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Constraint and Confession

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CONSTRAINT AND CONFESSION

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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

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.