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MIRANDA'S FAILURE TO RESTRAIN PERNICIOUS INTERROGATION PRACTICES

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As Yale Kamisar's writings on police interrogation demonstrate,[1] our simultaneous commitments to promoting law enforcement's interest in obtaining confessions and to protecting individuals from overreaching interrogation practices have created a nearly irreconcilable tension. If the police must be granted authority to engage in effective questioning of suspects, it will obviously be difficult to insure that "the terrible engine of the criminal law . . . not . . . be used to overreach individuals who stand helpless against it."[2] If we are committed to accommodating these conflicting interests, however, some means must be found to impose appropriate restraints on the police when they engage in interrogation.

The Warren Court undoubtedly believed that *Miranda*'s safeguards would impose significant restraints on the police, ensuring that suspects subjected to custodial interrogation would not only be informed of their constitutional rights but also protected against coercive interrogation practices. Indeed, when *Miranda* was decided, it was widely believed that the Court had imposed inordinate restraints on the police. In his *Miranda* dissent, Justice White asserted that there was "every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now . . . either not be tried at all or will be acquitted."[3]

Other commentators went further, even suggesting that the Court's decision would have the effect of "very nearly" eliminating the " 'confession' as an effective . . . tool [of] . . . law enforcement."[4] Based

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1. Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 732 (1963), *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 3-4 (1980) [hereinafter KAMISAR, ESSAYS].

2. Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (Frankfurter, J., plurality opinion), *quoted in* KAMISAR, ESSAYS, *supra* note 1, at 13.

3. Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

4. Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda*?*, 85 CORNELL L. REV. 883, 900 (2000) (quoting position paper issued by candidate Richard M. Nixon during the 1968 presidential campaign).

on their assessments of *Miranda*'s probable impact, conservative critics generally had no doubt that *Miranda* should be overruled,[5] a view that precipitated 18 U.S.C. § 3501, the statute considered in *Dickerson*.[6]

By the time the Rehnquist Court decided *Dickerson* more than thirty years later, however, conservatives' perception of *Miranda* had fundamentally changed. In a revealing portion of the *Dickerson* opinion, Justice Rehnquist seemed to indicate that the Court would not "agree with *Miranda*'s reasoning and resulting rule" if it "were . . . addressing the issue in the first instance."[7] In upholding *Miranda* against constitutional attack, however, he stated that "principles of *stare decisis* weigh heavily against overruling it now."[8]

But if a majority of the Court disagreed with *Miranda*'s constitutional holding, why should it reject an opportunity to overrule or at least modify the Warren Court's landmark decision? As the majority itself acknowledged,[9] *stare decisis* has not been an impediment to overruling other constitutional decisions. Did the *Dickerson* Court refuse to consider overruling *Miranda*'s constitutional holding simply because, as Justice Rehnquist put it, the *Miranda* "warnings have become part of our national culture?"[10] Or did *Miranda* survive because the Court considered the constitutionality of 18 U.S.C. § 3501 "at the very moment when the [C]ourt's interest in protecting its constitutional turf against Congressional incursions was at a peak unmatched in recent years"?[11]

Identifying the motives underlying the Court's decision in *Dickerson* is, of course, impossible. In my judgment, however, a major reason for the Court's disinclination to overrule *Miranda* relates to *Miranda*'s limitations. By the time the Court confronted the issue in *Dickerson*, it had become obvious that, regardless of what the Warren Court might have intended, *Miranda*'s safeguards provide very limited restraints on police interrogators.

To some extent, of course, *Miranda*'s limitations may be attributed to post-*Miranda* decisions. As previous commentators have pointed out,[12] decisions by the Burger and Rehnquist Courts have substantially

5. *See id.* at 894-906.

6. *Id.*

7. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000).

8. *Id.*

9. *See id.*

10. *Id.*

11. Linda Greenhouse, *A Turf Battle's Unlikely Victim: Dislike of* Miranda *Ruling Fell Prey to Desire to Win a Bigger War*, N.Y. TIMES, June 28, 2000, at A20.

12. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 407

weakened *Miranda*'s protections. Indeed, as interpreted by the present Court, *Miranda* essentially provides suspects with just two safeguards: first, the suspect will be informed of his four *Miranda* rights prior to police questioning;[13] and, second, the suspect has at least a theoretical opportunity either to avoid or to halt police questioning by invoking his right to remain silent[14] or his right to have an attorney present.[15]

These safeguards are not insignificant. Although there has been much dispute relating to *Miranda*'s impact on the police's ability to obtain confessions,[16] it seems highly likely that, in response to the warnings, a small group of suspects who would otherwise make statements to the police choose not to speak.[17] In addition, the warnings may lead some suspects to invoke their rights at some point during the interrogation, thereby reducing the extent of their incriminating statements. In the great majority of cases, however, suspects respond to the *Miranda* warnings by waiving their rights.[18] Once those rights have been waived, the restraints *Miranda* imposes on police interrogators are minimal.

For constitutional purposes, however, the question is not whether *Miranda* imposes significant restraints on police interrogators. Rather, the question is whether *Miranda*'s safeguards, combined with the Court's other constitutional restrictions on interrogation practices, provide suspects with sufficient protection against interrogation practices that should be viewed as pernicious, in the sense that they are abusive, overreaching, or otherwise contrary to societal norms. In ad-

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(1999); Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100.

13. Prior to custodial interrogation, the suspect must be warned that he has a right to remain silent, that anything he says may be used against him as evidence, that he has a right to have an attorney present during questioning, and that, if he cannot afford an attorney, one will be appointed to represent him. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

14. In *Miranda*, the Court stated: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74. This language was subsequently interpreted in *Michigan v. Mosley*, 423 U.S. 96 (1975). *See infra* text accompanying notes 27-28.

15. In *Miranda*, the Court stated: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474. This language was subsequently interpreted in *Edwards v. Arizona*, 451 U.S. 477 (1981), and its progeny. *See infra* text accompanying notes 30-34.

16. *Compare, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998), *with* Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996). *See generally* Leo & White, *supra* note 12, at 399-400.

17. *See* Leo & White, *supra* note 12, at 468-70.

18. *See* Richard A. Leo, Miranda *and the Problem of False Confessions*, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 275 (Richard A. Leo & George C. Thomas III eds., 1998).

dressing this question, I will consider both the effectiveness of the safeguards *Miranda* does provide and the significance of the post-*Miranda* Court's nearly total failure to identify pernicious interrogation practices.

Part I considers the extent to which *Miranda*'s core protections — informing suspects subject to interrogation of their constitutional rights and providing them with an opportunity to halt the interrogation by invoking their rights — protect individuals from pernicious interrogation practices. Part II considers the significance of the post-*Miranda* Court's failure to identify and to restrain pernicious interrogation practices. Parts III and IV then consider some of the ways in which the post-*Miranda* due process test should be modified so as to provide more effective restraints on such practices. Part III addresses the problem of identifying pernicious interrogation practices. In addressing this question, Part III responds to some of Professor Laurie Magid's assertions relating to the basis for prohibiting or regulating interrogation practices. In particular, it challenges her conclusion that the existing empirical evidence fails to prove that police-induced false confessions are a problem demanding societal attention. It then discusses both the proper role of empirical evidence in identifying pernicious interrogation practices and the reasons why interrogation practices that are substantially likely to produce untrustworthy confessions should be prohibited. Based on the principle that interrogation practices substantially likely to produce untrustworthy confessions should be excluded, Part IV then identifies three police practices that should be prohibited or subjected to close scrutiny. Part V then summarizes the Article's principal conclusions.

I. THE LIMITED EFFECT OF *MIRANDA*'S CORE PROTECTIONS

In *Davis v. United States*,[19] the Court stated that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves."[20] It added that "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process."[21] Based on this language, the current Court apparently believes that, in most instances, interrogators' iteration of the *Miranda* warnings provides a suspect with adequate protection from pernicious interrogation practices. If the suspect believes she lacks the resources to deal with the pressures generated by custodial interrogation, she can invoke one of her rights, thereby avoiding interrogation. Moreover, if she decides

19. 512 U.S. 452 (1994).

20. 512 U.S. at 460.

21. *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

to waive her *Miranda* rights but thereafter concludes that her interrogators are subjecting her to undue pressure, she has another opportunity to invoke one of her rights, thereby halting the interrogation.

In the context of twenty-first century interrogation practices, however, the claim that a suspect's awareness of her rights provides an antidote to the coercive effect of custodial interrogation is either naive or disingenuous. In *Miranda* itself, the Court said that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[22] As the length of a custodial interrogation increases, the practical significance of the suspect's knowledge of his rights decreases.

In addition, the practices employed by seasoned interrogators will often have the effect of undermining a suspect's ability or inclination to assert rights.[23] Transcripts of modern interrogations indicate that police interrogators are often so overwhelmingly in control of the interrogation — dictating the pace of the questioning and the topics under discussion — that the suspect has no practical opportunity to invoke his rights during the most critical parts of the interrogation.[24] In addition, the interrogator's ability to connect with the suspect — sometimes by establishing a close rapport so that the suspect views the interrogator as a mentor or a father figure[25] — often renders the suspect unable or disinclined to break the connection by asserting his rights. In many cases, the *Miranda* warnings are therefore inadequate to counteract the pressures generated by sophisticated interrogators.

If a suspect wants to halt an interrogation, moreover, post-*Miranda* cases make it difficult for him to do so. If the suspect invokes his right

22. Miranda v. Arizona, 384 U.S. 436, 469 (1966). In this quote, the Court was talking about the suspect's right to remain silent. The same point applies, of course, even if the suspect is given the four *Miranda* warnings rather than merely informed of his right to remain silent.

23. We know a good deal more about what transpires during an interrogation today than we did at the time *Miranda* was decided, thanks in part to Kamisar's admonition that we cannot understand issues relating to police questioning unless we have some understanding of "what such questioning is really like." KAMISAR, ESSAYS, *supra* note 1, at 1 (quoting Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 155 (C. Sowle ed., 1962)).

24. For examples of questioning that is so rapid that the suspect has no practical opportunity to halt the questioning in order to invoke his rights, 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 LAW, POL. & SOC'Y 189, 227-30 (1997) [hereinafter Ofshe & Leo, *Social Psychology*] (interrogation of Dante Parker); *id.* at 231-33 (interrogation of Edgar Garrett).

25. During Peter Reilly's interrogation, for example, the seventeen-year-old suspect came to view his chief interrogator as a father figure. At one point, he even asked if it might be possible for him to come and live with the interrogator and his family. *See* JOAN BARTHEL, A DEATH IN CANAAN 98 (1977).

to remain silent, *Michigan v. Mosley*[26] holds that the police are not required to cease the interrogation permanently. Rather, after temporarily halting the interrogation, they can resume questioning so long as they "scrupulously honor" the suspect's invocation of his right.[27] In practice, therefore, a patient interrogator will often be able to proceed with an interrogation even after a suspect invokes his right to remain silent.[28]

If the suspect asserts his right to have an attorney present at questioning, *Edwards v. Arizona*[29] requires police to end the interrogation immediately. Questioning cannot resume until the suspect initiates further exchanges with the police.[30] *Davis v. United States*,[31] however, held that, in order to satisfy *Edwards*, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[32] If the suspect's statements fail to meet this test, the police need not even pause for the purpose of clarifying the suspect's position.[33] They can simply continue the interrogation,[34] perhaps directing their questions to deter or deflect the suspect's requests for an attorney. Post-*Miranda* decisions therefore permit the police to interrogate suspects in ways that prevent the suspect's effective invocation of his rights.[35]

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26. 423 U.S. 96 (1975).

27. *Id.*, at 103-04 (quoting *Miranda*, 384 U.S. at 479).

28. *See, e.g.*, United States v. Hsu, 852 F.2d 407, 410-12 (9th Cir. 1988) (holding that police "scrupulously honor[ed]" the suspect's right to remain silent even though the same officer questioned him shortly after he asserted his right); Maestas v. State, 987 S.W.2d 59, 64 (Tex. Crim. App. 1999) (holding police "scrupulously honored" the suspect's right to remain silent where the same officer sought and obtained the suspect's *Miranda* waiver nine hours after the suspect had initially invoked her right to remain silent).

29. 451 U.S. 477 (1981).

30. *See id.* at 484-85. In *Oregon v. Bradshaw*, 462 U.S. 1039, 1043-46 (1983) (Rehnquist, J., plurality opinion), a pivotal plurality of the Court interpreted "initiated" broadly, holding that the police were permitted to resume interrogation when, after invoking his right to an attorney, the suspect said to the police, "Well, what is going to happen to me now?"

31. 512 U.S. 452 (1994).

32. *Id.* at 459.

33. If, for example, the suspect says, "Maybe I need an attorney," the interrogator could either ignore this comment entirely or say something that might deflect the suspect's interest in having an attorney. As suggested in the first edition of the Inbau Interrogation Manual, he might say, for example, "Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself." FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 112 (1962).

34. *See id.*

35. Justice Souter's assessment of suspects subjected to custodial interrogation seems apt: "A substantial percentage of them lack anything like a confident command of the English language, many are 'woefully ignorant,' and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament

In practice, therefore, *Miranda*'s core protections provide only minimal safeguards. Police routinely obtain *Miranda* waivers, and police routinely prevent suspects from asserting their *Miranda* rights during post-waiver interrogations. As the Court stated in *Davis*, "the primary," if not the only, protection afforded suspects subjected to interrogation is the information contained in the "*Miranda* warnings themselves."[36] In the context of twenty-first century interrogation practices, however, information relating to one's constitutional rights provides only minimal protection against pernicious interrogation practices.

II. *MIRANDA*'S FAILURE TO PROHIBIT PERNICIOUS INTERROGATION PRACTICES

As interpreted by the post-*Miranda* Court, one of *Miranda*'s most striking limitations is its failure to impose significant restraints on police interrogation practices. *Miranda* provides virtually no restrictions on interrogation practices designed to induce *Miranda* waivers and on interrogation practices employed after waivers are obtained.

Miranda, of course, could have been interpreted to impose such restrictions.[37] *Miranda* itself stated that "the fact of lengthy interrogation . . . before a statement is made is strong evidence that the accused did not validly waive his rights."[38] This language could have been interpreted to mean that lengthy interrogations are generally impermissible. The *Miranda* decision's apparent disapproval of interrogation techniques described in various interrogation manuals,[39] moreover, could have been interpreted to prohibit interrogators from employing those practices. And *Miranda*'s language imposing a heavy burden of waiver on the government[40] could have been interpreted to preclude interrogators from employing interrogation practices that pressure suspects to give up their right to remain silent through pressing them to reveal information they are reluctant to disclose.

But post-*Miranda* cases have not interpreted *Miranda* in these ways. Neither the Supreme Court nor any lower court has ever indi-

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that the ability to speak assertively will abandon them." *Davis*, 512 U.S. at 469-70 (Souter, J., concurring) (citations omitted).

36. Davis v. United States, 512 U.S. 452, 460 (1994).

37. *See generally* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 588-90, 608-17 (1979) (arguing that the *Miranda*'s safeguards should be interpreted to prohibit other deceptive interrogation techniques).

38. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

39. *See id.* at 449-54.

40. *See id.* at 475-76.

cated that the length of the interrogation,[41] the interrogation tactics employed during the interrogation, or pressure exerted on the suspect to reveal information he is reluctant to disclose has any bearing on the validity of the suspect's *Miranda* waiver. On the contrary, once the suspect validly waives his *Miranda* rights, the due process voluntariness test provides the only restrictions on police interrogation practices.

The restrictions provided by that test are insubstantial. Over the past two decades, the Rehnquist Court has indicated that the post-*Miranda* due process test is essentially identical to the pre-*Miranda* test.[42] As under the old test, confessions induced by force,[43] threats of force,[44] promises of protection from force,[45] or by excessively lengthy continuous interrogations[46] are involuntary. When these extreme techniques are absent, however, the voluntariness of a confession is determined on the basis of a totality of circumstances test, under which a court must assess both the interrogators' practices and the suspect's individual characteristics for the purpose of determining whether the suspect's will was overborne.[47]

Even when it was most rigorously applied, this test imposed few limitations on interrogators. Except for the clear prohibition of extreme tactics, such as the use of force or the threat of force, the Court provided few, if any, guidelines as to what practices were prohibited. Indeed, an interrogation practice impermissible in one case might be entirely permissible in another case involving different circumstances.[48] Interrogators operating in this environment of legal uncer-

41. For lower courts holding a defendant's *Miranda* waiver valid despite the fact that the defendant was subjected to a lengthy interrogation see, for example, *State v. Schofield*, No. 23038-1-II, 1999 Wash. App. LEXIS 1924 (Wash. Ct. App. Nov. 12, 1999) (*Miranda* waiver valid despite twelve-hour interrogation); *State v. LaPointe*, 678 A.2d 942 (Conn. 1996) (*Miranda* waiver valid despite nine-hour interrogation).

42. *See* Arizona v. Fulminante, 499 U.S. 279, 286-88 (1991); Colorado v. Connelly, 479 U.S. 157, 176 (1986). *See generally* Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2008-20 (1998) [hereinafter White, *Involuntary Confession*].

43. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

44. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967).

45. *See Fulminante*, 499 U.S. 279; Payne v. Arkansas, 356 U.S. 560 (1958).

46. *See* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (holding that thirty-six hours of virtually continuous interrogation is "inherently coercive").

47. *See* cases cited *supra* note 45; *see also* Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962); Spano v. New York, 360 U.S. 315, 321-23 (1959).

48. In *Spano v. New York*, 360 U.S. 315 (1959), for example, the Court expressed disapproval for the deceptive strategy employed by the interrogators, thus suggesting that certain categories of police trickery might constitute improper interrogation practices. In *Spano* itself, however, the Court stated that the trickery employed was simply "another factor which deserves mention in the totality of the situation." 360 U.S. at 323. If the same trickery were employed on another suspect under different circumstances, a lower court could thus properly hold that employing the trickery in those circumstances would not render the suspect's confession involuntary.

tainty were naturally inclined to err on the side of law enforcement interests, employing any interrogation techniques not expressly prohibited. Lower courts similarly lacked guidelines for applying the voluntariness test and struggled to determine whether particular interrogation techniques were impermissible.

Indeed, the limitations of the pre-*Miranda* voluntariness test prompted the Court to seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."[49] Simultaneously, those concerned with restraining pernicious interrogation practices sought a constitutional rule that would impose effective, general restraints on the police.[50] *Miranda* represented the solution to these problems. To the extent that the Court intended *Miranda* to replace the due process voluntariness test, however, the *Miranda* Court did not contemplate the important role that the due process voluntariness test would continue to play in regulating post-waiver interrogation practices.

Ironically, *Miranda*'s practical limitations may have derived from the fact that *Miranda* effectively reduced the efficacy of the due process voluntariness test. Although the pre-*Miranda* due process test constantly shifted and evolved,[51] the Warren Court applied the test with increasing strictness in the decade before *Miranda* was decided. *Miranda* halted this trend. In the post-*Miranda* era, the Court has equated a confession involuntary under the due process test with one that is compelled under the Fifth Amendment privilege.[52] In *Dickerson*, the Court acknowledged that, when the police have "adhered to the dictates of *Miranda*," a defendant will rarely be able to make even "a colorable argument that [his] self-incriminating statement was 'compelled.' "[53] Lower court decisions corroborate the view expressed in *Dickerson*. A survey of recent decisions suggests that, when the police have complied with *Miranda*, it is very difficult for a defendant to establish that a confession obtained after a *Miranda* waiver violated due process.[54]

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49. Stone, *supra* note 12, at 103 (quoting WALTER SCHAEFER, THE SUSPECT AND SOCIETY 10 (1967)).

50. *See, e.g.*, KAMISAR, ESSAYS, *supra* note 1, at 25 (advocating that the Court "scrap" the voluntariness test and adopt "a more direct approach").

51. *See generally* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996) (tracing the Court's shifting and evolving application of the due process voluntariness test).

52. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655 n.5 (1984).

53. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000) (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984)).

54. Based on a Westlaw search examining all federal and state cases decided during the years 1999 and 2000, it appears that, out of all the cases in those years in which the police obtained valid *Miranda* waivers, there were only four cases in 1999 and five in 2000 in which courts held the suspect's post-waiver confession involuntary. See Search of WESTLAW, Allfeds and Allstates Library (Oct. 15, 2000) (on file with the author). In at least four of

Two factors have contributed to the infrequency with which lower courts find due process violations in post-waiver confession cases. First, lower courts conflate the test for determining a valid *Miranda* waiver with the test for determining a voluntary confession because the tests are so similar. Both tests require the court to assess the "totality of circumstances" to determine whether the suspect's action was voluntary.[55] Although lower courts generally apply the two tests separately,[56] some courts appear to equate a finding that a suspect's *Miranda* waiver was voluntary with a conclusion that her confession was also voluntary. A finding that the police have properly informed the suspect of his *Miranda* rights thus often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices.

Second, the Supreme Court's limited application of the voluntariness test during the post-*Miranda* era has probably increased lower courts' natural inclination to disfavor involuntary confession claims. During the thirty-year period prior to *Miranda*, the Supreme Court held confessions involuntary in at least twenty-three cases.[57] In the thirty-four years since *Miranda*, however, it has held confessions involuntary in only two cases: *Mincey v. Arizona*[58] (1978) and *Arizona v. Fulminante*[59] (1991). As Professor Louis Michael Seidman has indicated, this "silence at the top" has undoubtedly led some lower courts to believe that claims of involuntary confessions need not be treated seriously.[60]

Miranda's most significant limitation is thus its failure to identify and to prohibit (or even to promote the identification and prohibition

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these cases (two in 1999 and two in 2000), moreover, this holding was based on state constitutional law rather than the Due Process Clause of the Fourteenth Amendment. *See id.*

55. *See, e.g.*, State v. Murray, 510 N.W.2d 107, 110 (N.D. 1994) (applying due process voluntariness test to determine the validity of a *Miranda* waiver). *See generally* Leo & White, *supra* note 12, at 418.

56. *See, e.g.*, United States v. Anderson, 929 F.2d 96, 98 (2d Cir. 1991) (observing that, even if suspect's *Miranda* waiver is valid, the court must still decide whether the officer "coerced [him] into confessing").

57. *See* Jackson v. Denno, 378 U.S. 368 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Lynumn v. Illinois, 372 U.S. 528 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Culombe v. Connecticut, 367 U.S. 568 (1961); Reck v. Pate, 367 U.S. 433 (1961); Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Watts v. Indiana, 338 U.S. 49 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Upshaw v. United States, 335 U.S. 410 (1948); Lee v. Mississippi, 332 U.S. 742 (1948); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

58. 437 U.S. 385 (1978).

59. 499 U.S. 279 (1991).

60. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 745 (1992).

of) pernicious interrogation practices. Is it appropriate to leave this problem to other institutions, such as legislatures or state courts?[61] Based on the Court's interpretation of both the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment due process clause, "interrogation techniques . . . offensive to a civilized system of justice"[62] are unconstitutional. The Court thus has a constitutional obligation to address this issue. In order to fill the gap left by *Miranda* and the post-*Miranda* due process test, the Court should formulate rules restricting pernicious interrogation practices.

III. IDENTIFYING PERNICIOUS INTERROGATION PRACTICES

What criteria should the Court use to identify pernicious interrogation practices?

Professor Laurie Magid argues that the primary, if not the sole, criterion for determining whether an interrogation practice is permissible is whether the interrogation practice will produce unreliable confessions.[63] Magid apparently agrees that interrogation practices that create an "unreasonable risk that an innocent person would falsely confess"[64] should be prohibited.

According to Magid, however, the existing empirical evidence fails to establish that police-induced false confessions occur with sufficient frequency to invalidate any current interrogation practices or to justify additional restraints on police interrogation practices. Specifically, she asserts that the few dozen police-induced false confession cases reported by commentators such as Richard A. Leo and Richard J. Ofshe[65] are insufficient to establish that police-induced false confessions present a societal problem of sufficient magnitude to demand at-

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61. Based on prior experience, there is little reason to believe that either state legislatures or Congress would be likely to address this problem in a way that would provide additional protection for suspects subjected to interrogation. The 1968 Congress's response to *Miranda*'s invitation for Congress to provide alternative safeguards for protecting custodial suspects' right to exercise their right to remain silent provides an example of the typical legislative response. Instead of providing alternative means of protecting suspects' rights, Congress passed 18 U.S.C. § 3501, which was intended to overrule *Miranda*. *See generally* Kamisar, *supra* note 4 (explaining the purpose and legislative history of 18 U.S.C. § 3501).

62. Colorado v. Connelly, 479 U.S. 157, 163 (1986) (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985)).

63. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1187 (2001) ("Because the reliability rationale focuses on protecting innocent suspects, it offers a more palatable — and appropriate — reason for limiting interrogation.").

64. *Id.* at 438.

65. *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 429 (1998) (collecting 60 proven and probable police-induced false confessions) [hereinafter Leo & Ofshe, *Consequences*].

tention.[66] In order to justify additional restraints on interrogation tactics, Magid would require refinements in the research on false confessions. According to her, future research "will need to be based on a statistically significant, randomly drawn sample of persons who gave confessions during interrogation."[67] If such research indicated that few innocent suspects falsely confessed, additional restrictions on deceptive interrogation practices would be unjustified.[68]

Both Magid's standard for determining a pernicious interrogation practice and her assessments of the empirical evidence are wrong. In view of *Miranda*'s holding that the Fifth Amendment privilege applies to custodial interrogation,[69] Magid's claim that the prevention of unreliable confessions is the sole (or primary) basis for prohibiting interrogation practices cannot be correct. Even if this claim were correct, it would not follow that the frequency with which interrogation practices induce false confessions in typical cases is the criterion for determining whether a problem exists. In my judgment, the empirical evidence sufficiently establishes both that police-induced false confessions occur frequently enough to create a serious societal problem and that current interrogation practices tend to produce these false confessions.

In supporting my claims, I will try to explain both the role and the limitations of empirical evidence in examining police interrogations. In Section A, I will show that reliability cannot be the sole criterion for determining whether an interrogation practice is pernicious. In Section B, I will assess the role of empirical evidence in determining both the frequency of police-induced false confessions and whether that frequency is socially significant. In Section C, I will consider how empirical evidence may be used to assist in identifying interrogation practices likely to produce untrustworthy confessions. Finally, in Section D, I will explain why the conclusion that an interrogation practice is substantially likely to produce an untrustworthy confession should be the criterion for determining that an interrogation practice is pernicious and warrants prohibition — even without empirical data to prove that the practice has actually produced false confessions.

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66. Magid, *supra* note 63, at 1193.

67. *Id.* at 1190.

68. *Id.*

69. As Professor Steven J. Schulhofer has observed, *Miranda* was in fact predicated on "three" holdings. *See* Steven J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987). The first was that the Fifth Amendment privilege applies to the "informal compulsion exerted by law-enforcement officers during in-custody questioning." *Miranda*, 384 U.S. at 461.

A. *Contemporary Standards of Fairness Should Determine the Permissibility of Interrogation Tactics*

Skilled interrogators could employ even the most pernicious interrogation tactics in ways that would only produce reliable confessions. Indeed, as early continental systems of criminal procedure recognized, practices involving torture would produce reliable statements if the practices were "employed in such a way" that a guilty suspect would be required to reveal merely details corroborating his guilt. Through the use of non-suggestive questioning, the interrogator could establish the suspect's guilt by forcing him to reveal "information which . . . 'no innocent person [could] know.' "[70] As Ofshe and Leo have explained,[71] modern interrogators can apply a variation of this technique to assess the reliability of suspects' confessions. By analyzing "[t]he fit between the suspect's post-admission narrative and the facts of the crime" the interrogator should be able to determine "whether the suspect possesses actual knowledge of the crime" and thus whether the suspect is making a true confession.[72] In many cases, therefore, interrogators can ensure that the tactics they employ will only be used to produce reliable confessions.

If, as Magid suggests,[73] the sole basis for imposing constitutional restrictions on interrogation practices is to exclude unreliable confessions, there is no need to prohibit any interrogation practices. Scrutinizing the reliability of each suspect's confession would be sufficient to protect this constitutional interest. If the government could show corroboration or other circumstances verifying the reliability of a particular confession, there would be no constitutional basis for exclusion.[74]

As I have already indicated, however, ensuring the reliability of confessions is not the sole basis for monitoring police interrogation practices. In *Miranda*, the Court held that the Fifth Amendment applies to custodial interrogation.[75] In addition, the pre-*Miranda* due process test barred the government's use of an involuntary confession.[76] During the post-*Miranda* era, the Court has conflated these

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70. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 5 (1977).

71. *See* Ofshe & Leo, *Social Psychology*, *supra* note 24, at 198-99.

72. *Id.* at 198 (emphasis omitted).

73. Magid, *supra* note 63, at 1171.

74. At least one commentator has essentially adopted this position. Professor Joseph D. Grano has asserted that in confession cases the "due process inquiry should focus on the likelihood of unreliability in a particular case." Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 921 (1979).

75. Miranda v. Arizona, 384 U.S. 436 (1966).

76. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959). *See generally* Hancock, *supra* note 51.

protections, holding that confessions involuntary under the due process test are also compelled within the meaning of the Fifth Amendment privilege.[77]

In determining whether a confession is involuntary, however, the Court has always examined the interrogation methods employed by the police as well as their actual effect on the defendant. Thus, in *Colorado v. Connelly*,[78] the Court reiterated that "certain 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."[79] In assessing the legitimacy of interrogation practices, the focus is thus on the nature of the interrogation practice itself, not on whether the practice appeared to have produced an unreliable confession. Interrogation practices viewed as pernicious based on contemporary standards of fairness should be prohibited.

B. *The Role of Empirical Evidence in Determining Whether Police-Induced False Confessions Are a Significant Problem*

No one disputes that police-induced false confessions have resulted in wrongful convictions during the post-*Miranda* era. Disagreement arises, however, over whether the rate of wrongful convictions is a significant social problem and, if so, whether police-induced false confessions lead to a significant percentage of all wrongful convictions.

Echoing assertions of Paul Cassell,[80] Magid has suggested that the failure to find police-induced false confessions in a random sample of police interrogation cases constitutes strong evidence that police-induced false confessions are not a serious societal problem.[81] But this suggestion fails to take account of the context in which police-induced false confessions are likely to be found. The existing evidence of police-induced false confessions, such as the cases collected by Leo and Ofshe,[82] seems to establish that such confessions are most likely to

77. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655 n.5 (1984) (observing that, in order to show his confession was compelled within the meaning of the Fifth Amendment privilege, the defendant would have to show that "his statement was coerced under traditional due process standards").

78. 479 U.S. 157 (1986).

79. 479 U.S. at 163 (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985)).

80. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions — and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 507 (1998).

81. Magid, *supra* note 63, at 1190.

82. *See* Leo & Ofshe, *Consequences*, *supra* note 65, at 444-49; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 133 (1997) (observing that police-induced "false confessions are most likely to occur in a small but significant category of cases — high-profile cases in

occur in high profile cases. In high profile cases, the police are under significant pressure to solve a crime and, because of the magnitude of the investigation, are able to devote an unusually large amount of time to interrogating suspects.[83] In contrast, interrogations conducted in low profile cases — the type of case likely to be collected in a random sample of interrogations[84] — would be much less likely to produce a false confession. In low profile cases, interrogators are generally disinclined to expend the time or employ the range of tactics likely to produce an untrustworthy confession. Barring unusual circumstances, moreover, suspects in such cases are likely to be guilty,[85] thus further reducing the risk of a false confession.[86] A random sample of interrogation cases is, therefore, unlikely to resolve the critical questions relating to the magnitude of the problem of police-induced false confessions.

Examining a sample of wrongful convictions in high profile or potentially capital cases, in contrast, could illuminate the extent to which police-induced false convictions precipitate wrongful convictions. If one accepts the premise that society should be concerned about wrongful convictions in high profile or potentially capital cases, then a finding that police-induced false confessions precipitate a significant proportion of wrongful convictions in such cases should be sufficient to show that police-induced false confessions are a significant problem.

Although Magid, Cassell, and others may disagree with me, the apparent number of miscarriages of justice in potentially capital cases seems to me to be sufficiently large to provoke concern.[87] Evidence

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which the police have no suspects other than the one who is subjected to interrogation") [hereinafter White, *False Confessions*].

83. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 485 (1996).

84. *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

85. The leading interrogation manual advises police that they should only use the psychologically-oriented interrogation techniques designed to elicit a confession when they are reasonably certain that the suspect is guilty. *See* Fred E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986). In the typical case, an officer's belief that a suspect is guilty is likely to be correct.

86. If the suspect is guilty, even the most pernicious interrogation tactics will not be likely to produce a false confession because, even if the suspect feels compelled to admit facts dictated by his interrogators, the essence of the admitted facts — the suspect's commission of the crime charged — will likely be true.

87. *See, e.g.*, Caitlin Lovinger, *Death Row's Living Alumni*, N.Y. TIMES, Aug. 22, 1999, § 4, at 1 (observing that "[s]ince the United States Supreme Court reinstated capital punishment in 1976, 566 people have been executed [and] . . . 82 convicts awaiting execution have been exonerated — a ratio of 1 freed for every 7 put to death"). *See generally* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 638-39 (1999) (summarizing data relating to wrongful convictions in capital cases); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49

indicating that police-induced false confessions account for a significant proportion of such miscarriages of justice would thus indicate that police-induced false confessions have contributed to a significant societal problem.

A randomly selected sample of cases involving probable wrongful convictions in potentially capital cases provides a reasonable source for determining the extent to which various causes are likely to precipitate such convictions. If it appears that police-induced false confessions contributed to a significant proportion of the convictions contained in such a sample, reducing such confessions should properly be identified as a priority of our criminal justice system.

Several collections of proven, or probable, wrongful convictions exist.[88] In order to determine the extent to which false confessions precipitate wrongful convictions, however, the collection should meet several criteria. First, it should be limited to serious cases. Second, it should be large enough so that it is likely to contain a representative selection of wrongful convictions in such cases. Third, the collection should be selected so that the most important causes of such wrongful convictions are unlikely to be either under- or over-represented. Fourth, and finally, the causes of the probably wrongful convictions should be identified with sufficient clarity so that it can be determined whether a police-induced false confession played any significant part in precipitating the wrongful conviction. Among the recent collections of wrongful conviction cases, the Bedau-Radelet collection of probable miscarriages of justices in capital cases[89] comes closest to satisfying these four criteria.

Bedau and Radelet identified 350 potentially capital cases in which miscarriages of justice[90] occurred in America between the years 1900 and 1985.[91] In selecting their cases, the authors relied heavily on previous research. Consequently, better known and previously researched cases were most likely to be included.[92] Because their cases are better

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RUTGERS L. REV. 1317, 1346-58 (1997) (summarizing and interpreting studies of false convictions in serious criminal cases).

88. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932); EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

89. *See* Bedau & Radelet, *supra* note 88.

90. Bedau and Radelet defined miscarriages of justice in potentially capital cases as "cases in which: (a) The defendant was convicted of homicide or sentenced to death for rape; and (b) when either (i) no such crime actually occurred, or (ii) the defendant was legally and physically uninvolved in the crime." *Id.* at 45 (emphasis omitted).

91. *See id.* at 38.

92. *See id.* at 28.

known and have been subjected to more intense scrutiny than average miscarriage of justice cases, their pool does not represent a random sample of miscarriages of justices in potentially capital cases. In addition Paul Cassell and Stephen J. Markman have challenged the Bedau-Radelet conclusions in 10 of the 350 cases, asserting that the defendants included in those ten cases were in fact guilty.[93]

Nevertheless, the Bedau-Radelet pool would appear to provide a representative data set for the causes of miscarriages of justice in potentially capital cases. There is no reason to believe that better known miscarriages of justice in potentially capital cases resulted from significantly different causes than other miscarriages of justice in similar cases. The fact that a small percentage of these cases may be inaccurately classified, moreover, would have only a slight bearing on the extent to which their sample represents the relevant population. There is no reason to believe that the possible misclassifications are likely to include a disproportionate number of cases involving any particular precipitating causes of wrongful convictions. Consequently, any misclassifications would simply have the effect of decreasing the size of the relevant sample,[94] without reducing the validity of generalizations relating to the likelihood of particular causes precipitating wrongful convictions in potentially capital cases.

In fourteen of 350 cases, Bedau and Radelet concluded that the record was too slender to provide any basis for determining the cause of the wrongful conviction.[95] In the other 336 cases, they concluded that a police-induced false confession was a cause of the wrongful conviction in 49, or 14.3%, of the cases.[96] Of the causes that Bedau and Radelet directly linked to the police or prosecution, false confessions ranked third. Only perjury by prosecution witnesses (117, or 34.8%) and mistaken eyewitness identifications (56, or 16.7%)[97] accounted for more wrongful convictions. Even if the Bedau-Radelet sample is limited to probably wrongful convictions occurring after *Miranda*, the percentage of wrongful convictions attributable to false confessions declines by only 3.5 percentage points; 11.4% of the wrongful convictions during the post-*Miranda* era were found to result from false confessions.[98] This figure (11.4%) may be compared with the 37.5% of wrongful

93. *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). For a response to the claims of Cassell and Markman, see Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

94. *See* Gross, *supra* note 83, at 470-71.

95. *See* Bedau & Radelet, *supra* note 88, at 64.

96. *See id.* at 173-79.

97. *See id.*

98. *See id.* at 177-79.

convictions resulting from perjured testimony and 24.1% of wrongful convictions resulting from mistaken eyewitness testimony.[99]

Since mistaken eyewitness identifications are generally understood to be the most frequent cause of wrongful convictions,[100] the Bedau-Radelet study surprised commentators in finding that the percentage of wrongful convictions resulting from police-induced false confessions was comparable to the percentage resulting from mistaken identification witnesses.[101] As Professor Samuel Gross explained in a thoughtful article,[102] the Bedau-Radelet results suggest that conventional wisdom regarding the causes of wrongful convictions does not necessarily apply in capital or other high profile cases. In typical felony cases, mistaken identification evidence is much more likely to precipitate wrongful convictions than police-induced false confessions. In high profile cases, however, where the police have more time to investigate and are under greater pressure to make an arrest, the possibility of a police-induced false confession is much greater than it is in ordinary cases. In that context, the chances of error resulting from police-induced false confessions are comparable to the chances of error resulting from mistaken identifications, the cause that in most contexts has been recognized as the most significant precipitator of wrongful convictions.

The Bedau-Radelet data does not, of course, establish even a rough estimate of the *extent* to which police-induced false confessions contribute to wrongful convictions in potentially capital cases. In determining whether a phenomenon is of sufficient magnitude to warrant societal concern, however, estimating the exact size of the phenomenon is not critical. Wrongful convictions in potentially capital cases may be analogized to a particularly virulent disease. If data showing that about 10% of the people suffering from a serious disease had been injected with a drug that appeared to contribute to the outbreak of the disease, for example, this would be enough to provoke concern. The existing data suggests that police-induced false confessions have contributed to producing the "disease" of wrongful convictions in about one-tenth of all cases. Although this data is certainly not conclusive, it is sufficient to show that wrongful convictions resulting

99. *See id.*

100. *See* United States v. Wade, 388 U.S. 218, 229 (1967) (quoting Wall's assertion that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor — perhaps it is responsible for more such errors than all other factors combined"). *See generally* PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).

101. *See, e.g.*, Gross, *supra* note 83, at 485 (observing that the Bedau-Radelet data indicates that "false confessions are a much more common cause of errors for homicides than for other crimes").

102. *See* Gross, *supra* note 83.

from police-induced false confessions are of sufficient magnitude to mandate concern.

C. *The Role of Empirical Evidence in Identifying Interrogation Practices Likely to Produce Untrustworthy Confessions*

The common law voluntariness test sought to exclude untrustworthy confessions.[103] In applying that test, courts relied on intuition rather than empirical data to identify interrogation practices likely to produce such confessions. Eighteenth-century English courts assumed, for example, that confessions induced by threats or promises were inherently unreliable.[104] Based on this assumption, confessions induced by threats or promises were excluded.[105]

Over the past two decades, scholars have conducted considerable empirical research on police-induced false confessions. As Magid points out,[106] commentators not only have collected cases of proven or probable police-induced false confessions, but also they have carefully examined these confessions to determine why they occurred.[107] In identifying modern interrogation practices likely to produce untrustworthy confessions, it thus seems appropriate to rely on conclusions emanating from this empirical data.

In using data to identify interrogation practices likely to produce untrustworthy confessions, however, the focus should be on why false confessions occur and "[h]ow . . . such errors [can] be prevented"[108] rather than on how often false confessions occur or how often particular tactics have been shown to produce false confessions. When a particular interrogation tactic played a major part in producing a false confession on even a few occasions, such a tactic should be classified as constitutionally suspect.

It remains disputed whether the documented cases of proven or probable police-induced false confessions are aberrations or the "tip of the iceberg"[109] — representing evidence of many undetected police-

103. *See generally* 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822 (Chadbourn ed. 1970) [hereinafter WIGMORE ON EVIDENCE].

104. *See* The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783).

105. *See id.*

106. Magid, *supra* note 63, at 1190.

107. *See, e.g.*, GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 235-40, 260-73, 316-20 (1992) (analyzing several British cases and one American case in which defendants were charged or convicted on the basis of confessions later shown to be false); Ofshe & Leo, *Social Psychology*, *supra* note 24, at 194-207 (explaining the psychological processes through which interrogators elicit both true and false confessions).

108. Leo & Ofshe, *Consequences*, *supra* note 65, at 492 (emphasis omitted).

109. Magid, *supra* note 63, at 1206.

induced false confessions.[110] But even if there are relatively few police-induced false confession cases in the total universe of cases, a tactic that is shown to have actually produced false confessions in a few cases is capable of producing untrustworthy confessions in all cases.

Barring very unusual circumstances, no interrogation tactic can produce a false confession unless the suspect is innocent.[111] Thus, the fact that an interrogation tactic appears to produce many more true confessions than false ones does not indicate whether the tactic is likely to produce trustworthy or untrustworthy confessions. The disparity between true and false confessions may be attributable to the disproportionate number of the suspects who are guilty rather than the particular tactic's tendency to produce true confessions.

Even a single case in which an interrogation tactic appeared to play a major part in producing a false confession is significant. Barring some evidence that the tactic had a highly aberrational effect on the suspect — perhaps relating to the suspect's unusual psychological characteristics — the fact that the tactic caused an innocent person to confess provides strong evidence that the tactic will at least sometimes lead a typical suspect to agree with the interrogator's version of the relevant facts, regardless of her own initial belief in the truth of those facts. The tactic will thus have a tendency to produce false confessions from innocent suspects and true confessions from guilty suspects. If, as appears likely, the tactic's tendency to produce both types of confessions is substantial, it is proper to conclude that the tactic is substantially likely to produce untrustworthy statements.

D. *Why Tactics Substantially Likely to Produce Untrustworthy Confessions Should Be Prohibited*

Most responsible members of society would agree with Magid that one standard against which police interrogation techniques should be measured is its propensity to produce untrustworthy statements. If there is a substantial likelihood that the employment of a particular interrogation technique will produce untrustworthy statements, then that interrogation technique should at least be viewed as highly problematic. Support for this principle stems not only from our historical concern for guarding against wrongful convictions resulting from government-induced confessions, but also from a strong perception that both guilty and innocent individuals should be protected against the suffering — in terms of both psychological damage and impairment of autonomy — that results from overreaching or abusive interrogation practices.

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110. *Id.*

111. *See id.* at 1190.

The due process voluntariness test derives from the common law rule that excluded involuntary confessions on the ground that they were untrustworthy.[112] Since empirical data shows that modern jurors are likely to give great weight to suspects' confessions, whether or not they are reliable,[113] the concern for preventing wrongful convictions based on false confessions is just as great today as it was when the common law rule evolved.[114].

But preventing the production of false confessions is not the sole, or perhaps even the primary, reason for prohibiting interrogation practices that are likely to produce untrustworthy statements. In many cases, the pressure generated by an interrogation technique and the likelihood that the technique will produce untrustworthy statements will be substantially equivalent. As Professor George Thomas has pointed out, in most instances a suspect would not falsely "admit guilt unless she found the pressure to confess overwhelming."[115] Accordingly, an interrogation method likely to produce untrustworthy statements should be constitutionally suspect regardless of whether its use in a particular case actually resulted in an unreliable confession. The interrogation method is suspect because of the damage it causes to individual autonomy, as well as because of its potential for producing false confessions.

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112. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (Frankfurter, J., plurality opinion) (stating that under the Due Process clause "[t]he ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness"). *See generally* White, *False Confessions*, *supra* note 82, at 111-13 (tracing the evolution of the due process voluntariness test).

113. *See, e.g.*, Gerald R. Miller & F. Joseph Boster, *Three Images of the Trial: Their Implications for Psychological Research*, *in* PSYCHOLOGY IN THE LEGAL PROCESS 19-38 (Bruce Dennis Sales ed., 1977) (discussing empirical data showing that in a mock trial experiment subjects exposed to various evidence of a suspect's guilt — including identification evidence, circumstantial evidence, and the suspect's confession — were "significantly more likely" to view the suspect's confession as establishing the suspect's guilt than either of the other types of evidence). *See generally* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 148, at 316 (Edward W. Cleary ed., 2d ed. 1972) ("[T]he introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.").

114. The common law rule excluded "involuntary confessions" on the ground that confessions resulting from certain pressures were untrustworthy. *See, e.g.*, The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783) (explaining that "a confession forced from the mind by the flattery of hope, or by the torture of fear" must be excluded because it "comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it"). *See generally* White, *False Confessions*, *supra* note 82, at 111-12 (citing other early authorities).

115. George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117, 124 (1991).

IV. REVIVING THE DUE PROCESS VOLUNTARINESS TEST TO REGULATE INTERROGATION PRACTICES LIKELY TO PRODUCE UNTRUSTWORTHY CONFESSIONS

If interrogation practices substantially likely to produce untrustworthy confessions should be prohibited, what new constitutional restrictions on interrogation practices are appropriate? In addressing this question, it is of course difficult to separate interrogation practices from the suspects on which they are employed or the settings in which the interrogations take place. In certain contexts, almost any interrogation practices are substantially likely to produce untrustworthy confessions.

Thus, for more than three decades, it has been recognized that modern interrogation methods are very likely to produce untrustworthy confessions from mentally handicapped suspects.[116] Recent empirical data suggests that youthful suspects are also especially likely to make false statements in response to police interrogation.[117] Even commentators who are sympathetic toward the interests of law enforcement have recognized the need to provide safeguards against the risk that standard interrogation methods will precipitate untrustworthy confessions from these populations.[118] Interrogation techniques permissible in other contexts should, therefore, be prohibited when interrogators are questioning youthful or mentally handicapped suspects.

Similarly, considerable evidence suggests that, regardless of the interrogation techniques employed, interrogations extending beyond a certain length are likely to produce untrustworthy confessions.[119] In *Ashcraft v. Tennessee*,[120] which held that a confession following thirty-six hours of virtually continuous interrogation was involuntary, the

116. *See* President's Panel on Mental Retardation, REPORT OF THE TASK FORCE ON LAW 33 (1963).

117. *See, e.g.*, Margaret Talbot, *The Maximum Security Adolescent*, N.Y. TIMES, Sept. 10, 2000, § 6 (Magazine), at 60 (observing that the seven- and eight-year-old boys who falsely confessed to sexually assaulting and killing eleven-year-old Ryan Harris "were enticed to confess over a McDonald's Happy Meal"). *See generally* Leo & Ofshe, *Consequences*, *supra* note 65, at 458.

118. *See, e.g.*, Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Convictions from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 586 (1999) (observing that special safeguards are needed to protect "mentally retarded" suspects when they are interrogated by the police); Fred E. Inbau, Miranda's *Immunization of Low Intelligence Offenders*, 24 PROSECUTOR: J. NAT'L DISTRICT ATT'YS, Spring 1991, at 9-10 (observing that youthful and mentally handicapped suspects are especially vulnerable to police suggestion).

119. *See generally* White, *Involuntary Confession*, *supra* note 42, at 2046-49 (discussing empirical data showing that lengthy interrogations are likely to produce false or untrustworthy confessions).

120. 322 U.S. 143 (1944).

Supreme Court provided some protection against lengthy interrogations. Based on recent empirical data relating to false confessions, however, it appears that interrogations' permissible duration should be shortened considerably. Regardless of the interrogation practices employed, an interrogation should not be allowed to extend beyond some prescribed limit, say six hours.[121]

In this Part, I will seek to identify interrogation practices that should be viewed as pernicious because of their tendency to produce untrustworthy statements when employed on normal suspects during an interrogation of reasonable length. The fact that interrogators do not generally rely on single tactics in isolation, but rather combine tactics to enhance the overall effectiveness of an interrogation, has two implications for this analysis. First, in assessing the likelihood that a particular interrogation tactic will produce an untrustworthy confession, due regard must be given to the fact that the effect of the particular tactic will generally be magnified by the context and manner in which it is used. Second, the fact that interrogators generally employ several interrogation tactics in combination makes it more difficult to identify particular tactics that are substantially likely to produce untrustworthy confessions. Based on the existing empirical data, it may be difficult to determine whether the employment of *any* particular interrogation tactic would be likely, in isolation, to produce an untrustworthy confession.

Despite these difficulties, it is preferable to establish clear principles to guide the police and lower courts in determining whether an interrogation tactic is pernicious. If particular interrogation tactics have a strong tendency to produce untrustworthy confessions when employed in the context of a typically intense interrogation, those tactics should be closely regulated. Starting with this premise, I will consider three interrogation tactics that have considerable potential for producing untrustworthy statements. The pre-*Miranda* due process test provided some restrictions on each of these practices. In order to provide appropriate safeguards against the use of these interrogation practices during post-waiver interrogations, however, the restrictions must be revived and strengthened.

A. *Threats of Punishment and Promises of Leniency*

At common law, confessions induced by any threat or promise were excluded as unreliable.[122] This exclusionary principle was

121. *See, e.g.*, White, *Involuntary Confession*, *supra* note 42, at 2049 (arguing that "empirical data showing a relationship between lengthy interrogation and false or untrustworthy confessions" supports the conclusion that confessions obtained "after more than six hours" of continuous interrogation should be automatically excluded).

122. *See* 3 WIGMORE ON EVIDENCE, *supra* note 103, § 836, at 275.

adopted in America during the nineteenth century. In 1896, *Russell on Crimes*, a leading criminal law treatise, asserted that, in order to be admissible, a confession could not be obtained by any direct or implied promise.[123] One year later, in *Bram v. United States*,[124] the Supreme Court adopted this rule as a matter of constitutional law, holding that the admission of a confession induced by "any direct or implied promise, however slight,"[125] violated the Fifth Amendment privilege.

Over the next century, *Bram* exerted only limited influence. In applying the pre-*Miranda* voluntariness test, the Court never rigorously applied *Bram*'s prohibition. In one case, it held that a confession that occurred after the defendant negotiated "a bargain with the police and the parole officers" was valid;[126] in two other cases, it held that confessions induced by threats of harsh punishment and express or implied promises of significant leniency were involuntary[127] but did not specify that the threats or promises were sufficient in themselves to dictate either result.[128] In the post-*Miranda* case of *Arizona v. Fulminante*,[129] the Court expressly repudiated *Bram*'s holding prohibiting confessions induced by any promises, stating that that rule "does not state the standard for determining the voluntariness of a confession."[130]

Fulminante's limitation of *Bram* nevertheless leaves open the possibility of barring confessions induced by promises that are substantially likely to produce untrustworthy confessions. As Wigmore observed, the premise that confessions produced by any promises are untrustworthy was probably never correct.[131] If the inducement to confess is relatively slight — a promise that the officer will testify that the

123. *See* 3 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896) [hereinafter RUSSELL ON CRIMES].

124. 168 U.S. 532 (1897).

125. *Id.* at 542-43 (quoting 3 RUSSELL ON CRIMES 478 (6th ed.)).

126. Stein v. New York, 346 U.S. 156, 185 (1953).

127. Lynumn v. Illinois, 372 U.S. 528 (1963); Leyra v. Denno, 347 U.S. 556 (1954).

128. In *Leyra*, the interrogator told the suspect he would have "a much better chance" if he "play[ed] ball" with the interrogators, and that "[t]hese people are going to throw the book at you unless you can show that in a fit of temper, you got so angry that you did it. Otherwise they toss premeditation in and it's premeditation. See?" *Leyra*, 347 U.S. at 583-84 (Appendix to Opinion of the Court). In holding the defendant's confession involuntary, the Court referred to the interrogator's "threat[s]" and "promise[s] of leniency." *Id.* at 559. In *Lynumn*, the interrogator told the defendant that if she did not confess she could get ten years and her children would be taken away and that if she did confess the interrogator would recommend mercy and see that she kept her children. 372 U.S. at 531-32. In a terse opinion, the Court held that the interrogator's statements to the defendant rendered her confession involuntary. *Id.* at 534.

129. 499 U.S. 279 (1991).

130. *Id.* at 285.

131. See 3 WIGMORE ON EVIDENCE, *supra* note 103, § 836, at 238.

suspect cooperated,[132] for example — there is little reason to believe that a suspect will respond with a false confession.

The likelihood that a promise will produce a false confession is substantially greater, however, when an interrogator promises a suspect that, if he confesses, he will not be charged at all or will be granted leniency. Based on the advice provided in the leading interrogation manual, one of the interrogator's goals is to convince the suspect that the police either already have or will be able to obtain evidence that establishes the suspect's guilt.[133] In this context, an innocent suspect might rationally conclude that confessing in exchange for a promise of leniency is in his best interest. After hearing the police repeatedly state that they have or will have evidence of his guilt, the suspect might believe that, if he does not confess, the police intend either to frame him for a crime he did not commit or to present genuine evidence that could result in conviction despite his innocence. An innocent suspect might thus believe that a false confession in exchange for leniency is his best alternative.

Recent empirical data support the conclusion that threats of punishment and promises of leniency sometimes produce false confessions. In their analysis of sixty proven or probable false confessions, Professors Richard A. Leo and Richard J. Ofshe identified this tactic as one that played a major role in precipitating several false confessions. In one case, for example, a seventeen-year-old suspect falsely confessed to stabbing her mother after an interrogator told her she would die in the electric chair if she maintained her innocence.[134] And in another, a young woman falsely confessed to shoving her boyfriend off a trail 320 feet above the Oregon coast after the police "creat[ed] the impression that her admission . . . carried no punishment."[135]

Both empirical data and precedent thus support imposing a prohibition on inducing confessions through threats or promises. Since the prohibition's underlying purpose is to bar threats or promises that are substantially likely to produce untrustworthy confessions, the test should focus on the suspect's interpretation of the interrogator's words rather than on whether the interrogator's words constitute an explicit threat or a binding promise. When the suspect would be likely to interpret the interrogator's words as constituting a threat of serious adverse consequences if he doesn't confess or a promise of significant leniency if he does, empirical data as well as intuition suggest that even an innocent suspect will be quite likely to confess rather than risk the

132. *See, e.g.*, State v. Fuqua, 152 S.E.2d 68, 72 (N.C. 1967) (excluding confession because officer told suspect he would testify that the suspect cooperated with the investigation).

133. INBAU ET AL., *supra* note 85, at 131.

134. See Leo & Ofshe, *Consequences*, *supra* note 65, at 475-76.

135. *Id.* at 470-71.

consequences of maintaining his innocence. To impose a restriction that will provide adequate protection against inducements that are substantially likely to produce untrustworthy confessions, interrogators should thus be prohibited from making statements (or engaging in conduct) that would be likely to lead the suspect to believe that he will suffer serious adverse consequences if he doesn't confess or be granted significant leniency if he does.

Adopting this rule will not adversely affect law enforcement. The leading interrogation manuals admonish interrogators to refrain from inducing confessions through threats or promises of leniency.[136] Thus interrogators who scrupulously adhere to the manuals' recommendations will not violate this rule. Moreover, the scope of the rule is limited. Promises to testify to the suspect's cooperation[137] or to inform the prosecuting attorney of such cooperation[138] would be permitted. Similarly, statements to the effect that confession will make the suspect feel better or be good for his soul would not necessarily be impermissible. The benefits offered by such promises seem either too insubstantial or too collateral to the criminal litigation to be likely to induce an untrustworthy confession.

Determining whether an interrogator is threatening the suspect with a punishment if he doesn't confess or promising him significant leniency if he does will sometimes be difficult. As Professor Philip Johnson has said, "the difference between expressions of compassionate understanding on the one hand, and implied promises of leniency on the other, is at the margins sometimes a matter of emphasis and nuance."[139] Similarly, a fine line will sometimes exist between implied threats and statements that merely suggest the possibility of adverse consequences.

In determining whether an interrogator's statements to the suspect constitute a prohibited threat or promise, an objective standard — which considers the probable perceptions of both the interrogator and the suspect subjected to interrogation — should be adopted. If the interrogator should be aware that either the suspect or a reasonable person in the suspect's position would perceive that the interrogator's statements indicate that the suspect would be likely to receive signifi-

136. *See, e.g.*, INBAU ET AL., *supra* note 85, at 114 ("In applying this technique of condemning the accomplice, the interrogator must proceed cautiously and must refrain from making any comments to the effect that the blame cast on an accomplice thereby relieves the suspect of legal responsibility for his part in the commission of the offense.").

137. *See supra* note 132.

138. *See, e.g.*, Layne v. State, 542 So. 2d 237, 239 (Miss. 1989) (holding that promise to inform prosecuting attorney that the suspect was cooperating did not render suspect's confession involuntary). *See generally* George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Analysis*, 1993 U. ILL. L. REV. 207 [hereinafter Dix, *Promises*].

139. Philip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303, 310-11 (1986).

cant leniency if he did confess or significant adverse consequences if he didn't, then the interrogator's statements should be viewed as improper and a confession occurring as a result of such statements should be excluded as involuntary.

Examples drawn from two cases illustrate how the test should be applied. In *Miller v. Fenton*,[140] Detective Boyce, who was investigating the murder of seventeen-year-old Deborah Margolin, interrogated Frank Miller for approximately one hour. During the course of the interrogation, Boyce repeatedly suggested to Miller that, if he confessed, Boyce would see to it that he received "help" rather than being treated as a criminal. At one point, for example, Boyce told Miller that the person responsible for the killing was "not a criminal."[141] He went on to say that the perpetrator had "[a] problem, and a good thing about that Frank, is a problem can be rectified."[142] After Miller agreed, Boyce developed his implicit proposal to Miller as follows: "I want to help you. I mean I really want to help you, but you know what they say, God helps those who help themselves, Frank."[143]

Boyce was never explicit about the kind of "help" that he hoped to provide for Miller. At one point, however, he asked Miller, "If I promise to, you know, do all I can with the psychiatrist and everything, and we get the proper help for you, . . . will you talk to me about it?"[144] Miller never answered this question,[145] and some of his responses to Boyce indicated that, despite Boyce's statements, he believed he would be treated as a criminal if he confessed.[146] Nevertheless, Miller eventually confessed to the killing.

Under the proposed approach, the first question is whether Boyce should be aware that a reasonable person in Miller's position would believe that, if he confessed, he would be likely to receive significant leniency. Although Boyce never explicitly promised Miller leniency in exchange for a confession, his statements taken as a whole would certainly suggest to a reasonable person that if he "helped" Boyce by confessing to the crime, he would not be treated as a criminal, but rather would receive the psychiatric help he needed. The promise of psychiatric help (presumably at a mental hospital) rather than punishment as a criminal certainly constitutes a promise of significant le-

140. 796 F.2d 598 (3d Cir. 1986), *cert. denied*, 479 U.S. 989 (1986).

141. *Id.* at 618 (Gibbons, J., dissenting).

142. *Id.*

143. *Id.*

144. *Id.* at 622.

145. His immediate response, "I can't talk to you about something I'm not . . ." was interrupted by Boyce. *Id.*

146. *See id.* at 633 (Appendix) (After Boyce said, "I don't think you're a criminal, Frank," Miller responded, "No, but you're trying to make me one.").

niency. Boyce's statements to Miller thus constituted an improper promise.

Should Miller's confession following Boyce's promise be excluded as involuntary? Based on the statements he made to Boyce, Miller did not appear to believe that he would receive psychiatric treatment rather than being treated as a "criminal" if he confessed. The government might thus claim that, even if Boyce made an improper promise, Miller's confession should not be excluded as involuntary because Boyce's promise did not induce the confession.[147]

In determining whether a promise induced a confession, the focus should be on whether the promise played any part in precipitating the confession. If Miller did not believe that Boyce had made a promise or was certain that whatever promise Boyce made would not be kept, Miller's confession should be admitted. Miller's skepticism as to Boyce's intentions should not be sufficient, however, to negate a finding that the promise induced the confession. Even if Miller believed that Boyce was unlikely to honor his implied promise, he might have been induced by the promise to believe there was "a small open window at the top of [a] long wall"[148] through which he could miraculously escape the possibility of punishment. In the context of custodial interrogation, a suspect can be induced to confess by a promise even when he believes there is only a remote chance that the terms of the promise will be fulfilled.

Indeed, when a suspect's confession follows a promise of leniency, the conclusion that the promise did not induce the confession is generally implausible. Even if the suspect is aware that he is grasping at straws, the promise probably played some part in precipitating the confession. Barring unusual circumstances, such as an explicit clarification of the officer's authority to make promises,[149] a confession following such a promise should be viewed as induced by the promise and, therefore, involuntary.[150] Since Miller's confession followed Boyce's implied promise of leniency, his confession should be excluded.

As a second example, consider the interrogation of Leo Bruce, who was suspected of murdering nine people at a Thai Buddhist Temple west of Phoenix, Arizona. After his arrest, Bruce was questioned by several officers, including FBI Agent Casey.[151] Near the beginning

147. In *Miller*, the majority opinion took this position. 796 F.2d at 611-12.

148. *See* DAVID SIMON, HOMICIDE 209 (1991).

149. If, in response to a request for clarification, Boyce told Miller that he had no authority to make a promise that would be binding on the prosecutor, it could be found either that Boyce made no implied promise of leniency or that the promise he did make did not induce Miller's confession.

150. *Accord* Dix, *Promises*, *supra* note 138, at 259.

151. *See* Roger Parloff, *False Confessions*, AM. LAW., May, 1993, at 58.

of the interrogation, Casey falsely told Bruce that the police had evidence showing that he was at the temple on the night of the killings. After Bruce denied ever being there, Casey said to him, "The best thing to do is to cooperate now. . . . Don't you think it's smart to get your version of the story down . . . before everybody else gives theirs?"[152] When Bruce continued to deny he had been at the temple, Casey told Bruce that, if he stuck with that story, he was "gonna end up being sorry, I think."[153] He added, "You're making a mistake by not cooperating at this point."[154] Bruce continued to deny his involvement. Eventually, however, he confessed to the killings.[155]

In this case, the critical question is whether Casey should have been aware that a reasonable person in Bruce's situation would believe that he was being threatened with significant adverse consequences if he didn't confess. Casey's comments suggesting that it would be "smart" for Bruce to get his story down before other suspects gave theirs could not reasonably be interpreted as communicating such a threat. The comments do, of course, suggest that Bruce will obtain some advantage by admitting his involvement so that he can get his "version of the story down" first. But there is no suggestion that getting his version down first will lead to any concrete benefit relating to the disposition of his case. At most, Casey's comments seem to suggest that if Bruce tells his story before the others tell theirs, the authorities will be more likely to believe his story, thus making it less likely that other suspects will later be able to convince the authorities that Bruce is more blameworthy than his statement indicates.

Casey's additional statement to the effect that Bruce "will end up being sorry" if he doesn't cooperate obviously comes closer to articulating a threat. Arguably, a reasonable person might take this language to mean that serious adverse consequences would accrue to him if he failed to comply with the Agent's suggestion that he "cooperate" through making a statement admitting his involvement. On the other hand, when considered in the context of Casey's other statements, the suggestion that Bruce would be "sorry" if he didn't make a statement might more reasonably be interpreted as merely reinforcing the suggestion contained in the earlier statements: if Bruce didn't provide the police with his own inculpatory statement, he might later regret his failure to cooperate because the police would then be more inclined to believe other suspects' statements incriminating Bruce. Even though the words, "You'll end up being sorry," have an ominous ring, they are

152. *Id.* at 59.

153. *Id.* at 60.

154. *Id.*

155. *Id.* Bruce was never brought to trial, however, because subsequently discovered evidence established that his confession was false. *Id.*

not on the same order as, "You'll lose your chance for being treated as a lesser offender," or other words that might suggest that the failure to cooperate would lead to tangible consequences relating to sentencing or disposition of the case.

Although the question is close, Agent Casey's statements to Bruce should not be interpreted as communicating a threat that his failure to confess would lead to adverse consequences. Accordingly, Bruce's confession should not be involuntary on the ground that it was induced by an improper threat or promise.

B. *Threats of Adverse Consequences to a Friend or Loved One*

In pre-*Miranda* due process cases, the Court's view of police trickery was ambivalent. In a few cases — most notably, *Spano v. New York*[156] — the Court indicated that police trickery was a factor contributing to its conclusion that the suspect's confession was involuntary.[157] The Court never indicated, however, that any particular sort of police trickery would be sufficient by itself to render a confession involuntary. Indeed, in *Frazier v. Cupp*,[158] the Court held that a confession induced by trickery that both misrepresented the strength of the evidence against the suspect[159] and minimized the suspect's culpability for the offense[160] was voluntary.[161] While stating that the interrogating officer's trickery was "relevant" under the due process test, it concluded that the trickery was insufficient to render the confession involuntary.[162]

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156. 360 U.S. 315 (1959).

157. *See id.* at 322-23. In *Spano*, the suspect's childhood friend, who was then a police officer, falsely told the suspect that his job would be in jeopardy if the suspect did not confess. The Court condemned this tactic, observing that it was "a factor" that in conjunction with other factors resulted in an involuntary confession. *See id.* at 323. In *Leyra v. Denno*, 347 U.S. 556, 559 (1954), the defendant, who was suffering from painful sinus headaches, requested the assistance of a doctor. The chief interrogator introduced him to a doctor who was supposed to provide the defendant with medical relief. *See id.* In fact, however, the "doctor" who met with the defendant "was not a general practitioner but a psychiatrist with considerable knowledge of hypnosis." *Id.* Instead of providing the defendant with medical relief, the "psychiatrist by subtle and suggestive questioning simply continued the police effort . . . to induce [the suspect] to admit his guilt." *Id.* In holding the suspect's confession involuntary, the Court treated this trickery as an important factor in the totality of circumstances. *See id.*

158. 394 U.S. 731 (1969).

159. The interrogating officer falsely told the defendant that his confederate had confessed. *See id.* at 737.

160. The officer also "sympathetically suggested that the victim had started a fight by making homosexual advances." *Id.* at 738.

161. *See id.* at 739.

162. *See id.*

Although the Court's dicta in *Spano* — which strongly condemned the deceptive tactics employed in that case[163] — seemed to suggest that some types of police trickery are worse than others, the Court has never articulated any basis for evaluating the propriety of particular types of interrogators' trickery. Based on the concern for prohibiting interrogation tactics that are substantially likely to produce untrustworthy statements, the Court should distinguish between different forms of trickery on the basis of whether or not the trickery has the potential for producing a false confession. This approach is consistent with *Spano* because, as lower courts have pointed out,[164] the type of trickery employed in that case did have the potential for precipitating a false confession.

In *Spano*, Bruno, the defendant's childhood friend and a "fledgling" police officer, falsely told the defendant that the defendant's failure to confess would cause him to lose his job as a police officer, resulting in dire consequences not only for himself but also for his wife and children. Bruno's trickery could be classified as informing the suspect that a friend or loved one will suffer adverse consequences unless the suspect confesses. Both intuition and empirical data[165] suggest that this type of trickery does have substantial potential for precipitating false confessions. In the context of a police interrogation, a suspect might easily be led to feel that protecting his friend or loved one from imminent harm is more important than the future consequences of confessing. Based on an appropriate reading of *Spano*, interrogators should thus be prohibited from informing a suspect that his failure to confess will lead to serious adverse consequences for a friend or loved one.

If this prohibition is adopted, how should a court determine whether an interrogator is making a prohibited threat? Since the prohibition is designed to deter a pernicious interrogation practice, the court's ultimate focus should be on the interrogator.[166] In assessing

163. *See Spano v. New York*, 360 U.S. 315, 323 (1959).

164. *See, e.g.*, Commonwealth v. DuPree, 275 A.2d 326, 327 (Pa. 1971) (citing *Spano* as an example in which "police employ threats likely to produce a false, involuntary confession").

165. In at least one of Leo and Ofshe's collection of "proven" false confession cases, this tactic seems to have played a critical part in producing a false confession. During Dante Parker's interrogation, the police indicated to Parker that if he didn't confess, the police would arrest and humiliate Parker's brothers, T.C. and Peter. One officer articulated the threat as follows: "They're gonna hit that house big time, T.C.'s gonna go down right in front of his kids." Ofshe & Leo, *Social Psychology*, *supra* note 24, at 230. According to Ofshe and Leo, this "threat precipitated Parker's false confession, and he began the process of inventing answers to the interrogators' questions." *Id.*

166. Adopting an objective focus for the purpose of determining whether an interrogation practice is impermissible is consistent with the Court's approach in dealing with other interrogation issues. *See, e.g.*, Berkemer v. McCarthy, 468 U.S. 420, 442 (1984) (whether suspect was in custody within the meaning of *Miranda* must be determined by assessing "how a reasonable man in the suspect's position would have understood his situation"); Rhode

particular inducements, a reasonable interrogator's perception of how the suspect would view the inducement would be critical. If a reasonable interrogator would believe that his inducement would cause the suspect to feel that he was confronted with the alternatives of confessing or causing serious adverse consequences for a friend or loved one, the interrogator's inducement should be impermissible.

If an interrogator tells the suspect, for example, that the police will take his wife or friend into custody if he doesn't confess, the question of whether this constitutes a threat of serious adverse consequences to the suspect's wife or friend should be determined on the basis of the interrogator's perception of how the suspect would be likely to view this statement. If the interrogator knows that the suspect's wife suffers from arthritis,[167] then the interrogator should certainly be aware that the suspect would be likely to believe that the interrogator was trying to induce a confession by threatening his wife with serious adverse consequences. Similarly, if the interrogator had reason to believe that the suspect would be likely to believe that taking a person into custody amounts to an arrest or other serious curtailment of liberty, then the statement that his wife or a friend is going to be taken into custody should qualify as an impermissible threat, regardless of his wife's or friend's physical condition.

Since the interrogation tactic is problematic because of its potential for producing untrustworthy statements, it should not matter in theory whether the interrogator is misrepresenting his intentions when he tells a suspect that his failure to confess will lead to consequences for a third party. In practice, however, when the interrogator is lying to the suspect, there would seem to be a much greater likelihood that the interrogator believes that the suspect would perceive that, if he doesn't confess, his friend or loved one would suffer serious adverse consequences. In most instances, therefore, the interrogator's misrepresentation as to the effect that a suspect's failure to confess would have for a third party should be strong evidence that the interrogator is employing an impermissible interrogation practice.

C. *Misrepresenting the Evidence Against the Suspect*

Misrepresenting the strength of the evidence against the suspect is another interrogation tactic that has the potential for producing false confessions. When confronted with an interrogator's claim that the evidence overwhelmingly establishes his guilt, some suspects will be inclined to believe either that continued resistance is futile (because

Island v. Innis, 446 U.S. 291, 301 (1980) (interrogation includes "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect").

167. *See* Rogers v. Richmond, 365 U.S. 534, 536 (1961).

the police have evidence that will convict him despite his innocence) or that he is in fact guilty. Not every such misrepresentation, however, is likely to produce untrustworthy statements. If the police tell a suspect they are confident they will find evidence establishing his guilt, or even that they have witnesses who will testify against him, an innocent suspect would be unlikely to confess. Even assuming he credits the interrogator's statements, he would be inclined to believe that the police or the witnesses are simply mistaken. On the other hand, if the interrogator shows the suspect a fabricated laboratory report indicating that the suspect's semen stains were found on the victim's underwear,[168] an innocent suspect might rationally conclude that the government's irrefutable (even if mistaken) proof of his guilt mandates his confession.

When should the tactic of misrepresenting the evidence against the suspect be impermissible? In view of the concern for prohibiting interrogation tactics substantially likely to produce untrustworthy statements, the test should be whether the interrogators employed a tactic that would be likely to induce the suspect to believe that the evidence against him is so overwhelming that continued resistance is futile. When this test is met, there is a substantial risk that the suspect will simply make the statements sought by the interrogator, regardless of whether those statements are true. In determining whether this test is met, the court should consider the type of evidence misrepresented, the nature and quality of the misrepresentation, the extent to which the misrepresented evidence seems to establish the suspect's guilt, and the suspect's apparent vulnerability.

Misrepresentations relating to forensic or scientific evidence are particularly likely to convince suspects that further resistance is futile. Most people believe that evidence obtained through accepted scientific procedures — fingerprints, ballistic reports, or DNA evidence, for example — is not only reliable, but irrefutable. Empirical data support this conclusion. Based on their examination of false confession cases, Ofshe and Leo report that "false evidence ploys based on scientific procedures" are more likely than "[f]alse evidence ploys based on eyewitness reports" to induce an innocent person to confess falsely.[169] Both intuition and the available empirical data thus suggest that misrepresenting the forensic or scientific evidence against the suspect

168. *See* State v. Cayward, 552 So. 2d 971, 972 (1989).

169. Ofshe & Leo, *Social Psychology*, *supra* note 24, at 202. As the authors state, "[f]alse scientific evidence can be presented so as to leave little opportunity for counters. Interrogators represent positive results of fingerprint, hair or DNA tests as error free and therefore unimpeachable." *Id.* Effective use of this ploy diminishes the suspect's ability to resist the interrogator's insistence on his guilt.

should in some circumstances be an impermissible interrogation tactic because of its potential for producing untrustworthy statements.[170]

Because scientific evidence has an inordinate potential for convincing a suspect that continued resistance is futile, misrepresenting the scientific evidence against the suspect should be impermissible whenever the misrepresented evidence would be sufficient to establish the suspect's guilt. Under this test, interrogators should certainly be barred from fabricating laboratory reports indicating that semen stains on the victim's underwear came from the suspect. Since, in most cases, manufacturing a false report would not be necessary to convince a suspect of the scientific evidence's validity, falsely informing the suspect of scientific evidence sufficient to establish his guilt — telling him, for example, that his fingerprints were found at the scene of the crime[171] or that his shoes matched tracks left by the perpetrator[172] — should also be impermissible. In both instances the interrogator's statements would be likely to lead an innocent suspect to believe that irrefutable proof of his guilt mandated his confession.

The tactic of falsely informing a suspect that he has failed a polygraph test presents a more difficult issue. An interrogator employing this tactic is misrepresenting scientific evidence; but the deception does not suggest to the suspect that the police will be able to present irrefutable proof of his guilt. A knowledgeable suspect would presumably be aware that polygraph results can be mistaken and that such results are not admissible in court. Nevertheless, empirical data indicate that this form of deception can have a powerful impact on innocent suspects. The Leo-Ofshe study of false confession cases indicates that, in at least two cases,[173] misrepresenting polygraph results played a major role not only in precipitating an innocent suspect's confession but also in leading the suspect to believe, at least temporarily, that he was in fact guilty.

Since the constitutional prohibition should only apply to exclude interrogation tactics substantially likely to produce untrustworthy statements, the tactic of misrepresenting polygraph results should

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170. In *Cayward*, the court distinguished between verbal misrepresentations and "manufacturing false documents" for the purpose of misrepresenting the strength of the government's case, stating that neither the suspect's nor the public's expectations "encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual." 552 So. 2d at 974. In particular, the court expressed the concern that "[a] report falsified for interrogation purposes might well be retained and filed in police paperwork," with the result that they might unintentionally "be admitted as substantive evidence against the defendant." *Id.* at 974-75.

171. *But see* Beasley v. United States, 512 A.2d 1007, 1010 (D.C. 1986) (admitting confession).

172. *But see* State v. Jackson, 304 S.E.2d 134, 144 (N.C. 1983) (admitting confession).

173. The two cases involved Peter Reilly, who falsely confessed to killing his mother, and Tom Sawyer, who falsely confessed to killing a young woman who lived near him. For a discussion of these cases, see White, *False Confessions*, *supra* note 82, at 128.

probably not be absolutely prohibited. As this example indicates, however, any tactic that distorts the suspect's perception of the scientific or forensic evidence relating to his participation in the crime does have some tendency to precipitate a false or untrustworthy statement. When such a tactic is employed, the court should at least closely scrutinize both the circumstances of the interrogation and the apparent vulnerability of the suspect, examining the extent to which the misrepresentation would be likely to precipitate an untrustworthy confession. When the tactic has been employed on a youthful or mentally handicapped suspect, for example, a court should conclude that the interrogator's use of the tactic rendered the suspect's confession involuntary.

In determining whether a particular misrepresentation of government evidence will be impermissible, the extent and nature of the misrepresentation is also significant. In *Miranda*, the Court disapproved of the "reverse line-up" tactic. In a reverse line-up, the "accused is placed in a line-up" and then falsely "identified by several fictitious witnesses or victims who associated him with different offenses."[174] When police employ this tactic, there is obviously a concern that even innocent suspects "will become desperate and confess to the offense under investigation in order to escape from the false accusations."[175]

If, rather than conducting a "reverse line-up," the police simply arranged to have a number of fictitious witnesses dramatically identify the suspect as the perpetrator of the crime under investigation, the tactic should still be impermissible. Even though suspects can be expected to know that witnesses are often mistaken, the power of the false evidence — in terms of both its apparent value to the prosecution and its vivid communication to the suspect — could easily convince an innocent suspect that continued resistance would be futile.

Although the test may prove difficult to apply, it should promote distinctions between reasonable and pernicious police practices. In Leo Bruce's interrogation, for example, the police took Bruce to a property room, showing him "photographs of enlarged fingerprints and other items of trace evidence, a floor plan of the temple, and a chart listing the names of Bruce's alleged associates."[176] If Bruce's interrogators had falsely indicated that Bruce's fingerprints were found at the crime scene, this interrogation tactic should be impermissible. If, on the other hand, they falsely asserted that the forensic evidence, such as the fingerprints, established the guilt of Bruce's alleged associates, but they said nothing about whether it established Bruce's participation, the tactic should be permissible.

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174. 384 U.S. at 453 (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 106 (1956)).

175. *Id.*

176. Parloff, *supra* note 151, at 60.

Classifying the interrogation tactic will not always be clear. If the police in the Bruce case not only indicated that the forensic evidence established the guilt of Bruce's alleged associates, but also stated (or intimated) that those associates were incriminating Bruce, the case would fall in the gray area. In determining whether this type of misrepresentation would be likely to convince an innocent suspect that further resistance was futile, a court would have to assess not only the exact nature of the misrepresentation, but also other factors — including the vividness with which the misrepresentation was made and the suspect's apparent powers of resistance. If, during the course of a lengthy interrogation, the interrogator repeatedly falsely indicated to the suspect that others whose guilt was established were unequivocally implicating him, the court should probably hold that the interrogation tactic was impermissible on the ground that it would be likely to convince even an innocent suspect that further resistance to the interrogator would be futile.

IV. CONCLUSION

In many ways, *Miranda* is a paradoxical decision. Among the Supreme Court's criminal procedure decisions, it has precipitated the most controversy and debate. As the *Dickerson* majority stated, moreover, the *Miranda* "warnings have become a part of our national culture."[177] Nevertheless, as interpreted by the post-*Miranda* Court, the extent to which *Miranda*'s safeguards protect suspects from pernicious interrogation practices is extremely limited.

By requiring the police to warn suspects of their constitutional rights before subjecting them to custodial interrogation, *Miranda* does provide suspects with at least a theoretical opportunity to avoid interrogation or to halt it after it begins by invoking one of their rights. In practice, however, the vast majority of suspects waive their *Miranda* rights and submit to interrogation. Once the interrogation begins, the suspect's awareness of his rights fails to provide significant protection from pressures generated by sophisticated interrogators. Interrogators have the ability to structure the interrogation in such a way that the suspect will be deterred from successfully invoking his rights.

In addition, *Miranda* provides virtually no restrictions on the interrogation practices police are permitted to employ once the suspect waives his rights and submits to an interrogation. Indeed, *Miranda* may have had the unintended effect of reducing the extent to which the due process voluntariness test provides protection against such interrogation practices. As a result, although the Court has indicated

177. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000).

that interrogation practices viewed as pernicious by society are prohibited, constitutional restrictions on such practices are minimal.

In order to address this problem, the Court first needs to determine what interrogation practices should be viewed as pernicious, and then to develop constitutional principles that will prohibit or restrain such practices. In this Article, I have argued that the Court should refurbish the due process voluntariness test so as to prohibit interrogation practices that are substantially likely to produce untrustworthy statements. By taking this approach, the Court will not only fill a significant gap left by *Miranda* but also come closer to insuring that "the terrible engine of the criminal law . . . not be used to overreach individuals who stand helpless against it."[178]

178. Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (Frankfurter, J., plurality opinion).