew their own food, made their own clothes, and generally operated as self-contained communities, largely on (free) patient labor. This practice depended, of course, on keeping the higher-functioning patients for long periods of time (the seriously mentally ill patients in the back wards were of no economic value, which was why many of them had been committed in the first place).[137]

With the increased dumping of dysfunctional persons into asylums, the basic costs of running the institutions increased to the point that they became economic liabilities to the administrating governments. During the civil rights revolution of the 1960s and '70s, unpaid patient labor was attacked as "institutional peonage," and states were forced to pay minimum wages to patients for their work.[138] When the lack of resources and even minimally adequate treatment programs was litigated, federal courts mandated significant im-

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Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430 (E.D. Va., 1995); Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489 (S.D. Fla. 1994). In response, the American Bar Association approved a compromise resolution that rejected existing practices of detailed inquiry into an applicant's past mental health history, but permitted inquiry into an applicant's current functioning. Similar suits have been filed against medical licensing boards, and the American Medical Association has recommended that inquiries be permitted only as to disabilities that require reports concerning competence to be made to the board, or that may reasonably be expected to affect a physician's current practice. *See* Robert D. Miller, *Licensing and Mental Disability*, 20 NEWSL. AM. ACAD. PSYCHIATRY L. 21 (1995). It also stressed the importance of confidentiality in these matters. *See id.*

135. 383 U.S. 107 (1966).

136. *See generally* HENRY J. STEADMAN & JOSEPH J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974).

137. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 346-50 (1980).

138. As an unfortunate result of this appropriate determination, patients were subsequently denied the opportunity to perform truly therapeutic work, because state departments of mental health would not provide the necessary funds in their budgets. *See* ANDREW T. SCULL, DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT—A RADICAL VIEW 139 (2d ed. 1984). Scull also argues that another purpose of the civil rights litigation was to force discharges from hospitals by making it economically infeasible to hold patients. *Id.*

provements in staffing and other resources,[139] thus further increasing the costs of operating state mental hospitals.

States responded by supporting advocates' efforts to limit admissions to state hospitals, and to "deinstitutionalize" those patients who were already there.[140] The original plan had been to take money saved from down-sizing state hospitals and transfer it to community-based treatment facilities—the "money follows the patient" plan.[141] For many reasons, this plan never worked in practice. The major reason was that while the census in state facilities has dropped by over eighty-five percent over the past forty years, improvements in court-mandated conditions and staffing have increased the cost per patient to the extent that relatively little actual savings have occurred. In addition, civil rights advocates filed suits to block needed improvements in hospitals, fearing states would merely divert funds so utilized from essential programs for community-based treatment.[142] In addition, the due process protections mandated by the courts took much needed funds from clinical resources.[143]

Another initial economic incentive for deinstitutionalization was the influx of federal money into community mental health centers beginning in the 1960s, giving state governments the opportunity to cost-shift by transferring patients to those facilities. Some states passed laws requiring local governments to reimburse the state for their residents who were hospitalized in state facilities.[144] When the federal monies that had supported treatment of the chronically mentally ill dried up, however, local governments felt the financial pinch, and their community mental health centers had to look to paying or insured clients to continue operating.[145]

One beneficiary of the deinstitutionalization movement was the nursing

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139. The leading case is Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). For a discussion of subsequent cases, see Stephen Rachlin, *Litigating a Right to Treatment: Woe is Me*, 58 PSYCHIATRIC Q. 182 (198).

140. *See* Lawrence H. Schwartz, *Litigating the Right to Treatment: Wyatt v. Stickney*, 32 HOSP. COMM. PSYCHIATRY 460, 462 (1981).

141. *Id.*

142. From 1964 until 1980, costs per patient per day at Bryce State Hospital rose from $3.50 to $65. *See Conference Report, Wyatt v. Stickney: Retrospect and Prospect*, 32 HOSP. COMMUNITY PSYCHIATRY 123, 125 (1981) [hereinafter *Conference Report*]. Morton Birnbaum, the creator of the concept of a right to treatment, *see* Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960), continued to pursue his creation in the courts for nearly 30 more years. His litigation through the state and federal courts, primarily *Woe v. Cuomo*, 801 F.2d 627 (2d Cir. 1986), ultimately resulted in the accreditation by the Joint Commission on the Accreditation of Health Care Organizations of all New York's state mental hospitals, at a tremendous cost to the state. *See* Stephen Rachlin, *Litigating a Right to Treatment: Woe Is Me*, 60 PSYCHIATRIC Q. 182 (1988).

143. Ronald Schouten & Thomas G. Gutheil, *Aftermath of the Rogers Decision: Assessing the Costs*, 147 AM. J. PSYCHIATRY 1348, 1351 (1990) (reporting that the budget of the Massachusetts Department of Mental Health increased by over a million dollars during an 18-month period following *Rogers*). The cost of compliance includes, of course, the costs to the judiciary and others in the judicial system, as well as the thousands of hours of clinical time taken away from patients in order to prepare and testify in involuntary treatment hearings.

144. *See, e.g.*, WIS. STAT. § 51.42(3)(as) (1976); *see also* Robert D. Miller, *Economic Factors Leading to the Diversion of the Mentally Disordered from the Civil to the Criminal Commitment Systems*, 15 INT'L J.L. & PSYCHIATRY 1 (1992).

145. *See generally* FRANKLIN CHU & SHARLAND TROTTER, THE MADNESS ESTABLISHMENT: RALPH NADER'S STUDY GROUP REPORT ON THE NATIONAL INSTITUTE OF PUBLIC HEALTH (1974).

home industry. A large number of mental patients that had been hospitalized for years were "transinstitutionalized"[146] to these facilities, which were supported in part by federal money. Because these were not state facilities, many civil rights activists were not concerned, despite the fact that many chronically mentally ill patients had been better off in hospitals which had programs specifically designed for their needs—programs almost totally lacking in nursing homes. Once the federal government caught on to what was happening, it threatened to cut off all funding to nursing homes with above a certain percentage of chronically mentally ill residents, because its support of medically ill home inhabitants did not include those with mental illnesses.[147] As a result of patients being thrown out of hospitals and then out of nursing homes, patients who would have been hospitalized in the past had nowhere to live. Again, since this is not the direct result of state action, patients' constitutional rights were not violated, and their injuries are difficult to articulate in tort litigation.[148]

This latter discrimination against mentally disordered persons is not the sole province of the federal government, however. Most private insurance companies, and now managed care corporations, have always refused to provide equal coverage for persons with mental disorders, as compared with

146. *See generally* H. Richard Lamb & Roger Peele, *The Need for Continuing Asylum and Sanctuary*, 35 HOSP. & COMMUNITY PSYCHIATRY 798 (1984); Leonard J. Schmidt et al., *The Mentally Ill in Nursing Homes: New Back Wards in the Community*, 34 ARCHIVES GEN. PSYCHIATRY 687 (1977); William R. Shadish & Richard R. Bootzin, *Nursing Homes and Chronic Mental Patients*, 7 SCHIZOPHRENIA. BULL. 488 (1981); Darold A. Treffert, *Sane Asylum: An Alternative to the Mental Hospital*, 17 CURRENT PSYCHIATRIC THERAPY 309 (1977).

147. Connecticut Dep't of Income Maintenance v. Heckler, 105 S. Ct. 2210 (1985).

148. The majority of legal efforts to require the provision of community mental health services have resulted in consent decrees. *See* Michael S. Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 MENTAL DISABILITY L. REP. 69 (1976). Courts have been reluctant to create a right to treatment for voluntary patients in the community, and many of the decisions have been based on state laws that guarantee such services or guarantee services in the least restrictive environment. *Id.* Enforcing such orders has proved problematic in many instances, and courts have had to continue their monitoring for years in some cases (e.g., *Wyatt* is still under court supervision after 26 years). *Id.*

For a discussion of specific consent decrees, see Barbara Armstrong, *St. Elizabeths Hospital: Case Study of a Court Order*, 30 HOSP. & COMMUNITY PSYCHIATRY 42 (1979); Jeffrey L. Geller et al., *Second-Generation Deinstitutionalization, II: The Impact of* Brewster v. Dukakis *on Correlates of Community and Hospital Utilization*, 147 AM. J. PSYCHIATRY 988 (1990); and Stonewall B. Stickney, *Problems Implementing the Right to Treatment in Alabama: The* Wyatt v. Stickney *Case*, 25 HOSP. & COMMUNITY PSYCHIATRY 452 (1974).

One frequent consequence of court decisions based on statutory rights to treatment is a legislative attempt to thwart the decision (or preempt future ones) by removing the rights. When the Colorado Supreme Court held, in *Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785 (Colo. 1988), that the state Act for the Care and Treatment of the Mentally Ill, 11 COLO. REV. STAT. §§ 27-10-101 to 129 (1982 & Supp. 1988) created a statutory right to appropriate treatment in the community for patients who had been voluntarily or involuntarily hospitalized, the state legislature amended the Care & Treatment Act by inserting "subject to available appropriations" in sections 27-10-101, -108, -109, and -116, and 27-10.5-101, -103, -105, -106 and -206. The legislature subsequently introduced further legislation (Senate Bill 94-221) that would have made it explicit that voluntary patients have no right to mental health services. That bill was defeated, largely through organized opposition by advocacy groups (including the Colorado Alliance for the Mentally Ill Forensic Network Taskforce, the Colorado Mental Health Association, and the Colorado Protection and Advocacy for Individuals with Mental Illness Program), but has continued to be introduced in subsequent legislative sessions.

"medical" illnesses.[149] "Parity" in insurance coverage has become a major political agenda for the American Psychiatric and American Psychological Associations.[150] While the self-serving nature of such agendas is apparent, the ultimate effect is on the mentally disordered persons, many of whom are no longer provided with treatment from any source. Parity legislation has passed the U.S. Congress, and is currently before a number of state legislatures.[151] Other similar forms of discrimination include the recent exclusion of persons convicted of drug-related felonies from social security payments,[152] and the exclusion of alcoholics from Veterans' Administration educational benefits.[153] The public mental health system, including state hospitals and local community mental health centers, used to provide the safety net for those with serious mental illnesses, most of whom can not obtain private insurance. Now that capitation plans are sweeping the country, that net is becoming as riddled with holes as is the private system.

An attempt in Wisconsin to use economic pressure to force change in the delivery of mental health services backfired badly; as part of the reforms in civil commitment following the *Lessard* decision, the state legislature made counties financially liable for the costs of hospitalizing their severely mentally disordered citizens in state facilities. This legislation did have the desired effect of forcing counties to develop their own local inpatient facilities, but as the legislation did not affect the state's responsibility for forensic patients (those being evaluated for competency to proceed and those found either incompetent or insane), the result was an increase in the numbers of patients admitted through the criminal justice system, the majority of whom were charged with misdemeanors.[154]

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149. *See Two Presidents Agree to Work Together for Parity*, 31(18) PSYCHIATRIC NEWS 1 (1996).

150. *See Capitol Hill Continues to Hear About Need for Parity*, 31(21) PSYCHIATRIC NEWS 1 (1996).

151. The Mental Health Parity Act of 1996, Pub. L. 104-204, tit. VII, 110 Stat. 2944 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.) provides parity for yearly and lifetime caps between mental disorders and other medical disorders. The Colorado House debated House Bill 1192 during the 1997 Legislative Session, which would provide complete parity for specified mental disorders—schizophrenias, affective disorders, obsessive-compulsive disorder, and post traumatic stress disorder.

152. Pub. L. 104-12, § 105(a), 110 Stat. 851, 852 (enacted Mar. 29, 1996), denies SSI and SSDI benefits to anyone disabled by substance abuse if convicted of a substance abuse related felony.

153. In *Traynor v. Turnage*, 485 U.S. 535 (1988), the Supreme Court held that the Veteran's Administration's irrebuttable presumption that all primary alcoholism is attributable to willful misconduct did not violate section 504 of the Rehabilitation Act. *Id.* at 551. The Court did not find it necessary to decide whether alcoholism is a disease. *Id.* at 552.

154. *See generally* Miller, *supra* note 144; *see also* Walter Dickey, *Incompetency and the Non-dangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22 (1980); Stephen Rachlin, *Incompetent Misdemeanants—Pseudocivil Commitment*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 23 (1986); Darold A. Treffert, *Legal "Rites": Criminalizing the Mentally Ill*, 3 HILLSIDE J. CLINICAL PSYCHIATRY 123 (1979).

V. INTERNAL CLINICAL COERCION ON PATIENTS

A. *Capacity to Give Informed Consent and Denial of Illness*

Many civil rights activists behave as if mental disorders don't exist. Deriving sustenance from the voluminous (and repetitive) works of Thomas Szasz, which denied the very existence of mental disorder,[155] and the more sophisticated writings of Stephen Morse[156] and Ennis and Litwack,[157] who did not deny the existence of mental disorder, but argued that psychiatrists could not adequately diagnose or treat it. These advocates rejected clinicians' arguments that mentally disordered persons could not make competent decisions about their treatment because of their disorders, and also rejected the possibility that mentally disordered persons' expressed wishes might be due to their disorders and thus not represent their true feelings. Clinicians, who follow their patients over long periods of time rather than at specific points along a time line, recognize that serious mental disorders significantly affect patients' abilities to understand and accept that they are ill and, thus, that they need treatment.[158]

The right to refuse psychiatric treatment—which is more accurately characterized as the patient's right to make treatment decisions to either accept or refuse proposed treatment—has often centered around the legal concept of informed consent. For such consent to be accepted, the clinician must provide adequate information upon which a patient can base a decision: the patient must have the capacity to make a decision; and the decision must be free from external coercion.

Mental health and legal professionals have often differed in their interpretations of the capacity issue. Loren Roth[159] and Laurence Tancredi[160] have discussed the spectrum of levels of capacity displayed by patients in informed consent paradigms, displayed in Table Two.

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155. *See generally* THOMAS S. SZASZ, LAW, LIBERTY AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES (1963); THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT (1961).

156. *See* Morse, *supra* note 2. Morse argues that mentally disordered persons are no more incompetent than other groups that exhibit poor judgment, such as smokers and overeaters; and that nonmentally ill persons with poor judgment are as treatable as those with mental illnesses. *Id.* at 61. He simply asserts these propositions without the evidence that he expects mental health professionals to provide for their arguments; and he ignores the powerful effects of some mental disorders on reality testing and cognitive functioning. While treatment (such as smoking cessation clinics, diet programs and Alcoholics Anonymous) do have beneficial effects for some addicted persons, their success rates do not begin to compare with the effects of medication on psychotic or severely depressed patients. A good comparison can be made with the behavioral treatment of volitional obesity versus the biological treatment of obesity secondary to metabolic disease.

157. *See* Ennis & Litwack, *supra* note 65.

158. *See, e.g.*, Loren H. Roth et al., *The Dilemma of Denial in the Assessment of Competency to Refuse Treatment*, 138 AM. J. PSYCHIATRY 910 (1982).

159. *See generally* Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977); *see also* Alan Meisel et al., *Toward a Model of the Legal Doctrine of Informed Consent*, 135 AM. J. PSYCHIATRY 285 (1977).

160. Laurence R. Tancredi, *Competency for Informed Consent: Conceptual Limits of Empirical Data*, 5 INT'L J.L. & PSYCHIATRY 51 (1982).

TABLE TWO

LEVELS OF INFORMED CONSENT

1. The Capacity to Evidence a Choice
2. The Capacity to Base a Choice on "Rational" Reasons
3. The Capacity to Understand Information Relevant to the Choice
4. The Capacity to Apply that Understanding to One's Own Situation

For many advocates, Level One is sufficient—that is, they accept their clients' stated wishes without further inquiry as to the bases of those decisions, since advocates do not acknowledge the internal conflicts experienced by seriously mentally disordered persons. Clinicians, on the other hand, look to the reasons for the decisions. Patients who are capable of accurately reciting the objective risks and benefits of a proposed treatment are still not considered competent either to refuse *or* to accept the treatment unless they accept that they are suffering from the disorder for which the treatment is proposed. Cognitive knowledge alone, or a "factual" understanding in the Dusky model, is insufficient to serve as a basis for meaningful informed consent.

This approach assumes great significance because the clinical research literature demonstrates that denial of illness is the most common reason for refusal of clinically appropriate treatment by psychiatric patients.[161] Thus, serious mental disorders—which are the ones for which psychiatric medications are prescribed—rob patients not only of their abilities to function autonomously, but also of their capacities to make truly informed choices about treatments that would restore their capacities and autonomy.

Alan Wertheimer distinguishes between negative freedom (absence of external constraints) and positive freedom (in which one can act autonomously).[162] He agrees that mental disorders can rob patients of positive freedom. The consequentialist position would be that if coerced treatment is the best objective alternative, it should be employed regardless of the patient's wishes. The rights position is that patients cannot be coerced for their own good. Wertheimer suggests that advocates often base this position on their own distrust of the therapeutic establishment, rather than on their clients' wishes. He cautions that paternalism can be justified only if patients are not capable of autonomous or voluntary action. Wertheimer further argues that Stone's "thank you theory"[163] does not replace initial consent, but does suggest the reasonableness of the coercive action taken. In addition, while it may be, and certainly has been, argued that society can coerce a person only to protect others,[164]

161. *See supra* note 60 and accompanying text.

162. Alan Wertheimer, *A Philosophical Examination of Coercion for Mental Health Issues*, 11 BEHAV. SCI. & L. 239 (1993).

163. *See supra* note 26 and accompanying text .

164. This argument is a central tenet of libertarian philosophy, most eloquently expressed by John Stuart Mill: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." JOHN STUART MILL, ON LIBERTY 9 (1978). Those citing Mill, however, generally ignore the subsequent statement that "[i]t is, perhaps, hardly neces-

it could also be argued that a person who is temporarily irrational may be prevented from harming his "normal self," and thus can be coerced under the danger-to-others rationale.

B. *Judicial Concepts of Voluntariness and Consent*

Although the courts have not provided comprehensive discussions of the capacity prong of the test for informed consent, they have discussed voluntariness at some length, albeit not in the context of informed consent.[165] Most of the decisions have come from criminal cases, particularly in the context of capacity to waive constitutional rights.[166] Before the current ascendancy of conservatives on the Supreme Court, the Court defined voluntariness in subjective terms, i.e., what defendants themselves experienced in the situation, with their own unique capacities.[167] Former Chief Justice Burger recognized in 1979 that "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty or free of stigma."[168]

More recently, however, the Court has rejected its own precedents and allowed police to use deceit to obtain confessions.[169] More significant, it has changed from a subjective to an objective test of voluntariness, at least in the criminal system. In its recent decision in *Colorado v. Connelly*,[170] the majority not only defined voluntariness to mean solely the lack of intentional police misconduct, but rejected the entire concept of free will, at least in the context of police interrogations.[171] This result suggests that the legal system is simply unprepared or unwilling to tackle the problem of voluntariness as applied to mentally disordered persons. By focusing on the conduct of others, the individual's autonomy may simply be ignored.

VI. EXTERNAL COERCION OF CLINICIANS

Discussions of coercion rarely concern themselves with service providers. It is assumed that providers have chosen their professions and can, therefore, leave their jobs if the conditions become unpleasant. This view was unfortunately reinforced by the president of the American Psychiatric Association in 1958, when he called for psychiatrists to abandon the state hospital system because of its (admitted) deficiencies.[172]

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sary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties." *Id.*

165. *See generally* Robert D. Miller, *The U.S. Supreme Court Looks at Voluntariness and Consent*, 17 INT'L J.L. & PSYCHIATRY 239 (1994).

166. *Id.*

167. *Id.*

168. Addington v. Texas, 441 U.S. 418, 429 (1979).

169. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court upheld a confession obtained through police deception, stating that "*Miranda* forbids coercion, not mere strategic deception." *Id.* at 297.

170. 479 U.S. 157 (1986).

171. *Connelly*, 479 U.S. at 169. In ruling admissible a confession obtained from an obviously psychotic person who said that he confessed under the commands of auditory hallucinations, the court concluded that "notions of 'free will' have no place [in this area of constitutional law]." *Id.*

172. Harry Solomon, *Presidential Address to the American Psychiatric Association*, 115 AM.

It is true that good clinicians can always elect to leave bad facilities or systems. Many, however, choose to remain in the public systems that provide mental health services to the most severely disordered patients, and continue to treat the majority of involuntarily committed patients. The focus here is not the coercion that they experience themselves, but rather the effects of that coercion on the patients they treat.

A. *Legal Constraints on Clinicians*

1. Negligent Release and the Duty to Protect Third Parties

In the past several decades, the law has characterized clinicians as undercover law enforcement officials. As mental health professionals adapted to changes in involuntary civil commitment laws and began to offer the required predictions of dangerousness in court in order to be able to provide their services to severely mentally disordered persons, the law has taken them at their word, and held them responsible for such predictions in other areas. Mental health professionals practicing in inpatient settings have for years been held responsible for not discharging involuntary patients considered to still be dangerous, and for petitioning for commitment of voluntary patients they consider dangerous but who request discharge. The fact that they had assumed legal custody of those patients placed upon them a concomitant burden to maintain custody until the patients were no longer felt to be dangerous.[173]

What is new is the law holding psychotherapists increasingly responsible for controlling or reporting outpatients' behavior. The ground-breaking case was *Tarasoff*,[174] in which the California Supreme Court held that the special relationship exception in the *Second Restatement of Torts* applied to the psychotherapist-patient relationship, and that when patients make threats of violence to identifiable victims, therapists have an obligation to protect those victims.[175] Most other states have reached similar conclusions, although not always on the same legal rationale.[176] Many clinicians predicted the death of psychotherapy as we know it,[177] but the research data, indirect though they are, have not supported those predictions.[178] One result that has been demonstrated anecdotally but not, to date, through methodologically sound research, is that clinicians feel compelled to initiate involuntary commitment and to delay release of patients who they likely would have released before *Tarasoff* and its progeny.

J. PSYCHIATRY 1 (1958).

173. *See, e.g.*, Robert D. Miller et al., *Emerging Problems for Staff Associated with the Release of Potentially Dangerous Forensic Patients*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 309 (1988).

174. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425 (1976) (*Tarasoff II*).

175. *Tarasoff*, 17 Cal. 3d at 431.

176. *See generally* ALAN R. FELTHOUS, THE PSYCHOTHERAPIST'S DUTY TO WARN OR PROTECT (1989); CONFIDENTIALITY VERSUS THE DUTY TO PROTECT: FORESEEABLE HARM IN THE PRACTICE OF PSYCHIATRY (James Beck ed., 1990).

177. ALAN STONE, *The* Tarasoff *Case and Some of Its Progeny: Suing Psychotherapists to Safeguard Society*, *in* LAW, PSYCHIATRY AND MORALITY (1984).

178. *See* Daniel J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 497 (1984).

2. Requirements to Report Child, Domestic, and Therapist Abuse

Two types of reporting laws designed for primary care physicians rather than psychotherapists have also led to some concern. The earlier and more common type is the child abuse reporting laws. While versions in the fifty-one jurisdictions vary, most require a variety of professionals to report if they have "reason to believe" that child physical or sexual abuse has occurred.[179] More recently, several states have added a requirement to report sexual abuse by previous psychotherapists,[180] and domestic abuse as well.[181]

The child abuse reporting laws are relatively noncontroversial, as they apply to clinicians such as pediatricians and emergency physicians who see the victims. The problems arise when therapists treat the perpetrators, or treat adults who were abused as children. Few child abuse reporting laws have statutes of limitations, so the laws may mandate reporting even when the perpetrator is dead.

Instead of serving society by treating abusers, these laws force clinicians to betray their patients by making reports to the police, and in most states subsequently testifying against their patients in criminal court.[182] Some treating therapists even feel compelled to give *Miranda*-type warnings to patients at the onset of therapy, warning them about all the situations in which confidentiality must be breached. Such warnings hardly provide the environment

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179. *See, e.g.*, COLO. REV. STAT. § 19-3-304(1) (Supp. 1990):

> Any person specified in subsection (2) who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect or who has observed the child being subjected to circumstances or conditions which would reasonably result in abuse or neglect shall immediately report . . . such fact to the county department or local law enforcement agency.

Subsection (2) includes physicians, nurses, and mental health professionals. *Id.* §§ 19-3-304(2)(a), (i), (n). Several authors argue that mandated reporting of child abuse may give therapists leverage with resistant patients, at the cost of upsetting the balance even more away from patients and toward therapists. *See* Elizabeth Anderson et al., *Coercive Uses of Mandatory Reporting in Therapeutic Relationships*, 11 BEHAV. SCI. & L. 335 (1993). Anderson and her co-authors interviewed 30 therapists who had made child abuse reports concerning children or families already in treatment with them during the previous 12 months. They found that therapists had mixed feelings about the mandate to report: many therapists resented the forced role of policeman, were concerned about their legal liability, and/or blamed the patient for the predicament; other therapists welcomed the authority under the law to effect changes in dysfunctional family systems. *Id.* at 342-44.

180. California requires only that psychotherapists who become aware that a patient has sexual contact with a previous therapist provide the patient with a brochure prepared by the state which describes, among many other things, administrative, civil, and other complaint procedures and remedies. CAL. BUS. & PROF. CODE §§ 337, 728 (1990). Wisconsin requires that a therapist who has reason to believe that a current client had sexual contact on or after May 16, 1996, with a previous therapist, ask the client if he or she wants the contact reported. WIS. STAT. ANN. § 940.22(3)(a) (West 1996). Reports cannot be made without client consent, and clients can decide whether to have their identities revealed in the report. *Id.* Immunity from liability for good faith reporting is provided. *Id.* at § 940.22(5). Failure to follow the statute's requirements is a Class A misdemeanor. *Id.* at § 940.22(3)(d).

181. *See* COLO. REV. STAT. ANN. § 12-36-135(1) (West 1996) (requiring reporting of domestic abuse as well as gunshot wounds and other injuries or illnesses that appear to result from criminal behavior).

182. *See generally* Robert D. Miller & Robert Weinstock, *Conflict of Interest Between Therapist-patient Confidentiality and the Duty to Report Sexual Abuse of Children*, 5 BEHAV. SCI. & L. 161 (1987).

of safety and trust so essential to successful psychotherapy.

In cases in which therapists are treating adult victims of child or domestic abuse, mandatory reporting can force patients to deal with their histories of abuse publicly before they have been able to resolve their feelings in therapy. The same is true in those states that require therapists to make reports when patients tell them of abuse by previous therapists.[183]

3. Antitrust Litigation

Courts had traditionally stayed out of the regulation of intraprofessional disputes, basing their position on the "learned professions" exception.[184] More recently, however, courts have decided that since medical facilities receive equipment and supplies through interstate commerce, the federal courts have jurisdiction under antitrust law.[185] This change of policy has been used by clinicians, including psychiatrists and psychologists, to overturn disciplinary actions by hospital credentials and peer review committees, as well as by licensing boards. Sanctioned clinicians, particularly those who lost privileges or licenses, have argued successfully, and sometimes unfortunately, that their disciplinary actions had economic bases, to reduce competition with established clinicians in the field. This use of antitrust litigation for covert purposes subverts those legitimate efforts to improve the quality of clinical practice, and the public has been justifiably concerned that internal regulatory agencies in all professions do not adequately police their professions. Even where litigation does not overturn a disciplinary action, regulatory boards—especially hospital-based boards, whose member clinicians are understandably reluctant to spend their time in court rather than treating patients—are increasingly intimidated and less willing to implement their professional judgment.

Another type of institutional coercion of both clinicians and their patients involves competency to be executed. The Supreme Court has interpreted the Eighth Amendment's bar on cruel and unusual punishment to proscribe execution of the incompetent.[186] This raised the issue of which methods states could use to restore a death row inmate's competency so that the state could execute him. Clinicians who evaluate death row inmates for competency for execution, particularly those required to treat incompetent inmates, are placed in an ethical dilemma,[187] although one can argue that for physicians to refuse

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183. *See generally* Larry Strasburger et al., *Mandatory Reporting of Sexually Exploitative Psychotherapists*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 379 (1990).

184. Arizona v. Maricopa Med. Soc'y, 457 U.S. 332, 348-49 (1982) (explaining that challenged conduct of professionals is subject to "the rule of reason" versus a per se analysis under the Sherman Act where acts are "premised on public service or ethical norms"); Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (finding that while the professions were not immune from prosecution under the Sherman Act, the "public service aspect" versus "a pure business aspect" of a profession justified treating acts which technically violate the law "differently").

185. Robert D. Miller, *Recent Developments in Antitrust: Challenges to Medical Autonomy, in* LEGAL IMPLICATIONS OF HOSPITAL POLICIES AND PRACTICES 70-71 (Robert D. Miller ed., 1989).

186. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986).

187. *See, e.g.*, Michael L. Radelet & George W. Barnard, *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 297 (1988); *see also* Robert D. Miller, *Evaluation of and Treatment to Competency to Be Executed: A National Survey and an Analysis*, 16 J. PSYCHIATRY & L. 67 (1988).

to evaluate inmates who may be incompetent for execution denies the inmates the chance to be found incompetent and avoid execution.[188] Professor Barbara Ward argues that treating incompetent death row inmates perpetuates their suffering, denies those who would prefer execution that right, and denies those few who might have the ability to make substantial contributions to postconviction procedures.[189]

One position statement, co-authored by physician and antideath penalty groups, refers to involvement in the physical aspects of execution (inserting intravenous lines, pronouncing death, etc.), but there is a section on psychiatric participation that holds evaluation of competence for execution to be unethical and treatment to restore competence for execution unethical except for cases of "*extreme suffering or immediate danger to life*."[190] The International Academy of Law and Mental Health, the world's largest interdisciplinary mental health organization, adopted the position as its own in June of 1994.[191]

Some courts and legislatures have dealt substantively with the issue of competence for execution. In *Perry v. Louisiana*,[192] the Supreme Court remanded the case of an incompetent inmate who the state wanted to forcibly medicate back to the Louisiana Supreme Court to consider the case in light of *Harper*.[193] The Louisiana court subsequently held that the state may not involuntarily medicate a prisoner to render him competent for execution.[194] The court found that such practices constituted cruel and unusual punishment under Louisiana's constitution, and violated an inmate's right to privacy.[195] The court stated that "forcing a prisoner to take antipsychotic drugs to facilitate his execution does not constitute medical treatment but is antithetical to the basic principles of the healing arts."[196] Citing the Hippocratic Oath, the court argued that forcing a physician to medicate an incompetent death row inmate forces him to act unethically and contrary to the goals of medical treatment.[197]

The South Carolina Supreme Court has also held that forced medication violates inmates' privacy rights,[198] and in addition two state legislatures have also addressed the issue. The Maryland legislature stated:

> If the court finds [an] inmate to be incompetent [to be executed] it shall stay any warrant of execution . . . and remand the case to the court in which the sentence of death was imposed, which shall strike

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188. *See generally* Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35 (1986).
189. *Id.*
190. AMERICAN COLLEGE OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 31, 33 (1994) (emphasis in original).
191. Personal Communication with Gregg Bloche (July 15, 1994).
192. 498 U.S. 38 (1990).
193. *Perry*, 498 U.S. at 38.
194. Perry v. Louisiana, 610 So. 2d 746, 758 (La. 1992).
195. *Id.* at 761.
196. *Id.* at 751.
197. *Id.* at 752.
198. Singleton v. State, 313 S.C. 2d 75, 87-90 (1993).

> the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole.[199]

Montana law does not provide for automatic commutation of a death sentence upon a finding of incompetence for execution, but does state that "[i]f . . . the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged."[200]

Regardless of a particular state's approach to execution of incompetent inmates, however, the process is fundamentally a powerful example of clinicians being coerced to be agents of the state, with their "patients" again the ultimate sufferers.

B. *Involuntary Civil Commitment*

While it is apparent that involuntary civil commitment coerces the patient, it is less often recognized that it also coerces therapists. That can serve a positive purpose—patients who have fears of abandonment report that they are reassured when they are committed to treatment by a particular therapist.[201] But it can also place additional burdens on outpatient therapists, particularly in the post-*Tarasoff* era. Courts are more likely to hold outpatient therapists responsible for patients that are committed to their care than to purely voluntary patients.[202] For this, as well as ideological reasons, a significant number of outpatient therapists do not accept committed outpatients, with the usual result being an involuntary hospitalization that could in most cases have been avoided if the therapist had accepted the challenge in spite of the increased risk of liability.[203]

C. *Economic Coercion*

This article considered direct economic coercion on patients above;[204] but pressures that affect patients are increasingly applied to their treaters. As state mental hospitals became economic liabilities, and as the private psychiatric hospitals and psychiatric units in general hospitals rejected indigent patients, public hospitals assumed the character and function of warehouses. Clinicians were still responsible for providing adequate treatment with dwindling resources, and assumed the liability when it was not provided.[205]

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199. MD. CODE ANN. art. 27 § 75A(d)(3) (1996).

200. MONT. CODE ANN. § 46-19-202(3) (1995).

201. *See generally* Katherine Schneider-Braus, *Civil Commitment to Outpatient Psychotherapy: A Case Study*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 273 (1986).

202. *See, e.g.*, Cain v. Rijken, 300 Or. 706 (1986).

203. *See* Robert D. Miller & Paul B. Fiddleman, *Outpatient Commitment: Treatment in the Least Restrictive Environment*, 45 HOSP. & COMMUNITY PSYCHIATRY 147 (1984).

204. *See supra* notes 22-25 and accompanying text.

205. *See generally* Robert Gibson, *The Rights of Staff in the Treatment of the Mentally Ill*, 27 HOSP. & COMMUNITY PSYCHIATRY 855 (1976); Stephen Rachlin, *One Right Too Many*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 99 (1975).

Just when the right to treatment suits appeared to have effected significant improvements in public hospitals, however, states found ways to create new classes of "patients" without providing the resources to provide even minimal treatment. One example comes from Wisconsin, previously hailed for its attention to patient rights and its willingness to provide sufficient resources to ensure adequate treatment. Recognizing that some insanity acquittees were in effect political prisoners, and others were refusing to participate in any treatment, the state mental health authority proposed legislation that would classify acquittees as either "patients" or "detainees." "Patients" would be provided with the full range of appropriate treatment, while "detainees" would be warehoused. The clinicians at the forensic facility initially supported the concept, as the plan allowed them to concentrate their resources on treatable patients. But when staff learned that the mental health authority, without consultation with the staff responsible for treatment, had classified seventy-five percent of the 200 acquittees as "detainees" (the staff put the number at twenty-five percent) in order to cut costs, the staff openly opposed the proposed classification. They were able to convince advocacy groups (which had also initially supported the proposal) to oppose the legislation, and it was defeated.

More troubling is the fact that the legislatures that have created the new sexual predator laws have not attempted to provide adequate funding for meaningful treatment.[206] These programs place clinicians in the conundrum of having to provide treatment to a population which engenders, arguably, the most public and political concern, without providing the resources necessary to effect any changes—a virtual guarantee that treatment will fail. Predictions that sex offenders are inevitable treatment failures become self-fulfilling prophecy, seemingly justifying indefinite commitments.

An allied offensive against sex offenders that attempts to legitimize its punitive intent by involving psychiatrists is forced "chemical castration" of child molesters. California Assembly Bill No. 3339, signed by Governor Wilson on September 17, 1996, authorizes judges to require convicted child molesters to take medroxyprogesterone acetate (Depo-Provera),[207] a medication that reduces the level of testosterone, the male hormone, in a dose-dependent fashion. The FDA has not approved the medication for use with male sex offenders. The California law requires no medical evaluation to determine if the medication is safe to administer, or clinically indicated. Depo-Provera has been shown to be effective with perhaps ten percent of sex offenders—those with abnormally high sexual arousal or sexual fantasy levels.[208]

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206. Washington State opened its unit with virtually no staff. *See* Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995). One of the reasons that the Kansas Supreme Court rejected its state's law, *see* Matter of Hendricks, 912 P.2d 129 (Kan. 1996), was because when the first "patient" was committed, there was no program at all in place. *See* American Psychiatric Ass'n, *Position Statement on the Adequacy of Treatment*, 123 AM. J. PSYCHIATRY 1468 (1967). Proposed legislation in Colorado also has woefully inadequate funding.

207. CAL. PENAL CODE § 645(a) (West 1988 & Supp. 1997). The law mandates treatment for parolees convicted of a second offense involving a child under 13. *Id.* § 645(b).

208. *See, e.g.*, David Barry & J. Richard Ciccone, *Use of Depo-Provera in the Treatment of Aggressive Sexual Offenders: Preliminary Report of Three Cases*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 179 (1975); John M.W. Bradford, *The Hormonal Treatment of Sexual Offenders*, 11

The Colorado legislature is currently debating a bill based on the California law. It adds a number of medications as possible alternatives to Depo-Provera, none of which are FDA-approved for male sex offenders, most of which have not been shown to have any efficacy with such patients, and one of which is not even legal to prescribe in the United States. Like the California law, it requires judges to sentence child molesters to treatment without following any clinical evaluation, for the purposes of "chemical castration."[209]

In similar circumstances, the Michigan Court of Appeals in *People v. Gauntlett*[210] overturned a judge's sentence of forced Depo-Provera treatment as a condition of probation, finding the condition punitive, unlawful, and coercive,[211] as well as virtually impossible to perform with informed "consent."[212] Further, the court held that "Depo-Provera treatment fails as a lawful condition of probation because it has not gained acceptance in the medical community as a safe and reliable medical procedure."[213] Apparently this court's reasoning did not impress California or Colorado legislators.

Luckily, few mental health professionals will fall into the legal quagmire of determining "competence" to "consent" to Depo-Provera treatment. Many more, however, will face issues of providing adequate care in the world of managed care. Parity for insurance coverage was discussed above,[214] but here I am concerned with the pressures that many managed care corporations place on employee/clinicians and the concomitant inferior care received by the supposed clients of the corporation. Managed care, in its single-minded attention to the bottom line, has "deprofessionalized" mental health care to an unprecedented degree. Front line mental health services are typically provided by therapists with bachelor's or at best master's degrees, with access to psychiatrists (who remain the only practitioners capable of diagnosing biological mental disorders and providing medications and other physical treatments that such patients require) severely limited by financial penalties for "excess" referrals.[215]

Edward Hanin and Harold Schwartz cite data on medication reimburse-

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BULL. AM. ACAD. PSYCHIATRY & L. 159 (1983); John Money, *Use of an Androgen-depleting Hormone in the Treatment of Male Sex Offenders*, 6 J. SEX RES. 165 (1970). These articles are representative of the literature which fails to condone using anti-androgen medication for "chemical castration." Note that a California parolee can avoid Depo-Provera treatment by voluntarily undergoing a "permanent, surgical alternative." CAL. PENAL CODE § 645(e).

209. *See* Robert D. Miller, *The Forced Administration of Sex-drive Reducing Medications to Sex Offenders: Treatment or Punishment?*, *in* PSYCHOLOGY, PUBLIC POLICY AND LAW (forthcoming 1998).

210. 134 Mich. App. 737 (1984).

211. *Gauntlett*, 134 Mich. App. at 747-50.

212. *Id.* at 751.

213. *Id.* at 750.

214. *See supra* note 151 and accompanying text.

215. *See, e.g.*, Edward Hanin, *The Regulating Effect of the Managed Care Movement*, *in* PSYCHIATRIC PRACTICE UNDER FIRE: THE INFLUENCE OF GOVERNMENT, THE MEDIA AND SPECIAL INTERESTS ON SOMATIC THERAPIES 147-69 (Harold Schwartz ed., 1994); Harold Schwartz, *The Impact of Cost-Containment Measures on Somatic Psychiatry*, *in* PSYCHIATRIC PRACTICE UNDER FIRE: THE INFLUENCE OF GOVERNMENT, THE MEDIA AND SPECIAL INTERESTS ON SOMATIC THERAPIES 135-46 (Harold Schwartz ed., 1994).

ment caps, capitation, prospective drug use review, restricted formularies, preferred pharmacy networks, copayment plans, "economic credentialling," and the use of nonmedical professionals to screen mentally disordered patients.[216] Although comprehensive data are not yet available, Dr. Schwartz presents data from a number of studies that suggest that these practices limit the appropriate use of psychiatrists and psychiatric somatic treatments on nonclinical bases.[217] Psychiatrists who have actively opposed such practices are certainly motivated in part by their own economic self interests, but they chose their professions in larger part to provide service to mentally disordered persons, and are systematically being prevented from doing so by purely economic factors. But psychiatrists often find themselves in the dilemma of obeying their masters on possible penalty of losing their jobs, while simultaneously risking malpractice suits for delivering care that they themselves know is inadequate.[218]

A number of cases have addressed the responsibility of managed care organizations to provide adequate medical care. In *Wickline v. State*,[219] the California Court of Appeals held that Medi-Cal was not liable when a physician discharged a patient too soon and post-operative complications ensued,[220] but it did observe that "[t]hird party payers of health care services can be held legally accountable when medically inappropriate decisions result from defects in the design or implementation of cost containment mechanisms." In *Hughes v. Blue Cross of Northern California*,[221] Blue Cross retrospectively denied payment for several hospitalizations, arguing that the hospital had not provided adequate records to justify the hospitalizations.[222] The California Court of Appeals affirmed the trial court's verdict for the plaintiff, including punitive damages, holding that Blue Cross failed to make reasonable efforts to obtain adequate information.[223] In *Harrell v. Total Health Care, Inc.*,[224] the Missouri Court of Appeals found that a state statute exempting a managed care entity from liability for negligence was constitutional, and that the legislature could distinguish between hospitals, which are liable for negligence in selecting and supervising staff, and managed care entities, which are not.[225]

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216. *Id.*

217. Schwartz, *supra* note 215.

218. *Id.*; *see also* Paul Appelbaum, *Legal Liability and Managed Care*, 48 AM. PSYCHOLOGIST 251 (1993).

219. 228 Cal. Rptr. 661 (1986).

220. *Wickline*, 228 Cal. Rptr. at 672. The court stated:

> This court appreciates that what is at issue here is the effect of cost containment programs upon the professional judgment of physicians to prescribe hospital treatment for patients requiring the same. While we recognize, realistically, that cost consciousness has become a permanent feature of the health care system, it is essential that cost limitation programs not be permitted to corrupt medical judgment. We have concluded, from the facts in issue here, that in this case it did not.

Id.

221. 245 Cal. Rptr. 273 (1988).

222. *Hughes*, 245 Cal. Rptr. at 276-77.

223. *Id.* at 279.

224. 781 S.W.2d 58 (Mo. Ct. App. 1989).

225. *Harrell*, 781 S.W.2d at 62-64.

D. *Internal Moral Coercion on Clinicians*

The legal concept of rights under which legal activists operate is a relatively recent historical phenomenon, but it has become so dominant in the United States that it is taken for granted. Although individual rights have lost some of their preeminent status recently, attempts to utilize different concepts of rights have met with rejection by the prevailing culture. Under the Greek theory of natural rights,[226] which established the original basis for the practice of medicine, the "wise man," a category which included the physician, had the duty to restore patients to physical and mental health so that they could fulfill their obligations as citizens. Those afflicted with mental or physical illnesses had a concomitant responsibility to cooperate with their physicians by following their orders.

Talcott Parsons, in his discussion of the "sick role,"[227] followed the Greek concept by arguing that there are four aspects of the social expectation system relative to the sick role: 1) an exemption from normal social role responsibilities, with such exemption requiring legitimization, ultimately by physicians, and imposing obligations on the patient; 2) no expectation that the sick person can get well by an act of decision or will; 3) definition of the illness as an undesirable state, and desire by the patient to get well; and 4) a requirement that the patient seek technically competent help and cooperate with the helper in trying to get well. Because of "secondary gain," a patient may be motivated to continue the privileges and exemptions of the sick role.[228] Just as it is the patient's obligation to cooperate in getting well, it is the physician's obligation to "do his part" in helping the patient to get well. Parsons did not explicitly consider the societal obligations of the physician to restore his patients to health, so that they may (in Parsons' words) become "functional" again.[229]

Physicians, including psychiatrists, continue to be socialized in their training to be responsible for the health of their patients, although the sense of responsibility is usually so covert as to be almost subliminal. When they accept patients—particularly patients that are legally committed to their care—who refuse the prescribed treatment—especially if they do so because they deny the very disorder for which treatment is being recommended—it places physicians in a considerable, if usually unexamined, ethical and professional bind.

226. *See* Leonard Kaplan & Robert D. Miller, Law, Psychiatry and Rights, presented at the 15th International Congress on Law and Mental Health, Jerusalem, Israel (June 26, 1989) (on file with author).

227. TALCOTT PARSONS, THE SOCIAL SYSTEM 428-79 (1951).

228. Goffman first discussed impression management by apparently mentally disordered persons. *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). Subsequent controlled research studies verify that patients diagnosed with schizophrenia are quite capable of varying their behavior and reported thinking, depending on their goals in the situation. *See* Benjamin Braginski & Dorothea Braginski, *Schizophrenic Patients in the Psychiatric Interview: An Experimental Study of Their Effectiveness at Manipulation*, 31 J. CONSULTING PSYCHOL. 543 (1967); Mark Sherman et al., *Impression Management in the Psychiatric Interview: Quality, Style, and Individual Differences*, 43 J. CONSULTING & CLINICAL PSYCHOL. 867 (1975).

229. PARSONS, *supra* note 227.

Nonmedical mental health professionals are socialized in different ways and are, as a result, demonstrably less authoritarian in their relationships with their clients.[230] Nonpsychiatric physicians are subject to the same professional pressures as are psychiatrists; but they have several escape clauses not available to psychiatrists. Most important, with rare exceptions, patients are not legally committed to nonpsychiatric physicians. Those doctors, therefore, have the option of terminating the physician-patient relationship with patients that refuse to accept their recommendations. Nonpsychiatric physicians also frequently will not treat mentally disordered patients even for their nonpsychiatric illnesses, referring them instead to psychiatrists.

VII. DISCUSSION

We live in a society in which coercion—governmental and private, overt and covert, subtle and dramatic—impacts on everyone in some way or another, but mentally disordered persons are perhaps subject to more coercion than most other groups. In order to utilize the benefits of coercion while minimizing the negative, socially unproductive effects, it is essential that *all* types of coercion be considered. It is not sufficient to examine part of the elephant and conclude that the problems are understood, much less solved. Legal rights are certainly important, but they remain only one small part of the picture. Single-minded attention to legal rights has led to increases in other types of coercion of mentally disordered persons that are at times arguably worse than the abolished or modified coercion.[231]

Before the civil rights litigation of the 1960s and '70s, psychiatrists largely called the shots in dealing with mentally disordered persons. They resisted intrusion by the courts into what they considered areas of clinical expertise. They resented restrictive civil commitment statutes, the recognition of a right to refuse treatment, and various reporting duties.[232] By staking out a narrow

230. *See* Frank Baker & Herbert Schulberg, *The Development of a Community Mental Health Ideology Scale*, 3 COMMUNITY MENTAL HEALTH J. 216 (1967); Robert Langston, *Community Mental Health Centers and Community Mental Health Ideology*, 6 COMMUNITY MENTAL HEALTH J. 387 (1970). Even the terms by which different mental health professionals refer to the mentally disordered persons whom they treat demonstrate significant conceptual differences: medically-trained clinicians (psychiatrists and nurses) use the term "patient," while nonmedical clinicians (psychologists, social workers, and other therapists) prefer "client."

231. In a classic paper, Penrose argued that the distribution of "socially undesirable" persons in prisons or mental hospitals depends on the availability of hospitals and the thoroughness of the psychiatric evaluations. *See generally* L.S. Penrose, *Mental Disease and Crime: Outline of a Comparative Study of European Statistics*, 18 BRIT. J. MED. PSYCHOL. 1 (1939). His observations have come to be called the "hydraulic theory," which holds that societal tolerance for deviant behavior is limited, and that if one repository for such persons is reduced (e.g., limiting involuntary psychiatric hospitalization,) another (e.g., incarceration in the criminal justice system) will expand to respond to the social need. While the situation he described is certainly unfortunate, it is also the reality that must be fully considered in analyzing coercion.

232. In the Council of the American Psychiatric Association, *Position Statement on the Adequacy of Treatment*, 123 AM. J. PSYCHIATRY 1458 (1967), the Council rebuffed judicial efforts to establish a right to treatment, stating, "The definition of treatment and the appraisal of its adequacy are matters for medical determination. Final authority with respect to interpreting the law on the subject rests with the courts." The American Psychiatric Association for years steadfastly opposed court inquiry into such matters, and in fact refused to submit a brief to the court in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), recommending clinical standards when requested to

territory, attorneys and advocates wrested hegemony over those aspects of mental health care that impinged on civil rights. Activist patient groups have rejected the goals of both clinicians and advocates in favor of just being left alone.[233] Groups representing families of mentally disordered persons, such as the National Alliance for the Mentally Ill, have supported easier access to treatment, and have generally sided with the psychiatrists. The National Mental Health Association has supported legal rights in some situations and clinical rights in others.

Addressing unproductive coercion effectively will require collaboration among all the groups concerned with mentally disordered persons. The extremists in each camp must moderate their positions and be willing to compromise or they remain a major part of the problem, rather than the solution. Adversarial roles will continue to be important in individual cases, but as they, by definition, ignore the larger systemic issues, they do not contribute to system solutions.[234] Litigation will still be necessary in individual situations in which the legislative and executive branches of government are unwilling to provide adequate resources. It is not, however, sufficient to deal with multisystem problems, especially with the "hands off" policies currently in vogue in federal courts. Legislative action will be essential, and legislators are more responsive when all the interest groups concerned are in accord.[235]

There must be some common ground among those groups for progress to be made. One axiom that must be accepted is that mental illness is not a myth, and that at least some mental disorders are biological diseases that respond to

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do so. Fortunately, the APA has changed its position significantly since those days, and now regularly submits amicus briefs to the Supreme Court on issues involving mentally disordered persons, and assists local chapters of the Association in state and lower federal court cases.

233. The problem, of course, is that if "left alone" by the mental health system, their behavior will not allow the mentally disordered to be left alone by the many other systems of social control, such as the police, social services, etc. If they choose the latter course competently, then that choice should certainly be respected. The conflict arises when the mentally disordered make self-destructive choices based on treatable mental disorders. The issue is not merely an individual's right to privacy, because most mentally disordered persons who are not committed to psychiatric treatment, or who are committed but not required to take medication, consume governmental resources that would not be required if they were to be treated effectively, even against their stated wishes.

234. When the author served as director of the admissions unit at a state mental hospital, he organized regular meetings with the chief judge, sheriff, police chief, district attorney's office, public defender's office, community mental health center director, and social services liaison for the hospital's major catchment area, to coordinate plans for a small but very difficult population of mentally disordered persons who bounced back and forth among all the social systems in the area. Before the meetings, no system would accept responsibility for these patients, and there was nothing resembling continuity of care. At the meetings, individual treatment plans were developed for each person. Outpatient and inpatient mental health services, as well as correctional and social service involvement, were apportioned according to the behavior and degree of mental disorder of each person. As a result, the systems were able to work together with these very difficult patients, rather than dumping them back and forth amongst themselves. The severity of mental disorder and the criminal behaviors both decreased significantly, and remained at a low level over time.

235. The parity legislation discussed above in note 151 passed despite significant dissention among the various mental health professional groups. Psychiatrists (who had the most to gain, since the disorders covered are those usually treated with psychotropic medications) supported the legislation, while other clinical organizations either abstained or opposed the legislation. Such guild-based dissention highlights the various mental health professions' economic interests in parity and similar legislation, and thereby significantly weakens the credibility of its advocates.

treatment with medications and other organic methods.[236] Another is that mental disorders vary significantly in their severity and in their effects on individual patients' autonomy. A third is that the goal of treatment must be to restore patients' autonomy, and that patients' wishes must be respected as much as possible, as the more voluntary and collaborative the treatment, the more effective it is likely to prove.[237] It is here that the findings of procedural justice research are particularly important—psychiatrists have not traditionally been trained to listen to their patients' wishes in areas of biological treatment; when they do so, many of the problems disappear.[238]

Planning groups must consider the ripple effects of litigation and legislation, and avoid disasters such as deinstitutionalization which resulted in patients being "involuntarily communitized"[239] before adequate resources in the community were available. One current example of similar problems is the movement to reverse the criminalization of mentally disordered persons through jail diversion programs.[240] As with the deinstitutionalization of civil psychiatric hospitals, there is considerable consensus that many mentally disordered inmates charged with minor crimes do not belong in jail. It is not difficult to remove mentally disordered persons from jails; what *is* difficult is to find a place to send them. Those diversion programs that are effective work because there are community mental health facilities willing to accept the responsibility of treating those diverted.[241]

The placement of mentally disordered prison inmates is even more difficult. Many inmates committed crimes in part because they could or would not

236. Psychotherapy is not usually as effective as medication under coercive conditions, though Katherine Schneider-Braus would disagree. See Schneider-Braus, *supra* note 201. Dr. Schneider-Braus reported that her patient became more invested in treatment after being committed, because she felt that the therapist was also committed to her under the court order, and thus would not abandon her. *Id.*

237. Medications are effective with noncooperative—but not with non-compliant—patients. Hiday and Scheid-Cook have reported that patients involuntarily committed to outpatient treatment, including court orders for medication, were highly compliant with the medication, but long-term treatment necessitates that patients accept their need for medication and take it because they know that it helps them, not because of a court order. *See* Hiday & Scheid-Cook, *supra* note 63.

238. A careful reading of *Rennie v. Klein*, 462 F. Supp. 1131 (D. N.J. 1978), indicates that Rennie was not so much refusing *treatment* as he was specific medications that the psychiatrist was prescribing for him. It is possible that had the psychiatrist been more receptive to Rennie's preferences, there might never have been a legal case.

239. Stephen Rachlin, *With Liberty and Psychosis for All*, 48 PSYCHIATRIC Q. 410, 410 (1974).

240. *See* STEADMAN ET AL., *supra* note 79.

241. *See id.* Steadman and his co-authors make a persuasive case that jails are part of the community, and therefore inmates should receive mental health care from community mental health centers. Where the centers accept the responsibility to provide treatment to persons involved with the criminal justice system, diversion is quite effective. Even when community centers are willing to become involved, however, obstacles remain. For example, many states indemnify local service providers from liability that arises from treatment of such patients; but the Colorado state constitution prohibits such protections:

> Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount, or for any purpose whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.

COLO. CONST. art. XI, § 1.

receive treatment in the community. As difficult as it is to obtain treatment before a felony conviction, the convicted felon is even less likely to receive treatment, in part because community mental health centers justifiably fear liability if the future parolee commits additional violent acts. As a result of these obstacles, the sad reality is that many mentally disordered persons receive better mental health care in prisons than they do in the community, and the lack of community facilities willing to accept parolees prolongs their incarcerations. Approaches to this problem require cooperation between the local and state correctional systems, the state and community mental health systems, and often the legislature as well. When all elements work together, diversion programs are demonstrably effective.

Areas in which interdisciplinary cooperation can reduce unnecessary coercion of mentally disordered persons include providing relevant information to legislatures and state bureaucracies concerning requirements to report confidential information about patients (such as the duties to protect third persons, and to report child, elder and domestic abuse) and other legislation affecting mentally disordered persons such as sexual predator acts, chemical castration, and changes in civil commitment law. Further, professional licensing boards should be furnished current data in areas such as the medically appropriate use of anti-anxiety, psychostimulant, and narcotic medications.

A combination of the concepts of procedural justice and therapeutic jurisprudence would seem to provide the best hope of stimulating the interdisciplinary and cross-system collaboration which is essential if meaningful answers to the problems of coercion in all its guises are to be successfully addressed.

VIII. SUMMARY

Those genuinely concerned with mentally disordered persons can no longer afford to specialize in one part of the problem. The majority of coercion currently experienced by mentally disordered persons does not come from direct state action, and efforts to convince the federal courts to create new legal rights to community-based treatment are not meeting with the success that earlier suits against hospitals did. Thus, the adversarial approach (even when the clinician defendants actually agree with the complaints)[242] is not only divisive, but has lost much of its effectiveness in reducing total coercion. The social and economic problems responsible for most coercion in practice can be dealt with only through interdisciplinary cooperation.

The apparent conflict between legal and clinical rights is more illusory than real; observation of legal rights does not need to interfere with the provision of clinical rights. In fact, the two can work together as long as each side considers the broader systemic issues discussed in this article. It is only when extremists on either side ignore the rest of the elephant that problems occur. *Appropriate* recognition of the civil rights of mentally disordered persons has led to greater autonomy, as well as better treatment, for patients. But when

242. *See Conference Report, supra* note 142, at 124.

ideologues refuse to listen to other viewpoints, and act as if their positions are the only acceptable ones, problems will and do occur. Libertarians cannot continue to use legal methods as covert abolitionist techniques to coerce their ideological opponents (and even their supposed "clients" at times); and clinicians cannot continue to undermine the observation of legitimate patient rights.

This is not a plea by a clinician to return to the "good old days" before the courts began to take an active interest in mental health issues. Judicial oversight is important symbolically as well as practically, even where judges defer to clinical judgments. The major problems with the current due process protections is not that they prevent needed treatment, but that they delay it excessively.[243] As with justice, "treatment delayed"[244] may be better than no treatment at all; but that should not be the choice.

243. The time period between clinicians' requests for court hearings on involuntary medications vary, but are usually measured in weeks to months. *See* Miller et al., *supra* note 55.

244. Pierce County v. Western State Hosp., 97 Wash. 2d 264, 270 (1982) (stating that "[t]reatment delayed and inadequate must surely be better than no treatment at all," and ordering Washington State Hospital to cease its moratorium on admissions in spite of severe overcrowding which resulted in patients sleeping on cots in halls).

EXPLOITATION AND COMMERCIAL SURROGACY

ALAN WERTHEIMER*

I. INTRODUCTION

Commercial surrogacy has been criticized on many grounds. It has been argued that surrogacy is baby-selling, that it is harmful to the children born to surrogates, that it is harmful to many other children whose sense of security is undermined by the practice, and that it is harmful to women as a class.[1] Another line of argument maintains that surrogacy involves the wrongful "commodification" of procreational labor, or that it violates the Kantian maxim that persons should never be treated merely as means but always as ends in themselves.[2]

In addition to and often intermixed with these (and other) arguments, it is frequently said that surrogacy exploits the surrogate mothers. "[O]nce money enters into the arrangement [the] possibilities of exploitation are everywhere."[3] "One of the most serious charges against surrogate motherhood contracts is that they exploit women."[4] "The prohibition on payments may be understood as protecting . . . women—especially poor, single women—from being exploited . . . paid 'breeding stock.'"[5] Despite the frequency with which these claims are made, they are typically advanced without much analysis or argument. In this paper I examine commercial surrogacy in light of some of the

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1. For an argument which focuses on the effects of surrogacy on women as a class, see Debra Satz, *Markets in Women's Reproductive Labor*, 21 PHIL. & PUB. AFF. 107 (1992). Apart from other effects on women as a class, the legitimation of surrogacy might impose psychic costs on many women, especially poor women, who would then have to treat the decision not to be a surrogate as a constant foregone opportunity to earn additional income for their family. *See* Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57 (1989).

2. Elizabeth Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990). For a critique of this view, see Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132 (1992).

3. PETER SINGER & DEANE WELLS, THE REPRODUCTIVE REVOLUTION 125 (1984).

4. MARTHA FIELD, SURROGATE MOTHERHOOD 25 (1988).

5. Alexander M. Capron & Margaret J. Radin, *Choosing Family Law Over Contract as a Paradigm for Surrogate Motherhood*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59, 62 (Larry Gostin ed., 1990). "But the core reality of surrogate motherhood is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women." George J. Annas, *Fairy Tales Surrogate Mothers Tell*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 43, 43 (Larry Gostin ed., 1990). "[T]he danger of exploitation of one human being by another appears . . . to outweigh the potential benefits in almost every case." MARY WARNOCK, A QUESTION OF LIFE 46 (1985).

distinctions advanced in my introductory paper. I ask whether surrogacy is a case of *harmful exploitation* or *mutually advantageous exploitation* and whether there are good reasons to think that surrogacy arrangements are typically nonconsensual. The discussion of commercial surrogacy will also allow us to sharpen the distinction between the truth conditions of an exploitation claim and the moral force of exploitation. For even if surrogacy is exploitative, we must ask whether such exploitation provides good reasons for prohibiting or refusing to enforce surrogacy contracts.

II. Is Surrogacy Exploitative?

Putting aside the possibility that surrogacy is not exploitative at all, there appear to be two possible answers. On one view, surrogacy is a case of harmful exploitation. The intended parents gain from the transaction while the surrogate makes a "grave self-sacrifice."[6] On a second view, surrogacy is a case of mutually advantageous exploitation. Both the intended parents and the surrogate gain from the transaction but the distribution of those gains is unfair to the surrogate.[7] There is, however, a third view, one which is difficult to locate in terms of the distinction between harmful exploitation and mutually advantageous exploitation. On this view, surrogacy is exploitative because the intended parents gain from a transaction that is fundamentally immoral. For want of a better term, call this *moralistic exploitation*.[8] Because I believe that moralistic objections to surrogacy must involve some sort of harm to the surrogate if they are to ground a claim of exploitation, I shall consider harmful exploitation under the rubrics of *nonmoral harm* and *moral harm* before going on to consider mutually advantageous exploitation.

III. Surrogacy As Harmful Exploitation

Nonmoral harm

It has been argued that surrogacy is harmful to the surrogate in straightforward nonmoral terms.[9] But here we must be careful. In deciding whether surrogacy is harmful, we must adopt an all-things-considered and *ex ante* conception of harm. There are, after all, negative elements in virtually all

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6. Anderson, *supra* note 2, at 87.

7. For example, it has been argued that surrogacy is exploitative because "the interests of wealthy contracting couples are better served than those of the surrogates." *Baby M and the Surrogate Motherhood Controversy*, 37 AM. U. L. REV. 1013, 1024 (1987).

8. I do not mean "moralistic" in its derisive sense, in which it connotes a narrow moral attitude, but to refer to arguments that go to the intrinsic immorality of a practice rather than the gains and losses to the parties.

9. "Since there is evidence that surrogacy arrangements . . . harm contracted mothers . . . a ban on commercial surrogacy needs to rely only on the harm principle [as opposed to legal moralism]." Rosemarie Tong, *The Overdue Death of a Feminist Chameleon: Taking a Stand on Surrogacy Arrangements*, 21 J. SOC. PHIL. 40, 47 (1990). As it stands, this is a non sequitur. After all, if surrogacy is harmful but consensual, a ban on commercial surrogacy cannot rely only on some version of the Millian harm (to others) principle; it would need to rely on a principle of paternalism. But the present question is not whether the surrogate is harmed with her consent, but whether she is harmed at all.

uncontroversially beneficial transactions. Paying money for a good that is clearly worth the price is still a negative element in the transaction. It would be better to get it for free. So the question is not whether surrogacy has harmful *elements*, but whether it is harmful, all things considered, or a net harm. We know that some surrogates, such as Mary Beth Whitehead, have regarded their experience as a surrogate as harmful, all things considered.[10] But this is largely irrelevant to a general assessment of surrogacy even if we assume that retrospective judgments are accurate indicators in an individual case. For the question is not whether surrogacy is a net harm in a given case, but whether it is typically or *ex ante* a net harm.

Surrogacy presents a particularly difficult context for making an all-things-considered judgment because some of the crucial benefits and harms are difficult if not impossible to measure and vary substantially from person to person. On the positive side of the ledger, we have to put the value of the monetary compensation and whatever psychological gratification the surrogate obtains from the process. These benefits may or may not be considerable. There is much that might appear on the debit side of the ledger: the risk of physical harm or death resulting from the pregnancy or delivery, the inconveniences and discomfort associated with a normal pregnancy, and perhaps most important, the psychic cost of the surrender of the baby to the intended parents.[11]

At this point, the defender of surrogacy might reply that the *ex ante* value of the surrogacy arrangement simply could not be negative, for, if that were so, women would not agree to serve as a surrogates. But that is false. That a woman agrees to serve as a surrogate does not show that the *ex ante* value of surrogacy is positive; it only shows that she thought it would be positive. She may have miscalculated, perhaps because surrogates are unable to make accurate predictions of their future psychological reactions. Thus, it is possible that surrogacy is harmful to most surrogates even though most surrogates believe it will be beneficial.

In addition, it might be argued that most surrogates are objectively harmed by their experience, even if they do not *feel* harmed. It is a commonplace that B's interests—as B defines them—can be harmed even if B is unaware that the harm has occurred. For example, B's self-acknowledged interest in her reputation or the fidelity of her spouse can be damaged by libel or infidelity, even if she is unaware that either has occurred. More controversially, it may be argued that a person's objective interests can be harmed even if she does not now and never will regard these interests as her interests.

Given all this, is surrogacy *ex ante* harmful, all things considered? In view of our limited factual knowledge and unresolved theoretical controversies over

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10. *See* ELIZABETH KANE, BIRTH MOTHER (1988); MARY BETH WHITEHEAD, A MOTHER'S STORY—THE TRUTH ABOUT THE BABY M CASE (1989).

11. A surrogacy contract may stipulate that the surrogate agrees to refrain from alcohol, tobacco, illicit drugs, and other risky activities. Although these restrictions are not independent harms to the surrogate—they may be beneficial—they do represent restrictions on her freedom and in that sense can be understood as costs.

what counts as objective harm, I am inclined to think that we should now remain agnostic.

Suppose that most surrogates are worse off for the experience, all things considered. Could surrogacy be made advantageous, all things considered, if the monetary compensation were higher? If we are operating in the territory of the surrogate's nonmoral interests, I think it is entirely possible, nay inevitable, that a sufficiently large increase in compensation would convert a net harm into a net benefit for many women. Moreover, if surrogacy is typically mutually advantageous but unjust, this unfairness can be remedied in the same way. Yet, and unlike other contexts in which it is uncontroversial that exploitation can be negated by increasing the value received by the exploited party, it is rarely argued that surrogacy would be less exploitative if the surrogate were paid more. In fact, *unpaid* surrogacy is often thought to be *less* exploitative than paid surrogacy. Among the critiques of surrogacy, higher pay is the dog that doesn't bark.

Moral harm

Why does the higher pay dog not bark? I suspect that a wage increase is rarely advanced as a solution to the alleged exploitativeness of commercial surrogacy because it is thought that procreative labor should not be exchanged for money, because the commodification of procreative labor is immoral.[12] And if procreative labor should not be exchanged for any money, it will not improve things to exchange procreational labor for *more* money. But if, as I have argued, the wrong of exploitation always involves a defect in the values exchanged, the task is to see whether this perspective can be related to exploitation. There are two ways in which the connection might be drawn: one focuses on the *incommensurability* of the values exchanged; the other focuses on *commodification.*

For present purposes, I shall focus on the second idea. The commodification argument maintains that whereas some goods and services (for example, automobiles, houses, books, and at least some forms of labor) are appropriately exchanged for money, other goods and services (for example, citizenship, human beings, criminal justice, marriage rights) should not be exchanged for money.[13] On this view, surrogacy is exploitative not because it comes too cheap, but because it commodifies a form of labor that should not be exchanged for money at all.[14]

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12. It is also possible that higher pay is not advanced as a solution because the very receipt of monetary compensation may actually cause some of the psychological harm experienced by surrogate mothers, for example, because they feel that they are doing something "sleazy." If so, increasing the compensation may only make things worse on this score.

13. They should be treated as "blocked exchanges." *See* MICHAEL WALZER, SPHERES OF JUSTICE 100 (1983).

14. Elizabeth Anderson states:

> Commercial surrogacy attempts to transform what is specifically women's labor—the work of bringing forth children into the world—into a commodity. It does so by replacing the parental norms which usually govern the practice of gestating children with the economic norms which govern ordinary production processes. The application of com-

Now I suspect that some of the rhetorical force of the commodification argument derives from linguistic aesthetics. Who could support something as ugly as the *com-mod-i-fi-ca-tion* of procreational labor? But even if we assume, arguendo, that it is wrong to commodify procreational labor, it does not follow that surrogacy is harmful to the surrogate. That is a different claim. So on the assumption that the commodification of procreational labor is wrong, we must ask whether the commodification of the surrogate's labor is: (1) harmful to the surrogate's objective nonmoral interests, (2) harmful to the surrogate because she is participating in an immoral activity, or (3) wrong but not harmful to the surrogate.

It might be thought that surrogacy is harmful to the surrogate because being *treated* as a commodity injures one's self-respect. It might also be claimed that a person can lose the respect of others or be degraded in their eyes even if she does not lose self-respect or become degraded in her own eyes. But that raises at least two points. First, it is not clear that surrogacy actually does have these effects. Second, to the extent that these effects stem solely from the way surrogacy is regarded by the society—as a matter of fact and without separate normative justification—it is not clear that it represents a basis for condemning the practice rather than a basis for condemning society's reaction.

Still, it might be argued that surrogacy harms the surrogate's objective interests because it violates her rights, independent of any other physical, economic, psychological, or social harm. If a woman has a right not to have her labor commodified, then surrogacy is harmful precisely because it is a violation of her rights. The problem here, of course, is that many acts that would violate B's rights if done without B's consent do not violate B's rights if done with B's consent. To put the point in Kantian terms, we do not treat a person merely as a means rather than an end-in-herself if she consents to be treated in that way. So the commodification of procreational labor is no obvious violation of the Kantian maxim if the commodification of the surrogate's labor is consensual—absent some additional argument, for example, that the rights involved are inalienable or that the consent is defective in some important respect.[15]

Suppose that we grant that the commodification of procreational labor constitutes an objective harm to the surrogate. Still, it would not follow that surrogacy is harmful to the surrogate, all things considered. Surrogacy would produce a net harm to the surrogate only if the degree of harm that results from the commodification of her procreational labor is greater than the benefits that she received from the commodification of her labor and that has not

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mercial norms to women's labor reduces the surrogate mothers from persons worthy of respect and consideration to objects of mere use.

Anderson, *supra* note 2, at 80.

15. It might be argued that surrogacy commodifies—and violates the Kantian maxim with respect to—the child who, after all, does not consent to the arrangement. Although I do not see how surrogacy could be harmful to the child who, after all, would not otherwise exist but for the surrogacy arrangement, the present discussion is confined to the claim that surrogacy is harmful to the surrogate mother.

been shown. Moreover, increasing the compensation would arguably offset such harm.

It may be argued, at this point, that surrogacy is injurious to the surrogate not because she is *treated* badly, but because she *participates* in something wrong. On this view, surrogacy is bad for the surrogate because it is bad for her character. But here we must be particularly careful. It does not follow that just because it is bad to participate in something wrong that it is bad for the person's interest to participate in something wrong. Still, to the extent that one does have an interest in one's moral character, then participating in an immoral activity may be harmful to that person.[16] But, and once again, even if we accept this line of argument, it is not clear that the harmful moral elements necessarily outweigh the beneficial nonmoral elements, at least if we also assume that surrogacy is *otherwise* advantageous to the surrogate.[17] Unless it is assumed that the moral aspect of well-being always trumps the nonmoral aspects of well-being, it is possible that the nonmoral aspect in which the immoral choice is beneficial to the chooser's well-being is more weighty than the moral aspect in which it is not.[18]

In the final analysis, I am inclined to think that it is very difficult to argue that surrogacy is harmful to the surrogate because surrogacy is wrong qua commodification. Commodification may be better understood as a basis for thinking that surrogacy is wrong for reasons unrelated to the interests of the surrogate and, therefore, unrelated to worries about exploitation of the surrogate.

Suppose that I am wrong. Suppose that the commodification argument does support the claim that surrogacy is exploitative. The moral force of that argument would still have to be resolved. For if surrogacy is wrong and exploitative because it commodifies that which should not be commodified, it does not follow that surrogacy should be prohibited or that surrogacy contracts should not be enforceable.

IV. SURROGACY AS MUTUALLY ADVANTAGEOUS EXPLOITATION

Suppose that the typical surrogate is not harmed by surrogacy or would not be harmed if the compensation were higher. All things considered, surrogacy is or would be a mutually advantageous transaction. Still, surrogacy might be a case of mutually advantageous exploitation if the transaction were

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16. Now even if this sort of moral harm is possible, it is not clear to whom it applies. On the one hand, we might say, with Plato, that all persons have an interest in being moral whether or not they themselves believe they have such an interest. Or we might say, with Feinberg, that only those who desire to be good persons have an interest in being good persons and can therefore be morally harmed. *See* JOEL FEINBERG, HARM TO OTHERS 65-70 (1984).

17. It is also not clear whether an increase in compensation to the surrogate would yield an increase in the amount of moral harm or whether the degree of moral harm is inelastic with respect to price.

18. We could think that moral considerations trump nonmoral considerations with respect to what B should do without thinking that moral considerations trump nonmoral considerations with respect to what is good for B. *See* THOMAS NAGEL, THE VIEW FROM NOWHERE 189-207 (1986) (discussing the connection between "living right" and "living well").

unfair to the surrogate. The problem, of course, is that if we are going to say that a transaction is exploitative because it is insufficiently beneficial to the exploited party, we may reasonably be asked to specify the criteria by which we are making this assessment. This is a difficult matter.

It is, for example, frequently said that a fair transaction is one in which both parties gain (roughly) equally. On that account, we can say that a surrogate is exploited if she receives less value from the transaction than the intended parents. Unfortunately, this definition of a fair transaction is clearly wrong. If a physician performs a procedure (for a normal price) that saves a patient's life, we do not say that the physician has been exploited because the patient has gained far more from the transaction than the physician.[19] In any case, and notwithstanding that I do not have an alternative account to propose at this point, I see no reason to think that a mutually advantageous transaction cannot be unfair. So I prefer to suppose that the surrogate may be exploited even if surrogacy provides a net benefit to her. On the other hand, if the compensation is (or could be made) adequate, then we will have to conclude that the surrogate is not (or would not be) *exploited*, whatever else we may want to say about surrogacy.

Choice

I suspect that there is another reason why the higher pay dog doesn't bark, and that relates to its effect on the quality of the surrogate's consent. If the lure of compensation compromises the surrogate's consent by coercing her to enter into the transaction or by distorting her judgment about the effects of surrogacy on her well-being, increasing the compensation will only make things worse.

Now resolving the question as to whether the surrogate gives appropriately voluntary consent may not be crucial to resolving the question as to whether she is exploited if, as I have argued, consensual exploitation is possible. But it would still be of importance to determine whether there is a defect in consent. It will be easier to justify the prohibition or nonenforcement of surrogacy agreements if they are nonconsensual.

Coercion

On one familiar view, poor women are coerced (or forced) to become surrogates because surrogacy represents an improvement over an unacceptable *status quo*.[20] The equally familiar response maintains that surrogacy offers

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19. We also cannot say that a person is not exploited just because they receive more value from the transaction than the other party. For if a physician charges an exorbitant price for the procedure, we might say that the physician exploits the patient even though the patient receives more value from the transaction than the physician.

20. "[A monetary offer] may be difficult for a person of little financial means to refuse and would, in that case, be coercive." Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood?*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY, *supra* note 5, at 136, 146. "To portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting surrogate mother, rather than to see her as driven by circumstances . . . fails to

women an additional option to their present menu of choices, and the addition of options to one's menu of choices is always freedom enhancing rather than coercive.

Which view is correct? On any standard account of coercion, surrogacy is simply not coercive. In general, A coerces B to do X only if A proposes (threatens) to make B worse off with reference to some baseline condition unless B does X, and whatever else we might want to say about the intended parents' proposal (offers can be unseemly without being coercive), they do not propose to make the potential surrogate worse off if she turns it down.[21] True, she might decide that becoming a surrogate is more attractive than her other options. But that is true for all decisions in which one accepts an offer.

It may be thought that the preceding view fails to acknowledge that some offers are simply "too good to refuse," and that nonrefusable offers are coercive even if they add to one's present menu of options.[22] An offer may be nonrefusable for two reasons, only one of which is problematic. If A offers B an opportunity (a new job) that would render her so much better off than her eminently acceptable status quo that it would be *irrational* for B to refuse, there is no reason to refer to such offers as coercive or to think that they compromise the voluntariness of B's choice. In other cases, however, the short-term benefits contained in A's offer may be so tempting or irresistible that they cause B to overlook the long-term harms. A does not threaten any adverse consequence if B declines the offer, but A's offer serves to distort B's judgment. I am inclined to think that this kind of offer is not best described as coercive, but it may well compromise the voluntariness of B's choice by introducing cognitive errors into B's decision. Let us bracket worries about cognitive errors. Still, it might be said that if B's status quo is highly unsatisfactory, as in *The Drowning Case*,[23] then A's offer may be coercive even if B makes a perfectly rational choice in accepting A's offer. But the model of coercion exhibited in *The Drowning Case* is of no help to the argument that surrogates are coerced. For, unlike A in *The Drowning Case*, the intended parents have no special obligation to help potential surrogates without demanding anything in return.

It seems, then, that the intended parents' proposal is an offer, and offers do not coerce. And that, I think, is the truth. But it is not the whole truth. Let us assume what is often alleged but has not been shown by the critics of sur-

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take account of realities." FIELD, *supra* note 4, at 27. "To say that a woman 'chooses' to do this . . . is simply to say that when a woman is forced to choose between poverty and exploitation, she sometimes chooses exploitation as the lesser of two evils." Tong, *supra* note 9, at 45. For present purposes, I ignore the distinctions between being coerced, or forced, or acting under duress.

21. Specifying the appropriate baseline against which to measure the proposal can be a complicated question. *See* ALAN WERTHEIMER, COERCION 202-41 (1987).

22. FEINBERG, *supra* note 16, at 233 (arguing that a proposal can be both coercive and "freedom-enhancing"); *see* WERTHEIMER, *supra* note 21, at 232-33.

23. A comes upon B, who is drowning. A proposes to rescue B if B agrees to pay A $10,000. A and B know that there are no other potential rescuers. ALAN WERTHEIMER, EXPLOITATION 110 (1996) (taking this example from Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD (Sidney Morgenbesser et al. eds., 1969)).

rogacy, namely, that women choose to serve as surrogates only because they are in dire economic straits. It may be argued that when background conditions provide an inadequate range of opportunities, the moral quality or significance of one's choice is diminished, even if the background conditions do not compromise the "voluntariness" of the choice, strictly speaking.[24] But even if this is so, it is arguable that it is the background conditions that are the problem and not the offer that allows B to improve on those background conditions. The offer is still a positive good. If a woman can reasonably regard surrogacy as improving her overall welfare given that society has unjustly limited her options, it is arguable that it would be adding insult to injury to deny her that opportunity. Whatever label we use to describe her choice, we must still decide whether she should be allowed to make such a choice. And referring to such choices as "coerced" will not resolve that substantive moral question.

Cognitive Errors

Considerations of coercion aside, I suggested that a woman's decision to serve as a surrogate may not be appropriately consensual if the lure of the financial gain motivates her to make a decision that she will regret or would regret if she thought objectively about its effect on her life. Given that we do not know whether surrogacy is typically harmful or advantageous, I do not think that we can say whether the typical surrogate makes this kind of cognitive error. Also, do not say that a woman's judgment cannot be appropriately consensual just because she cannot fully anticipate what it will be like to give up the child. People can voluntarily consent to sterilizations, sex change operations, abortions, and plastic surgery, and (shall we add?) marriage—where one cannot or frequently does not have any experience with the consequences of the decision. By comparison with some such decisions that we do allow, the problem of miscalculation in surrogacy may be relatively small and more amenable to preventive measures: restricting surrogacy to women who have given birth and therefore have personal knowledge of the bonding process (which would not have excluded Mary Beth Whitehead) and careful psychological screening (which might have excluded her).[25]

The claim that the surrogate makes a cognitive error would be more controversial if her error derives from her failure to take proper account of objective or moral harms to her interests. But even if we correctly believe that the surrogate's choice is nonconsensual for just this reason, it is less clear what would follow. Here we return to the moral force of exploitation.

24. *See* Thomas Scanlon, *The Significance of Choice*, *in* TANNER LECTURES ON HUMAN VALUES (1987).

25. It appears that an infertility center had performed a psychological evaluation of Mrs. Whitehead and that she had "demonstrated certain traits that might make surrender of the child difficult." *In re* Baby M, 537 A.2d 1227, 1247 (N.J. 1988). Unfortunately, it also appears that neither she nor the Sterns were given this information.

V. THE MORAL FORCE OF EXPLOITATION

What follows from all this with respect to societal intervention with commercial surrogacy? If surrogacy is a case of harmful exploitation, we need to ask whether paternalistic restrictions would be justified, although here our task will be relatively easy, particularly if we have reason to think that there are defects in the quality of the surrogate's consent. If surrogacy is a case of harmful cum moralistic exploitation, we need to ask whether restrictions can be justified on grounds of moral paternalism. That question would be at least somewhat harder. It is a commonplace that a liberal democracy is not justified in prohibiting transactions just because the transactions are morally suspect or fail to incorporate the best conception of human flourishing. This is not because we lack confidence that the transactions are truly wrong, but because there are reasons—good moral reasons—to prefer a political regime that does not regard such wrongness as a sufficient justification for invoking the coercive powers of the state.

If surrogacy is a case of mutually advantageous and consensual exploitation, then it certainly does not follow that just because it is wrong for A to exploit B, that we should prohibit A from exploiting B. If exploitation is to serve as an independent basis for social restraints, we would need to explain how the exploitativeness of a transaction justifies interfering with a transaction from which she benefits, particularly if prohibition is the only viable option.

Reducing Exploitation

But prohibition may not be the only viable option. Suppose that surrogacy would be less exploitative (or nonexploitative) if the compensation were higher or the contract terms were somewhat different. Might this justify societal intervention?

It might, but unlike some other contexts of alleged exploitation, I see no reason to believe that the compensation received by surrogates reflects a structural inequality of bargaining power.[26] It seems to me that the potential surrogate should be in a very strong negotiating position vis-a-vis the intended parents. I suspect that surrogates receive rather low compensation precisely because surrogacy is viewed with such moral skepticism. Information and competition are low. And unlike many other bargaining contexts, in which bargainers believe they can legitimately press for a better deal, social norms may suggest that it is inappropriate for a surrogate to hold out for a higher wage. Somewhat ironically, the widespread acceptance of the moral norms to which the critics of surrogacy often appeal may contribute to this—low compensation—dimension of its exploitativeness.

In any case and for whatever reason, it is possible that left to their own devices, most potential surrogates might be able to negotiate an agreement that is less desirable than would be negotiated under a form of minimum wage.

26. *But see* Allen Wood, *Exploitation*, 12 SOC. PHIL. & POL'Y. 136, 144 (1995) (maintaining that prospective adoptive couples are typically in a "significantly stronger bargaining position").

Some agreements would not occur. Some intended parents would be unwilling or unable to pay the higher price. But many would.[27] We would then face a problem of moral trade-offs. We would need to weigh the moral importance of reducing the exploitation of those who would be helped by this form of minimum wage legislation against the cost to those who would be excluded from the market because people refuse to purchase their services for the higher minimum wage.

Yet the latter point highlights a moral consideration that many critics of surrogacy have ignored. Any restrictions that discourage surrogacy arrangements hurt those who would have benefitted from such arrangements and arguably also interfere with their autonomy. If we are to respect the autonomy of potential surrogates in the world in which they find themselves, it is important that we not automatically apply to them the moral principles that define our conception of an ideal world.[28]

Autonomy

The question arises then as to whether considerations of autonomy would preclude using exploitation as grounds for restricting mutually advantageous and consensual surrogacy arrangements. An adequate answer to this question would require a more fully developed theory of autonomy than I can offer—for lack of a theory as well as space. But I do want to argue that two strategies—one conceptual, one legal—that have been advanced as solutions to this problem are less than fully satisfactory.

The conceptual strategy maintains that since a woman's "true" freedom or autonomy is violated by surrogacy contracts, the prohibition of such contracts does not constitute a violation of her freedom or autonomy.[29] I do not want to deny that there is something to the notion of positive freedom or, perhaps more accurately, to the values it attempts to capture. But even if we say that "true" freedom includes proper self-development, and if we think that surrogacy "would detract from the ideal of human flourishing that society should seek to foster," it remains an open question whether the right to choose not to be positively or truly free is itself a crucial dimension of one's autonomy.[30]

It might be objected at this point, that appeals to autonomy ignore the fact that surrogacy "takes advantage of motivations—such as self-effacing 'altruism'—which women have formed under social conditions inconsistent with genuine autonomy."[31] And, the argument goes, we do not interfere with a woman's genuine autonomy if we prohibit decisions that result from non-

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27. Indeed, it is possible that there would be more surrogacy agreements at the higher price, because it would increase the supply of potential surrogates.

28. For the distinction between ideal theory and non-ideal theory, see JOHN RAWLS, A THEORY OF JUSTICE 8 (1971).

29. Prohibiting surrogacy contracts does not violate the autonomy of women because "the content of the surrogate contract itself compromises the autonomy of surrogate mothers." Anderson, *supra* note 2, at 91.

30. Capron & Radin, *supra* note 5, at 64.

31. Anderson, *supra* note 2, at 91.

autonomously acquired motivations. But even if the surrogate's motivations are not autonomous in this sense, it is not clear what would follow. We certainly do not think that we can justifiably prevent religious organizations from soliciting or accepting donations just because we (even rightly) believe that the motivations that give rise to those donations may have been formed under social conditions inconsistent with genuine autonomy.[32] Respect for a person's autonomy sometimes requires that we respect choices that reflect values that she presently accepts, even if we are rightly worried about the way she acquired those values.

So much for the conceptual strategy. A popular legal strategy for resolving the tension between respecting autonomy and prohibiting surrogacy agreements is to permit surrogacy transactions, but to "make the arrangement performable or not at the option of the mother."[33] It might be thought that this strategy would give us the best of both worlds: it would preserve the freedom of women to enter into surrogacy arrangements, but would also preserve their freedom to keep the child if they so wish.[34]

Now it is entirely possible that the "unenforceable contract" solution will turn out to be the preferred public policy.[35] Even so, it would not entirely resolve the autonomy problem. There are two related ways in which it fails to do so. First, it fails to acknowledge that the ability to enter into a binding agreement is itself a crucial dimension of one's autonomy and that the "unenforceable contract" solution will deter some potential intended parents from making agreements that potential surrogates would want to be able to make. Second, it may be argued that in trying to protect women from having to surrender a child against her strong maternal desires, we do not express the appropriate respect for women as autonomous and responsible persons.[36] Whether or not this line of argument is ultimately decisive, it suggests that the unenforceable contract solution does not fully resolve the tension between

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32. I have in mind contributions to "normal" religious organizations, not contributions which are clearly the product of fraud. Interestingly, to the extent that surrogacy takes advantage of altruistic preferences, it does not represent a problem of commodification. After all, it is one thing to maintain that surrogacy does not represent a "gift" relation, and another thing to assume that it does, but that women have been involuntarily socialized into giving such gifts.

33. FIELD, *supra* note 4, at 78.

34. Martha Field states:

> One attractive feature of this solution is that it helps avoid resolution of the debate, which is currently dividing feminists, about whether surrogacy exploits women or liberates them. It recognizes the truth of both positions. Surrogacy is still available when the surrogate mother desires ultimately to carry out the contract. . . . But it avoids one of the most troubling features—a contract severing the maternal bond when the mother is unwilling to relinquish her child.

Id.

35. *See* Michael Trebilcock & Rosemin Keshvani, *The Role of Private Ordering in Family Law: A Law and Economics Perspective*, 41 U. TORONTO L.J. 533 (1991).

36. Carmel Shalev states:

> Her state of mind at the moment of agreement is not to be taken seriously because it is subject to change during the performance of her undertaking, due to the nature of pregnancy. The insinuation is that it is unreasonable to expect her to keep her promise because her faculty of reason is suspended by the emotional facets of her biological constituency.

CARMEL SHALEV, BIRTH POWER 121 (1989).

protecting surrogates from decisions that they may come to regret and respecting the autonomy of women.

Justice

Finally, I wish to consider a set of arguments for interfering with surrogacy contracts that appeals to considerations of justice. I say the set of arguments "appeals to" considerations of justice, because these arguments variably assert that surrogacy *instantiates* injustice, that surrogacy *derives from* injustice, that surrogacy *symbolizes* injustice, that surrogacy *reinforces* injustice. Note that some of these verbs suggest that surrogacy has a causal impact on the social world, whereas others do not, and it may be crucial to establish just which verb is most apt.[37] Surrogacy could, of course, derive from injustice or symbolize injustice without causing the world to be more unjust. By contrast, the claim that surrogacy reinforces or creates injustice is to claim that the world would be less unjust if surrogacy were prohibited.

There are at least three different lines of justice-based arguments that we might consider. First, it might be argued that we should prevent transactions that instantiate unjust distributions even if the transactions are beneficial to all concerned. On this view, it is wrong to allow unjust transactions to occur, even when (as contrasted with the world in which they do not occur) these particular transactions are not bad for anyone. Now I do not think it unreasonable for an individual to refuse to participate in a transaction that will improve her welfare on the grounds that the transaction is unjust. But the question is not whether an individual can herself reasonably refuse to participate in a beneficial transaction because it is unjust, but whether society can justifiably prevent her from participating in such a transaction on the grounds that it is unjust. And it is not clear that it can.

A second justice-based argument focuses on the relational dimension of surrogacy. On this view, the problem is not that surrogacy results in different "holdings," but that surrogacy instantiates highly asymmetrical and unjust personal relations. Now relational inequality is a serious matter, and it must be included in any all-things-considered assessment of whether a woman would be benefitted or harmed by entering into a surrogacy transaction. But if a woman can still plausibly maintain that she would benefit by such an arrangement, it is hard to see why such transactions should be prohibited on the grounds that the relation is unjust—at least if the welfare of the potential surrogate is the focus of our concern.

That gives rise to a third line of argument, one that focusses on the negative externalities of commercial surrogacy. Just as it is often argued that pornography has harmful effects on virtually all women, it may be argued that surrogacy has harmful effects on women as a class, because it reinforces in-

37. "[D]istributive justice requires that society's benefits and burdens be distributed fairly among different social classes. . . . Since women who are less well off will almost always be the ones to serve as surrogates for wealthier or professional women, the distribution is not fair." Macklin, *supra* note 20, at 147; *see* Annas, *supra* note 5, at 43.

equalities of gender, although it might not be harmful, all things considered, to the surrogates themselves, who are compensated for their services.[38]

I want to make three points about this line of argument. First, if we argue that a (potential) surrogacy arrangement between A and B should be prohibited because a policy of allowing such arrangements would have harmful effects on third parties, then we are not claiming that it is the exploitation of B that justifies its prohibition. Second, even if the prohibition of surrogacy has egalitarian consequences, we would be imposing a burden on one class of women (those who would be benefitted by serving as surrogates) in order to benefit a larger class of women. We are, of course, often justified in imposing costs on some persons in order to realize gains to other (present or future) persons. But it is harder to justify imposing such costs when they are incurred by those who are thought to be among the least well-off.

That brings me to the third point, namely, that we have no empirical evidence to support the claim that the prohibition of surrogacy actually has egalitarian consequences. Or, what amounts to the same thing, that the permissibility of surrogacy would reinforce or perpetuate social inequalities. For all we know, the legitimation of commercial surrogacy might serve to empower women in their relations to men.[39] Indeed, it is arguable that prohibiting surrogacy might simply shield our eyes from the background inequalities from which it derives, while allowing surrogacy would forcefully bring those inequalities to our attention and motivate us to change them.

V. CONCLUSION

Let us be clear as to what the previous arguments do and do not show. If commercial surrogacy is a case of harmful and nonconsensual exploitation, then there is a strong prima facie case for prohibiting commercial surrogacy and for refusing to enforce commercial surrogacy contracts. If commercial surrogacy is a case of mutually advantageous and consensual exploitation, then there is a strong prima facie case for allowing commercial surrogacy and for enforcing commercial surrogacy contracts. I have examined several arguments for the view that commercial surrogacy contracts should be prohibited or unenforceable because they are exploitative, even if commercial surrogacy is mutually advantageous and consensual. I have suggested that several arguments against that position are problematic at best.

I have decidedly *not* argued for the stronger position that commercial surrogacy contracts should be allowed or enforced as a matter of public policy, for that would require a determination as to whether commercial surrogacy is, in fact, harmful and nonconsensual or mutually advantageous and consensual. It would also require attention to reasons for prohibiting or refusing to enforce commercial surrogacy contracts that are beyond the scope of this article. I

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38. "[Surrogacy] contracts will turn women's labor into something that is used and controlled by others and will reinforce gender stereotypes that have been used to justify the unequal treatment of women." Satz, *supra* note 1, at 123-24.

39. *See* SHALEV, *supra* note 36.

have argued that it does not follow that surrogacy contracts should be prohibited or unenforceable just because they are exploitative—if the transaction is consensual and mutually advantageous.

THE TWIN FACES OF JUDICIAL CORRUPTION: EXTORTION AND BRIBERY

IAN AYRES*

Men won't do much for a shilling.
For a pound they may be willing.
For twenty pounds the verdict's in the sack.[1]

INTRODUCTION

On January 25, 1990, I stood in a Cook County Circuit Court and accused the presiding judge, the Honorable Thomas J. Maloney, of extortion. I was filing a final amended post-conviction petition on behalf of Dino Titone.[2] Titone had been convicted and sentenced to death in bench trials by Judge Maloney for participating in the murders of Aldo Fratto and Tullio Infelise.[3] My post-conviction petition alleged that Titone's own lawyer had solicited money from Titone on behalf of Judge Maloney, and that Titone with the help of his father had ultimately paid Judge Maloney $10,000.[4] The petition alleged that after Judge Maloney received the money, an FBI investigation of judicial corruption in Cook County—code name "Operation Greylord"—became public and that Judge Maloney convicted and sentenced Titone to death in order to cover up Maloney's felonious conduct.[5]

Accusing a sitting judge frightened me.[6] And I brought my own counsel,

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1. BERTOLT BRECHT, THE CAUCASIAN CHALK CIRCLE 102 (1947).

2. Rule 1.6 of the ABA Model Rules of Professional Conduct mandates that "a lawyer shall not reveal information relating to representation of a client unless the client consents . . . ." Titone has given me "permission to write, discuss and/or publish for any media any description, account, opinion or other information or material about and relating to my prosecution or his subsequent representation of me—except information covered by the attorney client privilege." Letter from Dino Titone to author (Feb. 3, 1997) (on file with author).

3. People v. Titone, 505 N.E.2d 300, 300 (Ill. 1986) Two codefendants, Robert Gacho and Joseph Sorrentino, were convicted in severed trials. *Id.*

4. The petition was based on affidavits of Titone and his father. The affidavits alleged that money was paid to Titone's lawyer, Bruce Roth, who was to pass it along to Judge Maloney's bagman, Robert McGee. People v. Titone, Third Amended Petition for Post-Conviction Relief, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Jan. 25, 1990).

5. *Id.*

6. The requirement that post-conviction petitions (the Illinois analog to habeas corpus petitions) must be heard before the original judge itself has an interesting history. The Illinois legislature in its wisdom determined that post-conviction petitions should be heard before a new judge, Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶ 122-8 (1984 Supp.), but the Illinois Supreme Court struck down this statute as violating the state constitution's separation of powers limitation and held that the courts will determine the venue for post-conviction petitions without

Tom Geraghty, in case Judge Maloney held me in contempt. When he read the allegations,[7] Maloney went ballistic. He forced me to answer a series of personal questions regarding my age and place of birth.

The case was ultimately transferred to another Circuit Court judge who vacated Titone's death sentence[8] but refused to grant Titone an evidentiary hearing to establish his claim of judicial corruption. I unsuccessfully appealed the latter ruling to the Illinois Supreme Court[9]—which brings me to the subject of this essay.

Even though I repeatedly characterized the deal between Judge Maloney and my client as "extortion," the Illinois Supreme Court insisted on referring to the underlying transaction as a "bribery conspiracy."[10] So which was it: bribery or extortion? And should the characterization of a conspiracy as "bribery" or "extortion" determine whether a convicted defendant earns a new trial?

My answers to these questions are straightforward. First, it will often be impossible to distinguish "bribery" and "extortion," because conspiracies will routinely combine elements of both deals. Second, deciding whether to grant a new trial should not turn on this characterization. Any defendant who can show that a judge accepted money (or negotiated for money) should be granted a new trial—regardless of whether the conspiracy seems more like bribery or extortion.

The *Titone* case squarely presents this "convicted payor" problem[11]—whether a convicted payor should receive a new trial? But judicial corruption creates at least two related problems: the "acquitted payor" problem is whether an acquitted payor should be able to avoid a new trial (because of the double jeopardy prohibition) and the "convicted non-payor" problem is whether a convicted non-payor should receive a new trial (because of judicial incentives to unfairly convict non-payors).[12]

Unfortunately, Maloney's pattern of corrupt practice has raised all three of these hypothetical problems not just in actual cases—but in murder cases.[13]

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legislative interference. People v. Joseph, 495 N.E.2d 501, 506 (Ill. 1986).

7. Along with the petition I simultaneously filed a motion to place the court papers under seal, and a motion that Judge Maloney be removed for cause. Judge Maloney—without reading any of the papers—initially resisted placing any of the documents under seal. He repeatedly asked me to state in open court why I wanted the proceedings private. When I finally succeeded in getting him to read a crucial paragraph of the complaint alleging judicial corruption, he then kept me standing before him for twenty minutes as he carefully read the paper.

8. The judge found that Titone's own lawyer, Bruce Roth, intentionally sought the death penalty for his client (in order to induce appellate courts to review the underlying conviction more seriously). The judge found that this all-or-nothing strategy represented an abnegation of the adversary process and constituted ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668 (1984).

9. People v. Titone, 600 N.E.2d 1160 (Ill. 1992).

10. *Titone*, 600 N.E.2d at 1164.

11. Even though this article describes Dino Titone as a "convicted payor," evidence suggests that Titone's father was in fact the payor. Affidavit of Salvator Titone (Oct. 12, 1994).

12. Although this essay is focused on the issue of judicial corruption, the ideas also apply to issues of juror or prosecutor corruption. Because jurors are not repeat players it will be more difficult for them to establish a credible pattern of accepting bribes or extorting money. But the actions of jurors (and the decision of prosecutors not to prosecute) are less reviewable than many judicial decisions and hence may give these other actors more opportunity for corruption.

13. Maloney is one of 18 judges from the Cook County Circuit Court who have been con-

Before taking the bench, lawyer Maloney facilitated the payment to a judge who subsequently acquitted Harry Aleman of murder.[14] In *People v. Aleman*,[15] an Illinois district court struggled with the acquitted payor problem—whether the double jeopardy clause prohibited Aleman's retrial.[16] The court held that double jeopardy protection did not apply in part because Aleman faced no risk of conviction in the initial trial.[17] This article, however, will argue that *Aleman*'s logic is incomplete. At a minimum, a court would need more fact finding to conclude that double-jeopardy should not apply.

The United States Supreme Court is now grappling with the convicted non-payor problem created by Judge Maloney's pattern of corruption. William Bracy and Roger Collins were convicted of murder and sentenced to death in a jury trial over which Judge Maloney presided.[18] Although "[t]here is no suggestion that Bracy and Collins bribed or offered to bribe [Maloney],"[19] the defendants seek a new trial arguing that Judge Maloney's corruption in other cases gave him an incentive to be biased against defendants who did not pay him—in part "to avoid suspicion that he was on the take."[20] Judge Richard Posner rejected the defendants' substantive claims and even denied defendants' claim for limited discovery to prove Judge Maloney's bias.[21] The Supreme Court subsequently granted certiorari in the case and at this writing has just heard oral argument on the limited question of discovery.[22] The convicted non-payor problem is admittedly vexing, but Judge Posner's opinion is uncharacteristically unnuanced—piling on arguments against the defendants' position without seeing the benefit of at least granting limited discovery.

This essay is divided into three parts. In the first, I extend Jim Lindgren's useful analysis of the difference between bribery and extortion.[23] Part II then examines how courts should respond to motions for new trials when there is an allegation of judicial corruption. Part III analyzes the acquitted payor problem raised in *Aleman*. And Part IV briefly analyzes the convicted non-payor

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victed of corruption in the last decade. Bracy v. Gramley, 81 F.3d 684, 704 (7th Cir. 1996) (Rovner, J. dissenting), *rev'd* 117 S. Ct. 1793 (1997), *cert. granted sub nom.* Collins v. Welborn, 117 S. Ct. 2450 (1997). Maloney "has the dubious distinction of being the only Illinois judge ever convicted of fixing a murder case." Bracy v. Gramley, 117 S. Ct. 1793, 1795 (1997).

14. People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996), *appeal denied*, 671 N.E.2d 734 (1996), *cert. denied*, 117 S. Ct. 986 (1997), *habeas corpus denied sub nom.*, United States *ex rel.* Aleman v. Circuit Court, 967 F. Supp. 1022 (N.D. Ill. 1997).

15. *Aleman*, 667 N.E.2d 615.

16. *Id.* at 623-25.

17. *Id.* at 626.

18. *Bracy*, 81 F.3d 684.

19. *Id.* at 688.

20. *Id.*

21. *Id.*

22. *Bracy*, 117 S. Ct. 941. *See* Linda Greenhouse, *Justices Consider How the Taint of a Corrupt Judge Should Be Measured and Remedied*, N.Y. TIMES, Apr. 15, 1997, at A18 (noting that the Court granted certiorari only to consider whether petitioners were entitled to "discovery to support his claim that he was denied the right to a trial before an impartial judge").

23. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs*, 35 UCLA L. REV. 815, (1988) [hereinafter Lindgren, *Elusive Distinction*]; James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993) [hereinafter Lindgren, *Theory*].

problem raised in *Bracy*.[24]

I. A THEORY OF BRIBERY AND EXTORTION

In distinguishing between bribery and extortion, it is useful to distinguish between procedure and substance. The crudest procedural theory would define extortion as conspiracies initiated by judges and bribery as conspiracies initiated by defendants.[25] Of course, one can define words as one likes. But a defendant's right to a new trial should not turn on who initiated a conversation. A procedural definition of bribery or extortion might only poorly correlate with the clean hands of a defendant. For example, if it becomes generally known that judges take money, then defendants may feel pressure to initiate the negotiation.[26]

Indeed, when intermediaries are involved, it may be very difficult to decide which side initiated the negotiation. In the *Titone* case, Bruce Roth was likely the instigator. But in beginning the negotiation, Roth (nominally Titone's lawyer) might have been acting as Judge Maloney's agent—after all Roth (who, like Maloney, served time for a pattern of corruption) had an ongoing illicit relationship with several Cook County judges.[27]

It is, however, possible to develop a substantive theory of bribery and extortion that more clearly correlates with moral desert. Imagine a defendant who in a fair trial—given the available evidence and the "proof beyond a reasonable doubt" standard—would have a 50% chance of conviction.[28] For such a defendant, a pure bribe would be an agreement to lower the probability of conviction. As Jim Lindgren has succinctly defined: "Bribery consists of paying for better than fair treatment."[29] By contrast, a judge extorting money would threaten to unfairly increase the probability of conviction unless she was paid. Under this definition, extortion consists of paying to avoid worse than fair treatment.

Both extortion and bribery agreements entail payments from a defendant

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24. *Bracy*, 81 F.3d 684. *See* Greenhouse, *supra* note 22.

25. In *Evans v. United States*, the Court held that:

> (1) there's no requirement of inducement for official extortion; (2) official extortion doesn't require coercion; (3) bribery isn't a defense to extortion; (4) official extortion isn't limited to false pretenses; and (5) the Government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

Lindgren, *Theory*, *supra* note 23, at 1708 (quoting Evans v. United States, 504 U.S. 255, 268 (1992)). An inducement requirement could be related to a procedural definition of extortion to the extent that inducement required the government official to initiate the negotiation.

26. Lindgren, *Elusive Distinction*, *supra* note 23, at 828.

27. United States v. Roth, 860 F.2d 1382, 1383 (7th Cir. 1988) (Easterbrook, J.), *cert. denied*, 490 U.S. 1080 (1989). Bruce Roth, the defendant in this Greylord prosecution, was a crooked lawyer. *Id.* He made a living bribing crooked judges. *Id.* Often Roth played the broker's role, matching lawyers who did not know which judges would take money with judges who did not know which lawyers would pay it. *Id.*

28. Titone was such a defendant. Titone had three alibi witness testifying on his behalf. People v. Titone, 115 Ill.2d 413, 425 (1986). The prosecution, in contrast, had only one, severely impeached witness—an uncharged, admitted accomplice who had fled the jurisdiction—linking Titone to the crime. People v. Titone, 505 N.E.2d 300, 300-01 (Ill. 1986).

29. Lindgren, *Elusive Distinction*, *supra* note 23, at 824.

to a judge, but there is—in the lingo of classical contract theory—a different substantive consideration. A substantive definition of bribery and extortion asks whether the defendant was paying to receive better than fair treatment or paying to avoid worse than fair treatment. The benchmark of expected treatment in the absence of agreement is crucial.[30] When a pure bribe is being negotiated, the defendant expects in the absence of agreement to receive a fair trial. When a pure extortion is being negotiated, the defendant expects in the absence of agreement to receive an unfair trial.[31] This substantive definition is identical to the threat/offer dichotomy which has been so central to the philosophical discussion of coercion.[32]

This substantive definition of bribery and extortion illuminates the moral desert of the payor/defendant. The judge's action in agreeing to receive money is morally repugnant regardless of whether the agreement is an extortion or a bribe. But from the payor's perspective, paying to receive better than fair treatment is clearly more repugnant than paying to avoid unfair treatment. If we could nicely separate judicial corruption into these two boxes, we might want to treat more favorably a defendant who paid to avoid injustice than someone who was purchasing injustice (in her favor).[33]

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30. *See* Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 900 (1997) (discussing moralized baseline). Fred McChesney has powerfully analyzed the potential for government shakedowns backed by the threat of unjust treatment. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEG. STUD. 101 (1987).

31. Jim Lindgren's two articles on bribery and extortion are path-breaking. He clearly sees the clean, substantive distinction between bribery and extortion, but then needlessly muddies the distinction by unhelpfully complicating the definition of extortion:

> [C]oercive extortion by a public official is the seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment or to make the payor worse off than he is now or worse than he expects to be. . . . Thus, while bribery has only one baseline (fair treatment), coercive extortion has at least three baselines (fair treatment, expected treatment, and the status quo).

Lindgren, *Theory*, *supra* note 23, at 1701. Lindgren's triple benchmark for extortion leads him to unhelpfully find an "overlap" between bribery and extortion:

> Now what about government officials who have a duty to arrest criminals? Here coercive extortion and bribery overlap. If a police officer suggests that he will not arrest a criminal if he is paid off, this is extortion, because he is threatening to make the criminal worse off than he is now. But it's also bribery, because the criminal is paying hush money for more than fair treatment.

Id. (footnotes omitted). *See also* Lindgren, *Elusive Distinction*, *supra* note 23, at 827. It seems more useful to describe this hypothetical as a pure bribe. Fair treatment would be for the official to arrest the criminal; here, the criminal is purchasing better than fair treatment. The criminal's actions are no less repugnant because the official was threatening to change the status quo. Indeed, the status quo was that the criminal was rightfully subject to arrest—so that threatening arrest is not clearly a change in the status quo. Like Lindgren, I will argue that pure bribery and extortion are often combined in the same agreement, see *infra* p. 35, but Lindgren's hypothetical is not a good example of this blending.

32. *See, e.g.*, John Lawrence Hill, *Moralized Theories of Coercion: A Critical Analysis*, 74 DENV. U. L. REV. 907 (1997).

33. There are three types of favorable treatment that might be afforded criminal defendants that pay an extortion:

1. if they were originally convicted, we might be more willing to grant them a new trial;
2. if they were originally acquitted, we might be less willing to retry them; or
3. we might be less likely to prosecute them for participating in judicial corruption.

The second possibility will be discussed in the acquitted payor section.

Unfortunately, there are strong structural reasons why we should often expect to see combinations of bribery and extortion. Just as a consumer could simultaneously buy a hamburger and a soda, a defendant's payment to a judge will often be for the purpose of *both* (1) avoiding worse than fair treatment (if the payment is not made) *and* (2) inducing better than fair treatment (if the payment is made).[34] Philosophers have already seen the possibility of these combined "threat" and "offer" and conveniently dubbed them "throffers."[35]

But previous authors have not seen that there are strong reasons to suspect that each side will prefer agreeing to a combination of bribery and extortion instead of a pure extortion agreement—*even if the price to be paid does not change*. It is easy to see that the defendant/payor would prefer to purchase better than fair treatment for the same price—not only because it is better to be assured acquittal, but also because structurally it will often be easier for the defendant to verify whether the judge is performing her side of the bargain. Under what I have defined as pure extortion, the judge upon payment merely agrees to judge fairly. But it will often be difficult to objectively assess what is fair treatment. If a judge after agreeing to pure extortion goes ahead and convicts in a bench trial, it will often be difficult for the defendant to know whether the conviction was warranted.

What is somewhat more surprising is that the judge might prefer a combination of bribery and extortion to simple extortion—even if the size of the defendant's payment does not change. Assuring the defendant's acquittal—regardless of the evidence—is likely to reduce the chance that an unsatisfied customer will complain to the authorities. If the judge merely extorts, defendants who are fairly convicted are more likely to inform authorities about the illicit agreements. By gratuitously combining bribery together with extortion, extorting judges reduce the chance that a defendant will testify against them.

This, however, is not an *a priori* proof that all extortion agreements will be combined with bribery. In some cases, an extorting judge would be disinclined to assure acquittal because doing so would tip off investigators.[36] When the threat that third-parties will uncover judicial corruption is low, there are strong reasons to suspect that combined agreements will tend to dominate either pure bribery or pure extortion.[37] Extorting judges will tend to overshoot

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34. Lindgren clearly saw this possibility. Lindgren, *Theory*, *supra* note 23, at 1700 ("The same envelope filled with cash can be both a payment extorted under a threat of unfairly negative treatment and a bribe obtained under a promise of unfairly positive treatment."); *see also* Lindgren, *Elusive Distinction*, *supra* note 23, at 826.

35. *See* ALAN WERTHEIMER, COERCION 204 (1987); MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY 12 (1982).

36. Bracy v. Gramley, 81 F.3d 684, 689-90 (7th Cir. 1996). The court stated:

> While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take.

Id. Also the foregoing arguments ignore the impact that criminal law of bribery and extortion itself can have on the parties. For example, if judges and/or defendants were subject to higher penalties for combination agreements, combined agreements might not dominate extortion agreements.

37. It's harder to say that bribery agreements will tend to throw in extortion elements. My

in the defendant's favor—providing not just a fair trial but assuring acquittal.

As the threat of third party scrutiny increases however, judges will have smaller incentives to assure acquittal. For example, when the Operation Greylord investigation became public, corrupt judges suddenly began to fear federal scrutiny more than the possibility that defendants would turn them in. Even judges who had entered into pure bribery agreements might prefer to overshoot in breaching their agreements—not merely retreating to a fair trial, but convicting regardless of the evidence. Judge Posner has suggested that unusually harsh judicial conduct may tip off authorities just as much as unusually lenient conduct.[38] But with regard to discretionary decisions—such as whether to convict in a bench trial—a corrupt judge is much more likely to divert investigative attention by calling close decisions against the defendant.

This analysis of judicial incentives should inform our normative rulemaking. First, we should realize that even when there is evidence of bribery, it may be part and parcel of a defendant's effort to avoid injustice if money is not paid. And second, the possibility that an extorting judge could *insist* on giving better than fair treatment reduces the defendant's moral culpability for participating in a combination of bribery and extortion. If paying to avoid unfair treatment is excusable, the payment becomes no less excusable if the judge, for her own reasons, wants to make sure that the defendant is acquitted. Here, I may part company with Jim Lindgren who has suggested that "there is no reason to let off a briber just because he was also a victim of extortion."[39]

Finally, a dramatic increase in the threat of third party detection may lead judges to convict the very defendants who had paid them money. Many people ask me why my client would have been *unjustly* convicted if he had paid the judge money. The increased threat of federal scrutiny provides the answer. When judges have more to fear from third-party detection than from a defendant disclosing a payment, they may decide that the safer course is to convict regardless of the evidence.[40]

Even if a defendant was morally culpable for entering into a pure bribe, the slow, public development of Operation Greylord raises the possibility that she would receive worse than fair treatment from the very judge she paid. It may be appropriate to separately punish a defendant for agreeing to bribe—and my previous argument suggested why such pure bribes would be difficult to identify—but we can no longer be confident that the underlying convictions of paying defendants are just.

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earlier argument was that if the parties were inclined to enter into an extortion agreement, they would routinely throw in an agreement for assured acquittal if the money were paid. But having agreed to a bribe (i.e., assured acquittal), it is harder to think what it would mean to combine elements of extortion.

38. *Bracy*, 81 F.3d at 689-90; *see infra* text accompanying note 51.

39. Lindgren, *Theory*, *supra* note 23, at 1700; *see also* Lindgren, *Elusive Distinction*, *supra* note 23, at 826. Lindgren, however, was not considering the specific context of judicial corruption in criminal cases. Given our general constitutional protection for criminal defendants, I imagine that Lindgren might well agree with the thesis of this paper that defendants who had entered into combination deals should receive new trials.

40. Indeed, once the first wave of Greylord indictments became public judges could say that defendants claiming to have paid money were merely concocting stories of judicial corruption.

A potentially stronger way to distinguish instances of bribery from instances of extortion—that is to say instances where the defendant/payor is more culpable for paying a judge—is to independently assess the probability of conviction at a fair trial. If the probability of conviction at a fair trial was virtually nil, then we might be confident that the defendant/payor was only being extorted—for example, paying money to avoid an unfair conviction. On the other hand, if the probability of conviction (given the requirement of proof beyond a reasonable doubt) was virtually certain, we might be confident that the defendant/payor was only bribing the judge for better than fair treatment. As the benchmark of uncorrupted treatment tends toward one extreme or the other (certain acquittal or conviction), there is only "room" to sell one type of consideration. But such independent assessment amounts to a quasi-retrial.

II. WHEN SHOULD A CONVICTED PAYOR RECEIVE A NEW TRIAL?

Always. Whenever a judge takes money, or negotiates to take money, the defendant should receive a new trial. The characterization of the agreement as extortion or bribery should not matter. Unfortunately, this is not the current state of the law. Courts tend to require that a convicted defendant show not merely that the judge accepted money, but that the judge's corruption caused judicial error. This section will argue that this prejudice requirement is an inappropriate vestige of our concern that bribers not profit from their bribe.

In *People v. Titone*,[41] the Illinois Supreme Court rejected a preliminary claim[42] that Titone should be given a new trial because of Judge Maloney's corruption.[43] The Court adopted the dual requirements of the Pennsylvania Supreme Court in *Shaw v. Commonwealth of Pennsylvania*[44] that:

> (1) "petitioner must establish a nexus between the activities being investigated and the trial judge's conduct at trial"; and
>
> (2) "petitioner must establish actual bias resulting from the trial judge's extrajudicial conduct."[45]

While unartfully drafted and somewhat redundant, the *Shaw* standard seems to require a showing that corruption *caused* error.

This requirement should be rejected because it cannot be squared with a long line of Supreme Court holdings on judicial bias. For example, in *Aetna Life Insurance Co. v. Lavoie*,[46] the Supreme Court held that a justice was acting as a "judge in his own case" when he participated in proceedings where the decision directly affected a case that the justice had independently filed.[47] The Supreme Court made clear that it was not required to decide whether in

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41. 600 N.E.2d 1160 (Ill. 1992).

42. Titone has renewed his claim based on additional evidence of Judge Maloney's corruption.

43. People v. Titone, 600 N.E.2d 1160, 1166 (Ill. 1992).

44. 580 A.2d 1379 (Pa. Super. Ct. 1990).

45. *Titone*, 600 N.E.2d at 1166 (citing Shaw v. Commonwealth of Pa., 580 A.2d 1379, 1381 (Pa. Super. Ct. 1990)).

46. 475 U.S. 813 (1986).

47. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824 (1986).

fact the justice was influenced, but only whether sitting on the case "would offer a possible temptation to the average . . . judge" leading the judge "not to hold the balance nice, clear and true."[48] The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties."[49] But to perform its high function in the best way, "justice must satisfy the appearance of justice."[50]

Judge Posner, with his usual clarity, has elucidated the concept of judicial bias:

> [J]udicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a petitioner for habeas corpus to a new trial. What is bias? Defined broadly enough, it is a synonym for predisposition, and no one supposes that judges are blank slates. There are prosecution-minded judges, and defense-minded judges, and both sorts have predispositions—biases that place an added burden on one side or the other of the cases that come before them. Yet no one supposes that the existence of such biases justifies reversal in cases where no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. . . . [F]or bias to be an automatic ground for the reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased."[51]

But as argued above, a judge who has taken money may have a substantial incentive to be biased to convict—to avoid third-party detection or to punish a defendant who the judge feels has not fully performed (read: paid). This liberty incentive is much stronger than the financial incentives involved in *Aetna* or *Tumey*.

Yet the *Shaw* standard requires a convicted defendant to prove more in the case of corruption-induced bias than the Supreme Court's *Aetna* decision required in the case of financially induced bias. I believe this disparate treatment is a continuing vestige of the concern that defendants should not benefit by their bribery.[52] The additional requirement in *Shaw* that corruption cause

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48. *Id.* at 825 (citations omitted), *discussed in* Ruling on Petitioners' Motion for Post-Conviction Relief, at 12, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651 (Cook County Ill. Cir. Ct., Sept. 18, 1996) (Dooling, J.).

49. *Lavoie*, 475 U.S. at 825.

50. *Id.*

51. Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996) (quoting Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1380 (7th Cir. 1994) (en banc)).

52. Ruling on Petitioners' Motion for Post-Conviction Relief, at 16, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651 (noting that "those who attempt to corrupt the judicial system may not later hide behind the very constitution they subvert"); *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 55 (1995).

error cannot be explained by a smaller judicial temptation—if anything, a judge who has received money has much more at stake. Instead, I believe the causal error requirement in *Shaw* and *Titone* grows out of a misguided sense that the requirement will distinguish failed extortion deals from failed bribery deals; a briber who is convicted has nothing to complain about unless she can show judicial error. Yet, the causal error requirement is unlikely to distinguish failed bribery and failed extortion agreements. The two types of agreements will often be combined and judges involved in either pure bribery or extortion may have incentives to convict regardless of the evidence in order to divert attention (or punish incomplete defendant performance).

Thus, even for courts that do not explicitly base their analysis on the distinction between bribery and extortion, the perceived dirty-hands of defendants who pay judges—evidenced in part by the Illinois Supreme Court's repeated characterization of Titone's claim as a "bribery" conspiracy even though I repeatedly characterized it as an extortion conspiracy—lead courts to impose harsher prerequisites for new trial.

Titone and *Shaw* should be overruled and those jurisdictions should instead follow the Third and Fifth Circuits, which have come closer to giving per se relief to convicted defendants who have established that they have paid off judges or jurors. For example, in *United States v. Forrest*,[53] the Fifth Circuit granted a new trial to a defendant who had attempted to tamper with a jury. And in *Zilich v. Reid*,[54] the Third Circuit remanded for an evidentiary hearing on the voluntariness of a defendant's guilty plea where the defendant alleged he was promised a sentence of probation in exchange for a $4,000 bribe to a trial judge.[55] Where surrender of a fundamental constitutional right is concerned, the court's inquiry should not focus upon the "clean hands of the defendant."[56]

My preferred new trial standard would make everything turn on whether a payment was made, or on whether an unreported payment negotiation occurred. Accordingly, much will turn on what evidence is required to prove that it is more likely than not that a judge was paid. This should remain an open-ended (and conventional) question of fact, but *Titone* has provided sufficient evidence.

The *Titone* case is clearly not a "me too" allegation of corruption—cobbled together only after Judge Maloney was indicted in the Greylord sweep. Rather, Titone was the first to accuse Judge Maloney of extortion.[57] Moreover, key facts in our accusation preceded and paralleled the proof beyond reasonable doubt that later convicted Judge Maloney of extortion from other defendants.[58] In 1990, Titone alleged that Judge Maloney had been paid

53. 620 F.2d 446 (5th Cir. 1980).
54. 36 F.3d 317 (3d Cir. 1994).
55. Zilich v. Reid, 36 F.3d 317, 318 (3d Cir. 1994).
56. Ruling on Petitioners' Motion for Post-Conviction Relief, at 18, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651.
57. People v. Titone, Third Amended Petition for Post-Conviction Relief, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Jan. 25, 1990).
58. *Id.*

$10,000 in Titone's murder case, the payment was made through Maloney's bagman Robert McGee, and Judge Maloney convicted Titone to divert the attention of federal Greylord investigators.[59] It was not until 1991 that Judge Maloney was indicted for extortion. The evidence establishing Judge Maloney's extortion of Earl Hawkins is eerily similar. The government alleged that Judge Maloney received $10,000 from the defendant in a murder case, that Robert McGee served as Judge Maloney's bagman, and that Judge Maloney convicted Hawkins to divert Greylord investigators.[60]

More important, one of the lead Greylord prosecutors, Scott T. Mendeloff, has sworn in an affidavit that Titone's father, Salvatore Titone, was the first to identify Judge Maloney's bagman:

> At the time Salvatore Titone gave his proffer in 1990, the government's investigation had not yet established that McGee acted as "bagman" for Maloney. It was only two years after Salvatore Titone first provided information regarding McGee's role as a "bagman" for Judge Maloney, that William Swano first identified McGee as Maloney's bagman.[61]

While a showing of judicial error or trial misconduct should not be a separate prerequisite for retrial, such judicial misconduct is certainly probative of judicial corruption. And indeed such misconduct is present in the *Titone* case. Strong evidence shows that after convicting Titone, Judge Maloney told Titone's lawyer, Bruce Roth, not to take a bench trial for the sentencing stage (of the bifurcated litigation) because Judge Maloney would sentence Titone to death.[62] This admonishment is probative of a prior deal. Judge Maloney, in effect, was telling Roth that Maloney would have to sentence Titone to death in order to avoid investigation.[63]

Yet in the face of all this circumstantial evidence, the Illinois courts have refused to grant Titone an evidentiary hearing or limited discovery to prove his allegations. At such a hearing Judge Maloney, Robert McGee and Bruce Roth would likely invoke their Fifth Amendment rights, allowing a trier of fact to infer an agreement from their refusal to speak.[64]

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59. *Id.*

60. Superseding Indictment, *U.S. v. Thomas J. Maloney, Robert McGee and William A. Swano*, 91 CONG. REC. 477 (June 25, 1991).

61. Affidavit of Assistant United States Attorney, Scott Mendeloff, at ¶ 5 (Oct. 12, 1994), *appended to* Fourth Amended Petition for Post-Conviction Relief, People v. Titone, No. 83-127 (Cook County Ill. Cir. Ct., Oct. 12, 1994).

62. Findings of Circuit Judge Earl Strayhorn, People v. Titone, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Sept. 7, 1990) (vacating Titone's death sentence).

63. Judge Maloney wanted to avoid deciding; if a jury decided, Judge Maloney could not be blamed for the result by either Titone or the federal investigators. Trying to induce Titone to opt for a sentencing jury was Maloney's way of balancing the threat of Titone going public against the threat of federal scrutiny.

64. Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (stating that in civil proceedings the Fifth Amendment does not forbid fact finders from drawing an adverse inference). If state courts continue to deny an evidentiary hearing, Titone should file a § 1983 or RICO suit against Judge Maloney—in part to force Judge Maloney in deposition to face the question of whether he or his bagman received money from Titone. Titone's ability to file a civil action now, however, may be hampered by the statute of limitations or by qualified judicial immunity.

III. WHEN SHOULD AN ACQUITTED PAYOR AVOID A NEW TRIAL?

The last section explored how courts should respond when a payor/defendant attacks a conviction because of judicial corruption, but prosecutors may have a parallel incentive to attack acquittals that are the product of judicial corruption. While the double jeopardy clause normally precludes an acquitted defendant from being retried for the same offense, Akhil Amar and Jonathan Marcus have suggested that a defendant who pays for an acquittal (pursuant to what I have called a pure bribe agreement) may not deserve the same constitutional protection.[65] Amar and Marcus consider the hypothetical of "a defendant on trial for murder bribes his jury and wins acquittal, and in a subsequent prosecution this bribery is proved beyond a reasonable doubt."[66] Judge Maloney's corrupt ways have forced an Illinois court to grapple with a very similar fact pattern.

In 1977, Thomas J. Maloney was not yet a judge, but he played a crucial role in brokering a corruption deal between his client Harry Aleman and Judge Frank Wilson.[67] Judge Wilson ultimately acquitted Aleman of murder charges in a bench trial.[68] Fifteen years later, the State reindicted Aleman for the same murder. In response to Aleman's motion to dismiss the indictment, the State argued that double jeopardy was inapplicable because Aleman had paid Judge Wilson $10,000 to acquit him.[69]

In this subsequent proceeding, the trial court found beyond a reasonable doubt that Judge Wilson had been bribed during the 1977 trial. The court refused to dismiss the second indictment and an Illinois appellate court affirmed.[70] In what it characterized as being an issue of first impression,[71] the appellate court adopted without citation the basic argument of Amar and Marcus (published a year earlier in the Columbia Law Review)[72]—holding that Aleman could be retried.

Amar and Marcus suggest that a bribery exception to the double jeopardy clause might be grounded in part on the concept of risk:

> If the jury was bribed, the defendant was never truly in jeopardy. The fix was in, and *he ran no risk*, suffered no jeopardy—from the French jeu-perdre, a game that one might lose, and the Middle English iuparti, an uncertain game. On this theory, a second trial would

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65. Amar & Marcus, *supra* note 52, at 54-57.
66. *Id.* at 55.
67. Maloney was Aleman's counsel when the agreement with Judge Wilson was struck and Maloney subsequently withdrew from the case at Judge Wilson's request because the two were such close friends that Judge Wilson did not want to show favoritism in a case in which Maloney was the defense attorney. *Id.* at 3.
68. *See* People v. Aleman, 667 N.E.2d 615, 619 (Ill. App. Ct. 1996).
69. *Aleman*, 667 N.E.2d at 617.
70. *Id.* at 627.
71. The court noted: "No case has been cited by Aleman or the State involving the application of double jeopardy principles to circumstances presented here: the alleged bribery of a judge resulting in acquittal of a defendant who the state seeks to retry for the same offense." *Id.* at 623.
72. Amar & Marcus, *supra* note 52. Amar tells me that he also informally advised the prosecutor in the case.

> truly put defendant in jeopardy not "twice" but only once, in keeping with the textual command.[73]

The *Aleman* decision similarly emphasized risk: "Of particular importance here is that '*[j]eopardy denotes risk*. In the constitutional sense, *jeopardy describes the risk* that is traditionally associated with a criminal prosecution.'"[74] The court ultimately concluded:

> Given [the defendant's] involvement in the bribery of Judge Wilson in order to procure an acquittal in his 1977 murder trial, we conclude that Aleman clearly was not subject to the risk normally associated with a criminal prosecution. The principles of double jeopardy do not bar the instant reindictment and reprosecution.[75]

The Court seems to reason that once the judge was paid there was no risk of conviction.

But this reasoning is flawed for two reasons. First, both the appellate court and Amar and Marcus ignore the possibility of extortion. If the agreement concerned pure extortion, then full performance of the agreement would have exposed the defendant to exactly the same risk that would have been "normally associated with a criminal prosecution." Accordingly, there should not be a double jeopardy exception with regard to pure extortion agreements.

The *Aleman* opinion cites to enough testimony to suggest that the substantive consideration for the $10,000 was at least in part bribery (a promise to acquit regardless of the evidence).[76] But as argued previously, there are strong structural reasons to expect that extortion agreements will often be combined with bribery agreements. The court's failure to mention the relevance of extortion (in subjecting defendant to risk of conviction) suggests that they did not consider this possibility in undertaking its fact finding.

Second, the court's (and the authors') risk reasoning is flawed because it does not consider the defendant's risk of "diverting" or "retaliatory" convictions. Even if the substantive agreement was a pure bribe or a combination of bribery and extortion, the defendant risked conviction because the judge might breach the agreement "in order to cover up and conceal original payments of the bribe"[77] or to retaliate against a perceived breach on the part of the defendant. Judge Maloney's later reaction to the Operation Greylord investigation vividly illustrates how a judge who has promised (and been paid) to acquit might nonetheless convict in order to divert third-party scrutiny. These are not just the allegations of Dino Titone, but parallel allegations were proven be-

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73. *Id.* at 55 (footnotes omitted) (emphasis added).

74. *Aleman*, 667 N.E.2d at 624 (emphasis in original) (quoting Breed v. Jones, 421 U.S. 519, 528 (1975)). The court similarly concluded for double jeopardy to apply "that a defendant must be 'subjected to the hazards of trial and possible conviction.'" *Id.* at 624 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

75. *Id.* at 626.

76. For example, before his initial trial, Aleman had told Vincent Rizza (a former Chicago police officer and bookmaker) that "his murder indictment 'was all taken care of,' and that 'committing murder in Chicago was okay if you killed the right people.'" *Id.* at 618.

77. Ruling on Petitioners' Motion for Post-Conviction Relief, at 5, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651.

yond a reasonable doubt at Judge Maloney's criminal trial with regard to Maloney's conviction of Earl Hawkins and Nathson Fields.[78]

Moreover, the risk of a "retaliatory" or "disgruntled" conviction can be found in the *Aleman*'s decision own description of Judge Wilson's conversations with Robert Cooley, a lawyer for "the mob in Chicago" who had personally negotiated the initial $10,000 deal:

> On the second day of trial, Judge Wilson and Cooley met. Wilson was very upset and voiced his concern that the case was not as weak as Cooley had initially represented. . . . Cooley met Wilson again. Wilson was even more upset this time because the prosecutors had informed him that a witness was receiving $10,000 for testifying falsely. Wilson was amazed that he was only receiving $10,000 although he was a "full circuit judge." Wilson explained that he may lose his job and asserted, "that's all I get is ten thousand dollars? I think I deserve more." Wilson blamed Cooley because he would receive "all kinds of heat" for this trial. He again requested more bribe money. Cooley told Wilson he would see what he could do.[79]

Even though the court found that "Wilson never expressed any intention not to fulfill his end of the deal,"[80] the judge's repeated concern and upset and his repeated attempts to bargain for more money (especially after learning that a mere witness was being paid the same amount) created a risk that Wilson might have convicted the defendant notwithstanding the agreement.[81]

A closer look at the facts suggests that bribery is far from a sure thing. Even though Amar and Marcus imagine that when the "fix was in, [a defendant] ran no risk,"[82] Chicago's unhappy history of corruption teaches, there are unlikely to be easy "no risk" cases to fit a double jeopardy exception. Instead, courts will need to grapple with how much risk and what kinds of risk are sufficient to put a defendant in jeopardy.[83]

Indeed, Amar and Marcus might respond that the risk of "retaliatory" or

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78. *Id.*; United States v. Maloney, 71 F.3d 645, 656-57 (7th Cir. 1995).

79. *Aleman*, 667 N.E.2d at 619.

80. *Id.*

81. If the agreement had been a sale of goods, there would be a sufficient risk of Wilson's non-performance that Aleman would have reasonable grounds for seeking additional assurances. U.C.C. § 2-608 (1994).

82. Amar & Marcus, *supra* note 52, at 55.

83. David Rudstein has previously argued that bribery does not eliminate the risk of conviction:

> [A] judge bribed by the defendant in a bench trial might change his mind after the start of the trial, return the bribe money, and, after hearing all the evidence, convict her. Or the judge might double-cross the accused and convict her while keeping the bribe money. . . . In none of these situations can it be argued that, because the defendant paid off the judge . . . prior to her trial, she was never in "jeopardy" at her trial. For she in fact was convicted. . . . Thus, even in a case in which the defendant bribed the judge in a bench trial, one or more jurors, or the prosecutor, she still runs the risk—albeit a reduced one—of being convicted.

David S. Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 MO. L. REV. 607, 639-40 (1995). Rudstein backs up his analysis, of course, by discussing Judge Maloney's willingness to convict and sentence to death defendants who had paid him money. *Id.* at 640 n.136.

"diverting" conviction does not count as a double jeopardy risk because only the risk of conviction at a fair trial counts in the constitutional calculus. For example, in discussing race-stacking, the authors suggest that "a stacked jury is, constitutionally speaking, no jury; its acquittal, no acquittal; and so defendant . . . was never constitutionally in jeopardy."[84]

This argument, however, ignores the realities of the last section. Defendants like Aleman not only ran the risk of initial conviction, but they ran the substantial risk that any conviction would be affirmed on appeal.[85] In the current world, a convicted defendant in Illinois has virtually no chance of winning even an evidentiary hearing or limited discovery to establish that her judge had received money. Regardless of what Amar and Marcus have in mind as minimal requisites for a fair trial, Illinois courts are currently likely to affirm convictions where a judge has taken money.[86]

Our assessment of whether Aleman was at risk in this initial trial must then turn not only on the likelihood of his being convicted at trial, but also on the likelihood that appellate courts would affirm when confronted with allegations that the judge had taken money. If Illinois changed its current law and began automatically granting new trials where paying defendants were convicted (as suggested in the previous section), there would be a much stronger case for a bribery exception to the double jeopardy rule—that is granting new trials where paying defendants are acquitted.[87]

The Illinois court's disparate treatment of the "convicted payor" and the "acquitted payor" problem is dramatically shown in the following passage from *Aleman* in which the court asks: "[Was the defendant] not subjected to 'the risk that is traditionally associated with a criminal prosecution'? The answer must be in the affirmative considering analogous circumstances."[88] The analogous circumstances to which the *Aleman* court is referring are the pecuniary interests cases discussed above—including *Lavoie* and *Tumey*.[89]

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84. Amar & Marcus, *supra* note 52, at 56.

85. It is inconsistent to treat corrupt acquittals as a nullity when corrupt convictions are treated as being valid.

86. As Rudstein has noted:

> [N]o appellate court would accept the claim by the defendant that her conviction should be reversed because a crooked judge, a corrupt juror, or a dishonest prosecutor failed to keep his end of the bargain and acquit her, vote to acquit her, or present a weak case against her, respectively.

Id. at 640.

87. Defendants would still run the risk that after being convicted they would not be able to prove that the judge had been paid.

88. *Aleman*, 667 N.E.2d at 624 (quoting Breed v. Jones, 421 U.S. 519, 528 (1975)).

89. The analogous circumstances are detailed in this annotated string citation that follows the passage quoted in the text:

> *See* Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (invalidating a judgment of the Alabama Supreme Court because a justice on that court was a party to a similar case pending in an Alabama trial court and, therefore, the judge's pecuniary interest in the outcome of the case required new proceedings); Breed v. Jones, 421 U.S. 519, 528 (1975) (where pecuniary interests of judges have been involved in the cases, the results must be invalidated); In re Murchison, 349 U.S. 133, 136 (1955) (recognizing that "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where

Bizarrely, these pro-defendant constitutional holdings are not sufficient to nullify Titone's conviction (or even assure him an evidentiary hearing) but they are sufficient to nullify Aleman's acquittal—notwithstanding the double jeopardy clause to the Illinois and United States constitutions.

Amar and Marcus, however, identify the defendant's malfeasance as a second possible basis for a bribery exception: "Call it what you will—estoppel, fraud, unclean hands, waiver, or forfeiture—the basic idea, rooted in general legal principles, is that defendant's own prior misconduct bars him from asserting a double jeopardy claim."[90] The authors admirably identify what is lurking below the surface of corruption cases. They explain that this line of argument "never gets to the Double Jeopardy Clause. It simply prevents a defendant from raising the issue."[91]

But as a normative matter, a defendant's prior misconduct by itself should not be sufficient to nullify the effect of an initial acquittal. First, it will often be difficult to determine the defendant's culpability. As emphasized above, judges will routinely insist on combining elements of bribery and extortion. A defendant who agrees to bribe as part and parcel of a deal to avoid unfair treatment is less culpable than the image of a pure briber that the *Aleman* court and Amar and Marcus have in mind. And at times it will be unclear whether the defendant or a third-party negotiated and paid the judge.[92]

To clarify the interaction of risk and estoppel, it is useful to consider two stylized hypotheticals. In the first, imagine that (unbeknownst to a defendant) the defendant's sibling enters into a pure bribe with a judge who subsequently acquits the defendant.[93] In the second, imagine a defendant who pays his lawyer to bribe the judge, but unbeknownst to the defendant the lawyer pockets the money and at a fair trial the defendant is acquitted. In the first case, there is no risk of conviction, but no defendant misconduct. In the second, there is defendant misconduct, but the normal risk of conviction. I cannot imagine a theory that would allow retrial under the second scenario.[94] Defendant misconduct may be a necessary condition for a bribery exception but it should not be a sufficient condition.

> he has an interest in the outcome"); Tumey v. Ohio, 273 U.S. 510, 521-32 (1927) (holding that defendant was entitled to a new trial where the trial judge received $12 by statute for each case which resulted in a conviction because "officers acting in a judicial . . . capacity are disqualified by their interest in the controversy to be decided . . .").

Id. at 625-26 (parallel cites omitted).

90. Amar & Marcus, *supra* note 52, at 55.

91. *Id.*

92. In the *Aleman* case, there is some uncertainty about the extent to which Aleman, himself, knew about and/or participated in the judicial corruption. The opinion merely says that two "1st Ward figures Pat Marcy and John D'Arco, Sr." asked Robert Cooley ("a former Chicago police officer and an attorney") "if he 'had a judge at 26th Street who could handle or take care of a case.'" *Aleman*, 667 N.E.2d at 618. It was Cooley who negotiated the deal with Judge Wilson. Even the opinion indicates that Aleman had illegal dealings with Cooley and Aleman bragged that "his murder indictment 'was all taken care of.'" *Id.* It is not clear that Aleman instigated the deal or knew of it in advance.

93. Akhil Amar in private conversation suggested this line of argument.

94. I can imagine, however, prosecuting the defendant for the independent crime of attempted bribery.

In sum, like Amar and Marcus, I can imagine a narrow bribery exception to a defendant's normal double jeopardy protection that turns on a prosecutor proving not only that money was paid but that (a) the payment virtually eliminated the risk of conviction at the initial trial and that (b) defendant is culpable for this initial corruption. But corruption Chicago-style teaches that purchasing a judge does not guarantee acquittal. Particularly in jurisdictions that make it extremely difficult for convicted payors to receive new trials, we should make it extremely difficult for prosecutors to retry acquitted payors. Indeed, this section has shown that proving that a judge was paid falls far short of proving the defendant was culpable or not at risk. Given the grave difficulties involved in proving these elements, the Double Jeopardy Clause may be better served without admitting a bribery exception.

The acquitted payor and the convicted payor problems need to be answered together. Giving the convicted payor an absolute right to a new trial, while subjecting the acquitted payor to a relatively small risk of retrial might induce more defendants to try to bribe judges. But the social cost of the convicted payor rule is relatively small: an absolute right to a new trial will often only mean an absolute right to be convicted a second time. Barring reprosecutions of acquitted payors may more substantially increase defendants' incentives to bribe. Yet a rule making it difficult to reprosecute acquitted payors might also reduce judges' incentives to extort or accept bribes. An acquitted payor would have more freedom under such a rule to subsequently disclose the identity of corrupt judges. This is not to say that these proposed rules would not have predictable costs. It is only to suggest that the cost in increased corruption may not be as great as it initially appears.

IV. When Should a Convicted Non-Payor Receive a New Trial?

This section analyzes a much more difficult problem created by Judge Maloney's corruption—a problem with which Judge Posner recently grappled and for which the United Supreme Court has recently granted certiorari. In *Bracy v. Gramley*,[95] defendants who were convicted and sentenced to death by Judge Maloney sought a new trial because they did *not* have (nor did they ever discuss) a deal with Judge Maloney.[96] The defendants claimed that Judge Maloney had an incentive to convict defendants who did not pay him in order to (1) divert the attention of prosecutors and the electorate and (2) to create a reputation as a tough judge so as to more easily extort money from defendants who did pay.[97] At this point, it might be useful to point out that Judge Maloney sentenced more people to death than any other judge in Cook County.[98]

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95. Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996).

96. *Bracy*, 81 F.3d at 688.

97. *Id.*

98. An Assistant United States Attorney, Scott Mendeloff, described Maloney's reputation for ruthlessness:

> As a judge [Maloney] was tough and hard-nosed. . . . But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion.

In one sense, the *Bracy* defendants' claim is more sympathetic than Titone's because there is no possibility that they participated in a bribery conspiracy. The *Titone* and *Aleman* decisions show how defendants' misconduct might make courts less likely to grant them a new trial or more likely to grant the prosecutor a new trial. The *Bracy* facts put to the test whether a defendant's clean hands can lead to a more lenient judicial approach.

The case is difficult, however, because it leads to an all-or-nothing result for a potentially large class of defendants. Indeed, as Judge Posner observed while rejecting the defendants' claim, a rule of automatic reversal "would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes."[99]

While the case presents a difficult problem, Judge Posner's decision systematically minimizes the benefits and overstates the cost of granting relief. His rhetorical strategy makes a hard case seem implausibly easy. Posner minimizes the benefits of granting a new trial by arguing that it is unlikely that Judge Maloney would have unjustly convicted the defendant: "The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway."[100] It is striking to hear one of the parents of law and economics argue that incentives do not, on the margin, affect behavior.

And Judge Posner even questions whether Judge Maloney on net would have an incentive to unjustly convict:

> While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is *equally possible* that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take.[101]

> The only time there was compassion that we can see has to do with the times in which money was being passed.

Bracy, 81 F.3d at 700 n.1 (Rovner, J., dissenting) (quoting United States v. Thomas J. Maloney & Robert McGee, No. 91 CR 477, Sentencing Tr. 559-60 (N.D. Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff)).

99. *Id.* at 689. During oral argument, Justice O'Connor echoed this concern: "This judge handled 6,000 criminal cases. By [defendants'] standard, they are all out the window. We're talking about a lot of cases." Greenhouse, *supra* note 22, at 18.

100. *Bracy*, 81 F.3d at 689.

101. *Id.* at 689-90 (emphasis added). During oral argument before the Supreme Court, Justice Scalia has echoed Judge Posner's concern:

> Justice Antonin Scalia, who said that Mr. Bracy's case "rests on a series of assumptions that are not necessarily self-evident."
>
> Addressing Mr. Levy, the inmate's lawyer, Justice Scalia said he thought it just as likely that rather than punishing those who did not pay bribes, a judge taking bribes to favor some defendants would be lenient in other cases as well to avoid calling attention to his behavior.
>
> "He would look worse if he were a hanging judge in most cases and a bleeding heart in some," Justice Scalia said, adding: "The fact that he was dishonest when he was given money doesn't mean he was dishonest when he was not given money."

This cannot be true. On the margin, it would benefit Judge Maloney (financially, in avoiding prosecution, and in winning reelection) to decide all close or discretionary questions against such defendants.[102]

Finally, Judge Posner minimizes the benefits of granting new trials by assuming that such defendants are guilty: "[T]he automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness."[103] But given Judge Maloney's predisposition for corruption, how can Judge Posner be so sure that he would be "overturning the convictions of the guilty"?

Against the "abstract interests in procedural fairness," Judge Posner sees a parade of horrible consequences. As earlier quoted, Judge Posner imagines that thousands of cases would need to be reopened. But his analysis is inflated because many of the defendants would have served their complete sentence (or it might be possible to limit new trials to defendants convicted while Judge Maloney was known to be engaged in a pattern of corruption).[104]

Judge Posner also suggests that granting new trials in this case might require granting new trials for any defendant when the judge is facing reelection:

> The assumption underlying [defendants'] argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that any system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime.[105]

But as a doctrinal matter, it is easy to distinguish reelection bias from extortion bias. Judge Posner himself notes that courts entertain a general presump-

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Greenhouse, *supra* note 22, at 18.

102. As Judge Rovner observed:

> A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. . . . [I]f he wanted to cultivate a pro-prosecution record to protect his interests as a bribetaker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge. . . . In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses; improper prosecution argument to the jury; the denial of a continuance prior to the sentencing hearing; and the refusal to sever the sentencing hearings.

Bracy, 81 F.3d at 698-99, 701 n.3 (Rovner, J., dissenting).

103. *Id.* at 689.

104. However, given Maloney's willingness to broker corrupt deals as a lawyer in *Aleman*, Maloney's pattern of corruption may have extended through out his judicial tenure.

105. *Bracy*, 81 F.3d at 689.

tion that "judicial officers perform their duties faithfully."[106] Posner admits that this presumption is "obviously inapplicable" under the facts of *Bracy*, but it could still adequately distinguish reelection bias.

A more balanced assessment would admit the difficulty of the problem. It might be more consistent with general judicial bias precedents to grant new trials to any defendant convicted while a judge was engaged in a pattern of receiving money. But at a minimum, courts should vacate the most important discretionary decisions of Judge Maloney that disfavored defendants—in particular, sentences and bench trial convictions. Or one might place a burden on the prosecution to prove that there was such overwhelming evidence of guilt that any judicial misconduct was harmless. In any event, defendants convicted by Judge Maloney should automatically be given an evidentiary hearing and a right to ask Judge Maloney under oath whether his pattern of judicial corruption affected their case. Sadly, both the *Titone* and *Bracy* litigation show that victims of Judge Maloney's extortion rarely can convince Illinois courts that they have good cause to be permitted either discovery or an evidentiary hearing.

CONCLUSION

Thomas Maloney's malfeasance in a murder case provides a pragmatic lens through which to evaluate the three core problems of judicial corruption: concerning the convicted payor, the acquitted payor and the convicted nonpayor.[107]

In this paper I have presented a theory to substantively distinguish bribery and extortion, and suggested reasons why bribery will often be combined with extortion. However, this article's more important insights are not derived from theory, but from what can be learned from the judicial corruption unearthed by Operation Greylord: Defendants who paid judges still ran substantial risks of conviction. Judges used the continuing threat of conviction to renegotiate higher bribes (as in *Aleman*) and judges convicted to divert the Operation Greylord investigation (as in *Titone*, *Hawkins* and *Fields*).

These insights throw new light on the "convicted payor" and the "acquitted payor" problem. Understanding that a paid judge might convict notwithstanding the evidence diminishes our confidence in such convictions and strongly argues for granting such defendants new trials. It also suggests that retrying an acquitted payor does create double jeopardy problems because there is always some risk that a paid judge will convict notwithstanding the

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106. *Id.* at 688 (citing Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1372-73 (7th Cir. 1994)).

107. The three covered categories suggest a fourth problem of judicial corruption concerning acquitted non-payors: to wit, when can an acquitted non-payor be reprosecuted notwithstanding the Double Jeopardy Clause? While it would seem obvious that the correct answer should be "never," the logic of Judge Posner's *Bracy* opinion might suggest otherwise. If it is "equally possible" that a corrupt judge would avoid "creat[ing] a pattern of inconsistent rulings" by acquitting non-payors, *Bracy*, 81 F.3d at 689, then Posner might argue that prosecutors should have a right to attack the validity of acquittals not procured by payment. Hopefully readers can see that the errors in this argument further undermine the persuasiveness of Posner's original decision.

payment.

Dino Titone and Thomas Maloney are currently both in prison. Titone is awaiting resentencing on his murder conviction and has filed a subsequent post-conviction petition seeking a new trial based on additional compelling evidence of Judge Maloney's extortion. Judge Maloney is serving a 15-year sentence for his pattern of bribery and extortion.

In rejecting the claims in *Bracy*, Judge Posner said that the defendants' death sentences were legally irrelevant to the question of whether they should receive new trials: "The fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence."[108] Should our society be willing to execute someone where the convicting judge was paid money? There are strong reasons to believe that (1) there was agreement between Titone and Maloney; (2) the agreement involved elements of extortion;[109] and (3) Judge Maloney had reasons to convict Titone regardless of the evidence. I cannot fathom a justice system that would deny him an evidentiary hearing to prove these allegations and, if proven, grant him a new trial.

Judge Maloney is despicable. He repeatedly sold his office in death penalty cases for a pittance. It sickens me that I had to submit myself to his authority. Judge Maloney, where were you born?

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108. *Bracy*, 81 F.3d at 689.

109. Maloney's willingness to extort—backed up by his willingness to convict notwithstanding the evidence if he was not paid—is vividly illustrated in his treatment of lawyer William Swano. As described by Judge Rovner in her *Bracy* dissent:

> [T]he notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1985, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "the case was a not guilty in any courtroom in the building." United States v. Thomas J. Maloney and Robert McGee, No. 91 CR 477, Tr. 2528 (N.D. Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. . . . One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that would ensure bribes in future cases. . . . [F]ixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (*Bracy* Reply at 1).

Id. at 697 (Rovner, J., dissenting). While Judge Rovner acutely understands that Maloney used the *Davis* case to induce Swano to pay in future cases, she insists on referring to these payments as "bribes" instead of "extortion."

POSTSCRIPT

Good news. Since drafting the initial essay, subsequent decisions in *Bracy*, *Titone* and *Aleman* have moved toward more fully protecting defendants' constitutional right to an impartial judge.[110]

The Supreme Court reversed Judge Posner's *Bracy* opinion.[111] Justice Rehnquist writing for an unanimous court found Bracy had established "good cause" for discovery on his claim of actual bias.[112] The opinion left unanswered what Bracy would need to prove to win a new trial, but at the very least the court found the "Due Process Clause of the Fourteenth Amendment establishes a constitutional floor" for "a judge's qualifications to hear a case."[113] Justice Rehnquist emphasized that the petitioner had met his burden not only because "Maloney was shown to be thoroughly steeped in corruption," but also because petitioner had provided evidence suggesting "that Maloney was actually biased in petitioner's own case."[114] Thus, the opinion stops short of creating a per se discovery rule for any defendants convicted during Maloney's reign of corruption.

In response to the Supreme Court's decision in *Bracy*, Illinois Circuit Court Judge Earl Strayhorn decided to vacate Titone's murder conviction and grant a new trial.[115] Judge Strayhorn's decision is remarkable not only procedurally—because the judge granted Titone's motion on the papers without an evidentiary hearing—but also substantively. After quoting Judge Rovner's eloquent dissent in *Bracy*,[116] Judge Strayhorn expressed the disquiet the Titone case had caused him:

> I cannot truly articulate the pain that I have borne in listening to the horrible things that went on in this case in what is supposed to be a courtroom of law and justice. And no amount of procrastination on my part, no amount of reluctance on my part can wipe out the fact that under the circumstances that have been presented here what went on in that courtroom as to Dino Titone was not justice. And that Dino Titone did not receive the kind of a fair, impartial trial before a fair,

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110. Bracy v. Gramley, 117 S. Ct. 1793 (1997); People v. Titone, Circuit Court of Cook County, Ind. No. 83 C 127, Report of Proceedings heard before the Honorable Earl E. Strayhorn (July 25, 1997) [hereinafter *Titone Proceedings*]; United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997).

111. *Bracy*, 117 S. Ct. at 1796. I had overnight mailed a draft of this paper to each of the justices shortly before this opinion was announced.

112. *Id.*

113. *Id.* at 1797.

114. *Id.* at 1799.

115. *Titone Proceedings*, *supra* note 110.

116. The court in *Bracy* stated:

> No right is more fundamental to the notion of a fair trial than the right to an impartial judge. "The truth pronounced by Justinian more than a thousand years ago, that 'impartiality is the life of justice,' is just as valid today as it was then." The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

Bracy, 81 F.3d at 696 (Rovner, J., dissenting) (quoting United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976)).

> unbiased, impartial judge that his constitutional right as a citizen required.[117]

The State of Illinois in its wisdom has chosen not to appeal this decision and the parties are preparing for a new trial.[118] Judge Strayhorn's words capture the simple idea that we can no longer have confidence that convictions of paid judges are the product of the defendant's guilt and not instead some effort to divert suspicion or bargain for more money.

Finally, Harry Aleman's claim has for the first time been considered by a federal court. Judge Suzanne Conlan denied Aleman's petition for habeas corpus, thereby upholding his reprosecution.[119] But in so doing, the court at least acknowledged that paying a judge does not extinguish the risk of conviction:

> While Aleman did not completely eliminate the risk of conviction, Aleman dramatically and illegally altered the playing field on which the decision would be made. It is sufficient that "Aleman clearly was not subject to the risk normally associated with a criminal prosecution." Aleman II, 667 N.E.2d at 626. For that reason alone, jeopardy did not attach in Aleman's 1977 trial.[120]

While this decision represents an improvement over the previous court's risk analysis, the decision continues to ignore the possibility of pure extortion—which would have subjected the paying defendant to exactly the same risk "normally associated with a criminal prosecution." And Maloney's own response to the evolving Greylord investigation suggests that even bribing defendants may be subjected to a risk that is not only substantial, but possibly greater than that of a fair trial. The *Aleman* decision is much more defensible in a world where convicted payors, like Titone, are also retried—but still more attention needs to be given to assess the quantum and quality of risk to which the acquitted paying defendants are exposed.

The Supreme Court's *Bracy* opinion avoids the dreaded e-word. Bracy had explicitly argued that Maloney might have convicted non-payors notwithstanding the evidence in order both (1) to deflect suspicion that he was taking money in other cases and (2) to better extort money in other cases.[121] But Rehnquist could not bring himself to consider the second possibility. Even though there was substantial evidence that Maloney extorted money from defendants,[122] Rehnquist—like the judges in *Titone* and *Aleman*—could not conceive of the possibility that defendants would pay judges to avoid unfair treatment. Until we are willing to admit the possibility of extortion as well as bribery, we are unlikely to respond properly to the multifaceted problems of judicial corruption.

117. *Titone Proceedings, supra* note 110, at 12.

118. Conversation with Thomas Geraghty (Sept. 18, 1997).

119. United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997).

120. *Id.* at 1026 (citation omitted).

121. *See Bracy*, 81 F.3d at 697 (Rovner, J., dissenting).

122. *See supra* note 109.

THE "SOPHIE'S CHOICE" PARADOX AND THE DISCONTINUOUS SELF: TWO COMMENTS ON WERTHEIMER

JENNIFER GERARDA BROWN*

I. INTRODUCTION

In this Symposium,[1] Alan Wertheimer weighs some of the standard arguments for and against the enforceability of surrogacy contracts, the agreements through which women bind themselves to carry, give birth to, and then surrender children.[2] My response to Wertheimer is twofold. First, I will challenge what may be an underlying assumption of his argument, that increasing a person's menu of choices is always desirable. Second, I will challenge his assertion that a woman's preferences and identity throughout the process of pregnancy and childbirth are sufficiently static that her agreement to surrender the child—made prior to pregnancy—can bind her after the child is born.

First, I will address the desirability of choice. In his article on surrogacy, Wertheimer recites a "familiar response" to claims of coercion: "surrogacy offers women an additional option to their present menu of choices, and the addition of options to one's menu of choices is always freedom enhancing rather than coercive."[3] Wertheimer elaborates, "[i]f a woman can reasonably regard surrogacy as improving her overall welfare given that society has unjustly limited her options, it is arguable that it would be adding insult to injury to deny her that opportunity."[4] Thus, Wertheimer may implicitly adopt the assumption that runs through much of contract theory and economic analysis of law: that more choice is always good, and that increasing people's choices can never be undesirable. But this assumption may not be well-founded in all cases. For some people in a specific set of circumstances, choice may be undesirable. If this is true, the undesirability of choice may present a new and distinct rationale for restricting freedom of contact.

I will argue that under at least one set of circumstances—circumstances I will refer to as "Sophie's Choice" preferences—people might prefer one or all

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1. Symposium, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 875 (1997).

2. Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889 (1997) [hereinafter Wertheimer, *Remarks*]; Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997) [hereinafter Wertheimer, *Surrogacy*].

3. Wertheimer, *Surrogacy*, *supra* note 2, at 1221-22.

4. *Id.* at 1223.

of the available alternatives to a choice between those alternatives.[5] The possibility of "Sophie's Choice" preferences represents a distinct rationale for restricting freedom of choice, including freedom of contract.

In the second part of this article, I will respond to the comparison Wertheimer draws between childbirth and other life transformative processes, such as plastic surgery, abortion, or marriage. My critique of Wertheimer will be theoretical and empirical. Theoretically, I will argue that Wertheimer himself falls prey to what he calls the "fallacy of equivocation" when he discusses consent in these various contexts. The "consent" one gives to his examples of transformative processes—abortion, plastic surgery, sterilization, or sex change surgery—has a fundamentally different effect from that which he would give consent to surrogacy. In Wertheimer's examples, the consent merely insulates others from tort liability: even if the patient later regrets an abortion, for example, the doctor who performs it will be free of liability if the patient gave informed consent. But that consent, however well informed, could not be used to force the patient to go through with the abortion if, just before the procedure began, she had second thoughts. Consent that insulates from tort liability would not necessarily support an award of specific performance, and yet Wertheimer seems to argue that the two kinds of consent are not significantly distinct.

Empirically, I will argue that Wertheimer compares childbirth to inapposite examples of life transformative experiences. I will specifically explore the stability of identity throughout pregnancy and childbirth. It seems almost axiomatic that people can be contractually bound only if they or their agents bind them. I will argue that in the context of surrogacy, this bedrock principle of contract law may serve as a rationale for the voiding of the surrogacy contract at the mother's option. The process of carrying and giving birth to a child so fundamentally changes a woman—physically, emotionally, and socially—that her very identity may change. The woman who emerges from the labor and delivery room is in a real way not the same woman who entered the surrogacy contract ten or more months before. Because of this discontinuity of identity, the prepregnant woman cannot bind the mother.

II. THE SOPHIE'S CHOICE PARADOX

To explain the dynamic I am labeling "Sophie's Choice," I will describe the paradox, beginning with its original context, William Styron's *Sophie's Choice*. I will explain why the Sophie's Choice paradox is distinguishable from other rationales for limiting choice. Finally, I will explore potential causes and implications of the paradox.

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5. I name these situations "Sophie's Choice" in honor of the William Styron novel by that title. WILLIAM STYRON, SOPHIE'S CHOICE (1966).

A. *Sophie's Choice: The Basic Definition*

The classic example of a person for whom choice was not desirable—for whom, indeed, being given a choice caused continuing agony for the rest of her life—is the character of Sophie Zawistowska in William Styron's novel, *Sophie's Choice.* I could not possibly paraphrase the novel without losing the power of Styron's insight, and thus I will quote at length the scene which gives rise to the novel's title. Sophie has just been transported to Auschwitz with her young children, Jan and Eva. The scene unfolds as she stands with the children on the train platform undergoing "selection," in which a doctor will decide whether she and the children should be immediately sent to gas chambers or kept in the camp for slave labor:

> But here she was, and here was the doctor . . . .She sensed from his manner, his gaze—the new look in his eye of luminous intensity—that everything she was saying, far from helping her, from protecting her, was leading somehow to her swift undoing. She thought: Let me be struck dumb.
>
> The doctor was a little unsteady on his feet. He leaned over for a moment to an enlisted underling with a clipboard and murmured something, meanwhile absorbedly picking his nose. Eva, pressing heavily against Sophie's leg, began to cry. "So you believe in Christ the Redeemer?" the doctor said in a thick-tongued but oddly abstract voice, like that of a lecturer examining the delicately shaded facet of a proposition in logic. Then he said something which for an instant was totally mystifying: "Did He not say, 'Suffer the little children to come unto Me'?" He turned back to her, moving with the twitchy methodicalness of a drunk.
>
> Sophie, with an inanity poised on her tongue and choked with fear, was about to attempt a reply when the doctor said, "You may keep one of your children."
>
> "*Bitte?*" said Sophie.
>
> "You may keep one of your children," he repeated. "The other one will have to go. Which one will you keep?"
>
> "You mean, I have to choose?"
>
> "You're a Polack, not a Yid. That gives you a privilege—a choice."
>
> Her thought processes dwindled, ceased. Then she felt her legs crumble. "I can't choose! I can't choose!" She began to scream. Oh how she recalled her own screams! Tormented angels never screeched so loudly above hell's pandemonium. "*Ich Kann nicht wählen!*" she screamed.
>
> The doctor was aware of unwanted attention. "Shut up!" he ordered. "Hurry now and choose. Choose, goddamnit, or I'll send them both over there. Quick!"
>
> She could not believe any of this. She could not believe that she was now kneeling on the hurtful, abrading concrete, drawing her

children toward her so smotheringly tight that she felt that their flesh might be engrafted to hers even through layers of clothes. Her disbelief was total, deranged. It was disbelief reflected in the eyes of the gaunt, waxy-skinned young Rottenführer, the doctor's aide, to whom she inexplicably found herself looking upward in supplication. He appeared stunned, and he returned her gaze with a wide-eyed baffled expression, as if to say: I can't understand this either.

"Don't make me choose," she heard herself plead in a whisper, "I can't choose."

"Send them both over there, then," the doctor said to the aide, "*nach links*."

"Mama!" She heard Eva's thin but soaring cry at the instant that she thrust the child away from her and rose from the concrete with a clumsy stumbling motion. "Take the baby!" she called out. "Take my little girl!"

At this point the aide—with a careful gentleness that Sophie would try without success to forget—tugged at Eva's hand and led her away into the waiting legion of the damned. She would forever retain a dim impression that the child had continued to look back, beseeching. But because she was now almost completely blinded by salty, thick, copious tears she was spared whatever expression Eva wore, and she was always grateful for that. For in the bleakest honesty of her heart she knew that she would never have been able to tolerate it, driven nearly mad as she was by her last glimpse of that vanishing small form.[6]

For purposes of discussion in this article, I will abstract away from the specific facts of Sophie's fictional choice[7] in an attempt to capture the paradoxical nature of her situation, a paradox that might be repeated in other situations presenting a "choice" to contracting parties. Excluding some elements of Styron's formulation from the analysis might give rise to other perversities, and a more general definition of the paradox helps to identify the core preferences or elements that would justify restricting freedom of contract.

In the novel, Sophie really had three alternatives. She could remain silent, she could surrender her boy, or she could offer the girl to be killed. The default was that both children would be killed, so that inaction or silence meant death for both the boy and girl (see Figure One). This default had a decision-forcing quality,[8] because it clearly appeared to be worse than either of the

6. *Id.* at 482-84.

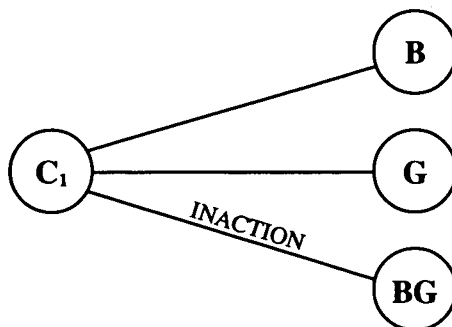
7. Carol Sanger has suggested that this was not a "choice" at all. *See* Carol Sanger, *Separating From Children*, 96 COLUM. L. REV. 375, 426 (1996) (citing Holocaust historian Lawrence Langer, who refers to this as a "choiceless choice").

8. Ian Ayres and Robert Gertner would describe this as a "penalty default." They argue that such penalty defaults can be efficient, because they induce parties to contract for arrangements that are better tailored to their relationship (than either a penalty or neutral default would be). Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989). Algebraically, Ayres & Gertner conceive the order of choices PD < D < NP where PD is the value of the penalty default to the parties, D is the value that an

alternatives Sophie was being asked to choose between. In other words, Sophie would clearly prefer to have only one of her children killed rather than losing both of them to Birkenau's gas chambers. To begin with let us assume that she loved her children equally. In such as case, we could present Sophie's initial preferences as BG < B = G, where BG represents the death of both children, B is the death of the boy and G is the death of the girl.

FIGURE ONE

ORIGINAL SOPHIE'S CHOICE (INACTION = BG)[9]



But so far we have ignored Sophie's preferences about choosing. The motive force behind the narrative—indeed the element that makes the doctor's "offer" so evil—is that Sophie wants not to choose between her children. That choice might prove so painful, in fact, that she would rather someone else decide which of her children should live or die. Algebraically, one might express Sophie's preferences as BG < C < B = G, where C is the choice between children. This arrangement of preferences would give rise to what I will call a "weak form" Sophie's Choice paradox. In the "weak form" of the paradox, Sophie prefers one of the alternatives to having a choice between the alternatives. Or to put it another way, Sophie values the choice between alternatives less than at least one of the alternatives available to her.

If the choice between children proves sufficiently painful, Sophie might even prefer that the doctor simply kill both of her children rather than force her to choose between them. She might prefer, in other words, that the deci-

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ordinary default might have, and NP is the value of a negotiated provision. *Id.* When these are the parties' valuations and the penalty default induces negotiation where an ordinary default would not, it can be value maximizing. *Id.* Sophie's Choice may give some basis for questioning Ayres and Gertner's enthusiasm for penalty defaults, however, because it provides at least one example in which the equivalent of NP—that is, the exercise of choice—will hold less value than an ordinary default would. The situation created by the penalty default under such circumstances, then, will not necessarily enhance value, because it may force negotiation/choice in circumstances where NP < D. If the default were more neutral, exacting no special penalty (e.g., boy or girl dies, but not both), Sophie might not feel as pressured to choose and would be spared some of the disutility that accompanies choice.

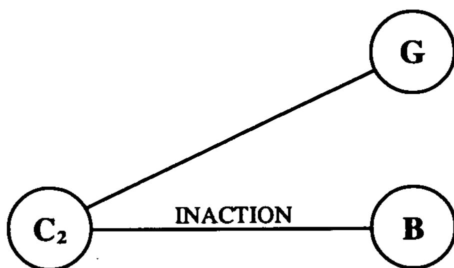
9. Figure One represents Sophie's choice in game theoretic terms, where Sophie can choose her son to die ("B"), choose her daughter to die ("G"), or refuse to choose, in which case her inaction will lead to the death of both children ("BG").

sion be completely taken from her hands. When a person prefers all of the proffered alternatives to being given a choice between those alternatives, the situation gives rise to what I will call a "strong form" Sophie's Choice paradox. The algebraic expression of such preference arrangement is as follows: $C < BG < B = G$.

A slight alteration of Styron's facts eliminates the decision-forcing quality of the status quo default and might create a strong form Sophie's Choice paradox. The altered version demonstrates that the existence of a Sophie's Choice paradox does not turn on the presentation of a penalty default. In this scenario, the doctor says that he will kill Sophie's son, but she can save his life if she allows the doctor instead to kill her daughter (see Figure Two). In this formulation, one child (but only one child) will die either way. Sophie may have no clear preference as between her children (so that being given the choice to kill the daughter instead of the son gives her no value).[10] Substantively, then, the choice is not more valuable than the status quo default. Procedurally, however, she suffers more if forced to choose than if the doctor simply kills one or the other of her children. Algebraically, this formulation looks like this: $C_2 < B = G$.

FIGURE TWO

MODIFIED SOPHIE'S CHOICE (INACTION = B)[11]



Of course, the choice that Styron writes about and the choice given Sophie in the altered version are not the same. If we label the Styron version C_1 and the altered version C_2, it may be that $C_1 \leq C_2$, because silence in the face of C_2 will not result in clearly greater harm than articulating a choice (thus giving Sophie the chance to avoid responsibility by remaining silent), while silence in the face of C_1 will cause greater harm than choosing (silence will cause both children to die). This makes the abdication of responsibility through silence a less viable alternative in C_1. But the fact that Sophie would probably prefer C_2 to C_1 certainly does not mean that she would prefer C_2 to the status quo.

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10. It is also possible that Sophie does prefer one child over the other, and I explore this possibility below. *See infra* Part II.B.2.

11. Figure Two represents the altered form of Sophie's choice, where Sophie can choose between inaction, where her son dies ("B"), or her daughter dies ("G").

I draw the distinction between the strong and weak form Sophie's Choice paradox because a public policy response to the paradox will be easier with the strong form than with the weak. In cases where people have strong form preferences, it will be easy for policymakers to forge a value-enhancing rule. Even flipping a coin between the alternatives will increase value, since people prefer any alternative to choosing between alternatives. If people have weak form preferences, on the other hand, policymakers face the more difficult task of determining which among the alternatives is preferred over choice. Policymakers will improve people's situations only by selecting the right alternative as the default, not by simply eliminating the choice. If they choose badly, policymakers can leave people worse off by eliminating choice. The distinction between the strong and weak forms of the paradox is also useful because it suggests minimal requirements for some governmental intervention. The strong form makes the case for intervention easy. If people have only weak form preferences in a given situation, governmental intervention might still be a good idea, but a little trickier.

The altered version of Sophie's Choice allows us to highlight the core of the paradox: someone may prefer any alternative to actually having a choice between alternatives. This paradox flies in the face of most economic theory and upsets the general view that choices are freedom-enhancing and therefore desirable.[12]

B. *Other Examples*

But does the Sophie's Choice paradox arise in the real world? I will explore this issue further below, but consider as an initial example the situation that arose when the state of California began to permit people given the death penalty to choose the mode of execution. The state gave inmates this choice in response to claims that the death penalty was cruel and unusual punishment. It is possible, of course, that giving condemned inmates a choice between punishments did make the punishment less cruel.[13] But it is also possible that forcing people to decide the mode of their own killing added another layer of suffering to the process.

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12. There may be a final element of the paradox that requires clarification here. Unlike some other examples of coercion discussed in this Symposium, *see, e.g.*, Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231 (1997), the person proposing the alternatives should remain constant, and should always be the doctor. We would not expect to hear Sophie speak first, offering her daughter to be killed if the doctor will only spare her son. If Sophie were to make such an offer, our intuition likely would not be that she was coerced, and the making of such an offer would also dispel the sense that is central to the paradox—the conclusion that less choice is better than more. In this sense, Sophie's situation is distinguishable from examples in which an extortion victim offers, "please let me pay you $100 to forego hitting me," and the offer is consistent with the conclusion that the person is nonetheless a victim of extortion.

13. Robert Alton Harris brought the court challenge that ultimately permitted him to choose the mode of his execution. This argument that choice can hurt inmates might be in some tension with a more general sense that inmates (like the Nuremburg defendants) "cheat the executioner" by committing suicide—exercising the ultimate power over their own deaths. It may be too difficult to discern whether a particular inmate is one who would be harmed or helped by receiving a choice about how to die.

Wertheimer himself suggests another situation in which the Sophie's Choice paradox might obtain. In "Norplant," a judge tells a convicted defendant that she will receive probation for her drug offense but only if she allows a doctor to implant the contraceptive Norplant in her arm.[14] The hypothetical may present a Sophie's Choice situation because the defendant in Norplant might prefer not to choose between liberty and fertility.[15]

In other contexts, courts have certainly recognized that some choices are simply too painful to be tolerated, even if they do expand the range of options from an initial status quo. For example, an employer could not legally force employees to "choose" between job benefits and observing religious regulations, such as the prohibition against work on Saturdays imposed by Seventh Day Adventists.[16] The concept of "unconstitutional conditions" may also be based in part upon the underlying premise that some choices ought not to be given to people.[17]

C. *What Sophie's Choice is Not*

My thesis is that the Sophie's Choice paradox presents a new and independent basis for restricting freedom of choice, including freedom of contract. In this section, I will discuss and distinguish seven other traditional rationales for restricting freedom of choice.

1. Sophie's Choice does not require the presentation of a penalty default.

Despite the fact that Styron presented it that way, the paradox of Sophie's Choice does not turn on the existence of a penalty default. As we saw above in the version of the facts slightly altered from Styron's narrative, Sophie would prefer not to choose between her children even (perhaps especially) if the status quo is that only one rather than both of the children must die. Thus, the paradox does not depend upon an agent making the undesirable choice in order to avoid a more costly alternative.

2. Sophie's Choice does not require an immoral baseline.

Again, despite the fact that Styron presented it this way, the paradox does not turn on the status quo being immoral. The novel is particularly dramatic because the status quo there did not stem from a "moralized baseline," in the words of Alan Wertheimer.[18] Sophie's moralized baseline would dictate that neither child should die. In the novel, then, both the status quo and the

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14. Wertheimer, *Remarks*, *supra* note 2, at 896.

15. For a "real world" case that closely resembles the Norplant hypothetical, see *Man Accused of Missing Vasectomy*, NEW HAVEN REG., March 25, 1997, at A11 (25 year-old defendant pled guilty to lewd and lascivious conduct because he impregnated a 15 year-old girl; he served a year in jail and agreed to have a vasectomy within 90 days as a condition of probation; after an unsuccessful attempt to have the vasectomy agreement dropped, he refused to go through with it and now faces 17 years in prison if a judge decides he violated the terms of his probation).

16. Sherbert v. Verner, 374 U.S. 398, 410 (1963).

17. William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989).

18. Wertheimer, *Remarks*, *supra* note 2, at 900.

doctor's proposal are clearly worse than her moralized baseline. But even in cases where the status quo is moral, a person might still prefer not to choose between that status quo and a proposed alternative.

For example, in Wertheimer's Norplant example,[19] the judge can legitimately sentence the convicted drug offender to a prison term. The defendant can avoid incarceration by submitting to the implantation of Norplant. The Norplant example is distinguishable from Styron's version of Sophie's Choice because the status quo (imposing a prison term) is moral, but the hypothetical illustrates that the Sophie's Choice paradox can exist even without an immoral baseline.

Sometimes a Sophie's Choice situation could be created by nature. Suppose that the Titanic is sinking and that Sophie and her children are passengers. Sophie is needed on a lifeboat because she has certain navigational skills that her fellow passengers value, but the lifeboat has room for only one more person, and Sophie is asked to choose which of her children to include. Nature—rather than the law or the humans who write it—has created the situation presenting this choice. But even when the choice is not created by people, Sophie might prefer not to choose. Situations giving rise to the Sophie's Choice paradox can be caused by good, bad, or no law.[20]

3. Sophie's Choice does not turn on whether the alternative are framed as gains or losses.

The paradox does not require a choice between unpalatable alternatives. We might imagine a situation in which a choice between positive, desirable alternatives might also raise problems. Suppose that a family with two children—a boy and a girl—were to receive a grant that would finance one child's college education, but only at Harvard. At a time when Harvard would admit only men, it would be clear that the son would receive the money. But when Harvard becomes coeducational, the situation may present a painful choice. The parent might prefer the days of single sex education where no choice was necessary, or she might prefer that a third party simply decide for her.

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19. *Id.* at 896.

20. Wertheimer has suggested that the presence of an immoral benchmark can distinguish threats from offers. Robert Nozick says that threats and offers can be distinguished by asking whether the person would choose to have the choice presented:

> the crucial difference between acting because of an offer and acting because of a threat vis a vis whose choice it is, etc., is that in one case (the offer case) the Rational Man is normally willing to move or be moved from the presituation to the situation itself, whereas in the other case (the threat case) he is not. Put baldly and too simply, the Rational Man would normally (be willing to) choose to make the choice among the alternatives facing him in the offer situation, whereas normally he would not (be willing to) choose to make the choice among the alternatives facing him in the threat situation.

Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 459 (1969).

Sophie's Choice defies both of these formulations. The presentation of alternatives may be coming from a moral benchmark (an offer according to Wertheimer), but the person might prefer not to have the choice (a threat in Nozick's view). In this way, the Sophie's Choice paradox complicates the distinction between threats and offers.

4. Sophie's Choice does not require that the choice create externalities.

Although the presence of externalities is a common rationale for restricting freedom of contract, the Sophie's Choice paradox suggests that we might want to restrict choice even in the absence of externalities. The alternatives presented need not hurt others outside the contracting relationship. The paradox arises because of the pain of choosing, and those costs are internalized to the chooser.[21]

5. Sophie's Choice does not require that the chooser's preferences be suspect.

A traditional rationale for restricting freedom of choice is paternalism: a belief that the government may know better than individuals what is good for them. But the Sophie's Choice paradox does not require that we fear the offeree will make the wrong choice, that she might choose the proposed alternative rather than the default despite its lower value to her.

The government might paternalistically choose for people when the outcomes of various choices are so uncertain that people are disabled from making the choices themselves.[22] But the Sophie's Choice paradox can arise even in situations where outcomes are certain. Even when outcomes are certain and people's preferences are respectable, they might prefer not to choose between proffered alternatives.

6. Sophie's Choice does not turn on the existence of unstable preferences.

Another form of hand-tying occurs in the presence of dynamically unstable preferences. In the classic (and most literal) case of hand-tying, Ulysses fears there will be a time in the future when his preferences will change, that he will be tempted by the Sirens in ways he now knows will be destructive. His present self wants to tie the hands of the future self because he does not trust his future self to have his long-term interests at heart. Jon Elster explains that "binding oneself is a privileged way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means."[23]

But the preferences of Sophie and those who stand in her shoes can be stable for eternity. The pain of the paradox does not turn on instability of preferences, but on being forced to choose something. Sophie might want to tie her own hands, but not to prevent a bad choice by a future self, because

21. This may not be entirely true. It may be the fear of causing such horrible externalities—harming one or the other child, and knowing that the doomed child can have no say in the decision—that causes a good bit of Sophie's pain in choosing. Less classic formulations of the paradox, such as the Norplant example, present fewer if any externalities, because the person making the choice is the one who will absorb all the costs and benefits of the choice. Here again, however, some of the pain of choosing may be caused by a recognition of externalities, as might arise if the defendant were married to someone who badly wanted to have a baby.

22. Gerald Dworkin has argued that "if one is faced with the two doors behind which are the famous lady and the tiger, one does not want one's choices increased by adding three more doors behind all of which are tigers. We are only concerned with options, each of which is known to the chooser." GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 65 (1988).

23. JON ELSTER, ULYSSES AND THE SIRENS 37 (1979).

she has no reason to think her future self would choose any differently from her present self. Rather, she might want to tie her hands to avoid having to make a choice altogether.[24] Sophie's Choice is therefore distinguishable from regret. In the case of Sophie's Choice, the only regret is that she had to choose, not the actual choice she made.[25] This is not the Ulysses problem, because the chooser's preferences are stable.[26]

7. Sophie's Choice does turn on the elimination of options as a precommitment device.

The Sophie's Choice paradox should be distinguished from situations in which people seek to increase leverage in negotiation by tying their own hands. Tom Schelling has suggested that negotiators might restrict their own choices in order to affect the behavior of others.[27] By precommitting to third parties, for example, a negotiator can tie his own hands to prevent deviations from those outside commitments. Hand-tying in the Schelling sense thus becomes a way of making true what the negotiator wants to be true (e.g., that he cannot pay more than a given amount for something), weakening the other party's ability to negotiate against this point.

This form of hand-tying—and the way it seeks to disempower the party from making a future choice—is distinguishable from Sophie's situation because it is a strategic move designed to elicit concessions from the other side. In Schelling's model, the negotiator ties her hands by precommitting to something that she clearly prefers (at least at the point of the hand-tying) to the concessions she might otherwise be forced to make. In Sophie's case, she might want to disable herself from making future choices, but she would do this merely to avoid a choice between the status quo and the proffered alternative that will be too painful to make, rather than to force concessions from the other side or to increase the likelihood that she will achieve a result she clearly prefers.

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24. But see *infra* notes 44-46 and accompanying text for a discussion of a second order Sophie's Choice problem.

25. One could therefore say that Sophie's regret is procedural rather than substantive.

26. While either shifting preferences or Sophie's Choice preferences might lead people to avoid choice, an example might reveal the strong relationship between them. As one story has it, someone tried once to bribe Abraham Lincoln. Lincoln dismissed the would be briber from his office, saying, "You're getting close to the price where I might say yes." Lincoln sent the person away before the offers became too tempting because Lincoln preferred not to have the choice between his integrity and a truly tempting offer. Perhaps Lincoln's case is merely one of shifting preferences. It is also possible, however, that Lincoln valued his integrity and the bribe money, and sending the man out of his office was a way of saying that he valued the choice between them less than he valued either. As Lincoln did in this story, people may follow a strategy of hand-tying to avoid Sophie's Choice situations. Such a strategy will not always be effective, however.

27. The metaphor Schelling presents to illustrate hand tying is of two trucks driving toward each other on a narrow road. One will have to pull off the road to let the other pass. If one truck driver—in plain view of the other—removes his steering wheel and throws it out the window, he sends a message to the other that he is powerless to pull over. Provided the other driver does not follow the same tactic, this form of hand-tying may be effective to force the other side to make a concession. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960). In Sophie's Choice situations, choosing not to choose will not always solve the problem, because inaction will have a certain substantive outcome that itself becomes a choice. *See infra* note 40.

D. *Possible Causes of the Sophie's Choice Paradox*

The Sophie's Choice paradox could arise from a number of causes. Understanding the possible causes of the paradox is important because the legal and nonlegal response could turn on our beliefs about the dynamic underlying the paradox. The possible causes of the paradox appear to be threefold: first, the costs of commensurating may be too high for some people, so that choosing between things is prohibitively difficult; second, people may know that they value alternatives equally and the pain of choosing comes from treating equals differently; third, choice may be undesirable for people who cannot or will not take responsibility for their decisions.

1. Incommensurability

Sophie's Choice may be caused by the fact that the chooser does not know whether she prefers the proposal to the status quo. The costs of commensuration—that is, of comparing the values of the options—are very high.[28] The chooser does know, however, that both alternatives are crucially important and she does not want to give up the more valued thing. Opportunity costs loom large as she starts to choose either option.[29]

This difficulty in sorting preferences has also been noted by Gerald Dworkin.[30] He in turn quotes at length a passage by Tibor Scitovsky:

> If, beginning with a situation in which only one kind of shirt were available, a man was transposed to another in which ten different kinds were offered to him, including the old kind, he could of course continue to buy the old kind of shirt. But it does not follow that, if he elects to do this, he is no worse off in the new situation. In the first place, he is aware that he is now *rejecting* nine different kinds of shirts whose qualities he has not compared. The decision to ignore the other nine shirts is itself a cost.[31]

This overload of alternatives leads, Dworkin argues, to what Kierkegaard called the "despair of possibility": in it "the soul goes astray in possibility."[32]

2. Treating Equals Differently

It is also possible that the pain of Sophie's Choice stems from its requirement that the chooser treat equals differently. Sophie might recoil from choosing between her children not so much because their relative values are hard to

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28. *See* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 799 (1994) (Sophie's dilemma "is tragic partly because the two lives are not fungible").

29. This concept is similar to Guido Calabresi's theory of "tragic choices." GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 24-26 (1978).

30. DWORKIN, *supra* note 22, at 72 (stating that "the possibility of increased choices can affect (for the worse) the original situation").

31. TIBOR SCITOVSKY, THE JOYLESS ECONOMY 98 (1976) (quoted in DWORKIN, *supra* note 22, at 72).

32. SOREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 169 (Walter Lowrie trans., 2d ed. 1954) (1843) (quoted in DWORKIN, *supra* note 22, at 73.

discern, but because she knows with certainty that she values them equally. Being forced to choose between them requires disparate treatment of children she loves and values equally, robbing her of any rational basis for decision.

3. Taking Responsibility

The third possible cause of the Sophie's Choice paradox stems from the costs of taking responsibility. It may be that Sophie eschews choice not so much because she is in doubt about her preferences, but because she cannot stand to be held accountable for her preferences.[33] The fear of accountability is a terrible trap, of course, because Sophie is in a no-win situation: she will feel great sadness and guilt whether or not she acts.

Sophie does not want to take responsibility for her choice or for choosing.[34] Gerald Dworkin points to responsibility as one of the primary reasons that some people might prefer fewer choices:

> At the most fundamental level, responsibility arises when one acts to bring about changes in the world as opposed to letting fate or change or the decisions of other actors determine the future. Indeed, once I am aware that I have a choice, my failure to choose now counts against me. I now can be responsible, and be held responsible, for events that prior to the possibility of choosing were not attributable to me. And with the fact of responsibility comes the pressure (social and legal) to make 'responsible' choices.[35]

"[M]ore choices bring in their train more responsibility," Dworkin argues, and "these are costs that must be taken into account."[36] Avoiding that responsibility is quite desirable to many people.

For example, at least one court has recognized that it is the exercise of

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33. It is not clear, however, that fear of responsibility necessarily drives the paradox of Sophie's Choice. Given the highly coercive context in which Sophie makes her choice, it is hard to say that she bears the slightest responsibility for it. One might define responsibility in a way that makes clear that Sophie lacked it. John Martin Fischer and Mark Ravizza say that "moral responsibility requires the freedom to pursue alternative courses of action" and "an agent is morally responsible only if he has the power freely to bring about one event, and he has the power freely to bring about some alternative event." John Martin Fischer & Mark Ravizza, *Introduction* to PERSPECTIVES ON MORAL RESPONSIBILITY 8 (John Martin Fischer & Mark Ravizza eds., Cornell U. Press 1993). Sophie's choice may bring about the saving of her son's life at the expense of her daughter, but one cannot say that Sophie "freely" brought about those events. One might argue, then, that the highly immoral baseline at work in Sophie's case should eliminate any sense of responsibility on her part and thereby remove the Sophie's Choice paradox. But this is apparently not enough for Sophie.

34. In the situations discussed so far, the doctor has always been the one proposing the alternatives to Sophie. But suppose that the doctor tells Sophie he will kill her son if Sophie fails to make a counteroffer (such as "take my daughter instead"). Should Sophie feel responsible for not offering? As long as she feels some uncertainty about whether the doctor would have accepted her girl instead of the boy, would Sophie feel responsible for choosing not to offer the girl? Most Sophies in that circumstance would not feel responsible for the boy's death if they failed to make the suggested counteroffer. But this lack of responsibility on Sophie's part is not a necessary conclusion; it may simply be contingent on the way society is currently organized. Sophie might feel that she should offer her own life. It is worth considering what distinguishes her own self-sacrifice from offering to sacrifice the life of her child. *See supra* note 12.

35. DWORKIN, *supra* note 22, at 67.

36. *Id.* at 68.

choice that gives rise to responsibility, rather than the particular substantive act involved. In *Application of the President and Directors of Georgetown College*,[37] the court ruled that a Jehovah's Witness could be given a life-saving blood transfusion without consenting to it. The court reasoned that the decision did not impair the patient's religious freedom because moral responsibility could arise only from a choice, which the patient had not exercised.[38]

A number of philosophers have suggested the hypothesis that action creates a stronger sense of responsibility for consequences than inaction does, even when the consequences of inaction are dire.[39] They consider two hypotheticals involving a runaway trolley car. In the first hypothetical, the trolley's current path will cause it to kill one person. If the subject chooses to switch the trolley's path to an alternate track, the trolley will kill five people. Most philosophers assert that it would be moral to keep the trolley on its present course. In the second hypothetical, the runaway trolley will kill five people on its present course. If the subject switches the track, however, the trolley will kill only one person. Surprisingly, most philosophers say that it would not be moral to switch tracks. Apparently people's intuition is that switching the track in Case A would create responsibility for the deaths of five people, but that failing to switch the track in Case B would not give rise to the same responsibility, even though the result would be the same—the deaths of five people.

The crucial point from the trolley example is that people seem to feel less responsible if they remain inactive and fail to change the status quo than if they act and move away from the default.[40] If this is true, and if the avoidance of responsibility is an important cause of the Sophie's Choice paradox, then Styron's version of the choice (involving a penalty default) was particularly cruel. Inaction—the alternative that would ordinarily make people feel less responsible for the outcome—would actually result in the deaths of both Jan and Eva. The doctor made the default so unpalatable that he drove Sophie to take action—creating in her a greater sense of responsibility.

E. *Consequences*

Given these possible causes of the Sophie's Choice paradox, strategies to avoid it will meet varying levels of success. Responses to the paradox will be both individual and collective. Strategies that work for individuals may require some governmental support.

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37. 331 F.2d 1000 (D.C. Cir. 1964).

38. *See* DWORKIN, *supra* note 22, at 68 n.10 (stating that "it was the *choice* of blood, not the blood itself, that was forbidden") (emphasis added).

39. ERIC RAKOWSKI, EQUAL JUSTICE 344-47 (1991); Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395-97 (1985).

40. Again, to the extent people feel less responsible for inaction than they do for action, we should see such intuitions as social constructs rather than anything inherent. It might be possible to reframe situations so that people would feel equally responsible for what they do and (in the words of the Roman Catholic confession) what they "have failed to do."

1. Individual Responses to the Sophie's Choice Paradox

Individual responses could fall into three categories: coin flipping, refusing to decide, and hand-tying. The effectiveness of such strategies might turn on which of the three causes discussed above seems to be most at work.

a. *Coin Flipping*

For some but certainly not all people, coin flipping might be a sufficient solution. Coin flipping could help the person who avoids choice because she does not know which alternative she prefers. The coin flip gives such a person a basis for deciding when her own preferences are unclear. Similarly, coin flipping could ease the paradox for a person who avoids choice because he dislikes treating equals differently. By subjecting both alternatives to the coin flip, he treats them equally, at least procedurally, and the equal treatment of the coin flip then becomes the basis for disparate substantive treatment.[41]

For the person who knows her preferences but wants not to take responsibility for them, on the other hand, coin flipping would be a less effective solution. Eventually, such a person would have to take action, and that seems to be the source of the pain. Even for those who dislike responsibility, however, the coin flip might be a useful scapegoat. For people who have a preference but are afraid to act upon it, a coin flip that comes out the right way could grant "permission" to follow the true preference. Even if the coin flip leads away from the person's true preference, the coin flip might help, because by preventing the person from acting upon her true preference (for which she does not want to take responsibility) the coin flip might absolve her sense of responsibility even more completely.

b. *Refusing to Decide*

Another way to respond to the paradox is to simply refuse to decide.[42] Sophie attempted this approach before she was coerced into her decision. Sophie might even have precommitted to this strategy if she had foreseen the doctor's horrible proposal and been able in some literal way to implement her internal wish ("Let me be struck dumb"). The problem, however, is that refusing to decide is, in a way, deciding. In the case of the penalty default, it is deciding to permit that penalty to be exacted. In Sophie's case, refusing to choose would have been a decision that both children would die. In the altered version of the case, refusing to choose would have been a decision to forego the "opportunity" that the doctor's proposal offered—saving her son.

41. Some people might care so much more about substantive treatment than procedure that they would find the equality of the coin flip somewhat hollow. *See* Richard Warner, *Topic in Jurisprudence: Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992). "It is not even possible for her to rationally decide by, for example, flipping a coin; to do so is to count saving the life of one as reason to choose that the other should die." *Id.* at 154.

42. Lois Shepherd, *Sophie's Choices: Medical and Legal Responses to Suffering*, 72 NOTRE DAME L. REV. 103, 103 (1996) ("Rather than choose one of her children over the other, Sophie could have rejected such a choice altogether.").

Refusing to decide in the original version might help the person who cannot choose because she does not know which she prefers. Because the penalty default results in the deaths of both children, Sophie avoids a passive choice between them. In the altered version, however, the refusal to decide will result in the death of one but not both children. Refusing to decide in such a case is, in fact, a decision that one child will die, and will not help the person who avoids choice because she does not know which of the alternatives she prefers.

Similarly, for the person who knows that she values the alternatives equally and wishes not to decide between them, refusing to decide might be an effective solution to the paradox in the original but not the altered version of the case. In the original case, refusing to decide has an equal impact on the two children, and thus would assure Sophie that she treated equals the same. In the altered case, refusing to decide might be a procedurally neutral stance and might satisfy some who avoid choice because they wish not to treat equals differently. But for those who value substance more than procedure, refusing to decide in the altered case will not solve the paradox, because they will recognize the decision they are passively making by refusing to decide.

For those who dislike choice because they wish to avoid responsibility, refusing to decide might appear to be an effective solution. Intuitively, it appears to avoid action and the sense of responsibility that comes with action. But as suggested above the heightened sense of responsibility that flows from action as a opposed to inaction may be merely a social construct. For those who see beyond the construct, refusing to decide will be an ineffective solution to the problem of responsibility for choice.[43]

The more certain the result of choosing (or refusing to choose), the greater the sense of responsibility that might settle on the chooser. When the default is clear (when, in Sophie's case for example, refusing to choose means that both children will certainly die), refusing to choose will be a substantive as well as a procedural decision. Sophie will know the substantive consequences of refusing to decide. If, on the other hand, the default is not clear, then refusing to decide may become more like a coin flip, a procedural choice, not a substantive one.

c. *Hand-tying*

A third individual response to the Sophie's Choice problem is hand-tying—a particularly strong refusal to decide which involves precommitments not to choose. Like the refusal to choose asserted at decision time, hand-tying may help the person who does not know her preferences and the person who dislikes treating equals differently.[44] But hand-tying may not be an effective strategy for those who wish to avoid responsibility, because while hand-tying appears to be a purely procedural strategy, it cannot completely mask the sub-

43. This will be true in either the original or the altered case, but will be particularly painful in the presence of the penalty default.

44. *See supra* note 43 and accompanying text.

stantive choice that will at least passively be made.[45]

Hand-tying may be a particularly ineffective strategy for people with "second order" Sophie's Choice preferences. Such people prefer not only to avoid the substantive choice (son versus daughter), but also the procedural choice (whether or not to choose). If they have to decide whether or not to tie their own hands, they will face this second order Sophie's Choice problem, and that too will cause them significant disutility. It may be difficult, moreover, to elicit information about whether people have first and second order Sophie's Choice preferences. When people don't want to make choices, they probably won't even want to talk about whether or not they want to choose. For such people, it may be better not to give them a choice about whether to choose.[46]

2. Governmental Responses to the Sophie's Choice Paradox

The Sophie's Choice paradox presents no less than a new rationale for restricting freedom of contract. This raises, then, the thorny problem of policy: should the government step in to restrict choice, and if so, how? I will address each of these questions in turn.

Even if Sophie's Choice preferences exist, we might not want government to respond because we might fear any rationale that would give a bad government another basis for restricting freedom. We might legitimately fear that the Sophie's Choice paradox would supply a pretext for restricting choice even in cases where Sophie's Choice preferences are absent.

If we were confident that the government was a good one and would restrict freedom of choice only in cases where Sophie's Choice preferences seemed really to be at work, we would still face two important questions of empiricism and methodology. First, how can even a good government know when Sophie's Choice preferences are at work? And second, once such preferences are detected, how should the government decide between the alternatives so as to relieve the individual of such choice?

a. *Detecting Sophie's Choice Preferences*

Sophie's Choice preferences may be particularly difficult to smoke out. As noted above, people who wish not to choose may not even want to discuss the alternatives, and thus government will have difficulty knowing whether they prefer one or all of those alternatives to choosing between them. Moreover, if people know that government is exploring the public's preferences to

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45. When the default or the substantive consequences of refusing to decide are uncertain, however, hand-tying takes on a very different character from the role it played in the case of Ulysses, where the consequences of hand-tying were clear. In such a case the substantive aspects of the passive choice may fall away.

46. For example, in the case of the crowded lifeboat, *see supra* note 20 and accompanying text, it might be better if the Titanic captain simply chooses which child to include in the lifeboat rather than giving Sophie the choice between her children. It might also be better for the captain to choose rather than giving Sophie the *choice* about whether or not she wants to choose between her children.

determine whether their freedom of choice should be restricted, they might also understand that the retention of a future choice may turn on their responses. This may cause their responses to become an implicit choice about whether or not they wish to choose in the future. In other words, asking people whether they have Sophie's Choice preferences in effect is asking them whether they want to choose at some point in the future. If people have second order Sophie's Choice preferences, they might not want even to decide whether to decide, and will resist the government's probing for that reason. For these reasons, it may be difficult for the government accurately to detect Sophie's Choice preferences.

b. *Responding to Sophie's Choice Preferences*

When the government does manage to find Sophie's Choice preferences, it will have to decide what to do about them. One option, of course, is to refrain from action altogether, and leave the problem to private, individual solutions, as outlined above. A second option would be to act only as an enforcer. The government might allow for private solutions and step in only to facilitate those strategies, by, for example, enforcing coin flip results or hand-tying commitments.[47] A third response to the Sophie's Choice paradox would resemble a strategy in certain situations when people cannot contract for themselves: government could try to predict what people would choose if forced to do so and simply make that choice for them.

In Sophie's Choice situations, the governmental choice would become an immutable rule in order to relieve people of any decision making.[48] In cases where individuals have strong form Sophie's Choice preferences, the government's job would be relatively easy. Any of the alternatives would be preferable to choosing between them, and government would increase welfare no matter which alternative were selected. If the Sophie's Choice preferences are manifest only in weak form, on the other hand, the government's job becomes more challenging, because individuals might prefer a choice to at least one of the alternatives. If the government selects one of the dispreferred alternatives, it will make those people worse off.

When the government tries to predict which alternative people would choose, however, it faces formidable informational problems. Just as people might be unwilling to discuss their preference not to have a choice, they will often be unwilling or unable to reveal their preferences among the proffered alternatives. Sometimes, even if the government accurately predicts people's choices (if forced to choose) it cannot rely upon those predictions to determine people's true preferences. To see how this might be true, consider again the hypothetical in which a parent must decide which of her children to send to Harvard. Suppose that the parent is an ardent and very public feminist. If

47. If the government chooses this response, it must be aware that coin flipping and hand-tying will not be effective in all cases, because some causes of Sophie's Choice preferences will not be addressed by these responses.

48. If the government's choice were merely a default rule that people could contract around, they would again be faced with a decision and the Sophie's Choice problem would persist.

forced to choose, she will select her daughter out of concern for her public image and the message her choice will send. Her preferences with respect to the alternatives she might choose, then, are as follows: $G_c > B_c$ where G_c is the girl if chosen by her parent and B_c is the boy if chosen by his parent. In her heart of hearts, however, the parent might actually prefer that her son go to Harvard. If someone else could choose (and thus absolve her of responsibility), the parent's preferences might be as follows: $B_u > G_u$ where B_u is the boy if chosen by someone else (and thus unchosen by the parent) and G_u is the girl if chosen by someone else. The government's task would be uncovering these underlying preferences, but knowing what the parent would choose if forced to do so will not necessarily illuminate that question. And of course asking the parent her true preferences will not work either, because declaring them is the same as choosing, and would lead back to the girl—not the parent's true preference.[49]

A final governmental response to the possibility of Sophie's Choice preferences would require the government to reconsider the kinds of choices it presents to its citizens. The Sophie's Choice paradox might expand the range of cases that are deemed to create unconstitutional conditions. As Bill Marshall has argued, it is the pain caused by choosing between two dearly held values, as in the case where the employer gave employees a "choice" between job benefits and the exercise of their religion, that gives rise to unconstitutional conditions.[50] The Sophie's Choice paradox may explain a class of unconstitutional condition cases in which the government's right to do a larger thing (declining to offer employees certain benefits) does not create a right to do the smaller thing (denying a particular employee benefits based upon his refusal to work on Saturday). This "smaller" thing the government proposes to do may impose a choice, and thus actually impose an intolerable burden.

III. THE FALLACY OF CONSENSUAL EQUIVOCATION

Wertheimer concedes that "a woman's decision to serve as a surrogate may not be appropriately consensual" if the woman makes a "cognitive error" and agrees to a transaction she "will regret or would regret if she thought objectively about its effect on her life."[51] But Wertheimer rejects this as a justification for making surrogacy agreements unenforceable. He says:

> [D]o not say that a woman's judgment cannot be appropriately consensual just because she cannot fully anticipate what it will be like to give up the child. People can voluntarily consent to sterilizations, sex change operations, abortions, and plastic surgery, and (shall we add?) marriage—where one cannot or frequently does not have any experi-

49. One might say that the parent is merely the victim of competing preferences in this case; feelings about her children's college education conflict with feelings about feminism and her public stance on women's issues. This may be true, but it does not mean that the parent's choices, if forced to choose, would be irrational. The ordering of chosen preferences, even if different from the true preferences, could be rational given the full range of the parent's concerns.

50. Marshall, *supra* note 17, at 249-51.

51. Wertheimer, *Surrogacy*, *supra* note 2, at 1223.

> ence with the consequences of the decision. By comparison with some such decisions that we do allow, the problem of miscalculation in surrogacy may be relatively small and more amenable to preventative measures . . . .[52]

The problems with Wertheimer's assertion are twofold: first, his assertion is based upon questionable empirics, because pregnancy and childbirth may be significantly different from the transformative processes he cites; second, by treating consent monolithically—assuming that various kinds of consent are comparable—he commits what he calls the "fallacy of equivocation."[53]

The empirical problems with Wertheimer's argument stem from the fact that pregnancy and childbirth may be more transformative than the other processes he discusses. Pregnancy and childbirth alone combine two key elements of transformation: physical change intertwined with social, relational change. Marriage brings no bodily changes. Plastic surgery, sterilizations, and sex change operations do not by definition involve another human being in the process. Abortions involve another life (whether a person or not is immaterial for this discussion), but not in an ongoing way, because the abortion causes that other life to end. Indeed, in my view, pregnancy and childbirth are so transformative that the person who emerges from the process can in a very real sense be said to be a different person from the one who entered the process.

Pregnancy and childbirth involve dramatic physical changes in the woman.[54] Systemic hormonal shifts may change her affect and mood. Her brain may change in size and perhaps in function.[55] In the course of the pregnancy and childbirth, she will grow and shed a whole new organ—the placenta. These same hormonal changes will cause her muscles to relax, her joints to loosen, and her bones to change calcium content.[56] She may increase her body weight by 30%.[57]

She will change emotionally throughout the pregnancy and post-partum period. The same hormones that change her body will also alter the way she thinks and feels about the world. In some women, these changes are so dramatic that a disease has been named to embody them: post-partum depression.

Pregnancy and childbirth will leave marks on her body.[58] Her pigmenta-

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52. *Id.*

53. Wertheimer, *Remarks*, *supra* note 2, at 892.

54. Some physical changes caused by pregnancy are trivial, such as increased growth of hair and fingernails, but signal the overwhelming alteration of a woman's physical functions.

55. *Health Watch / Brain Shrinkage and Pregnancy*, NEWSDAY, Jan. 14, 1997, at B32 (reporting that a team of British radiologists and anesthetists found that the brains of women they tested shrank in late pregnancy and took up to six months to regain their full size).

56. All of these changes are cited in ARLENE EISENBERG, ET AL., WHAT TO EXPECT WHEN YOU'RE EXPECTING 100-255 (1991), the veritable "bible" for pregnancy and childbirth.

57. The usual guidelines for pregnancy weight gain suggest that most women gain 25-40 pounds. *Id.* at 147-48.

58. These external changes alone would probably not be sufficient transformation to create discontinuous selves, but the long and almost universal tradition of using outward marking (piercing, tattooing, cutting, or painting the body) to signal internal change could make these alterations significant.

tion may change, causing the so called "pregnancy mask" or a characteristic dark line that sometimes runs vertically along the woman's abdomen away from the navel. Whether she delivers vaginally or by a cesarean section, she is likely to suffer tears, incisions, and/or stitches. She may gain "stretch marks" as her skin strains to contain her growing uterus.

Most importantly, perhaps, the woman will be changed socially and relationally. She will be forever redefined in terms of at least one other human being. She will add *mother* to the list of many social roles she plays. Even if she loses or surrenders the child, this change of role will be indelible. She may think of the child often, especially on his or her birthday.[59] She may be forced to acknowledge her relationship to the child if she or the child develops a disease that might be congenital or for which treatment might require blood or bone marrow from a genetically related person.[60]

Any one of these physical, emotional, or social changes might not individually justify a conclusion that the person undergoing them has been transformed, but in combination they could very well have that effect.

Ordinarily, a person can only be contractually bound if she or her agent binds her. If the dramatic changes wrought by pregnancy and childbirth do cause some discontinuity of self, then we must seriously question whether the prepregnant woman is the same as—or even a faithful agent for—the mother.

Wertheimer notes that "[r]espect for a person's autonomy sometimes requires that we respect choices that reflect values that she presently accepts, even if we are rightly worried about the way she acquires those values."[61] This would seem to respond to the argument that a surrogate may have entered the contract for bad reasons, because she is brainwashed, or because she suffers from some "false consciousness" of her role in the world. Wertheimer does not tell us what should happen if a brainwashed person enters into a contract and then, preperformance, comes to her senses. We cannot say, as Wertheimer does, that at the point the contract is to be enforced the woman "presently accepts" the values reflected in her earlier choice.

Wertheimer argues that "the ability to enter into a binding agreement is itself a crucial dimension of one's autonomy and . . . the 'unenforceable contract'[62] solution will deter" some contracting. "[I]n trying to protect women from having to surrender a child against her strong maternal desires," he says, "we do not express the appropriate respect for women as autonomous and responsible persons."[63] Here he cites Carmel Shalev, who disapprovingly

59. I know a woman who bore and gave up a child for adoption. On the child's birthday each year, a close friend of the woman would send her a rose for every year the child had been alive.

60. I know a woman who was adopted at birth but came to know her biological parents when her biological father became ill. The biological parents contacted my friend because the illness could be genetically transmitted and if my friend tested positive for the gene, she would be advised to take immediate precautionary steps to prevent the disease.

61. Wertheimer, *Surrogacy*, *supra* note 2, at 1226.

62. The consequences of declaring the surrogacy agreement an "unenforceable contract" are not entirely clear. If it is "unenforceable" it could simply be voidable but not void, that is, unenforceable *at the option* of the mother.

63. Wertheimer, *Surrogacy*, *supra* note 2, at 1226.

paraphrases the arguments of her opponents this way: "Her state of mind at the moment of agreement is not to be taken seriously because it is subject to change during the performance of her undertaking, due to the nature of pregnancy. The insinuation is that it is unreasonable to expect her to keep her promise because her faculty of reason is suspended by the emotional facets of her biological constituency."[64]

But to say that the prepregnant woman cannot bind the mother is not to denigrate the reasoning of either person. If we see a discontinuity in the self, we do not view either of the selves as particularly feeble or disabled by emotion. Rather, we recognize that their preference structures are fundamentally different and respecting the autonomy of the later, post-partum self requires that we lessen the power of the prepregnancy self. The prepregnant woman retains autonomy, but only over herself and only for as long as she exists. With the onset of pregnancy, and certainly in the wake of delivery, she ceases to exist. To make her agreement binding is to give her more than autonomy; it actually gives her power over another.

The decision to make the agreement of the prepregnant woman nonbinding on the mother cannot rest on a belief that pregnancy and childbirth somehow disable a woman's powers of reason. We would be voiding the decision of the person who existed prior to pregnancy, so it can't be the pregnancy that makes the woman's agreement suspect. Indeed, by allowing pregnant or post-partum women to void surrogacy contracts, we would be honoring their decisions when they occupy the position that is traditionally most vulnerable, when they are performing their most gender-specific role. Moreover, by voiding the surrogacy contract we would not declare all of the woman's decisions suspect, but only those that relate specifically to the nature of the relationship between mother and child.

Also, recognizing a discontinuity of self does not necessarily mean that rights of parenthood are inalienable. What it suggests, instead, is that when the surrogacy contract is formed, the *mother of the specific child in issue* is not yet present to alienate her parental rights. The woman who enters the surrogacy contract is a different person and cannot alienate the rights of another. The post-partum mother, however, is free to alienate her own rights. This means only that the woman cannot relinquish her parental rights until after the child is born.[65]

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64. CARMEL SHALEV, BIRTH POWER 121 (1989).

65. I should say a word about remedies. If discontinuity of self wipes out consent, then a woman who reneges on a surrogacy contract would fear neither specific performance remedies nor damages. It is curious, perhaps, that specific performance is often sought and awarded in surrogacy cases. Standard contract doctrine would not provide specific performance to enforce a contract for personal services. And if a court will not force someone to sing at the Met, why should it force a woman to surrender her child? Perhaps the surrogacy contract is viewed more as a contract for goods than for services. But this commodification of the child seems highly objectionable. Perhaps enforcement of the contract would seem less harsh if the mother simply paid damages to compensate for her breach. This might prevent unjust enrichment when the other party to the contract has been paying the woman's expenses. Damages might also include "expectation" damages to try to give the other party the benefit of the bargain, but the calculation of such damages might prove impossible. Moreover, given the economic straights of many women who enter surrogacy contracts, having to pay damages to the other side might be so threatening that they would

My thesis, then, is that the changes wrought by pregnancy and childbirth might be fundamental enough that they should cause us to question whether—at least for the purposes of this particular contract—the prepregnant/precontractual self can be considered the same person as or agent for the mother. If we see an important discontinuity of identity in a woman going through pregnancy and childbirth, and we lack a good theory of agency to bind the contracting self to the self against whom the contract is to be enforced, this could create serious problems for consent, for it seems axiomatic in contract law that a person must be a party to the contract to be bound by it.

Wertheimer argues that we can address the problem of discontinuity by allowing only women who have already been pregnant and given birth to serve as surrogates, because they are more likely to know the likely effects of pregnancy and childbirth: "the problem of miscalculation in surrogacy may be relatively small and more amenable to preventative measures: restricting surrogacy to women who have given birth and therefore have personal knowledge of the bonding process . . . ."[66] This is not a complete solution to the problem, however. No two pregnancies or childbirth experiences are exactly the same, and the transformative effects of a first pregnancy could be more limited than subsequent pregnancies. Certainly medical evidence abounds that second or third pregnancies affect women's bodies differently from first pregnancies.[67] The labor and delivery may proceed very differently, the child that emerges will be different from the first child, and it may be impossible for a woman to predict how she will respond to that specific child.[68] Furthermore, because the changes wrought by pregnancy and childbirth as so importantly social and relational, we must be sensitive to the differences between first and subsequent births in this dimension. The birth of the second child affects not only the woman but also her existing child or children—with whom the woman is so fundamentally connected that changes in their lives will cause changes in her life as well. Knowing how the first child affected her may reveal little of how subsequent children will affect her. Thus, Wertheimer's solution (followed by some agencies handling these arrangements) that only second-time mothers be permitted to serve as surrogates is not always going to work. The transformative impact of pregnancy and childbirth will in many cases undermine our confidence in the continuity of self.

The second problem with Wertheimer's argument about surrogacy stems from a potential inconsistency with his second article in this Symposium. In *Remarks on Coercion and Exploitation*, Wertheimer describes what he calls the "fallacy of equivocation":

the meaning of coercion assumed by the major premise is not identi-

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feel coerced into giving up the child. In any case, giving damages rather than specific performance might provide little relief to the woman seeking to avoid the surrogacy agreement.

66. Wertheimer, *Surrogacy*, *supra* note 2, at 1223.

67. EISENBERG, ET AL., *supra* note 56, at 21-22.

68. If I may indulge in a brief autobiographical note, here, I would say that my five week-old daughter is quite different from her older brother. I felt different during the pregnancy, the labor and delivery were different, and Anna's behavior from birth has been a contrast to her brother's. Knowing how it felt to become the mother of my son has turned out to tell me very little about how it would feel to become the mother of my daughter.

> cal to the meaning of coercion in the minor premise, and thus the conclusion does not follow even though both the major and minor premise may be true (given different meanings of the word).[69]

Similarly, it may be true that women consent to surrogacy contracts. It may also be true that people consent to marriage, sex change operations, sterilizations and plastic surgery. But the fact that we make consent binding in these latter contexts does not necessarily lead to the conclusion that a woman's consent to surrogacy should make that contract binding. By arguing that consent to surrogacy is comparable to consent in the context of marriage, surgery, or abortion, Wertheimer confuses two different normative consequences of consent, and thus himself unwittingly commits a fallacy of equivocation.

Wertheimer's point is that in many other situations we allow consent to be binding despite the fact that the consenter lacks experience and does not/cannot know what life will be like after the event or process has occurred. That much is true. We do allow people to commit themselves to undertakings that are great, even though they may have difficulty measuring the change in their lives that such a commitment will entail. The problem is that consent will have different effects in different contexts, but Wertheimer groups all kinds of consent together. One sort of consent, for example, may be sufficient to insulate other actors from tort liability. This is the sort of consent involved in the context of plastic surgery or sex change operations. But, the consent sufficient to insulate doctors from tort liability would not suffice to bind a patient to undergo the surgery if he or she hesitated at the eleventh hour.

Wertheimer's examples are also inapposite because they are, in the main, irreversible processes. Once the scalpel hits the skin, consent to the surgery is irrevocable, at least where the knife cuts. But until that point, the patient can withdraw consent. In cases of surrogacy, until she actually surrenders her baby, the surrogate mother is like a patient who has not yet felt the surgeon's knife. As long as the process is reversible, we do not bind the party or patient to her earlier consent and force her to go through with it.

And much like marriage and some forms of sterilization,[70] surrogacy is reversible. After the baby is born the mother could still change her mind to prevent irrevocable consequences. Just as we allow men to reverse their vasectomies and we allow couples to divorce, so too we should permit women to escape surrogacy commitments.[71]

IV. CONCLUSION

Of the two responses I have made to Wertheimer, the discontinuous self may be the less radical. Certainly it presents a less dramatic challenge to freedom of contract than Sophie's Choice does. The implications of the discontin-

69. Wertheimer, *Remarks*, *supra* note 2, at 892.

70. Some vasectomies may be reversed—consent is not binding for all time.

71. In conversation, Wertheimer has said that consent to join the military might be a better example. There, a person can't get out, even though the commitment is in theory reversible. But the government and national security may present special cases. It is difficult to see that a party seeking enforcement of surrogacy can advance anything like the global security interests that rest with the military.

uous self are consistent with standard contract doctrine regarding the identity of parties to be bound by a contract. Sophie's Choice, on the other hand, undermines more fundamentally a bedrock assumption of much of contract doctrine—that more choice is better than less.

On the other hand, the discontinuous self could have implications that are further reaching than at first appear. The concept could spill over into cases where parties wishing to be excused from contract have survived any number of transformative experiences—violent crime, war, serious illness, near-fatal accident, mass disaster, or addiction (drugs or alcohol). We might find that "real world" examples of discontinuity are easier to find than examples of Sophie's Choice. Sophie's Choice preferences are difficult to detect, precisely because people with such preferences often wish to not discuss their preferences. If Sophie's Choice arises only in a very narrow set of circumstances, its deeper challenge may appear only rarely. In conversation, Wertheimer has suggested that Sophie's Choice may be only a "curioso," and if it is sufficiently rare he may be right. Perhaps we should hope that the Sophie's Choice paradox is merely a curioso. If it turns out to be more common, it could undermine much of contract and economic theory.[72]

As I write this conclusion, I am taking breaks to breastfeed my 5 week-old daughter. I first read the materials for this Symposium when I was well into the third trimester of this pregnancy. Perhaps I can be forgiven, then, for bringing to the subject matter some subjectivity. Perhaps my ideas about Sophie's Choice and the discontinuity of self say more about my own intellectual and emotional state right now than they do about Wertheimer's ideas. When my hormones return to "normal," whatever that is, and my brain has expanded to its ordinary size, perhaps I will regret these remarks.[73] But then I may become Exhibit A in the case for the discontinuous self.

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72. For example, Kenneth Arrow's Impossibility Theorem posits that given five crucial assumptions, there is no way to nonarbitrarily aggregate preferences. KENNETH ARROW, SOCIAL CHOICES & INDIVIDUAL VALUES (1952). Among the five assumptions is the axiom of the independence of irrelevant alternatives. The classic example used to illustrate this axiom presents a diner who is told that dessert can be either chocolate or vanilla ice cream. If the diner chooses chocolate and is then told by the waiter, "you can also have strawberry," it would violate the axiom if the diner were then to switch to vanilla. Being given the additional choice of strawberry ice cream should be "irrelevant" to whether the diner prefers chocolate to vanilla.

But consider Arrow's assumption in the face of strong Sophie's Choice preferences. If the Nazi doctor initially says that Sophie must choose whether Jan should be killed or whether both Jan and Eva should be killed, Sophie may say that only Jan should be killed. If the doctor then presents an additional alternative, "you could also have only Eva killed," it is possible that Sophie would be so pained by choosing between Jan and Eva that she would actually shift her choice back to having both Jan and Eva killed. Sophie's Choice preferences may thus undermine the seemingly innocuous assumption of the independence of irrelevant alternatives.

73. *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1467 n.*, 1521 n.210. In a wonderful sort of anti-cite, Meyer self-deprecatingly writes, "Insofar as I suggested there were no difficulties with a positivist approach to qualified immunity doctrine in a previous article—well—I was wrong. *Don't see* Meyer, *supra* note 131, at 480-81. Live and learn." *Id.* at 1521 n.210.

CONCEPTUALISM BY ANY OTHER NAME . . .

NANCY EHRENREICH*

I. INTRODUCTION

Attitudes towards critical legal thought seem to be changing. When the Conference on Critical Legal Studies first came on the legal scene in the 1970s, it was the "bad boy" of legal scholarship. Critical legal theory's sharpest critics characterized it as pure critique, as containing no substance of its own but instead merely delighting in the deconstruction of prevailing modes of legal analysis. In short, they saw it as not a theory at all; it was pure nihilism.[1] Failing to see the political assumptions that informed their own work, these writers viewed critical theory as the exact opposite of scholarship: as biased and self-interested instead of neutral, advocacy instead of analysis, political diatribe instead of legal reasoning. In short, many law professors saw it as a discourse *outside* the academy, not of it. Nevertheless, I would argue that at the beginning CLS actually *reinforced* the legitimacy of mainstream legal thought,[2] providing the foil against which such thought could define itself, the "other" in a self-other binary.[3] If critical theory was nihilist, biased,

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1. *See, e.g.*, Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-7 (1984).

2. It is always hazardous to generalize about the views of a large and diverse group of people, such as "mainstream" law professors. Moreover, most law professors are rather atheoretical (if not antitheoretical) in their orientation. (Many were trained by legal realists and have taken from that experience a commitment to empiricism and a profound skepticism about grand theory; others identify with the practicing bar and are dismissive (if not suspicious) of "ivory tower" thinking that seems to have little relevance to the world of practice.) Nevertheless, I would argue that there are definite similarities among most law professors' ideas of how to "do" law. Those ideas tend to be composed of an amalgam of jurisprudential influences, including: a realist-styled emphasis on social science and policy analysis, a process theory focus on institutional roles, an enduring formalist commitment to the basic (even if not complete) objectivity and determinacy of language, and a liberal belief in the essential neutrality of law (evinced through distinctions such as process/substance, facts/beliefs, and law/politics, as well as in the use of supposedly apolitical balancing tests). It is this set of characteristics that I envision when I use the term, "mainstream legal thought."

3. Of course, this is not unusual. Many recent writers have discussed how the dominant term in any hierarchical relationship needs the other term to define itself. For a particularly trenchant articulation of such an analysis, see EDWARD W. SAID, CULTURE AND IMPERIALISM (1994). At one point Said quotes Sartre: "[T]he European has only been able to become a man through creating slaves and monsters." *Id.* at 197 (quoting Jean Paul Sartre, *Preface* to FRANTZ FANON, THE WRETCHED OF THE EARTH 7, 26 (1968)); *see also*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT 68 (1991).

destructive and totalitarian, then mainstream legal theory must be positive, neutral, constructive and liberating.[4] As long as critical theory was seen as pure critique, mainstream theorists could continue to maintain that they, in contrast, were doing neutral "legal reasoning" (whether they saw the neutrality as coming from doctrinal or from policy analysis). By viewing CLS as not a legitimate legal theory at all, they could avoid acknowledging the substantive assumptions implicit within their own analyses.

Of course, instead of seeing critical legal thought as pure critique, mainstream legal thinkers could have viewed it as presenting an alternative set of substantive political preferences upon which to found a legal system—as articulating, for instance, a preference for the community over the individual, for substantive over formalist definitions of justice, for participatory over authoritarian legal structures, for human values over property values, for contextual over abstract legal rules, and the like. However, to see CLS in this way would have required mainstream legal thinkers not only to recognize the substantivity of their own approach, but also to concede that the debate between themselves and critical scholars was a debate between equally rational, alternative paradigms that were founded upon differing *political* preferences about the ordering of society. Such an admission would, of course, have fundamentally challenged the assumption that mainstream legal analysis was based on logic, not substantive political judgments. It was easier, therefore—and indeed useful—to simply dismiss CLS as irresponsible rowdyism.

But times have changed. At least in terms of institutional presence, CLS is much more accepted now. Most law schools feel the need to have at least one self-proclaimed "Crit" on their faculty; many panels at conferences include one or more among the presenters; the newer textbooks frequently cite to critical authors in the notes and textual material they present;[5] jurisprudential surveys invariably include critical theories in their lists. While such representation is often mere tokenism, it is still undeniable that many have come to see critical legal thought as a legitimate approach to legal theorizing.

As a result, one would expect a crisis in confidence to be occurring within mainstream legal scholarship. That is, it would seem that recognition of the value of critical theory would necessarily bring with it a concomitant crisis of legitimacy for mainstream thinking. One would expect, in other words, to see the entire landscape of legal scholarship changing, to see the foundations of mainstream legal theory shaking, to see new paradigms overtaking the field—or, perhaps, a disintegrative splintering of scholarship into a plethora of approaches, as has happened in other academic fields. And, indeed, on the

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4. *See, e.g.*, Carrington, *supra* note 1, at 227. I realize that, in drawing a contrast between CLS and mainstream legal theory here, I am ignoring a plethora of other jurisprudential schools of thought, from process theory to law and society to feminist theory, queer theory, and critical race theory. But if one had to reduce all of the various developments in legal theory during the second half of the 20th century down to two major trends, I would argue that CLS and mainstream legal theory best capture the contemporary jurisprudential landscape. Most identity-politics-related theories (critical race theory, feminism, etc.) have close affinities with CLS (despite their forceful disagreements on particular points) and law and economics is arguably just a pseudoscientific take on the liberal legal constructs that undergird mainstream theorizing.

5. *See, e.g.*, JAMES A. HENDERSON ET AL., THE TORTS PROCESS (4th ed. 1994).

margins this splintering is exactly what *is* happening. *Within* progressive legal scholarship there has been a luxurious growth of offshoots: queer theory, intersectionality, feminism, critical race theory, etc. But all of this has taken place only on the edges of the academic world, while mainstream legal thought remains essentially unchanged, sailing on placidly like a huge ship oblivious to the sharks sniping at its bows.

Now, it is not unimportant that critical theory has become an accepted mode of legal analysis. No longer the "bad boy" of the academy, today it is seen as a legitimate choice in the smorgasbord of jurisprudential offerings. For those who recognize the value of working within the system, this new inside (if still not insider) status brings a certain satisfaction. From the inside one can affect hiring, rules structure and policies, institutional publications, and the like. But there is also something very troubling about being inside, about the notion that one can choose between CLS and law and economics, or feminism and utilitarianism, in the same way that one chooses between Crest and Pepsodent, chocolate and vanilla. Like its predecessor, critical realism, critical legal theory risks being merely absorbed into liberal legal thinking, its insights reduced to window-dressing—a set of flat and simplified assertions to which one pays brief obeisance before continuing on with one's analysis, but which do not change that analysis in any fundamental way. In the past, mainstream legal theory (and the larger liberal ideology of which it is a part) reduced the threat posed by critical knowledges such as CLS by rejecting their contributions as illegitimate obstructionism. Today, it continues to reduce the threat of CLS, but in a subtler way—by absorbing it through reformist adjustments to the existing system.[6] Moving from outside to inside might thus be merely a phyrric victory—a move from exclusion to domestication.[7]

It is from the perspective of these observations that I find it interesting and elucidating to examine the two articles by Alan Wertheimer in this issue—both of which were presented at the symposium on Choice and Coercion for which this article was written.[8] Although Professor Wertheimer is a political philosopher, not a legal theorist, I believe that his papers may provide us with a valuable window into the interaction between theoretical perspectives within our own discipline, and may indirectly illustrate the domesticating dynamic with which I am concerned here.

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6. Political discourse in the United States is arguably still in the first stage of outright rejection. Thus, this country, in contrast to Europe, lacks an established socialist political presence, still viewing left political critique as destructive and un-American, rather than as an alternative—and equally legitimate (even to those who disagree with it)—political perspective. Presumably, inclusion of the left within the world of legitimate activity would have mixed results in the political arena, just as (I will argue) it has had in law.

7. On the domestication of legal realism, see generally Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

8. Alan Wertheimer, *Exploitation and Commercial Surrogacy*, 74 DENV. U. L. REV. 1215 (1997) [hereinafter Wertheimer, *Commercial Surrogacy*]; Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889 (1997) [hereinafter Wertheimer, *Remarks*]. Professor Wertheimer has written extensively on subjects relevant to the symposium topic. *See, e.g.*, ALAN WERTHEIMER, COERCION (1972); ALAN WERTHEIMER, EXPLOITATION (1996). However, given the space limitations of this commentary on his symposium presentations, I will confine myself here to those presentations and will not discuss his other work.

When I first began reading Wertheimer's work in preparation for my role as commentator at this symposium, I attempted, as one always does, to categorize his analysis. What type of theorist was he? How was he approaching the material? Indeed the papers presented at the symposium, especially the one on exploitation, seemed to invite such categorization, by explicitly addressing the issue of methodology. As I understood Wertheimer's description of his own approach, he meant to eschew conceptualism in favor of something different, which he termed "moral" or "normative" analysis.[9] But as the argument proceeded, I became confused, for Wertheimer's "moral" analysis seemed in fact to be very abstract, categorical, and deductive—in short, it seemed decidedly conceptual. Thus, I will argue here that Wertheimer's analysis is an example of a domesticating use of anti-conceptualist theory. While he seems to have heeded the critique of abstract analytics, he ultimately succumbs to it, presenting an analysis that, because of its anticonceptualist window-dressing, appears at first reading to be something that it is not.

What this suggests is that it is important in our own field of legal academics to be wary of similar tendencies. In his purported rejection of conceptualism, Wertheimer of course stakes out a position that is consistent with critical legal theory (and legal realism before it). Yet, like generations of liberal legal scholars who have claimed to heed antiformalist arguments only to produce the same old conceptual analyses in new garb,[10] Wertheimer reveals himself to be (assumedly not intentionally) a wolf in sheep's clothing. As such, his analysis attests to the resilience of conceptualism (and/or, perhaps, of liberal ideology), and suggests that recently expressed scholarly receptivity to critical arguments does not necessarily presage conceptualism's downfall. Thus, while it may be encouraging to Crits and other progressive legal academics to see our colleagues apparently listening to what we have to say, it is important that we not to be so grateful for the open ear that we fail to criticize incomplete or domesticating uses of our work.

Professor Wertheimer's articles provide a useful context in which to explore this problem of domestication, for, although he is a political philosopher, he is writing here about a subject near and dear to mainstream legal categories of thought: coercion.[11] Moreover, he discusses the concepts of exploitation and coercion in the context of a number of hypothetical situations that are exactly like the questions law professors love to pose in classroom discussion, situations involving such things as offers to buy organs from poor people, exorbitant charges for sea rescues, sales of lifesaving drugs at high prices, etc.

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9. As I will discuss further in Part III.A, Wertheimer does not completely reject conceptualism, but rather conceives of it as having a limited, preliminary, definitional role in his analysis. As I will also discuss further, he clearly does not see the conceptual aspects as controlling the conclusions he reaches. *See infra*, Part III.A.

10. While legal thinkers often claim to have escaped conceptualism, they continually fall prey to its appeal. Thus, process theory has been shown to be fundamentally formalist, *see* Gary Peller, *Neutral Principles in the 1950s*, 21 MICH. J. LEGAL REFORM 561, 617-19 (1988), as has law and economics. *See* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

11. His focus is actually on distinguishing coercion from a different phenomenon, which he calls exploitation.

In addition, as I will discuss in more detail later, the assumptions informing Professor Wertheimer's analysis of these types of situations are the same assumptions that underlie most mainstream legal approaches to such questions. Thus, his articles for this symposium provide fertile ground for an exploration of the ways in which mainstream legal analysis might domesticate critical legal theory.

The following discussion focuses on Professor Wertheimer's discussion of the issue of contract parenthood, or surrogacy.[12] Just as Wertheimer's purpose in discussing surrogacy is to highlight his analysis of the concepts of coercion and exploitation, so my purpose here will be to use the contract parenthood issue as a vehicle for exploring the nature of the underlying analytical approach that Wertheimer takes to his subject matter. Thus, while I will be saying many things about surrogacy contracts, articulating a fully-developed position on the legality or desirability of such arrangements will not be my goal. My central point is that, while Wertheimer presents his analysis as a "normative" approach that relies only minimally upon conceptual reasoning, he ultimately reproduces the very mode of analysis that characterizes the perspective he is attempting to escape.

II. Overview of Wertheimer's Analysis of Surrogacy

Professor Wertheimer's analysis of surrogacy takes off from his broader conceptualization of coercion and exploitation. For Wertheimer, coercion relates to problems in the *formation* of a contract between two parties. In contrast, exploitation refers to problems in the *substance* of the agreement reached, such as unfairness in the pricing arrangement (the price paid by the buyer for a good or service is too high or the compensation received by the seller is too low[13]) or inappropriateness of the subject matter (the subject of the contract is something that "should not be exchanged for money"[14]). I will refer to the first type of exploitation as reflecting the "just price" concern and the second type as reflecting the "commodification" concern. Whereas Wertheimer apparently believes that *coercive* contracts should not be enforced, he contends that *exploitative* agreements are acceptable unless they harm the offeree.[15] Thus, what he calls "mutually advantageous exploitation"—contracts that benefit the offeree but nevertheless violate either just

12. I prefer the term "contract parenthood," since "surrogacy" implies the illegitimacy of the biological (or gestational) mother's connection to the child. Nevertheless, since "surrogacy" is so widely used, I will employ that term as well.

13. Wertheimer, *Remarks*, *supra* note 8, at 897. According to Wertheimer, however, this does *not* mean that any transaction in which the parties did not gain roughly equally would be exploitative. He does not explain how some contract prices could be determined to be too low or high if not by comparing the benefits obtained by both sides. Instead, he renders the exploitation question irrelevant, by *assuming* that surrogacy contracts are exploitative and by arguing that, even if they are, they are still enforceable as long as they benefit both parties. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1220-21.

14. Wertheimer, *Remarks*, *supra* note 8, at 898.

15. "We do not need to be moral rocket scientists to argue that harmful exploitation may be legitimately prohibited by the state or that coerced agreements are neither morally nor legally binding." *Id.* at 897.

price or commodification concerns—should be legal.[16]

Applying this conceptual framework to surrogacy, Wertheimer begins with the assumption that such contracts *are* exploitative, and thus turns immediately to the question of whether they're mutually advantageous. Here he first considers "nonmoral" harm, asking whether the tangible benefits the surrogate receives from a surrogacy arrangement outweigh the disadvantages of the contract for her. He concludes that, although it is difficult to say definitively whether the benefits outweigh the costs,[17] even if they don't that problem can be simply solved by paying the surrogate more money.[18] Discussions of surrogacy often fail to consider that option, Wertheimer continues, because of fear of the "moral" harm of surrogacy. It is under the category of moral harm that he addresses the commodification concern.

Rather than considering the impact that the commodification of reproduction might have on the condition of women as a group, Wertheimer confines his discussion at this point to the impact surrogacy has on the actual women who agree to be surrogates.[19] Defining the harm of commodification quite narrowly, he essentially treats it as a loss of respect—either of one's self or of others.[20] He then dismisses this concern, expressing doubt as to whether either the surrogate herself or others in society in fact lose respect for her and concluding that, even if they do, "it is not clear that [such loss of respect] represents a basis for condemning the practice [of surrogacy] rather than a basis for condemning society's reaction" to it.[21] Thus, for Wertheimer, surrogacy is probably advantageous to the surrogate, because it causes her neither

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16. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1224. Where surrogacy creates moral harm,

> there are reasons . . . to prefer a political regime that does not regard such wrongness as a sufficient justification for invoking the coercive powers of the state.
>
> . . . .
>
> If surrogacy is a case of mutually advantageous and consensual exploitation, then it certainly does not follow that . . . we should prohibit A from exploiting B.

Id.

17. *Id.* at 1217. "In view of our limited factual knowledge and unresolved theoretical controversies over what counts as objective harm, I am inclined to think that we should now remain agnostic." *Id.* at 1217-18.

18. *Id.* at 1218. "If we are operating in the territory of the surrogate's nonmoral interests, I think it is entirely possible, nay inevitable, that a sufficiently large increase in compensation would convert a net harm into a net benefit for many women." *Id.*

19. Wertheimer recognizes that his limited inquiry into whether commodification makes the contracts exploitative does not end the discussion: "Commodification may better be understood as a basis for thinking that surrogacy is wrong for reasons unrelated to the interests of the surrogate and, therefore, unrelated to worries about exploitation of the surrogate." *Id.* at 1220. But when he returns to those reasons, they do not prevent him from concluding that surrogacy should be legal. *See infra*, text accompanying notes 68-72.

20. For a much richer conceptualization of the harm that commodification of reproductive functions can produce, see Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1880-81 (1987).

> To speak of personal attributes as fungible objects—alienable 'goods'—is intuitively wrong. . . We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object. Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person.

Id. at 1880-81.

21. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219.

nonmoral nor moral harm.[22]

According to Wertheimer, such a "mutually advantageous" contract should be allowed, even if it is unfair to the surrogate. Even "if surrogacy is wrong and exploitative because it commodifies that which should not be commodified, it does not follow that surrogacy should be prohibited or that surrogacy contracts should not be enforceable."[23] For Wertheimer, exploita-

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22. I must admit that the structure of Wertheimer's argument is a bit confusing to me here. It is unclear which of two alternative arguments he means to be presenting. First, he could be differentiating between the question of whether a contract is exploitative and the question of whether it is harmful. Under that approach, his analysis would look like this:

Exploitation	+	Harmfulness	
unjust price?	) if yes, contract is ex-	nonmoral harm?	) if yes, it's harmful
or	) ploitative; if no, it's not	or	) exploitation; if no,
commodification?)		moral harm?	) it's mutually adv exploitation

The problem with this way of setting up the analysis is that the concept of mutually advantageous exploitation becomes difficult to comprehend. How can an agreement involve either an unjust price or commodification and yet not be harmful to either party? In some contexts, the answer seems easy. If you sell me a glass of water in the desert for a million dollars, I'm still better off than I would be without it, because without it I'd be dead. The contract, while exploitative ($1,000,000 is an unjust price for a glass of water (or is it, if it's in the desert?)), is still mutually advantageous (being alive is better than being dead). But in other contexts, and specifically in surrogacy, the distinction between exploitation and harmfulness loses its coherence. How do we know that an unjust price has been paid for surrogacy services? How do we know whether a surrogate is better off being a surrogate than she would have been had that option not been available? The only way to judge both exploitativeness and harmfulness is to measure the benefits to her against the costs; the two inquiries collapse into one.

Alternatively, it could be that Wertheimer in fact intended to collapse the two inquiries together, in which case his analysis would look like this:

Exploitation	
nonmoral harm (unjust price)?	) if yes, then harmful exploitation;
or	) if no, then mutually advantageous
moral harm (commodification)?	) exploitation

Under this approach, however, the concept of exploitation loses all of its substantive content. An arrangement is seen as mutually advantageous exploitation whenever it involves neither moral nor nonmoral harm. But there is no indication of why, in such circumstances, it should still be considered to constitute exploitation at all. The exploitation label loses all significance, and Wertheimer's argument reduces to the contention that beneficial contracts should not be prohibited, a rather uncontroversial point. Because I assume that Wertheimer is meaning to say more than that, I am assuming that the first interpretation is the correct one.

However, an additional comment that Wertheimer makes in his paper suggests that the second interpretation might actually be what he intends. At one point Wertheimer acknowledges, and in fact makes light of, the absence of a definition of exploitation in his paper, noting that, if someone contests his view that a contract can be both exploitative and mutually advantageous, such agreements can instead be called "cases of mexploitation or shmexploitation or whatever. I am interested in the moral character of certain sorts of transactions and relationships, whatever we want to call them." Wertheimer, *Remarks*, *supra* note 8, at 898-99. Thus, he seems to be saying that he *intends* for the concept of exploitation to be in some sense extraneous to his analysis. Under his formulation, then, the fighting issue is apparently whether the agreement is harmful. Yet Wertheimer treats that question very conceptually, citing little empirical evidence and aiming most of his discussion at a very abstract, general level. Nor does Wertheimer ultimately explain why it is necessary to address the notion of exploitation at all if it is in fact irrelevant to his analysis.

23. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1220.

tion does not justify banning surrogacy so long as the practice is beneficial to the surrogate. "[T]he surrogate may be exploited even if surrogacy provides a net benefit to her. On the other hand, if the compensation is (or could be made) adequate, then we will have to conclude that the surrogate is not (or would not be) *exploited*, whatever else we may want to say about surrogacy."[24] Apparently, then, just price trumps commodification; if the amount paid is large enough, the arrangement cannot be exploitative, regardless of its commodification effects. Whatever disrespect the surrogate might feel can be salved with money.

Regardless of whether surrogacy is considered exploitative, Wertheimer nevertheless believes that "[i]t will be easier to justify the prohibition or non-enforcement of surrogacy agreements if they are nonconsensual."[25] He believes absence of consent is not likely to be a problem, however, for "[o]n any standard account of coercion, surrogacy is simply not coercive."[26] The offer made to a surrogate is a "positive good"[27] because it confers a benefit on her and does not propose to make her worse off if she refuses it. Moreover, any sense of compulsion that she might experience due to the circumstances in which she finds herself—such as a need for money or a lack of employment options—does not render the contract coercive because those conditions are not produced by the offeror. Relying here on an individualist notion of citizens' responsibilities of the sort that critical scholars often critique, Wertheimer asserts that the intended parents have no obligation to correct the unequal background conditions that might cause a surrogate to accept a "nonrefusable offer"—an offer that anyone in her situation would rationally choose to accept. In such situations, the surrogate should be allowed to choose between the two evils with which she is presented.[28]

Having concluded that most surrogacy contracts are mutually advantageous and therefore should probably not be prohibited even if exploitative, Wertheimer considers whether, as an alternative to banning these arrangements, the government should instead regulate the amount paid to the surrogate. However, he concludes that is not necessary either, arguing that a potential surrogate is likely to be in a strong negotiating position vis-a-vis the intended parents and that any restrictions that discouraged surrogacy would unacceptably infringe upon the autonomy of women who desire to be surrogates. Moreover, even if the surrogacy contract itself could be seen as violative of a woman's freedom, "it remains an open question whether the right to choose not to be positively or truly free is itself a crucial dimension of one's autonomy."[29]

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24. *Id.* at 1221.
25. *Id.*
26. *Id.* at 1222.
27. *Id.* at 1223.
28. *Id.* In contrast to situations where background conditions influence the surrogate's decision, if her decision is instead the product of "cognitive error"—a miscalculation as to the effect that surrogacy will have on her life—Wertheimer *is* willing to consider her consent involuntary. *Id.* For Wertheimer, then, it appears that irrational or unperceptive women might be deserving of protection, although powerless women are not. He ultimately leaves the question open, however.
29. *Id.* at 1225 (cites omitted).

Finally, Wertheimer returns to the question of the impact of contract parenthood arrangements on society as a whole—a "justice" concern which he dismisses rather quickly. First, Wertheimer reiterates his point that societal, as opposed to individual, effects of surrogacy have nothing to do with exploitation as he defines it. Second, he asserts that, since prohibition of surrogacy would burden "the least well-off" women to benefit others, it is hard to justify.[30] Finally, citing an absence of empirical evidence to indicate that surrogacy would reinforce existing inequalities, Wertheimer concludes that the practice should not be prohibited.

III. A CRITIQUE OF WERTHEIMER'S ANALYSIS

In his attempt to avoid a conceptualist analysis, Professor Wertheimer commits the same error as do those who domesticate critical legal thought. His alternative approach reveals a very narrow conception of what is wrong with the type of thinking that critical realists and Crits have consistently attacked. Apparently viewing abstract, categorical reasoning as the primary flaw in conceptualist analyses, he ignores the critical argument that such analyses are necessarily grounded upon challengeable, but nevertheless invisible, *substantive* assumptions. Rather than appreciating the more radical implications of the critical realist attack on formalism, he domesticates that attack, reducing it to little more than a call to empiricism.

I will limit my comments on Professor Wertheimer's analysis to three points. First, as stated above, although Wertheimer dismisses conceptualist analysis, in founding his argument upon an elaborate web of abstractions and an essentialist view of the individual legal subject, he ultimately reproduces the metaphysical approach he purports to reject. Second, like his conceptualism, Wertheimer's summary conclusion that negative liberty is the only type of liberty to consider here reflects a conceptual framework typical of mainstream legal thought and sharply criticized by the Crits. In endorsing an abstract, decontextualized notion of human liberty, Wertheimer uses as formalistic an argument as that found in *Lochner v. New York*,[31] the anticonceptualists' favorite whipping boy. Yet his anticonceptualist gloss makes his analysis seem less dated than it really is. Third, Wertheimer's assertion that background conditions are irrelevant to the enforceability of surrogacy agreements ignores the constitutive role of law in creating those background conditions and thus contributing to the individual choices that respond to them. This argument, too, adds little to traditional mainstream legal takes on such issues. Throughout, Wertheimer's argument reproduces, rather than escapes, an individualist, conceptual, and formalist approach to questions of coercion, exploitation, and surrogacy.

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30. *Id.* at 1228.
31. 198 U.S. 45 (1905).

A. *Normative in Name Only*

Professor Wertheimer describes his approach to exploitation as a "normative" or "moralized" approach, emphasizing that "[t]he questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than conceptual analysis."[32] He continues:

> I do not deny that it is possible to produce a morally neutral or empirical account of coercion . . . . I do maintain that if we were to operate with a morally neutral account of coercion, we would have to go on to ask whether that sort of coercion renders B's agreement invalid and that we will be unable to answer that question without introducing substantive moral arguments.[33]

Thus, regardless of whether the moral inquiry is imported at the definitional level—the determination of "what counts"[34] as coercion or exploitation—or at the justification level—the determination of when coercion or exploitation is justified—it cannot be avoided.[35]

In his articles for this Symposium, Wertheimer seems to mean to limit himself to discussion of the definitional side of the equation, explaining that such conceptual analysis is not completely useless, but must be supplemented at some point by moral inquiry. "The concepts of coercion and exploitation," he argues, "provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that."[36] Thus, at the same time that Wertheimer rejects conceptual analysis as inadequate, he endorses it as useful. And, at the same time that he labels his own approach as normative, he grounds it upon a definitional, conceptual bottom. Wertheimer apparently believes that conceptual and normative approaches can coexist, and sees no contradiction in trying to combine them as he does.[37] But I will argue here that the definitional side of

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32. Wertheimer, *Remarks*, *supra* note 8, at 890.

33. *Id.* at 892.

34. *Id.* at 890.

35. The two questions that Wertheimer applies to coercion seem to apply to exploitation as well, and his discussion of surrogacy reflects a similar bifurcation between definitional and justificatory questions, so I am treating his *methodological* approaches to coercion and exploitation as the same.

36. *Id.* at 890.

37. It is unclear to me exactly what Wertheimer means by "normative" analysis or "substantive moral arguments," but it seems likely that he does not mean the same thing that critical legal scholars mean when they talk about the moral or value-based element in law. The latter mean to be referring to the *irreducibly political* nature of legal decisionmaking, to the fact that the manipulability of legal doctrine means that judicial decisions are based not on the rules but on substantive visions of how society should be structured and substantive assumptions about the nature of existing social relations. Wertheimer probably does not intend to go that far. In any event, what is important for present purposes is that he clearly intends to be contrasting normative with conceptual; he clearly believes that purely conceptual analysis is inadequate to the task of resolving problems involving human choices. And, like mainstream theorists who make allusions to critical insights in their own work, he seems to believe that conceptualism and anticonceptualism can peace-

his argument, the importance of which he minimizes, is actually central to his approach. Like many legal theorists who have tried to respond to critical critiques of conceptualism, Wertheimer ultimately fails at the task he sets for himself. Despite his protestations to the contrary, the analytics ultimately drive the analysis.

1. What Counts as Mutually Advantageous Exploitation is What Counts, Period

As I described above, how surrogacy is categorized determines Wertheimer's assessment of how it ought to be treated. Wertheimer thinks exploitation that produces *nonmoral* harm to the surrogate should perhaps be restricted, that *morally* harmful exploitation is a harder case, and that *mutually advantageous* and consensual exploitation should probably not be prohibited at all.[38] Thus, for Wertheimer, the categorization of a type of exploitation determines its treatment. Once he has decided that surrogacy constitutes mutually advantageous exploitation, his position on regulation is a foregone conclusion. Although Wertheimer distinguishes between definitional and justificatory inquiries, and emphasizes that either one or the other must include moral analysis, his conceptual approach to defining types of exploitation becomes the tail that wags the dog, leaving no room for a moralized account.

In setting out his overall approach to analyzing coercion and exploitation, Wertheimer clearly sees the definitional inquiry as separate from and unrelated to the justificatory questions.[39] He thinks it is possible to decide how to define concepts such as coercion and exploitation without considering the results of those definitions. He treats the definitional and justificatory questions separately and notes that the former "are much less important than they first seem,"[40] because they do not tell us whether to prohibit or allow certain agreements. Moreover, Wertheimer believes as well that it is possible to proceed from the definitional questions to a moral analysis of how a practice ought to be treated, without having the previously-engaged-in definitional analysis determine one's moral results.

Yet, by separating the definitional from the justificatory questions

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fully coexist.

38. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

39. As noted earlier, he states:

> The concepts of coercion and exploitation provide important templates by which we organize many of the moral issues in which we are interested, but they cannot do much more than that. The questions as to what agreements should be treated as invalid and what behaviors should be prohibited will be settled by moral argument informed by empirical investigation rather than by conceptual analysis.

Wertheimer, *Remarks*, *supra* note 8, at 890.

40. *Id.*

in this way, Wertheimer has painted himself into a box. If the question of whether a particular agreement ought to be seen as coercive or exploitative really has no practical ramifications—if it cannot tell us whether the agreement ought to be regulated or banned—then it is hard to see why one should care *what* the agreement is called. We could call it "coercive," "exploitative," "mutually advantageous," "meditative," or "car wax," and it would make no difference whatsoever to any conclusions we might draw about its legitimacy. If the definitional inquiry is not tied to justificatory questions it is pure metaphysics (fine for a philosopher, perhaps, but rather unsatisfying for a lawyer).[41]

On the other hand, if we attempt to tie the definitional question to the justificatory one—as Wertheimer does in basing the treatment of a contract on its categorization—then we face a different problem. That is, it is impossible to decide what counts as coercion or exploitation (or mutual advantage) without knowing how coercive or exploitative (or mutually advantageous) agreements will be treated. The definition of a concept necessarily turns on the *purpose* for which we are defining it. To draw on the well-known realist example of this point:[42] The definition of what constitutes a *vehicle* under an ordinance prohibiting vehicles in the park will depend upon whether the ordinance is designed to prevent noise pollution (a war monument with a truck on it will be OK), assure pedestrian safety (golf carts might be OK), or reduce air pollution (electric cars will be OK). In other words, Wertheimer has set up a false dichotomy between definitions and impacts. That is, it is arguably impossible to define coercion without reference to what one is attempting to accomplish with the concept. Similarly, it is arguably impossible to decide when a coercive practice should be prohibited without knowing *what* exactly we mean by coercive. Thus, once Wertheimer tells us that, under his scheme, mutually advantageous exploitation will probably not be prohibited, the response to the question of whether surrogacy constitutes mutually advantageous exploitation resolves as well the question of whether surrogacy should be prohibited. They are two ways of asking the same thing. The conceptual analysis that (in Wertheimer's terms) does no more than organize the issues in fact resolves them, leaving no room for moral argument. The question of what counts as mutually advantageous exploitation is what

41. This may, of course, be a problem of paradigm differences. *See generally* Catherine Kemp, *The Uses of Abstraction: Remarks on Interdisciplinary Efforts in Law and Philosophy*, 74 DENV. U. L. REV. 877 (1997). Professor Wertheimer is a political philosopher; I am an attorney. Political philosophy invites the exploration of knotty metaphysical problems for the edification that such exploration provides; law requires concrete answers. I would suggest instead, however, that there is a flaw in Wertheimer's argument. If exploitation is irrelevant to his analysis, then it should have been excluded.

42. *See* Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 633 (1958).

counts, period.

2. Conceptualism and Consent

In addressing the voluntariness of surrogacy agreements, Professor Wertheimer again raises both a definition question and a justification question, and again fails in his effort to keep the two separate. He emphasizes that the label "coercive" means nothing, but he simultaneously sets up his analysis so that it means everything.

Wertheimer states that our labeling of a surrogate's contract as consented or coerced will not resolve the substantive moral question of whether it ought to be prohibited. "Whatever label we use to describe her choice, we must still decide whether she should be allowed to make such a choice. And referring to such choices as 'coerced' will not resolve that substantive moral question."[43] Here Wertheimer sounds very much as if he believes that terms like *rights*, *duress*, and *coercion* should not be understood metaphysically and that conceptual reasoning relying upon such terms cannot be the basis for judicial conclusions—points that critical scholars frequently make as well. But he nevertheless ultimately resorts to an approach to coercion that is just as formalistic as his approach to exploitation, ignoring his earlier indictment of the question-begging nature of such analyses.

Consent is important in two places in Wertheimer's surrogacy article. First, he notes that, while consensual exploitation is possible, it is nevertheless easier to justify prohibiting surrogacy contracts if they are nonconsensual—that is, involuntary.[44] Second, he states that, even if a surrogacy contract could be said to have violated the woman's rights (for example, her right not to have her reproductive labor commodified), her consent eliminates any concern we should have for such a violation. To Wertheimer, the answer to the question, "Was the surrogate's consent coerced?," directly affects how the contract should be treated.

Despite having expressed skepticism about the validity of the enterprise, Wertheimer does not hesitate to label surrogacy voluntary: "On any standard account of coercion, surrogacy is simply not coercive."[45] This is because coercing someone means threatening to make her worse off if she does not accept one's offer. Since the intended parents do not propose to make the surrogate worse off were she to refuse their offer to pay her for bearing them a child, their offer is not coercive. Moreover, any situational factors that might make the offer

43. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

44. *Id.* at 1221. Wertheimer also asserts, more definitively, that coerced agreements should not be legally binding.

45. *Id.* at 1222.

"nonrefusable"—difficult to pass up—are irrelevant, because they are not caused by the intended parents. In such situations, "it is arguable that it is the background conditions that are the problem and not the offer that allows [the surrogate] to improve on those background conditions. The offer is still a positive good."[46] Even if the surrogate has been forced by circumstances to agree to sell her reproductive capacity, she has not been "coerced" because the parties with whom she has contracted are not responsible for those circumstances. Thus, Wertheimer concludes, "the intended parents' proposal is an offer, and offers do not coerce."[47]

Just as Wertheimer's attempt to combine a conceptual definition of exploitation with a normative argument as to when it is justified collapses under its own weight, so here the inquiry into voluntariness ultimately determines the question of enforceability. A surrogacy contract is enforceable, Wertheimer says, only if it is freely entered into. Yet his inquiry into consent is extremely conceptualist, with definition piled upon definition. Treating the presence or absence of coercion as a question susceptible of logical determination, he ignores the moral/political choices involved in the selection of a definition. And since, under Wertheimer's schema, how coercion is defined determines how the surrogacy contract is to be treated, this flawed conceptual analysis becomes the central determinant of the outcome; the normative element is rendered irrelevant.[48]

In separating out his conceptual analysis from a subsequent normative inquiry, Wertheimer not only fails to see that the conceptual analysis will affect what follows, but also erroneously assumes that by saving the normative dimension for later he can assure the viability of the conceptual part. But Wertheimer's focus here on whether one of the parties to the contract has affirmatively acted to harm the other party, and his treatment of the background conditions as irrelevant, is itself a value choice—a substantive preference for an individualist, rights-based inquiry over, for example, a more community-focused perspective that emphasizes, say, fiduciary duties and security instead of self-protection and autonomy.[49] While it may be that this is what Wertheimer means

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46. *Id.* at 1223.

47. *Id.* at 1222.

48. Compare, for example, Albert Alschuler's take on coercion: "Most lawyers have known for a long time that the term coercion cannot be defined, that judges place this label on results for many diverse reasons, and that the word coercion metamorphoses remarkably with the factual circumstances in which legal actors press it into service." Albert Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 957 (1997). While some of Wertheimer's language suggests that he adopts a similar view, the details of his analysis suggest otherwise. For him, the conceptual inquiry into definition determines the supposedly normative conclusion about application.

49. *See, e.g.*, Leslie Bender, *A Lawyer's Primer of Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

by the normative element in his analysis, that seems unlikely, for he neither articulates the basis of that value choice nor defends it in any way. Rather, it seems more likely that he simply fails to see the substantive political content residing within what he perceives to be the initial, purely conceptual, side of his analysis.

Like the legal scholars who treat conceptual and anticonceptual approaches as equally viable alternatives, Wertheimer here retains a faith in conceptualism that reveals a failure to comprehend the corrosiveness of the critique that has been directed against it. Thus, rather than fully abandon conceptualism, he tries to redeem it by combining it with a separate "normative" analysis. But this pluralist approach domesticates the anticonceptualist critique and, as a result, fails to escape reliance upon a set of formalist abstractions.

B. *Decommodification and Positive Freedom*

In addition to mislabeling his analysis as anticonceptualist, Wertheimer also relies upon many of the substantive assumptions for which conceptual thinkers, at least in law, have been repeatedly criticized. In particular, his narrow conceptualization of the autonomy interests at stake and his implicit reliance upon the public/private dichotomy are both analytical moves that have characterized formalist legal thought since the mid-19th century. Yet Wertheimer's rejection of conceptualism apparently does not extend to these elements. Like many legal theorists who thought the realists' main contribution was to reveal that legal thinking was divorced from modern social realities, Wertheimer seems to be centrally concerned with the need to tie analyses of issues like surrogacy to concrete, empirical information. But, just as many legal theorists who focused on empiricism failed to appreciate the indeterminacy arguments of the critical realists, so here Wertheimer has taken only a small piece of the modern critique of formalism into his analysis, leaving much just as it was before. By thus domesticating the progressive critique, he opens himself up to repeating many of the flaws of conceptual analysis.

Wertheimer sees surrogacy as presenting a choice-of-two-evils type of situation. If the woman would be worse off without being a surrogate, then we should not presume to prevent her from choosing that option, even if surrogacy causes her some harm. "If a woman can reasonably regard surrogacy as improving her overall welfare given that society has unjustly limited her options, it is arguable that it would be adding insult to injury to deny her that opportunity."[50] By assuming

50. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1223.

that governmental interference with such private choice is illegitimate, Wertheimer ignores the fact that a number of practices are considered sufficiently harmful to justify prohibition precisely *to prevent* individual actors from choosing them. Thus, the pressing question about surrogacy is, in a sense, whether a surrogate *can* reasonably regard the contract as beneficial to her—or whether we want, instead, to say as a matter of law that it is not. While it is certainly possible to argue that surrogacy is sufficiently harmful to justify prohibition,[51] Wertheimer's argument precludes that discussion by focusing on the question of government intervention and narrowly defining the harm of surrogacy.

Wertheimer fails to consider, for example, the wide variety of choice-of-evil situations in which we prohibit a choice that would arguably benefit someone because we decide that the harm that it would do, both to that individual and to society at large, is of a type that we simply do not wish to incur. That harm might come, in fact, precisely from one's being required to make the decision to engage in dehumanizing behavior that no rational person in one's position would resist. As Wertheimer himself acknowledges, in limiting his conception of harm to the surrogate to *negative* liberty, he precludes the conclusion that her *positive* liberty will actually be served by banning or regulating such contracts.

Yet the law has clearly recognized that decommodification—restraints on people's economic choices (on what can be exchanged in the market)—is sometimes necessary to truly protect people's freedom. And an entire set of legal rules is premised upon the assumption that "[t]here are . . . some things that money cannot buy."[52] We do not allow people to enter into contracts of slavery, to sell their organs, to agree to work in substandard industrial workplaces or for less than the minimum wage, to live in housing that fails to meet the housing code, etc. At least in some circumstances, we have answered the question Wertheimer poses, as to whether autonomy necessarily includes "the right to choose not to be positively or truly free,"[53] with a resounding "No." Sometimes, as John Stuart Mill so aptly put it, such exercises of negative liberty "defeat[] . . . the very purpose which is the justification of allowing" the exercise of freedom to begin with.[54] And Roscoe Pound, commenting on Mill's quote, adds, "[This principle] applies to any situation where a person by contract imposes substantial restraints upon his liberty. Freedom to impose

51. For an excellent articulation of that argument, see Radin, *supra* note 20, at 1921, 1928-33.

52. *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988).

53. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1225 (cites omitted).

54. John Stuart Mill, *Liberty*, ch. V (discussing selling oneself into slavery) (cited in Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484 (1909)).

these restraints, in the hands of the weak and necessitous, defeats the very end of liberty."[55]

Now, obviously, there are many choices of evils that we allow people to make. In fact, we usually do not worry at all about the coercive effect of market exchanges. Thus, we allow people to decide to work in toxic workplaces, to labor a grueling number of hours each week (with overtime pay or not, depending upon one's profession), to work for companies that provide neither day care nor health insurance, etc. The crucial question to address, therefore, is whether one can articulate a principled basis for decommodifying certain types of transactions but not others. Why should I be prevented from selling myself into slavery but not from deciding to be a surrogate? What is it about the *harm* of slavery that makes it categorically different from surrogacy? If we do not consider the harm of commodifying human beings through slavery to be remediable by payment of a sufficiently large amount of money, should we consider the harm of commodifying human reproductive capacities through surrogacy to be? Questions like these have been thoughtfully addressed by a number of legal scholars, most notably Margaret Radin.[56] Wertheimer's analysis, in failing to raise them at all, is unsatisfying and incomplete.[57]

In addition, in limiting his notion of autonomy to negative liberty, Wertheimer implicitly assumes that illegitimate governmental action is limited to affirmative interference in the surrogate's decisions, rather than including as well the failure to assure that the circumstances in which she makes such decisions are adequate. In short, his position on negative liberty relates to his argument that unjust background conditions are irrelevant to the status of a surrogacy arrangement. My critique of that argument is the focus of the next section.

C. *Bringing the Background to the Foreground*

1. Background Conditions and the Social Good: Wertheimer on Individual and Society

a. *Background Conditions and Nonrefusable Offers*

At several points in his article, Wertheimer asserts that the social or economic conditions under which a woman decides to be a surrogate

55. Pound, *supra* note 54, at 484.

56. *See* Radin, *supra* note 20, at 1928-33.

57. My point here is not that Wertheimer needed to engage in a lengthy discussion of such questions in this symposium, for I realize that he was using surrogacy primarily as a vehicle for exploring his concept of exploitation. The problem is rather that his approach—including his cramped definition of harm—allows one to analyze the question of surrogacy without ever having to acknowledge the *importance* of these questions.

are irrelevant to his analysis. First, in considering nonrefusable offers, he argues that the fact that background conditions may have caused the woman to accept an offer she otherwise would have refused does not render her decision involuntary.[58] Wertheimer acknowledges the critical challenge to conceptualist notions of choice, commenting that, "[i]t may be argued that when background conditions provide an inadequate range of opportunities, the moral quality or significance of one's choice is diminished."[59] But he adds that this can be so "even if the background conditions do not compromise the 'voluntariness' of the choice, strictly speaking."[60] Moreover, he proceeds to dismiss the voluntariness concern in the surrogacy context, asserting that, regardless of any unjust background conditions, the contractual father's offer is still a "positive good" because it allows the surrogate to improve her welfare over the situation in which society has placed her.[61] Thus, he contends, a woman who finds herself in difficult background conditions should not be prohibited from making the rational decision to sign a surrogacy contract. "[I]t would be adding insult to injury," he asserts, "to deny her that opportunity."[62]

b. *Societal Attitudes and Commodification*

Similarly, Wertheimer is not willing to use societal reactions to surrogacy as a reason for prohibiting it. In discussing whether the commodification of surrogates' reproductive capacities harms them,[63] he suggests that, because surrogacy might be regarded by some as "immoral" (on the grounds that "it is wrong to commodify procreational labor"[64]), a woman who engages in this practice might be "degraded" in her own eyes or those of others.[65] Because such loss of respect comes from "the way surrogacy is regarded by the society,"[66] however, "it is not clear that it represents a basis for condemning the practice

58. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1222.

59. *Id.* at 1223.

60. *Id.*

61. Wertheimer also emphasizes that whether we *label* the surrogate's consent coerced is irrelevant anyway, since the coercion question cannot be resolved without substantive moral analysis. As discussed above, however, he never offers that analysis, and the question of coercion turns out to be crucial to his ultimate conclusions, for he clearly asserts that nonconsensual surrogacy contracts should probably not be enforced. *Id.* at 1221.

62. *Id.* at 1223.

63. Wertheimer does subsequently discuss whether surrogacy harms women as a group, concluding that it does not. *See infra*, text accompanying note 71.

64. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219.

65. *Id.* For a critique of Wertheimer's rather limited definition of commodification, see *supra* note 20 and accompanying text.

66. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219. For a discussion of other, arguably more plausible, societal attitudes that could affect surrogates, see *infra*, text accompanying notes 73-81.

rather than a basis for condemning society's reaction."[67] Attitudinal, as well as economic, background conditions are simply irrelevant to the legitimacy of surrogacy contracts.

c. *Social Good and the Individual*

For Wertheimer, societal attitudes are not only an insufficient reason for concluding that surrogacy unacceptably commodifies women, but are also an inadequate basis upon which to conclude that surrogacy is unjust. He contends that, because its unjust effects on women as a group or on society at large are counterbalanced by the positive effects for the individual surrogate, contract parenthood ought not to be prohibited.

Wertheimer describes three possible bases for concluding that contract parenthood arrangements are unjust: because they "instantiate unjust distributions," because they "instantiate[] highly asymmetrical and unjust personal relations," and because they have "harmful effects on women as a class."[68] As to the first, he concludes that concern about the distributive effects of such contracts does not justify state intervention in the individual's decision to enter into one. The question, he says, is "whether society can justifiably prevent [the surrogate] from participating in such a transaction on the grounds that it is unjust. And it is not clear that it can."[69]

In addressing the second type of justice concern, asymmetrical and unjust personal relations, Wertheimer again focuses on whether the government can override the choices of the individual: "[I]t is hard to see why such transactions should be prohibited on the grounds that the relation is unjust—at least if the welfare of the potential surrogate is the focus of our concern."[70] As to the third concern, the effect on women as a group—arguably the most relevant to issues of the relationship between the individual and the society—Wertheimer objects, as noted above,[71] that prohibiting surrogacy would burden a small group of women (those who would like to be surrogates) at the expense of a larger group of women (presumably women in general). Appar-

67. Wertheimer, *Commercial Surrogacy*, *supra* note 8, at 1219.
68. *Id.* at 1227.
69. *Id.*
70. *Id.* It might be objected here that, because Wertheimer is using the surrogacy issue as a vehicle for exploring and developing his concept of exploitation, his focus on the individual is appropriate—and does not necessarily indicate an unwillingness to consider other non-individualist bases for prohibiting surrogacy. However, to the extent that he addresses the ultimate prohibition question, and includes in his analysis questions such as the impact of surrogacy on women as a group, he clearly means to go beyond the development of his exploitation thesis. And, to the extent that he treats the exploitation question as determinative, which he seems to do at points, see *supra*, text accompanying notes 38-42, he leaves himself open to the criticism leveled here.
71. *See supra* note 30 and accompanying text.

ently, Wertheimer grounds this argument on the assumption that the impact of any such group-wide harm on surrogates themselves is outweighed by the benefits to them (otherwise they wouldn't be burdened by the prohibition at all.) He never explicitly states the basis of this conclusion, however. Perhaps he believes that his discussion of "disrespect" of the surrogate adequately resolves the question, but, since that discussion fails to consider the broad range of possible dehumanizing effects that commodification could have on women (beyond loss of respect), it is unconvincing.[72]

It is interesting to note the rhetorical impact of Wertheimer's concern for surrogates' interests. By suggesting that those interests ought not to be sacrificed for the benefit of a larger group, he invokes an image of the need to protect minorities—a concern for the little guy. But the irony, of course, is that the commodification concern that many writers have articulated relates directly to the status of women who are likely to choose to be surrogates. That is, it is precisely the women who have limited economic resources and hence might choose earning money through surrogacy whose reproductive capacities are most susceptible to being seen as a means to individual or societal ends. Moreover, by conceptualizing the problem in this way, Wertheimer portrays the issue as representing a sort of battle of the interest groups—pitting the self-interest of potential surrogates against the self-interest of women unlikely to be surrogates. In so doing, he ignores the general *societal* interest in assuring that people are not treated in dehumanizing ways and that harmful gender roles are not reinforced. Rather than thinking about the common good in more organic terms, he reduces it to the preferences of discrete groups.

Wertheimer's analyses of nonrefusable offers, commodification, and what he calls "justice concerns" reveal a classic liberal individualist approach to the surrogacy issue—an approach which frames the question as concerning the relationship between the state and the individual and assumes that legal rules regulating the contracts do not and should not implicate broader societal concerns. For Wertheimer, it is illegitimate for legal rules to burden individuals in order to improve the community at large. He assumes a radical disjunction between the individual, the state, and the society: individual choices and societal attitudes neither are nor should be affected by law; the role of the state is to facilitate private freedom, not to change the conditions under which that freedom is exercised, and the common good is determined by political struggle among interest groups. As the next subsection will argue, in rejecting conceptualism, Wertheimer has not moved the ball

72. *See* Radin, *supra* note 20.

very far beyond 19th century formalist analysis. He ignores the more corrosive aspects of the critical challenge to conceptualism.

2. Choices, Background Conditions, and the Essentialized Legal Subject: Wertheimer Criticized

Ignoring the extent to which surrogates' decisions are socially constructed, as well as the role of law in that process, Wertheimer precludes the recognition of society's, and the legal system's, responsibility for any harm that such arrangements might cause surrogates, as well as any meaningful discussion of the broader societal impact of the practice. In conceptualizing economic conditions, societal attitudes, and individual women's choices as part of a private world in which law does not and should not interfere, he employs essentially the same conception of the relationship between society and the individual as is employed by many mainstream legal thinkers, the public/private dichotomy. Like them, he rejects conceptualism while retaining the central organizing structures that characterize much of formalist thinking in law.

Wertheimer asserts that the intended parents who sign a surrogacy contract have no obligation to repair the unjust background conditions that induce the surrogate to agree to its terms. But this argument fails to recognize that the invalidation of such contracts would not constitute an illegitimate governmental intervention in the relationship between two private actors. The legal system is implicated in the existence of those background conditions; they are often, themselves, the product of law. Thus, invalidation of the contracts is merely a change in the *already existing* regulatory system, not a *turn to* regulation where there has previously been none.

Consider, for example, the surrogate's choice to bear a child for an infertile couple, which many such women make because they want to "give the gift of life" to others.[73] (Wertheimer appears to allude to such altruistic impulses when he mentions the "psychological gratification"[74] that surrogates get from the practice.) Why do such women find giving this type of gift gratifying? If it makes them feel like good people, why does it? To the extent that these women are also motivated to use surrogacy as a way to earn money, why does the "job" of bearing children appeal to them? It doesn't take an expert on gender relations to notice that both altruism and motherhood (not to mention *selfless* motherhood) are central components of the idealized image of womanhood that has been imposed upon women in this society for

73. *See In re* Baby M, 537 A.2d, at 1236.
74. Wertheimer, *Commercial Surrogacy, supra* note 8, at 1217.

generations.[75]

But my point here is not merely that societal attitudes contribute to surrogates' choices.[76] What is important for my argument is rather the role that law has played in constructing those societal attitudes. Legal culture, by treating the ideal woman as a creature of the domestic sphere of children and home and not the public sphere of politics and work, has helped to create and reinforce the societal attitudes that likely contribute to women's decisions to become surrogates. Legal rules such as those that prohibited or discouraged women from being trustees of estates[77] or serving as jurors[78] or continuing to work when pregnant[79] prevented both privileged and outsider women[80] from entering or staying in the public sphere and, by establishing a domestic ideal of womanhood, stigmatized those women who continued, whether by choice or by necessity, to work outside the home. Thus, law is implicated in the societal attitudes that may make the altruistic aspects of surrogacy appealing to some women. Similarly, judicial rulings that justify the legal regulation of women's reproductive functions on the grounds that it furthers the societal interest in producing babies[81] legitimate instrumental uses of women's bodies and may thereby make it easier for women themselves to see their reproductive capacities as vehicles for the realization of others' objectives.

Moreover, even if the main appeal of surrogacy is economic, rather

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75. While not all women have been stereotyped in accordance with this image—privileged women have been seen as vulnerable, altruistic, etc, while low income women and women of color have not—all of them have been *subjected* to it, in the sense that it has been held up as an ideal against which all are measured.

76. Nor do I mean to suggest that surrogates' decisions are *determined* by social forces. Clearly, individuals themselves make their own choices within the decisional universe constructed by the surrounding society. And clearly, the relationship between agency and environment is an extraordinarily complex one. *See generally* Kathryn Abrams, *Sex Wars Redux: Agency & Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995). (A statement by Karl Marx best captures, to my mind, the complexity (and truth, if you will) of the relation: A wage worker, he says, is a "man who is compelled to sell himself of his own free will." KARL MARX, CAPITAL VOL.1 766 (1967) (*quoted in* Jeffrey Reiman, *The Marxian Critique of Criminal Justice*, in RADICAL PHILOSOPHY OF LAW 119 (David S. Caudill & Steven Jay Gold, eds., 1995)). My only point here is that Wertheimer fails to recognize this fact, and as a result, produces a cramped and ultimately unelucidating discussion of the surrogacy issue.

77. *See* Reed v. Reed, 404 U.S. 71, 77 (1971) (overturning statute that gave preference to men over women to serve as trustees of estates).

78. *See* Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (upholding statute that excluded women from jury duty).

79. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 352 (1984-85).

80. I use the term "privileged women" to refer to upper- and middle-income white women, and "outsider women" to refer to low income white women and women of color of all socioeconomic classes. *See* Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 495 (1993) (developing these terms more fully).

81. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 873-77 (1992) (holding that the right to reproductive autonomy is not violated by state policies explicitly aimed at encouraging women to have children).

than attitudinal, law still affects women's choices to enter such contracts. As has been frequently pointed out, wealth distribution is greatly affected by governmental policies, both directly (through tax laws, for example) and indirectly (through property law, family law, criminal law, comparable worth law, workplace regulation, and the like).[82] The unjust background conditions that Wertheimer sees as irrelevant to the legitimacy of the surrogacy arrangement are themselves the product of legal regulation of society. Even the infertile couple's infertility, as well as their felt need to surmount it through surrogacy, are not disconnected from legal rules and policies.[83]

Thus, to ban surrogacy would not necessarily be to make the intended contractual parents repair the surrogate's unjust background conditions, as Wertheimer suggests. Such a ban would not necessarily constitute governmental imposition on the infertile couple of an obligation to protect surrogates from harmful choices. To see it that way is to assume that both contracting parties exist in a self-created, extra-legal condition, and that the surrogacy ban inserts governmental action to change that otherwise purely private condition. Yet, in recent years, critical legal scholars have thoroughly dismantled this vision of the relationship between private freedom and public power[84] (not to mention the earlier challenges by the realists[85]). As Frances Olsen has pointed out, "[T]he terms 'intervention' and 'nonintervention' are largely meaningless . . . and as general principles, 'intervention' and 'nonintervention' are indeterminate . . . . As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so."[86] For this reason, a law that prohibited surrogacy need not necessarily be seen as the imposition of a governmental burden on those

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82. In the surrogacy context, for example:

> From a legally enforced regime of private property that makes most people's survival depend on wage labor, to a publicly structured wage system that fails to give equal pay to women for work of comparable worth to that performed by men, to a definition of wage labor ... that excludes domestic work in one's home, the law establishes a background that severely constrains women's economic power and choices.

Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Contexts*, 41 DEPAUL L. REV. 1369, 1386 n.62 (1992) (reviewing CARMEL A. SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989)).

83. Causes of infertility that can be affected by legal policies include sexually transmitted diseases, workplace hazards such as chemicals and radiation, and unconsented sterilization. Moreover, law's role in elevating biological kinship reinforces the notion that infertility is a tragedy. *See* SHALEV, *supra* note 82, at 76-77; Ehrenreich, *supra* note 82, at 1386-87.

84. *See, e.g.*, Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

85. *See, e.g.*, Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

86. Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835-36 (1985).

citizens who desire to participate in the practice. Rather, it could just as easily be seen as the *removal* of a previously-created governmental *subsidy* in favor of those individuals—as elimination of the effects of all the policies that gave the contracting parents the bargaining power to obtain the surrogate's consent to begin with.[87]

Thus, by retaining the liberal individualist notion of the essentialized subject—a self-creating person separate from social context, who *responds to* culture rather than being *constituted by* it—Wertheimer reproduces the same structural categories that usually inform conceptualist analyses. In so doing, he fails to acknowledge the alternative, constructivist, understanding of the relation between individual and society and hence fails to recognize his own take as challengeable. Like many conceptualists, he fails to see that his analysis is grounded on an unarticulated, *political* choice.[88]

Surrogacy is a very difficult issue. It is not clear to me that all surrogacy contracts for pay should necessarily be prohibited, or that all instrumental uses of women's bodies or reproductive capacities necessarily harm the women who engage in those practices. Like Professor Wertheimer, I find it somewhat patronizing when academicians presume to know better than the individuals involved which side of a choice of evils is the least harmful one to pick. But I also believe that approaching the contract parenthood question from a perspective like Wertheimer's is ultimately more harmful than helpful.

IV. CONCLUSION

In surrogacy, as in many legal issues, the devil is in the details. A process like that which led to Mary Beth Whitehead's pregnancy is clearly untenable; one where the surrogate picks the couple she is to work with, where both sides receive an independent mental health exam and the results of all such exams, where the surrogate has her own independent attorney, where she is allowed to pick her physician, where the fee is commensurate with the valuable and demanding service being provided, and where the costs of medical complications of the pregnancy (including lost income) are born by the contracting parents, might not be. Surrogacy might reinforce the damaging reduction of women to their bodies or it might destabilize traditional notions of motherhood as selfless and domestic, rather than lucrative and commer-

87. *See id.* at 852, 860.

88. I should emphasize here that I am not saying the constructivist account is more true or correct. And in fact, it might be most helpful to conceive of the individual and society as in a dialectical relationship with each other, so that neither essentialism nor constructivism provides the full answer. My point here is simply that Wertheimer's analysis, like the conceptualism he attempts to escape, necessarily entails political choices.

cial. Its effects will depend on its implementation and, in any event, they are inevitably difficult to predict.

But, regardless of the ultimate conclusion one reaches about contract parenthood, it is clear that to pose the issue as a question of whether certain abstract definitions of harm or consent are met, or whether government can justly override the private choice of a woman to become a surrogate, or whether it can require the contractual parents to act altruistically towards her, is to obscure the very real moral/political decisions that must be made. It is to substitute abstract, individualist analytics for an admittedly more ambitious (and muddy) inquiry into what kind of kinship system, gender relations, relationship to our physical bodies, and reproductive roles we want to have in this society.[89]

Moreover, an argument that retains these structural elements of liberal thinking, even while explicitly rejecting purely abstract and deductive analysis, fundamentally misperceives the danger of formalist approaches to sociolegal issues. It reduces the critical argument to nothing more than a set of alternative methodological preferences (the specific over the general, the concrete over the abstract, the empirical over the metaphysical, etc.) and ignores the more fundamental substantive assumptions that motivate modern critiques. Dangerously domesticating critical thought, it pretends that pluralist combination of contradictory views is possible and that politics can be tamed by law.

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89. For a treatment of the surrogacy issue that relies upon the same public/private dichotomy as does Wertheimer, but nevertheless manages to engage issues of gender role and kinship definition in a creative and thought-provoking way, see SHALEV, *supra* note 82. *See also*, Ehrenreich, *supra* note 80 (reviewing Shalev's book).