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Police Use of Trickery as an Interrogation Technique

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TABLE OF CONTENTS

I. INTRODUCTION

In *Miranda v. Arizona*,[1] the Supreme Court attempted to ameliorate the "inherently coercive" nature of custodial interrogation.[2] The Court reasoned that by extending certain fifth amendment protections[3] to the interrogation room, the coercive atmosphere would be significantly reduced. *Miranda*'s loophole, however, was its provision that suspects could be interrogated if they made a "knowing

1. 384 U.S. 436 (1966).
2. *Id.* at 458.
3. *Miranda* held that the fifth amendment's self-incrimination clause requires that a person undergoing custodial interrogation be informed of his right to silence, as well as his right to the presence of counsel, either retained or appointed, during interrogation. *Id.* at 444-45.

and intelligent" waiver of their fifth amendment rights.[4] In practice, most suspects do waive their *Miranda* rights,[5] and, as a result, interrogation proceeds much as it did before *Miranda.* Consequently, *Miranda*'s goal of reducing the coercive atmosphere inherent in custodial interrogation has not been realized.[6] The spirit of *Miranda* thus requires that other, more effective, steps be taken to alleviate the coercive nature of interrogation.

Trickery is an especially coercive interrogation technique.[7] Because trickery has its harshest effect upon innocent persons,[8] and,

4. *Id.* at 444. *See also* F. GRAHAM, THE SELF INFLICTED WOUND 182 (1970).

5. *See* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347, 1394-95 (1968) [hereinafter cited as D.C. STUDY]; *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519, 1563, 1577-78, 1613-16 (1967) [hereinafter cited as NEW HAVEN STUDY]. These two studies, although dated, remain the major empirical studies on the effect of *Miranda,* and frequent reference will be made to them. *See also* Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality,* 64 J. CRIM. L.C. & P.S. 320, 325-26, 331 (1973). For a discussion of several empirical studies, including the New Haven and D.C. Studies, see O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 168-78 (1973).

6. *See* D. C. STUDY, *supra* note 5, at 1394; O. STEPHENS, *supra* note 5, at 200. Stephens believes that the primary benefit of *Miranda* has been its "educational" value. *Id.*

7. The *Miranda* Court recognized this in its condemnation of trickery used to obtain a waiver. *See* 384 U.S. at 453, 476. *Miranda,* however, did not expressly prohibit the use of trickery after a waiver, nor have the courts interpreted it in that manner. *See* text accompanying notes 146-52 *infra.* Very little psychological literature on the subject of interrogation is available, probably because the police conduct most interrogations in complete privacy. The major psychological work in the area is Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42 (1968). In that article Professor Driver catalogued the sociopsychological pressures focused against the suspect undergoing interrogation even after *Miranda,* and concluded that "[t]he *Miranda* warnings failed to provide safeguards against the social psychological rigors of duress and interrogation, except to the extent that they prevent interrogation altogether." *Id.* at 59. Although the article does not contain any specific discussion of trickery and its effect on interrogation, Professor Driver does conclude that the interrogator's "air of confidence" in the suspect's guilt is an important factor in inducing a suspect to confess. *Id.* at 55-56. This suggests that any technique in which the police falsely confront a suspect with evidence of his guilt would have a powerful effect.

Professor Milton Horowitz addressed this point in *The Psychology of Confession,* 47 J. CRIM. L.C. & P.S. 197 (1956). He pinpointed five conditions that induced a suspect to make a confession: (1) an accusation by authorities; (2) evidence of guilt presented to the suspect; (3) the reduction of friendly forces; (4) the suspect's feeling that he is guilty; and (5) the suspect's feeling that confession is the path to psychological freedom. *Id.* at 204. Horowitz hypothesizes in regard to the second condition that when a person perceives that actual evidence backs the accusation of authority, his psychological position becomes very precarious. *Id.* at 202. The article does not discuss police trickery specifically, but Professor Horowitz' emphasis on the important role that confrontation with evidence plays in obtaining a confession certainly suggests the coercive potential in deceptive police tactics.

8. In his 1956 article Professor Horowitz briefly discusses the effect of interrogation on innocent persons who have nothing to confess. He observes that "[e]ven innocent persons placed under a cloud of accusation, feel apprehension or anxiety, and, sometimes guilt." Driver, *supra* note 7, at 203. Although he does not discuss the plight of the innocent person in detail, Horowitz' observation suggests that the innocent suspect's feelings of anxiety and

because *Miranda* apparently has not curtailed its use, this Note submits that the law should pursue effective means of curbing this practice. For purposes of this Note, trickery is defined as any police attempt to confront a suspect with evidence of his guilt when no such evidence exists.[9]

In sum, this Note maintains that trickery can be effectively curtailed despite the failure of *Miranda* to do so. This Note argues that trickery in the interrogation room is a violation of fourteenth amendment substantive due process.[10] The Supreme Court has recently stated, in very unambiguous terms, that due process requirements exist independently of the fifth amendment *Miranda* requirements in the interrogation context.[11] This Note therefore proposes an *objective* due process standard that would prohibit trickery. The violation of this due process standard would require the exclusion at trial of confessions induced by trickery. Because the exclusionary rule is not a sufficient sanction against willful police misconduct, however, this Note also argues that a tort remedy should be available to innocent persons victimized by a police trickery.

II. LEGAL BACKGROUND TO MODERN CONFESSION LAW[12]

A. Miranda v. Arizona

In 1966, the United States Supreme Court "revolutionized"[13] modern confession law by holding in *Miranda v. Arizona*[14] that the

guilt make it more difficult for him to assert his innocence.

This inference receives support from Professor Inbau of Northwestern University Law School, co-author of F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967), and a noted advocate of the policeman's perspective on confession law. For a general introduction to Inbau's life and work, see the tribute to him in 68 J. CRIM. L.C. & P.S., iii, iii-197 (1977). Professor Inbau admits that in presenting an innocent suspect with accusations of guilt "he may become so disturbed and confused that it will be more difficult . . . to ascertain the fact of the subject's innocence or even to obtain possible clues or helpful information which might otherwise have been obtainable." F. INBAU & J. REID, *supra*, at 92. If the mere accusation of guilt has such adverse effects, one may reasonably surmise that an actual confrontation with "proof" will greatly exacerbate the suspect's psychological disturbance.

9. This definition of trickery, as well as its more common manifestations, will be discussed in Part V *infra*. This Note recognizes that other forms of police misconduct that do not fit this definition could be generally classified as "trickery," but they are beyond the scope of this Note.

10. *See* text accompanying notes 215-31 *infra*.

11. Mincey v. Arizona, 437 U.S. 385, 396-402 (1978).

12. For an excellent discussion of the evolution of American confession law, see Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 279-300. For an in-depth treatment of this area, see O. STEPHENS, *supra* note 5, at 17-119; *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 954-96 (1966).

13. The word is borrowed from Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 519 (4th ed. 1974) [hereinafter cited as CRIMINAL PROCEDURE].

14. 384 U.S. 436 (1966).

self-incrimination clause of the fifth amendment,[15] applied to the states through the fourteenth amendment, guarantees certain rights to the citizen undergoing "custodial interrogation" by a governmental police agency.[16] As a result of *Miranda,* the suspect has the right to remain silent and, more significantly, the right to the presence of counsel during interrogation itself.[17] In addition, the fifth amendment entitles indigent suspects to appointed counsel.[18] From the perspective of police practice, *Miranda*'s significance lay not so much in its recognition of these rights as in its constitutional requirement that the police affirmatively inform the suspect of his rights before questioning.[19] Moreover, no questioning may begin unless the suspect makes a "knowing and intelligent" waiver of his rights.[20]

Miranda can be described as revolutionary because it held that these rights are grounded in the *fifth* amendment's guarantee against self-incrimination.[21] It had only been two years before, in *Malloy v. Hogan,*[22] that the Court first held the self-incrimination clause applicable to state criminal proceedings. *Miranda*'s recognition of the constitutional basis of the individual's right to silence during interrogation was not entirely original. In *Escobedo v. Illinois,*[23] decided in 1964, the Court held that the sixth amendment's right to counsel guaranteed the individual's right to absolute silence in the face of police questioning. *Miranda,* however, took the long step of *requiring*[24] the police to inform the suspect of this right, or else the subsequent confession would be inadmissible at trial.[25]

Of far greater constitutional significance was *Miranda*'s holding that the fifth amendment's self-incrimination clause guarantees the right to counsel during custodial interrogation. It was this aspect of the *Miranda* decision that brought the loudest howls from members

15. The fifth amendment provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

16. The self-incrimination clause was applied to interrogations conducted by federal officers in the early case of Bram v. United States, 168 U.S. 532 (1897). Although the invocation of the fifth amendment in the interrogation context was rather startling, the practical significance of *Bram* was limited, since the Court held that the fifth amendment was "but a crystallization" of common law confession doctrines. *Id.* at 543; *see* Dix, *supra* note 12, at 289.

17. 384 U.S. at 444.

18. *Id.*

19. *Id.*

20. *Id.* For a second summary of the Court's holding, see *id.* at 478-79.

21. *Id.* at 439.

22. 378 U.S. 1 (1964).

23. 378 U.S. 478, 490-91 (1964).

24. 384 U.S. at 476.

25. *Id.* at 479.

of the "law and order" community.[26] What these critics failed to foresee, however, was the astonishingly high rate at which suspects would waive the fifth amendment rights guaranteed by *Miranda*.[27] Indeed, thirteen years later, there is little reason to believe that *Miranda* has had any substantial effect upon either the conduct or the effectiveness of police interrogation.[28] To some extent this minimal impact may be attributed to subsequent decisions of the Burger Court limiting the scope of the *Miranda* protections.[29] A more likely explanation, however, may be the Warren Court's failure to recognize the numerous influences that result in the waiving of rights by most suspects; for example, the perfunctory, ritualistic manner in which most officers read off the warnings,[30] the inability of most suspects to understand what the warnings really mean,[31] and even the basic social and psychological pressures that inherently make it very difficult for many people to refuse to answer questions.[32]

Miranda represents the high-water mark[33] in constitutional protections accorded the citizen undergoing interrogation. Above all else, *Miranda* was a noble attempt to "objectify"[34] the test for determining whether a confession is constitutionally admissible. The old due process voluntariness standard that preceded *Miranda*, discussed at length below, left entirely too much room for subjectivity and ad hoc judgment.[35] Moreover, the case by case treatment re-

26. *See* F. GRAHAM, *supra* note 4, at 183.

27. *Id.* at 182-84.

28. O. STEPHENS, *supra* note 5, at 205. Graham suggests that the "furor" surrounding *Miranda* had the beneficial effect of informing the public that people do not have to explain their activities to the government. He also refers to observers who believe that the frequency of dragnet arrests, prolonged incommunicado interrogations, and physical brutality has greatly diminished since *Miranda*. F. GRAHAM, *supra* note 4, at 184. With regard to interrogation itself, however, Graham concludes that the Court knew that it had "only dealt a tap on the wrist" to custodial interrogation. *Id.* at 183.

29. *E.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (limiting the definition of custodial interrogation); Michigan v. Mosely, 423 U.S. 96 (1975) (although petitioner had refused to talk during first interview, statement made two hours later during second interview with different detective after new *Miranda* warnings was admissible); Harris v. New York, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* held admissible for impeachment purposes).

30. *See* NEW HAVEN STUDY, *supra* note 5, at 1550-52.

31. *See* D.C. STUDY, *supra* note 5, at 1372-75.

32. *See* Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 315-18 (1967). This study is particularly interesting because it involved Yale faculty, graduate students, and undergraduates who had turned in their draft cards and were subsequently approached by the F.B.I. The study reinforced the original New Haven Study's conclusion that the *Miranda* warnings are almost totally ineffective, even when the suspect is intelligent, and the interrogation is polite and non-custodial. *Id.* at 318.

33. F. GRAHAM, *supra* note 4, at 157.

34. *Id.* at 179, 184; Dix, *supra* note 12, at 297-98.

35. *See* Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the*

quired by the voluntariness standard threatened to deluge the Supreme Court with confession cases.[36] Unfortunately, *Miranda* did not bring total clarity to the law of confessions. The battleground merely shifted to the waiver provisions of *Miranda*.[37] The issue became whether a suspect had made a knowing and intelligent waiver before spilling his story. Once again the courts became entangled in problems surrounding the suspect's subjective state of mind.[38] This problem suggests that it is appropriate to re-examine the legal background of modern confession law in order to determine whether there are standards that could more easily and objectively be applied to determine whether a confession meets constitutional requirements.

B. Common Law Evidentiary Requirements—Reliability

Traditionally, American common law[39] permitted the admission of a confession into evidence if the prosecution could show that the confession was reliable. The confession was deemed reliable if there was no reason to doubt the truth of the statements made therein.[40] This reliability standard excluded confessions only in the most extreme circumstances, as when the confession was procured through the use of torture, threats, or promises.[41] The standard had a certain amount of superficial appeal; after all, if the court had no reason to doubt the truth of a particular statement, why should it not be used against the defendant? Wigmore maintained to the end of his life that this was the only standard by which confessions should be judged.[42]

Because many forms of coercion would not be classified as threats or promises, this approach allowed the police very broad freedom in conducting an interrogation. For example, this standard

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"New" Fifth Amendment and the Old "Voluntariness" Test, 65 MICH. L. REV. 59, 94-104 (1966).

36. Dix, *supra* note 12, at 295; F. GRAHAM, *supra* note 4, at 179.

37. Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109 (1978).

38. *See* Dix, *supra* note 12, at 314-24.

39. For a discussion of the English common law regarding confessions, see Dix, *supra* note 12, at 279-85.

40. *See* 3 WIGMORE, EVIDENCE § 822 (Chadbourn rev. 1970).

41. *See* Note, *supra* note 37, at 112-14.

42. *See* 3 WIGMORE, *supra* note 40, at § 822. Wigmore's view still has a considerable number of supporters, the most notable of whom is probably Professor Inbau. The following is Inbau's "rule of thumb" for determining a confession's admissibility, as viewed by a police officer. "Is what I am about to do, or say, apt to make an innocent person confess?" Inbau believes that this test still satisfies constitutional requirements, once a suspect has waived his *Miranda* rights. F. INBAU & J. REID, *supra* note 8, at 163.

would have permitted the prosecution to use a statement that had been obtained after thirty-six consecutive hours of questioning, since an innocent person presumably has no more reason to confess after thirty-six hours than he would after one.[43] Thus, because the reliability test neither reflected concern for innocent persons subjected to such abuse nor recognized that allowing police to "break" a guilty suspect into confessing runs counter to our society's sense of justice, the Supreme Court gradually developed constitutional limits on the tactics that police could use in interrogation, regardless of the truthworthiness of the confession those tactics produced.

C. Constitutional Limits—The Voluntariness Test

In 1936, in *Brown v. Mississippi,*[44] the Supreme Court held for the first time that a confession was inadmissible in a state court on fourteenth amendment due process grounds. The Court found the torture used to extract the confessions in *Brown* so revolting that it offended fundamental principles of justice.[45] Since the coerced confessions in *Brown* were clearly unreliable,[46] *Brown* actually went no further then to establish the trustworthiness test as a minimum requirement of fourteenth amendment due process.[47] In the years after *Brown,* however, the Court began to indicate that due process required something more than a showing that the particular confession at issue was reliable. For example, in 1941 Justice Roberts, writing for a majority of the Court in *Lisenba v. California,*[48] stated that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[49] Three years later, in *Ashcraft v. Tennessee,*[50] the Court overturned on due process grounds a conviction based on a confession obtained after thirty-six hours of questioning, even though there was no reason to doubt the trustworthiness of the particular statement at issue.[51]

Ashcraft signalled the beginning of a due process "voluntariness" test that focused on the fundamental fairness of

43. *See* Justice Jackson's dissent in Ashcraft v. Tennessee, 322 U.S. 143, 156 (1944).

44. 297 U.S. 278 (1936).

45. *Id.* at 286.

46. For example, a deputy sheriff in *Brown,* after severely whipping one of the defendants, declared that he would continue the whippings until the suspect confessed, whereupon the defendant agreed to make a statement. *Id.* at 282-83.

47. *See* Note, *supra* note 37, at 114.

48. 314 U.S. 219 (1941).

49. *Id.* at 236.

50. 322 U.S. 143 (1944).

51. *Id.* at 156 (Jackson, J., dissenting); CRIMINAL PROCEDURE, *supra* note 13, at 511.

police interrogation methods and the effect of those methods on the will of the suspect.[52] Two cases from the 1950's, *Leyra v. Denno,*[53] and *Spano v. New York,*[54] applied the new standards to situations involving more subtle forms of psychological coercion. In *Leyra,* the police sent a physician to treat Leyra's sinus condition. Unknown to Leyra, the physician, a Dr. Helfand, was actually a highly-skilled psychiatrist employed by the police to extract a statement from Leyra. Dr. Helfand achieved notable success in this regard.[55] The Court found that Leyra's ability to resist interrogation, already weakened by his physical and emotional exhaustion after days and nights of intermittent questioning, was "broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist."[56] The admission of such a confession, the Court held, was inconsistent with due process. The reliability of Leyra's incriminating statements was not questioned.

Five years later, in *Spano v. New York,*[57] the Court held inadmissible a murder confession obtained by exploiting Spano's friendship with a police officer named Bruno. Bruno, at the behest of his superiors, led Spano to believe that if he did not confess to Bruno, officer Bruno would lose his job. Officer Bruno naturally pointed out the adverse consequences unemployment would have on his pregnant wife and three small children. Spano, a young, uneducated immigrant with a history of emotional disturbance, had been questioned for eight hours before finally breaking down in the face of Bruno's emotional coercion. The Court emphasized officer Bruno's ruse in holding Spano's statement involuntary and therefore inadmissible.[58] Chief Justice Warren's majority opinion emphasized the irrelevance of a confession's reliability for the purposes of the voluntariness test.[59] The Chief Justice further stated that the recent confession cases suggested that the police bore an increasing burden "in protecting fundamental rights of our citizenry," a burden that could only increase as police officers became more responsible and the methods used to extract confessions more sophisticated.[60]

52. *See, e.g.,* Harris v. South Carolina, 338 U.S. 68 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949). (All three cases involved confessions whose trustworthiness was not seriously disputed).

53. 347 U.S. 556 (1954).

54. 360 U.S. 315 (1959).

55. *See* 347 U.S. at 562-84 (transcript of Dr. Helfand's interrogation of Leyra).

56. *Id.* at 561.

57. 360 U.S. 315 (1959).

58. *Id.* at 318-24.

59. *Id.* at 320-21.

60. *Id.* at 321.

If doubt remained as to whether the common law reliability test was a part of the emerging fourteenth amendment voluntariness test, *Rogers v. Richmond*[61] dispelled it.[62] In *Rogers*, decided in 1961, the Court held unequivocally that a trial court could not consider the probable truth or falsity of a confession in determining the voluntariness of the statement under the due process clause.[63] The proper question to ask, the Court explained, is whether the behavior of the police overbore the suspect's will to resist and brought about a confession "not freely self-determined."[64]

The voluntariness standard that emerged from *Rogers v. Richmond*—whether or not the suspect's will was overborne so that his confession was not freely self-determined—obviously required clarification. Justice Frankfurter attempted to delineate the "principles" of the voluntariness test in his plurality opinion in *Culombe v. Connecticut*,[65] but his sixty-seven page effort satisfied neither the Court[66] nor the academicians.[67] Justice Frankfurter listed a number of "factors" and "surrounding circumstances" that were relevant in determining the voluntariness of a confession. He concluded, however, that there was no "single litmus-paper test for constitutionally impermissible interrogations;"[68] the "ultimate test" remained: "Is the confession the product of an essentially free and unconstrained choice by its maker?"[69] Professor Kamisar, in a major criticism of this standard[70] concluded that "involuntariness" was little more than a fiction used to vilify certain interrogation methods, while "voluntariness" was little more than a fiction designed to beautify certain other interrogation techniques.[71]

In 1963, the Supreme Court itself seemed to lend considerable support to Professor Kamisar's criticism in the case of *Haynes v.*

61. 365 U.S. 534 (1961).

62. In Blackburn v. Alabama, 361 U.S. 199 (1960), Chief Justice Warren had emphasized that "there are considerations which transcend the question of guilt or innocence," *id.* at 206, but the Court did not hold, as in *Rogers*, that the probability of the confession's truth was irrelevant in applying the voluntariness test.

63. The Court stated that the question of voluntariness is "to be answered with complete disregard of whether or not petitioner in fact spoke of the truth." 365 U.S. at 544. Of course, if the confession is probably false, fundamental fairness would require its exclusion.

64. *Id.*

65. 367 U.S. 568 (1961).

66. Only Justice Stewart actually joined in the Frankfurter opinion. *See* CRIMINAL PROCEDURE, *supra* note 13, at 506 n.*b*.

67. See Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 744-46 (1963) [hereinafter cited as *Comments*].

68. 367 U.S. at 601.

69. *Id.* at 602.

70. *Comments*, note 67 *supra*.

71. *Id.* at 745-46.

Washington.[72] The police held Haynes incommunicado for sixteen hours and told him that he could not contact his wife until he had signed a written confession. The Court held that, under the totality of the circumstances, his resulting written confession was involuntary.[73] Justice Goldberg, writing for the majority, stated that

> [t]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.[74]

This statement, in which the Court admits the difficulty, if not the arbitrariness, of line drawing, appears to acknowledge the accuracy of Professor Kamisar's criticism.

While Justice Goldberg spoke of the difficulty in drawing lines between acceptable and unacceptable police conduct in a particular case, his statement also suggests a more fundamental reason why the Court's voluntariness standard failed to provide standards that could be objectively applied by the lower courts with any consistency. As Justice Goldberg expressed it, the test required "fine judgments" about the effect of psychological pressures on the mind of a particular defendant—a highly subjective standard. Ever since *Leyra v. Denno,*[75] the Court had gone out of its way to emphasize that each case must be decided on its own facts. The catch phrase became "totality of the circumstances."[76] By thus limiting the holding of each case to its own facts, the Court avoided the necessity of objectively classifying particular police practices as per se violations of due process. The vagueness of this standard resulted in a severe administrative burden on the Supreme Court because the standard required extensive review of lower courts unable to apply it satisfactorily. This burden was a significant factor leading to the Court's attempt to objectify confession law in *Miranda.*[77] For example, although *Haynes* condemns the practice of conditioning a suspect's right to call his wife on his signing a confession, it does not actually hold that this practice per se renders the subsequent confession involuntary. The court instead must look at the totality of the circumstances, or the "context in which [the confession was] made."[78]

72. 373 U.S. 503 (1963).

73. *Id.* at 514.

74. *Id.* at 515.

75. 347 U.S. 556 (1954).

76. *See, e.g.,* Haynes v. Washington, 373 U.S. 503, 514 (1963).

77. *See* Dix, *supra* note 12, at 294-97; CRIMINAL PROCEDURE, *supra* note 13, at 513 (quoting from Justice Black's remarks during the *Miranda* oral arguments).

78. 373 U.S. at 514.

Presumably this approach leaves open the possibility that in other circumstances, a court might not find a confession involuntary, even though the police had told the suspect that he could not contact anyone until he confessed.

This Note submits that the Court developed the totality of the circumstances test as a means for simply expressing its judgment that in a given case the police misconduct actually caused the defendant to confess against his will. It is illuminating to note that the phrase developed in cases in which the defendant was a "more susceptible subject"[79] than the average person would have been. In *Fikes v. Alabama,*[80] in 1956, the Court first used the phrase "totality of the circumstances."[81] The petitioner in *Fikes* was an uneducated black of low mentality, perhaps mentally ill.[82] Viewing the "totality of the circumstances," the Court emphasized the weakness and susceptibility of Fikes in holding the confession involuntary.[83] By contrast, in *Crooker v. California*[84] the Court placed great weight on the petitioner's college education and one year of law school as part of the "sum total of the circumstances" in holding that Crooker's confession had been voluntary.[85] On the other hand, in *Blackburn v. Alabama,*[86] the Court relied almost entirely on Blackburn's alleged insanity at the time of his confessions in determining that the confession was involuntary, even though the other "pertinent circumstances," objectively viewed, were less offensive than those in *Crooker.*[87] Similarly, in *Spano v. New York*[88] the Court emphasized

79. The phrase is from Fikes v. Alabama, 352 U.S. 191, 197 (1957). As Justice Clark suggested in his *Haynes* dissent, the Court's confession cases "ordinarily dealt" with the "mentally sub-normal accused," the "youthful offender" or the "naive and impressionable defendant." 373 U.S. at 522.

80. 352 U.S. 191 (1956).

81. *Id.* at 197. Of course, the concept of examining the circumstances surrounding the confession in each case existed long before the Court started using this particular phrase. For example, in 1949, in Watts v. Indiana, 338 U.S. 49, 53 (1949), the Court had referred to "the total situation out of which [the defendant's] confessions came." And in Leyra v. Denno, 347 U.S. 556, 558 (1954), the Court spoke of "the circumstances surrounding the confessions."

82. 352 U.S. at 196.

83. *Id.* at 196-98. The Court quoted from Stein v. New York, 346 U.S. 156, 185 (1953): "The limits in any case depend upon a weighing of the circumstances or pressure against the power of resistance of the person confessing. What could be overpowering to the weaker will or mind might be utterly ineffective against an experienced criminal." Reck v. Pate, 367 U.S. 433, 433-34 (1961), emphasized the subnormal mental capacity of the petitioner, as well as his "illness, pain, and lack of food" in holding that his confession had been involuntary.

84. 357 U.S. 433 (1958).

85. *Id.* at 438.

86. 361 U.S. 199 (1960).

87. Crooker had expressly requested and been denied an opportunity to contact his attorney on at least two occasions before making his confession. 357 U.S. at 436. In *Blackburn,* by contrast, the main "pertinent circumstance," aside from Blackburn's insanity, was the

Spano's youth, lack of education, and emotional instability in finding his confession involuntary.[89]

One way of explaining the Court's emphasis on the suspect's subjective weaknesses in these cases is that these weaknesses serve to exacerbate the level of police abuse. The problem with this explanation, however, is that it suggests that the Court was in effect requiring police to categorize suspects before subjecting them to various interrogation techniques. In other words, police were to treat suspects of subnormal intelligence more delicately than those of average or above-average intelligence. Nothing in the Court's opinions, however, suggests that this is in fact what was being required. Indeed, nowhere in *Fikes, Spano,* or *Blackburn* does the Court suggest that the interrogators had even been aware of the suspect's weaknesses.

This Note instead submits that the Court's interest in the suspect's individual weaknesses in these cases arose because the heightened susceptibility of a particular suspect assured the Court that the police abuse in question actually *caused* the suspect to confess against his will. This analysis is profered despite Professor Kamisar's criticism that the voluntariness standard was an arbitrary means of distinguishing acceptable from unacceptable police practices.[90]

Rather than reach an arbitrary decision, the Court went out of its way when applying the voluntariness test to demonstrate that the questionable police practice at issue was the immediate cause of the resulting confession. This conclusion is evidenced by the Court's detailed discussion of the strengths and weaknesses of the petitioners in each case. In none of the thirty-five confession cases preceding *Miranda* did the Court nullify confessions simply because of a particular form of police abuse. In each case the Court carefully established the causal link, or lack thereof, between the police misconduct and the resulting confession.[91]

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eight to nine hours of interrogation. *See* 361 U.S. at 207. It does not appear that Blackburn had ever requested to contact anyone during his detention, although the Court noted the absence of Blackburn's friends, relatives, or legal counsel as another circumstance suggesting the involuntariness of the confession. *Id.*

88. 360 U.S. 315 (1959).

89. *See* notes 57-58 *supra* and accompanying text.

90. *See Comments, supra* note 67, at 745-46.

91. See Justice Brennan's concurrence in Brady v. United States, 397 U.S. 742, 799 (1970): "Even after the various meanings of 'involuntary' have been identified, application of voluntariness criteria in particular circumstances remains an illusory process because it entails judicial evaluation of the effect of particular external stimuli *upon the state of mind of the accused." Id.* at 803 (emphasis added). Although *Brady* involved the voluntariness of a guilty plea, it is clear that Justice Brennan's observation regarding involuntariness applies

This Note thus suggests that what the Court was really doing in the voluntariness cases was first, identifying an abuse of the interrogation process, and second, determining that the abuse was the direct cause of the subsequent confession. When the Court found that an abuse had caused the confession, it deemed the resulting confession "involuntary." The phrase "totality of the circumstances" simply became the Court's shorthand way of saying that it had found a causal link between the abuse and the confession.[92]

One reason why the Court, whether consciously or intuitively, expressed its causation finding in terms of the totality of the circumstances could well be that it would have been awkward to explicitly make a completely de novo finding as to the petitioner's state of mind. It is interesting to note, however, that the Court could have made such an independent evidentiary determination in a case alleging violation of due process.[93] Nevertheless, by invoking the "totality" test in these cases, the Court maintained its appearance as an appellate body, even though in reality the Court had found as a factual matter that the petitioner had been coerced into confessing.

The voluntariness test has been soundly criticized as an "ineffective" and "inadequate"[94] means of determining a confession's admissibility. Indeed, the *Miranda* opinion itself is indisputable evidence that the Court has recognized the unworkability of this standard. The fundamental flaw in this standard is its extreme subjectivity; any test based almost exclusively on a particular individual's state of mind could not possibly serve as an effective legal standard. The "totality of the circumstances" test of voluntariness required exactly this sort of subjective inquiry to determine whether the police misconduct at issue had actually caused the confession in question. This Note submits, however, that the Court should not have felt compelled to find an actual causal link between the police behavior and the confession in question, but should have instead ruled that certain interrogation tactics were so unfair as to render the confession violative of due process per se. For example, in *Haynes v. State*,[95] the Court could have held that police refusal to allow the suspect to make a phone call rendered the confes-

equally to confessions, because the case he cites in support of his statement is Haley v. Ohio, 332 U.S. 596 (1948) (Frankfurter, J., concurring), a confession case.

92. *Cf.* Justice Frankfurter's observation that "a complex of values underlies this stricture against use . . . of involuntary confessions which, by way of convenient shorthand, this Court terms involuntary." 361 U.S. at 207.

93. Haynes v. State, 373 U.S. 503, 515-16 (1963).

94. Kamisar, *supra* note 35, at 109; Dix, *supra* note 12, at 296.

95. 373 U.S. 503 (1963).

sion violative of due process. In *Spano,* the Court could have found that the deceptive use of Officer Bruno, in and of itself, resulted in an invalid confession. Similarly, the Court in *Fikes* could have ruled that five days of incommunicado interrogation invalidated the confession. Thus if the Court had used due process to vilify certain *techniques,* a due process standard might have emerged that would have served as a more effective means of controlling police misconduct.[96]

III. THE DUE PROCESS STANDARD AFTER *Miranda:* A PROPOSED OBJECTIVE STANDARD

In *Miranda,* the Court applied the fifth amendment in a way that it had never been applied before. The Court held that a certain type of police misconduct, failure to give the required warnings or interrogation without a valid waiver, would result in an inadmissible confession, regardless of the suspect's subjective mental condition.[97] *Miranda* was the Court's magnificent attempt to objectify modern confession law.[98] Although critics cheered the death of the due process voluntariness standard,[99] the standard did not die with *Miranda* as its critics had hoped.[100] Instead, the Court strikingly reaffirmed the independent viability of the voluntariness standard in the 1978 case of *Mincey v. Arizona.*[101]

In *Mincey* the suspect's incriminating statements concerning the murder of a police officer were obtained from him while he was under treatment in the intensive care unit of a Tucson hospital for wounds received in a shoot-out. Although the interrogating detective informed Mincey of his *Miranda* rights, the interrogation continued despite Mincey's repeated requests that the questions stop until he could get a lawyer.[102] While the prosecution did not attempt

96. An "objective" standard for determining voluntariness is not unheard of. Judge Weinstein has applied an objective standard, as well as a separate subjective test, for determining whether a guilty plea is involuntary. United States v. Mancusi, 275 F. Supp. 508, 515-16 (E.D.N.Y. 1967). The objective test would invalidate any plea when threats or promises have been made to the defendant, regardless of whether they actually "overwhelmed" him. The purpose of this objective standard is to deter official impropriety. *Id.* at 516.

97. 384 U.S. at 468-69.

98. *See* Dix, *supra* note 12, at 297; F. GRAHAM, *supra* note 4, at 184.

99. *See* Kamisar, *supra* note 35.

100. Harris v. New York, 401 U.S. 222 (1971), made it clear that due process requirements co-existed with the *Miranda* requirements. The Court held in *Harris* that a statement obtained in violation of *Miranda* and therefore inadmissible as part of the prosecution's case in chief could be used to impeach the defendant so long as "the trustworthiness of the evidence satisfies legal standards." *Id.* at 422. The Court elaborated on *Harris* in Oregon v. Hass, 420 U.S. 714, 720-24 (1975).

101. 437 U.S. 385 (1978).

102. *Id.* at 396.

to use Mincey's statement in its case-in-chief at trial,[103] it did use Mincey's statements for impeachment purposes when he took the stand.[104] The Court held that such use of Mincey's statements was impermissible because the statements were involuntary. As Justice Stewart stated, "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law, 'even though there is ample evidence aside from the confession to support the conviction.' "[105]

Thus *Mincey* clearly shows that it is legally possible to raise both a fifth amendment *Miranda* and a due process voluntariness challenge to the admissibility of a confession.[106] A defendant who has made a valid waiver of his *Miranda* rights may still challenge his confession's voluntariness on due process grounds.[107] As a practical matter, however, such a challenge currently has little chance of success because the old voluntariness test has become the standard for determining the validity of a *Miranda* waiver.[108] As a result, a determination that the waiver was valid necessarily implies that the ensuing confession was voluntary.[109] This effectively amounts to an irrebuttable presumption that a confession is voluntary once a valid *Miranda* waiver is found. This presumption makes it virtually impossible for a defendant to convince a court that his confession was involuntary regardless of the coerciveness of the police conduct following the waiver. When one also considers the rather relaxed standards that have come to be applied in determining validity of *Miranda* waivers,[110] the ultimate irony of *Miranda* may well be that the police are freer to use coercive tactics now than they were before that landmark decision. This hypothesis suggests the necessity of

103. The prosecutor stipulated that he would use Mincey's statements only to impeach him, as allowed by *Harris,* and therefore the possible *Miranda* violation became irrelevant. *Id.* at 397 n.12.

104. *Id.* at 397. The trial court, relying on *Harris* and *Hass,* found that Mincey's statements were voluntary and therefore could be used for impeachment. *See* note 100 *supra.*

105. 437 U.S. at 398, quoting Jackson v. Denno, 378 U.S. 368, 376 (1964).

106. Mincey, for example, had originally challenged the admissibility of his statements on both *Miranda* and voluntariness grounds, but the prosecutor's stipulation that he would not use the statements in the state's case mooted the *Miranda* challenge. *See* 437 U.S. at 397 n.12.

107. *See, e.g.,* United States v. Scott, 592 F.2d 1139, 1141-42 (10th Cir. 1979).

108. *See* Dix, *supra* note 12, at 300; Note, *supra* note 37, at 117-18.

109. Apparently no reported cases exist in which a court has found that a confession satisfied the *Miranda* requirements but nonetheless was involuntary on due process grounds. *Cf.* United States v. Scott, 592 F.2d 1139 (10th Cir. 1979) (rejecting defendant's claim that government must show voluntariness of his statement; no argument that statement was obtained in violation of *Miranda*).

110. *See* Dix, *supra* note 12, at 314 ("[T]he courts have been unreceptive to arguments that waivers are invalid when the defendant fails to understand his rights after being given the *Miranda* warnings."); Note, *supra* note 37, at 117-18 (1978).

developing a new due process standard to cope with police abuses that have continued to flourish since *Miranda*.

Although, as *Mincey* unmistakably shows, *Miranda* did not spell the end of the voluntariness standard in confession cases, *Miranda* did spell its death in another sense. After *Miranda*, the Supreme Court ceased to develop the content of the voluntariness doctrine.[111] The Court's surprisingly strong reaffirmance in *Mincey* of the due process voluntariness standard, however, calls for a reexamination of the standard so that future application of the due process clause will not suffer from the same problems encountered in the past. A new due process standard could be a useful weapon in curbing police misconduct left untouched by *Miranda* without significantly hampering the legitimate law enforcement interest in custodial interrogation. Thus, in this light, this Note proposes that the courts should apply a revised due process test that does not require consideration of the subjective peculiarities of a particular defendant. The courts should invoke the doctrine to prohibit objectively identifiable forms of police misconduct.[112] This Note contends that certain deceptive interrogation techniques qualify as the first victims of this new due process standard.

IV. TRICKERY AND THE COURTS

For the purposes of this Note, trickery is defined as any police attempt to confront a suspect undergoing interrogation with evidence of his guilt when no such evidence exists. This Note identifies

111. Only a few post-*Miranda* cases deal with the voluntariness issue in a confession context; all of these cases arose from pre-*Miranda* trials, so that the voluntariness standard is the only applicable test. Johnson v. New Jersey, 384 U.S. 719 (1966), held that *Miranda* would be applied only to trials begun after the date on which the *Miranda* decision was announced; thus petitioners whose trials were conducted before *Miranda* could only raise voluntariness objections to the admissibility of their confessions. *See* Frazier v. Cupp, 394 U.S. 731 (1969); Boulden v. Holman, 394 U.S. 478 (1969); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Beecher v. Alabama, 389 U.S. 35 (1967); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

Another group of cases deals with the issue of voluntariness as it relates to the question of whether a statement obtained in violation of *Miranda* can be admitted for impeachment. These cases hold that a statement obtained in violation of *Miranda* may be used for impeachment purposes, but an involuntary statement may not be used for any purpose whatsoever. Mincey v. Arizona, 437 U.S. 385, 397-98 (1978); Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 224 (1971). None of these cases, however, significantly developed the standard for voluntariness.

112. *See* note 96 *supra*. The especially vulnerable defendant should still have his subjective infirmities considered in any voluntariness determination, whether in the context of a confession or guilty plea. For example, a statement obtained from a defendant while he was heavily drugged would probably be involuntary, regardless of the officer's knowledge. This Note proposes, however, that no subjective consideration is *necessary* when certain objectively identifiable types of police misconduct have occurred.

four such techniques that fit this definition: (1) confronting a suspect with the "confession" of his accomplice when there is no such confession—the "accomplice confession ploy"; (2) confronting a suspect with a false claim that there is hard physical evidence against him, such as his fingerprints at the scene of the crime; (3) falsely telling a suspect that there is an eye-witness who saw him commit the crime; and (4) subjecting a suspect to a staged identification procedure in which he is picked out as the culprit.[113] Under American common law, confessions induced by the use of such trickery were admissible because it was assumed that there was no risk of unreliability in such statements.[114] The emergence of the constitutional voluntariness standard did not significantly change judicial treatment of such confessions, perhaps because the Supreme Court never squarely addressed the issue of whether a confession induced by trickery was involuntary.[115]

The Court's closest brush with the trickery problem came in *Frazier v. Cupp*,[116] decided in 1969. In *Frazier* the police had used the accomplice confession ploy on the petitioner, apparently without success.[117] The petitioner attempted to claim that the confession later obtained from him was involuntary, citing the police deception as one of the circumstances that made it so. The Court responded that "[t]he fact that the police misrepresented the statements that Rawls [the accomplice] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissi-

113. Other interrogation techniques may exist that fit the general definition but would not be classified under one of these four specific techniques. If such techniques do exist, the same analysis would almost certainly prohibit their use.

114. *See* Note, *supra* note 37, at 119-20.

115. *See* Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 201 (1977). In Turner v. Pennsylvania, 338 U.S. 62 (1949), the Court mentioned that the police falsely told Turner that the other suspects had "opened up" on him, but the Court did not emphasize this circumstance in finding Turner's statement involuntary. *Id.* at 64.

Twelve years later, Justice Clark, dissenting in Reck v. Pate, 367 U.S. 433, 448 (1961), relied heavily on the deception practiced in *Turner* in his attempt to distinguish *Turner* from *Reck*. Justice Clark stated:

> In *Turner*, however, the petitioner "was falsely told that other suspects had 'opened up' on him." Such a falsification, in my judgment, presents a much stronger case for relief because at the outset Pennsylvania officers resorted to trickery. Moreover, such a psychological artifice tends to prey upon the mind, leading its victim to either resort to counter-charges or to assume that "further resistance [is] useless," and abandonment of claimed innocence the only course to follow.

Id. at 453. Justice Clark was no friend of petitioners presenting claims of involuntary confessions. Thus, his condemnation of trickery has special significance.

116. 394 U.S. 731 (1969).

117. *Id.* at 737-38. Frazier was falsely told that his accomplice, Rawls, had confessed, but Frazier "still was reluctant to talk."

ble."[118] Many courts and commentators have seized this language as representing the Supreme Court's definitive word on the admissibility of confessions induced by police trickery.[119]

There are a number of sound arguments, however, that support the conclusion that the *Frazier* Court's one sentence[120] should not be viewed as a holding that trickery is not sufficiently coercive in and of itself to render a confession involuntary. First, Frazier's involuntariness argument was not a major part of his petition. Because the case, although decided after *Miranda,* arose in the interlude between *Escobedo v. Illinois*[121] and *Miranda,* Frazier based his main argument on the police denial of his request to see an attorney. Frazier argued that this refusal violated his sixth amendment right to counsel as enunciated in *Escobedo.*[122] It was only as part of this argument that Frazier added: "the record also presents a general question of voluntariness under the Fifth and Fourteenth Amendments."[123] Frazier's brief devotes only three sentences to the argument that the confession of Frazier's accomplice was a "deliberate misrepresentation."[124] Several paragraphs later, the brief concludes that "[m]oreover, the record in this case shows not only a violation of *Escobedo*'s principles, but also that Frazier's confession was induced by the police by deliberate factual misrepresentations and psychological coercion, making the confession involuntary and inadmissible under well-established Fifth and Fourteenth amendment principles."[125] Frazier's involuntariness argument was clearly subordinate to his *Escobedo* argument.[126] It is thus not fair to conclude that *Frazier* squarely presented the Court with the question of whether the misrepresentation rendered the confession involuntary.

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118. *Id.* at 739.

119. *See, e.g.,* Tucker v. State, 549 S.W.2d 285, 288-89 (Ark. 1977); People v. Houston, 36 Ill. App. 3d 695, 702, 344 N.E.2d 641, 646-47 (1976); Hopkins v. State, 19 Md. App. 414, 424, 311 A.2d 483, 488-89 (1973); State v. Stubenrauch, 503 S.W.2d 136, 138 (Mo. Ct. App. 1973); State v. Aguire, 91 N.M. 672, 676, 579 P.2d 798, 800 (1978); Evans v. Commonwealth, 215 Va. 609, 614, 212 S.E.2d 268, 272 (1975); Dix, *supra* note 12, at 319; Note, *supra* note 37, at 120.

120. *See* text accompanying note 118 *supra.*

121. 378 U.S. 478 (1964).

122. Brief for Petitioner at 30-35. The Court, however, held *Escobedo* inapplicable to Frazier's case. 394 U.S. at 739.

123. Brief for Petitioner at 30. Argument II was worded as follows: "Frazier's Confession, Given After His Request for Counsel Had Been Ignored and After He Had Been Deceived Into Believing That His Alleged Accomplice Had Incriminated Him, Was Illegally Obtained and Its Admission Into Evidence Violated His Fifth and Sixth Amendment Rights." *Id.*

124. *Id.* at 31.

125. *Id.* at 34.

126. The involuntariness claim was not even mentioned in the heading of the Argument. *Id.* at 30.

The only case cited in support of Frazier's argument on this point was *Haynes v. Washington,*[127] in which there was no claim of trickery whatsoever. Second, Frazier's involuntariness argument was weak under the circumstances because the accomplice ploy apparently was not the cause of Frazier's confession. Frazier began to talk only after the interrogating officer "sympathetically suggested that the victim had started the fight by making homosexual advances . . . ."[128] Last, the State's brief illustrates the relative insignificance of Frazier's involuntariness argument. In responding to Argument II of Frazier's brief in which the involuntariness argument appears, the State's brief does not even mention the deception issue.[129]

Frazier's comment on the use of trickery, that it was merely a relevant circumstance in determining whether a confession was voluntary, seemed particularly significant at the time because in *Miranda* the Court clearly had condemned deceptive interrogation techniques.[130] Perhaps the *Miranda* Court's strongest indictment of such practices was its statement that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege [against self-incrimination]."[131] On its face this statement only prohibited the use of trickery in obtaining a *waiver*; the Court did not expressly condemn the use of trickery in an interrogation following a waiver. The strength of the Court's condemnation of trickery, however, led some observers to conclude that the Court had completely outlawed the use of deceptive interrogation techniques.[132] It seemed quite logical to conclude that since a trickery-induced waiver would be deemed involuntary, a trickery-induced confession should be equally involuntary.[133] *Frazier* thus was interpreted as a response to such speculation in its apparent statement

127. 373 U.S. 503 (1963), cited in the Brief of Petitioner at 34. A serious involuntariness argument would certainly have cited Turner v. Pennsylvania, 338 U.S. 62 (1949), the only Supreme Court case in which the accomplice confession ploy had led the Court to find a confession involuntary. *See* note 115 *supra* and accompanying text.

128. 394 U.S. at 738.

129. *See* Brief for Respondent at 16-21.

130. *See* 384 U.S. at 453, 476.

131. *Id.* at 476.

132. *See* A NEW LOOK AT CONFESSIONS: *Escobedo* — THE SECOND ROUND 75, 237-39 (B. George, Jr. ed. 1967). This volume contains a very interesting panel discussion on the constitutionality of trickery after *Miranda*. *Id.* at 237-39. Judge Skelly Wright, one of the panelists, concluded that *Miranda*'s effect on the use of trickery after a valid waiver is a gray area. *Id.* at 239.

133. *Id.* at 238. Note especially the statement of Attorney General Lynch of California that, even though the Court refers only to the obtaining of a waiver, the language condemning trickery is "all-inclusive." *Id.*

that the use of trickery, by itself, is not a basis for excluding a confession.[134] Indeed, Professor Inbau regards *Frazier* as a "tacit approval" of trickery.[135] In any event, no reported decision after *Frazier* has relied on *Miranda*'s arguably implicit prohibition of trickery in holding a post-waiver confession inadmissible.[136]

In the aftermath of *Frazier,* many state and federal courts have cited that case for the proposition that police trickery is relevant in applying the "totality of the circumstances" test to determine whether a confession was involuntary.[137] Most of these courts have then decided that the relevant circumstances did not amount to involuntariness. Even those courts that expressed displeasure with police trickery have nevertheless almost invariably decided that police trickery, even in combination with other police misbehavior, does not invalidate the resulting confession.[138]

Review of the trickery cases since *Frazier* reveals that state and federal courts have used the "totality" language as a shorthand way of saying that, even though the court disapproves of trickery, it is simply not offensive enough to warrant the exclusion of an otherwise reliable confession.[139] Reliability, in fact, may well be the ultimate reason why courts rarely exclude confessions induced by trickery, even though *Rogers v. Richmond*[140] expressly held that the probable truth of a confession should not be considered in determining whether a confession meets the due process voluntariness requirement. Lower courts have had great difficulty adhering to that principle in applying the voluntariness test.[141] The case most often chosen as an illustration of lower courts' sluggishness in responding to the Supreme Court's voluntariness standard is *Davis v. North Carolina.*[142] In *Davis* the police held the petitioner incommunicado for sixteen days. There was even a notation on his arrest sheet that

134. *See* Dix, *supra* note 115, at 201.

135. Inbau, *Legally Permissible Criminal Interrogation Tactics and Techniques,* 4 J. POLICE SCI. & AD. 249, 251 (1976).

136. *See* Dix, *supra* note 12, at 319.

137. *See* cases cited at note 119 *supra.*

138. *See* People v. Houston, 36 Ill. App. 3d 695, 702, 344 N.E.2d 641, 647 (1976); People v. Robinson, 31 A.D.2d 724, 725, 297 N.Y.S.2d 82, 84 (1968). Robinson later obtained federal habeas corpus relief. Robinson v. Smith, 451 F. Supp. 1278 (W.D.N.Y. 1978). *See also* text accompanying notes 147-55 *infra* for other judicial statements disapproving the use of deception, including the statement of Judge Curtin, the federal district judge who heard Robinson's habeas corpus petition.

139. *See* cases cited at note 119 *supra.*

140. 365 U.S. 534 (1961); *see* text accompanying notes 61-64 *supra.*

141. *See* Dix, *supra* note 12, at 306-09; Note, *supra* note 37, at 114-16.

142. 384 U.S. 737 (1966). Professor Kamisar singles out *Davis* as a prime example of the ineffectiveness of the old voluntariness standard. Kamisar, *supra* note 35, at 99-104.

he was not to be allowed visitors or the use of the telephone.[143] Although the Supreme Court had never sustained the use of a confession obtained after such a lengthy period of detention and interrogation,[144] the North Carolina appellate courts and the lower federal courts found Davis' confession voluntary. The lower courts purported to apply the voluntariness standard, but somehow, despite the patent coerciveness of the *Davis* circumstances, the courts just could not bring themselves to suppress an apparently trustworthy confession.[145]

An even more unsettling demonstration of lower courts' inability to follow *Rogers* can be seen in recent decisions that have ignored the voluntariness requirement altogether, and reverted to the common law reliability standard in determining whether a confession meets due process requirements.[146] Although this defiance of settled constitutional law may be startling, these courts deserve commendation for their candor. They could have reached the same result by applying the totality of the circumstances voluntariness test. In other words, the vagueness of the totality of the circumstances test would allow a court to hide behind its smokescreen and deem a confession voluntary, even though the court's real reason for admitting the confession was its trustworthiness. The lower court decisions in *Davis* are prime examples of this phenomenon.

Although courts have been reluctant to exclude confessions obtained by trickery on due process grounds, there does appear to be serious dissatisfaction with deceptive interrogation techniques. For example, in *Robinson v. Smith,*[147] a 1978 habeas corpus decision of the United States District Court for the Western District of New York, the petitioner challenged the voluntariness of the confession used against him at his 1959 trial on a number of grounds, one of which was that the confession was involuntary because the police had used the accomplice confession ploy during interrogation.[148] The court found that a detective had falsely told Robinson that his alleged accomplice "had accused him of pulling the trigger," and that the interrogators foisted this phony confession on Robinson "in an obvious effort to trick him into implicating himself."[149] Judge Curtin

143. 384 U.S. at 744.

144. *Id.* at 752.

145. Kamisar, *supra* note 35, at 101-02.

146. Moore v. Hopper, 389 F. Supp. 931, 934 (M.D. Ga. 1974), *aff'd mem.*, 523 F.2d 1053 (5th Cir. 1975) (held that admission of confession was not error because the deception was "not calculated to procure an untrue statement"); People v. Felix, 72 Cal. App. 3d 879, 886, 139 Cal. Rptr. 366, 370 (1977).

147. 451 F. Supp. 1278 (W.D.N.Y. 1978).

148. *Id.* at 1291.

149. *Id.*

clearly expressed his feelings about such deception as follows: "This police practice is to be soundly condemned. Such deception clearly has no place in our system of justice."[150] Although the court listed several factors in finding that under the totality of the circumstances Robinson's confession was involuntary,[151] the court stated that "[t]he deception practiced in this case is an important factor that weighs in petitioner's favor."[152] Similarly, the Indiana Court of Appeals, confronted with a claim that the police had used the accomplice confession ploy, stated that police trickery is "a factor which should weigh heavily against a finding of voluntariness."[153] The appellate court in Illinois has stated in dictum that "the State has no right to extort confessions by deliberate fraud or trickery."[154] Eleven years ago the United States Court of Appeals for the District of Columbia also declared in dictum that garnering a confession by artifice is no more permissible than achieving the same result by cruder forms of coercion.[155]

It is not suggested that these cases represent a substantial "trend" against the use of trickery in custodial interrogations. The cases are cited merely to suggest that at least a detectable amount of judicial disapproval of deceptive interrogation practices exists. Under the present state of the law, trickery is a "quasi-legal" form of police behavior. Although courts do not approve of it, and *Frazier* dictates that it is a "relevant factor" in a due process claim,[156] the practice does not seem offensive enough to warrant the exclusion of confessions induced by such trickery. Trickery seems particularly palatable when an appellate court is dealing with it in the context of a defendant who has already been convicted and is undoubtedly guilty of the crime charged. No appellate court, however, has ever considered that tolerating trickery in the case of an obvious criminal greatly enhances the likelihood that innocent persons will also be subjected to deceptive interrogation practices because the police know that they have nothing to fear by using such techniques. Although it may be true that an innocent person will not confess just because he is told that a rape victim has identified him,[157] he need

150. *Id.*

151. *Id.* at 1292-93.

152. *Id.* at 1291.

153. Swaney v. State, 374 N.E.2d 554, 556 (Ind. Ct. App. 1978).

154. People v. Smith, 108 Ill. App. 2d 172, 180, 246 N.E.2d 689, 693 (1969).

155. Fuller v. United States, 407 F.2d 1199, 1213 (D.C. Cir. 1968).

156. *See* text accompanying note 118 *supra.*

157. At least one commentator has seriously questioned whether deceptive interrogation tactics adequately protect the innocent from making false confessions. Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View,* POLICE POWER AND INDIVIDUAL FREEDOM 153, 165 (C. Sowle ed. 1962).

not possess a great imagination to be terribly shaken by the experience.[158] Thus this Note submits that police trickery raises a number of fundamental questions that the courts must confront. First, do the benefits of trickery in the detection of crime outweigh its cost in terms of the unnecessary anguish it causes innocent persons? Second, even in the case of a guilty suspect, should the due process clause sanction such coercive practices? Last, do the benefits of trickery outweigh the effect its use has on the image of law enforcement officers?

V. POLICE PRACTICES

A. *Police View of Interrogation*

Before discussing particular deceptive interrogation techniques, it is appropriate to ascertain how the police view the role of the interrogation process. Because there is little empirical data in this area,[159] the best indicators of police attitudes remain the "interrogation manuals" written primarily for police consumption. The best-known work of this type is Inbau and Reid's *Criminal Interrogation and Confessions.*[160] The second major work is Aubry and Caputo's *Criminal Interrogation.*[161] Not surprisingly, these authors suggest that the primary function of an interrogation is to obtain an admission of guilt from a guilty person.[162] Aubry and Caputo express this objective in somewhat dramatic terms: "Generally, [interrogation] techniques might be compared to the conduct of a military operation in which there is one all-important objective—the defeat and surrender of the enemy."[163] It is not sug-

158. Although a person will probably be very distressed simply because he has been taken into custody for questioning, this Note maintains that a confrontation with "evidence" of guilt significantly exacerbates the coercive elements of an interrogation. Even Professor Inbau admits that confronting a suspect with direct accusations of guilt may be so disturbing that it is difficult to ascertain when a suspect is actually innocent. *See* note 8 *supra.* One might well surmise from this that such accusations in the form of "evidence" of guilt could be psychologically devastating, even though the suspect is not induced to make a false confession.

159. The *New Haven Study, supra* note 5, at 1591-93, contains some data on how police view the necessity of interrogations. It also contains a survey of detectives' attitudes towards interrogation after *Miranda. Id.* at 1610-13.

Professor Stephens' study is probably the most in-depth attempt to gauge police attitudes towards interrogation. O. STEPHENS, *supra* note 5, at 179-200.

160. F. INBAU & J. REID, *supra* note 8. The *Miranda* Court quoted extensively from the first edition for examples of extremely coercive interrogation tactics. 384 U.S. 436, 448-54.

161. A. AUBRY & R. CAPUTO, CRIMINAL INTERROGATION (1965).

162. *Id.* at 24.

163. *Id.* at 97. This statement, in fairness, should be considered in light of Aubry and Caputo's recommendation that only suspects of certain guilt should be interrogated. *See id.* at 77-78.

gested that it is necessarily wrong for the police to adopt such an attitude; after all, if a detective truly believes in a suspect's guilt, he should be diligent in attempting to uncover it. It is maintained, however, that such diligence must be tempered by limitations on the forms it may take.[164]

B. *A Standard for Determining Intolerable Trickery*

"Deceit is inherent in every question asked of the suspect, and in every statement made by the interrogator."[165] It does not follow, however, that because *some* level of trickery is inherent in interrogation, that *all* forms of trickery should be allowed. For example, although almost everyone would agree that some amount of uninterrupted questioning is necessary for effective interrogation, many persons, including the Supreme Court in *Ashcraft v. Tennessee*,[166] would feel that thirty-six straight hours of questioning is too much. By analogy, the same principle should apply to trickery; a certain amount of deception is inevitable, but at some point certain forms of especially coercive deception should not be tolerated, especially when they are not indispensable law enforcement weapons. The problem, of course, is the question of where to draw the line between permissible and impermissible methods of deception.

This Note submits that intolerable trickery occurs whenever the police affirmatively confront a suspect with "proof" or "evidence" of his guilt when no such proof or evidence exists. Intolerable techniques include the ploys of falsely telling a suspect that his accomplice has already implicated him in the crime—the accomplice confession ploy; falsely informing a suspect that there is hard physical evidence, such as fingerprints, linking him to the crime in question; falsely telling a suspect that there is an eyewitness to his criminal act; and submitting a suspect to a staged identification procedure in which he is falsely "identified." The test is whether a reasonable innocent person would feel that he is being confronted with proof of his guilt. The state of mind of the interrogating officer is irrelevant. The trickery is intolerable even if the officer has a reasonable or honestly mistaken belief that such evidence actually exists. On its face this standard appears to impose sanctions on negligent police behavior as well as intentional miscon-

164. As Chief Justice Warren stated in Blackburn v. Alabama, 361 U.S. 199, 206 (1960): "[C]oercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition."

165. F. INBAU & J. REID, *supra* note 8, at 196. *See also* A. AUBRY & R. CAPUTO, *supra* note 161, at 147.

166. 322 U.S. 143 (1944).

duct. The threat of police perjury, however, supplies the rationale for this standard.[167] A standard that would allow trickery of suspects so long as the police are able to fabricate a plausible story demonstrating a good faith mistake would, unfortunately, supply little protection at all.

A number of tactics suggested by the police manuals would not be impermissible by this standard. For example, any technique in which the officer pretends to "emphathize" with the plight of the suspect would not be considered intolerable.[168] This would include the noted "Mutt and Jeff" or "hot and cold" technique in which one "friendly" partner sympathizes with the suspect about the way he is being treated by the "unfriendly" partner.[169] In addition, this standard would not prohibit the police from misleading the suspect about the nature of the contemplated charge. The most common example of this technique is to mislead a murder suspect into believing that the victim of his assault is still alive.[170] Although this might appear to fit within the eyewitness ploy, an element of coercion is missing; if the defendant intended to kill the victim, a report of the victim's survival would presumably come as a relief to the suspect, since he is already under suspicion. In addition, this technique would not violate the proposed standard because the reasonable innocent suspect would not believe that the victim's being alive was proof of his guilt. In fact, it is more likely that the innocent suspect would be relieved to hear that the victim is alive to clear him.[171]

The distinction between impermissable techniques that confront a suspect with evidence of his guilt and other tolerable forms of deception is not arbitrary. The standard is based in part on the

167. The problem of police perjury is forcefully articulated by Professor Irving Younger in *The Perjury Routine,* THE NATION, May 8, 1967, at 596-97, *quoted in* CRIMINAL PROCEDURE, *supra* note 13, at 247-48.

168. *E.g.,* Note, *supra* note 37, at 121-25 (1978). In an extreme case of "empathy" the suspect may be misled into believing that he is being promised leniency or that his statement cannot be used against him. If the technique's use rises to that level, any resulting confession should be barred on that basis. *See id.* at 125.

For a discussion of various manifestations of the "empathy" technique, see A. AUBRY & R. CAPUTO, *supra* note 161, at 79-83.

169. *See* F. INBAU & J. REID, *supra* note 8, at 62-64.

170. *See, e.g.,* Collins v. Brierly, 492 F.2d 735 (3d Cir. 1974); People v. Smith, 108 Ill. App. 2d 172, 246 N.E.2d 689 (1969); People v. Solari, 43 A.D.2d 610, 349 N.Y.S.2d 31 (1973).

171. Misrepresentation of the charge is a questionable form of deception, and commentators have argued that a misrepresentation of the charge results in an invalid *Miranda* waiver, because the suspect is not given a sufficient basis for making a "knowing and intelligent" waiver. *See* Dix, *supra* note 12, at 328-38 & n.217. This appears to be the best approach to the misrepresentation of the charge problem. The courts, however, have not accepted this argument. *See, e.g.,* Collins v. Brierly, 492 F.2d 735 (3d Cir. 1974).

cat-out-of-the-bag doctrine first enunciated in *United States v. Bayer.*[172] The issue in *Bayer* was whether a confession that followed an illegally-obtained prior confession could be used against the defendant. If the subsequent confession was the "fruit" of the first illegal confession, it could not be used. Writing the majority opinion for the Court, Justice Jackson stated that "after an accused has once let the cat out of the bag by confessing . . . he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first."[173]

Although the "cat" referred to in *Bayer* is the suspect's own prior confession, implicit in the Court's statement is a recognition of the psychological truth[174] that once a suspect realizes that hard evidence against him exists, he may well see no further reason to resist interrogation. Indeed, to use the traditional formulation, his will is overborne. It should make no difference whether the "cat" is the suspect's own confession or some other form of evidence with which the police confront him; a suspect may be just as coerced by a false eyewitness report as he would be by his knowledge that he has already made an incriminating statement. It must be emphasized that, according to *Bayer,* the second confession is inadmissible not simply because the first confession is illegal, but because the first confession actually coerces the second one. Of course, if it is clear that the first confession did not coerce the second confession, as when a great length of time passes between the two confessions, the illegality of the first confession becomes irrelevant. On the other hand, if the first confession is not illegal, a defendant will not be allowed to argue that his second confession was illegally coerced. It is interesting to note that the latter result obtains even though the second confession is likely to be just as involuntary as a confession following an illegal one. Thus the only distinction is the police misconduct in the case of the prior illegal confession. In short, the cat-out-of-the-bag doctrine protects against both police misconduct and coercion such as that which occurs when one confession pressures the defendant into making further statements. It is important to note that the cat-out-of-the-bag doctrine comes into play only if *both* of those factors are present; the absence of illegality, or the absence of any apparent connection between the misconduct and

172. 331 U.S. 532 (1947).

173. *Id.* at 540.

174. *See* Horowitz, *supra* note 7, at 204 (emphasizing the importance of a suspect's belief that there is evidence against him in making his decision to confess).

the second confession, means that the confession is admissible.

A prohibition against trickery would work in the same way. Thus a defendant could not complain that the police confronted him with a truthful eyewitness report identifying him, even though the pressure brought against him in such a case is as great as the pressure brought to bear when the same story is told but no eyewitness exists. A defendant has no legal protection against being confronted with the truth,[175] just as he has no protection against being confronted with his prior legal confession. Furthermore, a defendant cannot complain if there is no apparent coercion as a result of the trickery. Thus this Note submits that the appropriate approach in these cases should be that a defendant can claim that his confession is involuntary only if police confront him with a falsehood, a violation of fourteenth amendment due process, as proposed below,[176] and it reasonably appears that the illegality was coercive.[177]

Justice Clark, ordinarily no friend of petitioners in confession cases, recognized the coercive powers of trickery in his *Reck v. Pate*[178] dissent condemning the accomplice confession ploy: "[S]uch a psychological artifice tends to prey upon the mind, leading its victim to either resort to countercharges or to assume that further resistance [is] useless, and abandonment of claimed innocence the only course to follow."[179] By further implication, a police representation to an innocent suspect that the "cat is out of the bag" can only serve to magnify the intensity of that unfortunate citizen's nightmare, even though he has nothing to confess. The proposed standard for determining impermissible practices can be defended on purely practical grounds as a rational means of line

175. Thus a confession induced when an officer mistakenly or accidently confronts a suspect with actual evidence of his guilt should be admissible. Furthermore, a confession obtained when an officer thinks he is tricking a suspect by presenting him with false evidence that in fact exists would be admissible. As a theoretical matter, this distinction based on truth may not be entirely satisfactory because the officer suffers no penalty for his misconduct. As a practical matter, however, it should be noted that it would be virtually impossible to prove that an officer intended to trick a suspect with false evidence, when such evidence actually existed. For example, if an officer "fabricates" an eyewitness when in fact there is an eyewitness available, he need only produce the eyewitness in order to refute any charge that he fabricated one.

176. Thus, confrontation with a falsehood is equally illegal as a prior confession obtained in violation of the fifth amendment. Consequently, a confession obtained by trickery is as tainted as a confession that is the fruit of a prior illegal confession.

177. The standard, however, is strictly an objective one: would a reasonable person confronted with such evidence conclude that it was no longer possible effectively to assert his innocence. *See* text accompanying notes 97-112 *supra*. The test does not imply that an innocent person would actually be driven to make a false confession.

178. 367 U.S. 433, 448 (1961).

179. *Id.* at 453.

drawing. The pronouncements of Justice Jackson in *Bayer* and Justice Clark in *Reck v. Pate,* however, suggest that there is some legal basis for the standard as well.

C. *Particular Techniques That Violate the Standard*

(1) Accomplice Confession Ploy

A number of common police techniques can be identified as violating the standard proposed herein. For example, Inbau and Reid discuss the accomplice confession ploy as a part of the more general tactic called "Play one against the Other."[180] Inbau and Reid state that there are two principal methods used in playing one suspect against the other when two or more persons are suspected of collaborating in a crime. In the first method, the interrogator merely intimates to one suspect that his accomplice has confessed,[181] while in the second method, the detective actually tells the suspect that the other has confessed and made particular statements incriminating the first suspect.[182] The authors suggest the use of this technique only as a last resort[183] because, if the bluff fails and the guilty suspect realizes that the police have nothing on him, the entire interrogation becomes useless.[184] Although this implies that the technique is used rarely, and only on guilty suspects, its status as a technique of last resort nevertheless means that innocent suspects are likely to be exposed to it, because the police will presumably feel a need to use their last resorts in an attempt to shake the innocent suspect's "story." Unlike the guilty suspect, however, the innocent suspect is not likely to be relieved when he realizes that the charges against him are unfounded; he already knows that the police have falsely accused him. His distress results from his inability to convince the police of his innocence. The use of the accomplice ploy only serves to increase his feeling that the police are refusing to believe him.

The proposed standard would only exclude the more extreme forms of the "Play one against the Other" technique as described by Inbau and Reid. The mere "intimation" that a suspect's accomplice has implicated him would not be impermissible; indeed it would be very difficult to avoid conveying that implication in some

180. F. INBAU & J. REID, *supra* note 8, at 84-91.
181. *Id.* at 85.
182. *Id.* at 88-90.
183. *Id.* at 85.
184. *Id.* at 90.
185. *Id.* at 85.

fashion, at least from the guilty suspect's point of view.[186] The line would be drawn, however, at the point where the officer affirmatively confronts the suspect with false incriminating written or oral "statements" from his accomplice. In other words, the test would be whether a reasonable, innocent suspect would feel that he was being confronted with evidence of his guilt.[187] Such abuse could cause extreme distress to the innocent suspect because for all he knows the other suspect may be incriminating him in order to shift the blame. Moreover, the prohibition of this tactic would probably not have any detrimental effect on obtaining statements from guilty suspects. Aubry and Caputo, as well as Inbau and Reid, warn against the use of "wild guesses" in the practice of this bluff[188] because, once the suspect realizes it, further interrogation will be fruitless.[189] Thus, the use of completely fabricated statements would appear to be pointless in the interrogation of many guilty suspects. On the other hand, if the police are sure enough of the facts to manufacture an accurate fabricated statement, one might question why a confession is even necessary.[190]

(2) Physical Evidence Ploy

Aubry and Caputo suggest the pretense of possessing physical evidence against the suspect as a "very effective approach" in interrogation.[191] Inbau and Reid recommend the technique as an effective means of distinguishing guilty and innocent suspects,[192] hypothesizing that a guilty suspect will attempt to explain away the evidence, while an innocent suspect will usually make a simple reply asserting his innocence.[193] One might question the particular effectiveness of

186. For example, even keeping the two suspects in separate cells might suggest to each of them that the other is talking. *Id.* at 86-87.

187. The "intimation" techniques suggested by Inbau and Reid (such as confining accomplices in separate cells) would appear to have value only when the alleged accomplices are actually guilty. *Id.* at 85-87. For example, an innocent suspect would have no reason to feel added distress because his alleged accomplice is confined elsewhere. A technique that is not coercive in regard to an innocent person is not coercive in the case of a guilty suspect simply because of the psychological pressures created by the suspect's knowledge of his guilt.

188. *Id.* at 90; *see* A. AUBRY & R. CAPUTO, *supra* note 161, at 122.

189. F. INBAU & J. REID, *supra* note 8, at 90.

190. The authors of the *New Haven Study* concluded that interrogation was "necessary" for conviction in only a relatively small percentage (13%) of the cases they observed. *New Haven Study, supra* note 5, at 1581-88. It would seem that if the police have sufficient evidentiary basis to make an accurate fabrication, they probably have enough evidence to obtain a conviction.

191. A. AUBRY & R. CAPUTO, *supra* note 161, at 88. The *New Haven Study* suggests that this practice is fairly common. *See New Haven Study, supra* note 5, at 1546.

192. F. INBAU & J. REID, *supra* note 8, at 103-04.

193. *Id.* at 104.

this technique. It would appear that, by confronting a guilty suspect with nonexistent evidence, an officer would run a high risk of suggesting to the suspect that the case against him is very weak because the suspect might know that such evidence is nonexistent. The innocent suspect, on the other hand, could easily imagine that the police have fabricated evidence against him, or even that he has been "framed" by a third party.

The proposed standard would prohibit the police from falsely telling a suspect that there is a particular form of hard evidence linking him to the crime. It would not prohibit such tactics as showing the suspect a "bloody sweatshirt" and asking him if he knows anything about it. It would also, to use Aubry and Caputo's example, permit the police to show a murder suspect the murder weapon and point out that there are fingerprints on it.[194] The purpose of the standard is to prevent the police from conducting a "kangaroo court"[195] with fictitious evidence, rather than to prevent them from using what evidence they do have in a good faith effort to ascertain the truth.[196]

(3) Fictitious Eyewitness

Another technique recommended by Aubry and Caputo is to attribute a hypothetical story implicating the suspect to a nonexistent eyewitness.[197] An easier application of the same tactic would be to assert that there is an eyewitness who saw the suspect commit the deed in question.[198] Once again, one might question the effectiveness of such an approach.[199] The guilty suspect may know for certain that no one witnessed his crime, or he may recognize the fictitious nature of the attributed story. If the police have enough information and evidence to piece together the real story, one must question the necessity of the confession in obtaining a conviction.[200]

194. A. AUBRY & R. CAPUTO, *supra* note 161, at 88. The police would not be allowed to assert that the fingerprints are those of the suspect, however.

195. The "kangaroo court" reference in regard to interrogation is from Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is Interrogation? When Does it Matter?*, 67 GEO. L.J. 1, 83 (1978).

196. Once again, the test would be whether a reasonable person would feel that he was confronted with evidence of his guilt; more specifically, would a reasonable person conclude that the police were claiming that the prints belonged to him? The reasonable person is presumed to be innocent. Thus the sensitivities of the guilty suspect would not in any way contribute to a finding of coercion.

197. *See* A. AUBRY & R. CAPUTO, *supra* note 161, at 86.

198. *Id.* at 85.

199. Aubry and Caputo themselves refer to this sort of bluffing as a "weak technique." *Id.* at 86.

200. *See* note 190 *supra.*

The innocent suspect is likely to be extremely disturbed by the eyewitness ploy, especially if he happens to know that eyewitness mistakes are not uncommon, and that eyewitness testimony is especially damning at trial. This technique is a particularly frightening psychological technique from the standpoint of an innocent suspect.

(4) Staged Identification

This technique, in which a phony eyewitness or victim "identifies" a suspect or even points him out in what appears to be a legitimate line-up, is basically an elaboration of the fictitious eyewitness ploy. This Note singles it out for treatment because of its especially offensive qualities. Inbau and Reid list the staged identification as a permissible technique,[201] and an earlier police manual especially recommended the fake line-up technique.[202] At least two reported cases, both of which were decided against the defendant, have questioned its use.[203] The *Miranda* Court noted the line-up method in its discussion of coercive interrogation tactics.[204] The criticisms of the fictitious eyewitness ploy apply to the staged identification ploy with even greater force. The guilty suspect may see through the ruse, especially if the "identification" is face-to-face. The tactic will coerce the more naive guilty suspects because they may well determine that further resistance to interrogation is useless. The innocent suspect will conclude that his situation is now utterly hopeless. The proposed standard would clearly exclude all manifestations of the staged identification technique.

D. Prevalence of the Tactics

Because of the secrecy surrounding custodial interrogations, it is impossible to gauge the frequency with which police officers employ the deceptive tactics discussed above.[205] The police manuals

201. F. INBAU & J. REID, *supra* note 8, at 196.

202. S. GERBER & O. SCHROEDER, CRIMINAL INVESTIGATION AND INTERROGATION 369 (1962).

203. People v. McRae, 23 CRIM. L. REP. (BNA) 2507 (N.Y. Sup. Ct. July 17, 1978); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

204. 384 U.S. at 453 (1966). The Court described two variations on the fake identification technique. In the first one, the suspect is simply taken out for a line-up and "confidently" pointed out as the guilty party. Questioning then resumes as if there were no longer any doubt about the suspect's guilt. In the second variation, the suspect is placed in a line-up and identified as the culprit in several different offenses, the theory being that the suspect will become so desperate that he will "confess to the offense under investigation in order to escape from the false accusations." *Id.* at 453 (citing C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 105-06 (1956)).

205. The *New Haven Study* includes some data on the use of the Inbau and Reid "tactics," but its presentation does not refer specifically to the tactics discussed in this Note. *See New Haven Study, supra* note 5, at 1542-49.

discuss and recommend the tactics, but they provide no measure of how frequently the police actually employ such tactics.[206] Because reported cases[207] dealing with each of the tactics do exist, it is likely that police use deceptive tactics far more often than the cases report. This is so because only a small fraction of interrogated suspects are ultimately convicted and pursue an appeal ending up as a reported case. Moreover, a basic feature of the criminal justice system ensures that only a very small percentage of criminal cases containing a confession appear in the reports: once a suspect has confessed, he will almost always waive his right to trial and enter the plea bargaining process,[208] regardless of how his rights may have been violated during interrogation.[209] More importantly, it is fair to assume that a significant number of persons subjected to deceptive techniques are innocent of any crime whatsoever, even though certain police departments may have a policy of interrogating suspects only when their guilt appears to be relatively certain.[210] Indeed, it seems fair to surmise that innocent suspects face trickery more often than guilty suspects, since the manuals[211] warn the detective to use such tactics only when all other approaches fail.[212]

A recent article in the Nashville Banner suggests that police trickery is a very common practice in that city. For example, a police sergeant was quoted as saying that deception has played a part in police interrogations for years. The article focused on the Police Department's Legal Advisor, who has recently published an article in a national police publication strongly advocating the use of trickery in interrogations. Nashville Banner, April 20, 1979, at 1, col. 4.

206. Justice Clark made this point in his *Miranda* dissent. 384 U.S. at 499.

207. Accomplice confession ploy: *e.g.*, Frazier v. Cupp. 394 U.S. 731 (1969); United States v. LaVallee, 391 F. Supp. 1150 (S.D.N.Y. 1974); People v. Houston, 36 Ill. App. 3d 695, 344 N.E.2d 641 (1976), *cert. denied sub nom.* Gibson v. Illinois, 429 U.S. 1109 (1977); People v. Boone, 22 N.Y.2d 476, 239 N.E.2d 885, 293 N.Y.S.2d 287, *cert. denied,* 393 U.S. 991 (1968).

Physical evidence: *e.g., In re* D.A.S., 23 CRIM. L. REP. (BNA) 2541 (D.C. Ct. App. Aug. 21, 1978); People v. Pritchett, 23 Ill. App. 3d 368, 319 N.E.2d 101 (1974); State v. White, 146 Mont. 226, 405 P.2d 761 (1965).

Fictitious eyewitness: *e.g.*, People v. Clark, 62 Cal. App. 2d 870, 402 P.2d 856, 44 Cal. Rptr. 784 (1965).

Fake line-up: People v. McRae, 23 CRIM. L. REP. (BNA) 2507 (N.Y. Sup. Ct. July 17, 1978); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

208. *See* O. STEPHENS, *supra* note 5, at 200.

209. A claim that a confession was involuntary cannot ordinarily be raised once a guilty plea has been entered. *See* McMann v. Richardson, 397 U.S. 759 (1970) (holding that a defendant who claims that he pleaded guilty because of a coerced confession is not entitled to federal habeas corpus relief).

210. For example, the New Haven Police Department rarely arrested anyone without considerable evidence, and therefore the detectives seldom felt under pressure to obtain information from suspects. *New Haven Study, supra* note 5, at 1539.

211. *See* A. AUBRY & R. CAPUTO, *supra* note 161, at 86.

212. This assumes that an innocent suspect presumably has not been induced to confess by other techniques. Of course, the same may be true of a guilty suspect; however, the savvy

Police trickery raises the fundamental question of whether American society believes that its police should have the right to exercise such coercive tactics on its citizens, guilty or innocent. This Note does not suggest that the courts or legislatures should prohibit trickery simply because it is occasionally used on suspects who turn out to be innocent. Trickery's benefits as an effective means of obtaining confessions, and ultimately convictions, should be weighed against the costs incurred by the innocent persons sometimes victimized by trickery, as well as against our society's reservations about granting to the police any coercive powers in excess of those needed to maintain order. No apparent reason exists to believe that trickery is a notably effective means of obtaining confessions. Even Aubry and Caputo admit that subterfuge in general is a weak technique likely to succeed only with inexperienced criminals.[213] Presumably these are the same suspects who would make statements in the face of lesser coercion, or who have left evidence of their crime. From a broader perspective, there is little reason to suspect that the use of trickery significantly contributes to the ultimate goal of obtaining a conviction. For example, in the *Yale Law Journal*'s New Haven study, the authors concluded that confessions were necessary in only thirteen percent of the cases observed.[214] Given the apparent ineffectiveness of trickery in obtaining confessions, there is little basis for believing that, in the minority of cases where confessions are necessary, trickery would result in a confession when all other methods have failed. Little support exists for the proposition that the use of trickery has resulted in convictions that could not have been achieved otherwise. In short, trickery does not appear to be an essential means of pursuing the ends of justice.

VI. REMEDIES

A. *Due Process—The Exclusionary Rule*

This Note submits that any interrogation technique that falsely confronts a suspect with evidence of his guilt is a violation of substantive due process, and any resulting confession therefore must be excluded from evidence. There are two rationales for this conclusion. The first rationale is essentially the same as that applied in *Rochin v. California*,[215] in which the Supreme Court held that evi-

criminal whose interrogation might require "last resort" tactics will probably refuse to waive his *Miranda* rights in the first place.

213. A. AUBRY & R. CAPUTO, *supra* note 161, at 79. On the other hand, the authors claim that on some occasions, subterfuge can work "magnificently." *Id.* at 85.

214. *New Haven Study*, *supra* note 5, at 1585.

215. 342 U.S. 165, 173-74 (1952).

dence obtained through pumping a suspect's stomach is inadmissible as a violation of due process. According to the *Rochin* Court, certain forms of police misconduct are so offensive that they should not be tolerated in a civilized society. Judge Curtin in *Robinson v. Smith* recently echoed this sentiment in commenting on police trickery: "[s]uch deception clearly has no place in our system of justice."[216] Although trickery may not be as strikingly offensive as stomach pumping or torture, the cases that first outlawed those practices are rather old. There is thus some reason to hope that the standards of police conduct have risen since then. The second rationale states simply that such techniques are inherently coercive, even if the police have not intended to abuse the suspect. The psychological studies that have been done in this area suggest that confrontation with proof of guilt is a powerful means of inducing a confession.[218] This Note suggests that when a suspect is confronted with false evidence of his guilt, the effect is so overwhelming that the resulting confession is involuntary. Indeed, as a psychological matter, the confession is involuntary even if the evidence actually exists. As a legal matter, however, it is absurd for the defendant to argue that reality has rendered his confession involuntary.[219]

To declare a particular form of police behavior a violation of due process is in large part a moral judgment that ideally reflects the changing values of a society. The basis for such judgments sometimes may be abstractions that fail to consider adequately the harsh realities of police work.[220] Although the law should reflect the demand for higher levels of police conduct, it should not strip the police of weapons they need in order to be effective in their fight against crime. Trickery, however, is not an indispensable weapon. Confessions themselves are of marginal value in obtaining convictions.[221] In those cases in which confessions are necessary, the police manuals themselves suggest that trickery is not a particularly effective device in obtaining a confession.[222] It is recommended both as

216. Robinson v. Smith, 451 F. Supp. 1278, 1291 (W.D.N.Y. 1978).

217. Brown v. Mississippi, 297 U.S. 278 (1936), the torture case, is 43 years old; *Rochin* was decided in 1952.

218. *See* notes 7-8 *supra* and accompanying text.

219. Of course, this is not to deny that there may be circumstances involving no deception in which the police conduct is so coercive as to render the resulting confession involuntary. *See, e.g.*, Annot., 27 A.L.R.3d 1185 (1969) (collecting cases in which confessions of murder suspects were held involuntary because the suspect was forced to view the victim's corpse).

220. *See* F. INBAU & J. REID, *supra* note 8, at 213-19.

221. *See* text accompanying note 214 *supra*.

222. *See* note 213 *supra* and accompanying text.

a technique of last resort,[223] and as a device that is primarily effective against the young and inexperienced offender.[224] One may question how often the interrogation of a young or inexperienced offender would require a last resort measure. Finally, even if trickery were shown to be appreciably effective in obtaining confessions from the guilty without undue coercion, the courts must recognize the interests of the innocent suspect who finds himself taken in for questioning. Such techniques could have a shattering effect on the innocent suspect. His situation is already grim, and he may see no readily apparent way out of it. His only hope lies in the knowledge of his innocence. The confrontation with "proof" of his guilt, however, may destroy even that vestige of security.[225] Under those circumstances, he may conclude that he is destined to become another victim in the tragic history of justice's mistakes. This Note submits that this form of mental torture inflicted upon the innocent outweighs any possible incremental effect that trickery may have on effective law enforcement. Thus this Note maintains that the courts should ban trickery as an interrogation tactic by holding it a violation of substantive due process.[226]

Such a holding would mean that confessions induced by trickery would be inadmissible against the defendant at trial. This Note proposes a very straightforward procedure for determining admissibility: if the defendant comes forward with evidence that the police tricked him, the state must refute these assertions and prove beyond a reasonable doubt that the confession was voluntary.[227] The threat of the defendant's perjury is not a serious fear because the police will probably win swearing matches over such matters.[228] The substantive test can be stated as follows: Was the misrepresentation of such a nature that a reasonable person could believe that the police had

223. *See* text accompanying note 183 *supra.*

224. *Id.*

225. This is not to suggest that the innocent suspect will actually make a false confession in these circumstances, although that is a possibility.

226. This argument is a part of the police misconduct *(Rochin)* rationale presented in text accompanying notes 215-16 *supra;* it is not a separate rationale.

227. Jackson v. Denno, 378 U.S. 368 (1964) (holding that the question of a confession's admissibility must be decided by the judge prior to trial), provides the context for the hearing contemplated by this procedure. Lego v. Twomey, 404 U.S. 477 (1972), held that a confession is constitutionally admissible if the prosecution proves by a preponderance of the evidence that the confession was voluntary. Many jurisdictions have gone beyond the Supreme Court and require the prosecution to prove voluntariness beyond a reasonable doubt. *E.g.,* People v. Jimenez, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978); Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973); State v. Peters, 315 So. 2d 678 (La. 1975); State v. Phinney, 370 A.2d 1153 (N.H. 1977); State v. Washington, 135 N.J. Super. 23, 342 A.2d 559 (1975); *see* Lederer, *The Law of Confessions—The Voluntariness Doctrine,* 74 MIL. L.J. 67, 90 (1976).

228. *See* CRIMINAL PROCEDURE, *supra* note 13, at 513.

evidence that could be used against him, even though such evidence would necessarily be contrived. The reasonable person is presumed to be innocent. This presumption prevents any problems that might arise because of guilty suspects' extreme sensitivities about the presence or absence of evidence.[229] This objective test does not require any demonstrated causal connection between the trickery and the statement.[230] The standard avoids the subjective inquiries that made the old due process voluntariness standard unworkable because it simply declares certain forms of conduct violative of due process regardless of their subjective impact on the suspect.[231] The remedy may seem harsh when there is reason to believe that the trickery did not in fact have any effect on the particular defendant's decision to confess, but it is no harsher than the rule requiring exclusion of unconstitutionally seized evidence, regardless of the officer's good faith, or than the *Miranda* rule that all confessions obtained without the *Miranda* warnings are inadmissible, regardless of the circumstances. It is unfortunate that this objective standard might someday allow a guilty person to go free simply because "the constable has blundered." The broader societal interests at stake, however, outweigh the revulsion towards isolated instances of criminals benefitting, perhaps unduly, from modern notions of criminal procedure designed to protect the innocent.

B. Recovery in Tort for the Infliction of Mental Distress

Although the exclusion of confessions obtained by trickery would presumably deter the police from employing such methods,[232] it is painfully obvious that the only direct beneficiaries of the exclusionary rule would be the relatively small number of guilty suspects brought to trial who would seek to have their confessions suppressed. This remedy is of little comfort to the innocent suspect victimized by willful police deception when the police have not been deterred by the exclusionary rule.[233] The law currently provides no

229. *See,* notes 185-187 *supra* and accompanying text (discussing a guilty suspect's particular susceptibility to the "intimation" that his accomplice has confessed).

230. In attempting to prove beyond a reasonable doubt that the confession was voluntary, the prosecution would be allowed to show that there was in fact no causal connection between the trickery and the confession. If this can be shown beyond a reasonable doubt, the confession should be found voluntary.

231. *See,* Judge Weinstein's approach to the voluntariness of guilty pleas in United States v. Mancusi, 275 F. Supp. 508, 516 (E.D.N.Y. 1967) (objective test for determining voluntariness of guilty plea applied without regard to whether the defendant was "subjectively overwhelmed" by acts of official impropriety). *See* note 96 *supra.*

232. Weisberg points out that there are several unanswered questions regarding the effectiveness of the exclusionary rule as a deterrent. Weisberg, *supra* note 157, at 176-77.

233. Justice Harlan expressed this idea in Bivens v. Six Unknown Named Agents, 403

protection to the victim of such practices.[234] This Note suggests that a victim of police trickery who suffers emotional distress as a result of reckless police misconduct should be able to recover for his damages. The *Restatement (Second) of Torts* sets out essentially three elements for the tort of outrageous conduct causing severe emotional distress: (1) extreme and outrageous conduct, (2) intentionally or reckless causing, (3) severe emotional distress.[235] A suit to recover for emotional distress caused by a police officer's attempt to confront a suspect with "proof" of his guilt could meet all three requirements.

An unfounded accusation of criminal behavior, much less a confrontation with evidence of guilt, can constitute extreme and outrageous conduct for purposes of this tort. Indeed, accusations of bad conduct, short of criminal, have given rise to successful suits for damages based upon the resulting emotional distress. For example, in a 1926 Minnesota case[236] school authorities confronted the plaintiff, a high school girl, with accusations that she had engaged in immoral sexual conduct. The authorities interrogated her at length, threatening her with prison[237] and disgrace unless she confessed. After finally "confessing" despite her innocence, the girl suffered a mental disturbance that resulted in physical illness. The court allowed her to recover for her damages.[238] Although the defendant's conduct in that earlier case was outrageous for a number of reasons,[239] the false accusations of immoral conduct were obviously an important element.

A 1919 English case is perhaps even more on point for purposes of this Note. In that case, *Janvier v. Sweeney*,[240] a private detective

U.S. 388, 398 (1971) (Harlan, J., concurring). Bivens had sued in tort for damages sustained by him as a result of an illegal search. The Government argued that Bivens was adequately protected by the exclusionary rule. Justice Harlan observed that "assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Id.* at 410.

234. *See* Weisberg, *supra* note 157, at 166.

235. RESTATEMENT (SECOND) OF TORTS § 46 (1965) [hereinafter cited as RESTATEMENT]. Section 46 states in full:

§ 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.

236. Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926).

237. Despite the threats of prison, there was no indication that the plaintiff was accused of any conduct that could actually lead to incarceration.

238. 167 Minn. at 207-08, 208 N.W. at 816.

239. The case also involved a statute prohibiting words that impaired the reputation of a female. *Id.* at 207, 208 N.W. at 816.

240. [1919] 2 K.B. 316.

falsely told the plaintiff, a resident alien, that he was a policeman and that he would charge her with espionage unless she gave him certain letters that he was seeking. The court allowed the plaintiff to recover for her resulting emotional disturbance and serious illness.

In 1974, the Virginia Supreme Court held in *Womack v. Eldridge*[241] that the plaintiff stated a cause of action against a photographer who had taken photographs of the plaintiff for use in a child-molesting case. An attorney representing a criminal defendant, Seifert, in the child-molesting case employed Eldridge to obtain photographs of Womack to be used in the trial of Seifert.[242] Eldridge obtained the photographs by falsely telling Womack that she wished to photograph him in connection with an upcoming newspaper story about Womack's roller rink. At trial the defense attorney showed the two victims the photograph of Womack and asked if he had molested them. The boys replied negatively. The prosecutor then asked for the photographs and for information concerning Womack. Womack subsequently was called as a witness at the trial where he was asked if he had molested any children. A police officer questioned Womack several times afterwards. Womack then sued Eldridge, alleging that, as a result of the investigations resulting from the photographs, he had suffered great shock and distress.[243] The court's primary holding was that a cause of action would lie for emotional distress unaccompanied by physical injury.[244] The court further held, however, that the jury could decide the question whether the defendant photographer's conduct had been extreme and outrageous.[245] The court stated that "a reasonable person would or should have recognized the likelihood of the serious mental distress that would be caused in involving an innocent person in child molesting cases."[246]

Thus, *Womack* illustrates the point that false accusations of guilt may constitute extreme and outrageous conduct, depending to some extent upon the nature of the crime in question and the plaintiff's public exposure. Indeed, the photographer's misconduct in *Womack* did not really amount to an accusation of guilt; she merely helped to implicate Womack in a criminal proceeding. The plaintiff's indisputable innocence in *Womack* clearly contributed to the

241. 215 Va. 338, 210 S.E.2d 145 (1974).

242. The only excuse given for seeking the photographs was Womack's presence at the time and place of Seifert's arrest.

243. 215 Va. at 338-40, 210 S.E.2d at 146-47.

244. *Id.* at 342, 210 S.E.2d at 148.

245. *Id.*

246. *Id.*

court's finding that the defendant's conduct was sufficiently outrageous to present a jury question. That innocence, however, in no way detracts from the basic proposition that accusations of criminal conduct may be extreme and outrageous for the purposes of the tort. It simply means that the clearly innocent plaintiff will have a greater chance of sending his case to the jury.[247]

Because it is clear that an unfounded accusation of criminal conduct can be sufficiently extreme and outrageous to cause emotional distress,[248] false confrontations with actual evidence of guilt, being even more outrageous, would even more clearly satisfy the "extreme and outrageous conduct" requirement of this tort.

In addition to showing "extreme and outrageous" police conduct, the plaintiff seeking damages for emotional distress must show that the police acted intentionally or recklessly. Comment i to Section Forty-Six of the *Restatement,* providing for tort recovery for outrageous conduct causing severe emotional distress, states that the section applies not only when the actor desires to inflict severe emotional distress, but also when he knows that such distress is certain, or substantially certain, to result from his conduct.[249] The section also applies when the actor acts recklessly, in deliberate disregard of the high probability that emotional distress will result from his actions.[250] Although the entire process of interrogation arguably can be viewed as a deliberate attempt to inflict emotional distress on the subject,[251] it is not necessary to analyze the use of trickery as an intentional tortious act because the *Restatement* allows liability for reckless behavior causing mental distress.

The *Restatement* provides that conduct is reckless when the actor knows or has reason to know of facts that would lead a reasonable man to realize that such conduct creates an unreasonable risk of harm.[252] There are two basic types of reckless conduct: (1) the actor knows or has reason to know[253] of facts that create a high risk of harm to another, and deliberately proceeds to act in disregard of,

247. In theory, a suspect found guilty of the crime in question could bring this cause of action, but the improbability of recovering any damages for alleged mental distress suffered in those circumstances suggests that a convicted defendant would rarely if ever bring such a suit.

248. Accusations of dishonesty by a creditor may constitute outrageous conduct for the purposes of the tort. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 (4th ed. 1971).

249. RESTATEMENT, *supra* note 235, § 46, Comment i.

250. *Id.*

251. Aubry and Caputo acknowledge that "[i]nterrogation creates anxiety, nervous tension, and a state of mental aggravation in the subject." A. AUBRY & R. CAPUTO, *supra* note 161, at 123.

252. RESTATEMENT, *supra* note 235, § 500.

253. The phrase "reason to know" is defined in § 12 of the *Restatement.*

or indifference to, that risk; and (2) the actor has such knowledge, or reason to know, of the facts, but does not realize the high degree of risk involved, although a reasonable person in his position would.[254] The latter is an "objective standard" under which the actor is "held to the realization of the aggravated risks"[255] that a reasonable person would entertain, even though subjectively the actor does not apprehend the risk. It would appear that unfounded confrontations with evidence of guilt could often be classified as recklessness of the latter type. Reasonable people would know that serious accusations of guilt create significant risks of causing mental distress to a person, and the actor who makes such an unfounded accusation is reckless, whether or not he is aware of those risks.[256]

A 1954 case, *Savage v. Boies,*[257] serves as an example of liability for the reckless infliction of emotional distress. The defendants in that case were two sheriff's deputies who were under orders to detain the plaintiff for civil commitment proceedings. In order to accomplish this, the deputies located the plaintiff and told her that her husband and baby had been critically injured in a car accident, and invited her to accompany them to the hospital. Upon finding out that the whole story was a ruse designed to get her into custody, the plaintiff suffered severe distress.[258] The court held that a jury could find that "emotional distress is substantially certain to follow from such conduct,"[259] and that the plaintiff could recover damages for it.[260] Thus, if this sort of conduct is "substantially certain" to cause mental distress, then a false confrontation with evidence of guilt should also be deemed reckless, if not indeed intentional, misconduct.

That an unfounded accusation of criminal behavior may be reckless seems indisputable. The *Restatement,*[261] however, contains a limitation that may apply in deciding whether such an accusation in a police interrogation is reckless. The comments state that "the

254. RESTATEMENT, *supra* note 235, § 500, Comment a.

255. *Id.*

256. Comment f of section 500, distinguishing intentional misconduct and recklessness, also contains useful language regarding the reckless state of mind as defined by the *Restatement*:

> While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.

257. 77 Ariz. 355, 272 P.2d 349 (1954).

258. *Id.* at 356-57, 272 P.2d at 350-51.

259. *Id.* at 358, 272 P.2d at 351.

260. *Id.*, 272 P.2d at 351.

261. RESTATEMENT, *supra* note 235, § 500, Comment a.

risk [of harm] must itself be an unreasonable one under the circumstances. There may be exceptional circumstances which make it reasonable to adopt a course of conduct which involves a high degree of risk of harm to others."[262] One might argue that interrogation of a suspect is one of these exceptional circumstances justifying the risk of otherwise reckless behavior.[263]

Finally, the plaintiff seeking damages for emotional distress must show "severe" emotional distress. The *Restatement* sets forth this requirement: the distress must have in fact resulted, and it must be severe. The term includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."[264] It is obvious that a criminal accusation could result in most of these reactions, even to the extreme degree required by the *Restatement*. Although the plaintiff would be denied recovery if he had not actually suffered the harm, such a determination is for the jury, once the court decides that, on the evidence, a finding of severe emotional distress is possible.[265] Thus, review of the elements constituting a successful claim for damages for emotional distress reveals that such a claim would provide a remedy for persons recklessly accused of criminal conduct.

Because reckless accusation of criminal conduct can give rise to a cause of action for outrageous conduct causing severe emotional distress, false confrontation with evidence of one's guilt should also give rise to such a cause of action. Thus, if A falsely tells B that he, A, has documented evidence that B has been embezzling from a bank, B may recover for his emotional distress thereby induced.[266] The question that must be posed, however, is whether it makes any difference if A happens to be a policeman who is interrogating B about a crime. More generally, the question is whether a policeman is privileged to trick a suspect undergoing interrogation into believing that there is incriminating evidence against him. If the policeman were merely a private citizen, it is clear that such conduct would be tortious. Our society, however, grants its police privileges[267] to perform acts that would be tortious if a private person

262. *Id.*

263. There may be extreme circumstances that justify the use of trickery. For example, consider a case in which the victim's life may be in danger unless a confession is obtained quickly.

264. RESTATEMENT, *supra* note 235, § 46, Comment j.

265. *Id.*

266. Assuming, of course, that B can prove all the elements of the tort. *See* note 235 *supra* and accompanying text.

267. A privilege in tort law allows the actor to avoid liability for tortious conduct under

were the actor. A policeman's privilege to make arrests[268] is the most common example of a tort privilege granted the police. A police officer is privileged to make an arrest upon an invalid warrant, so long as it is fair upon its face.[269] Although every citizen has a legal privilege to make warrantless arrests under certain circumstances, a policeman's privilege in this context is much broader.[270] The policy reason for the policeman's protection is obvious: because the making of arrests is an important societal interest, those whose primary responsibility it is to make such arrests should not be deterred from the diligent execution of their duties by the fear of tort liability. A policeman's arrest privilege is closely related to the existence of custodial interrogation, in that custodial interrogation requires an arrest.[271] Indeed, an officer may arrest somebody for the primary purpose of conducting a custodial interrogation, without any fear of tort liability.[272]

This Note submits that there is also a police privilege to conduct interrogation that is analytically distinguishable from the privilege to make arrests. The privilege[273] provides that it is not tortious for the police to question people in a manner that could be tortious if a private citizen were in an analogous position.[274] The privilege allows the police to inquire about highly personal matters in a manner that might otherwise be viewed as a tortious invasion of privacy.[275] It also permits the police to falsely accuse citizens of crimes, a practice that, under other circumstances, might be treated as

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circumstances that make it just and reasonable that liability not be imposed. A privilege defeats the existence of the tort itself. For a general discussion of privilege, see W. PROSSER, *supra* note 248, at 970.

268. The meaning of "arrest" in this context is limited to its tort law definition. Prosser describes the legal restraint that qualifies as an arrest by a police officer as follows: "The restraint upon the plaintiff's freedom may also be imposed by the assertion of legal authority. If the plaintiff submits or if there is even a momentary taking into the custody of the law, there is an arrest . . . ." *Id.* § 11 (footnotes omitted).

269. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.03 (1958).

270. *See* W. PROSSER, *supra* note 248, § 26.

271. Oregon v. Mathiason, 429 U.S. 492 (1977), clearly implies that "custodial interrogation" requires at least the restraint that would qualify as an arrest for tort law purposes, even though the suspect is not arrested in the sense that he is to be charged with any crime. *See generally* note 268 *supra.*

272. This assumes that the conditions required for the existence of the privilege are present, even though the officer may not intend to charge the suspect with a crime. *See* W. PROSSER, *supra* note 248, § 26.

273. The requirements of *Miranda* are irrelevant in relation to this privilege; the fact that an officer has not complied with *Miranda* does not dissolve his tort privilege.

274. *See, e.g.*, Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (imposing liability on school officials for conduct in a situation resembling an interrogation).

275. More specifically, such inquiries might otherwise be viewed as intrusions upon seclusion. *See* RESTATEMENT, *supra* note 235, § 652B (1977).

intentional infliction of mental distress. The privilege is broad; its rationale is to ensure that the police are free to make effective use of interrogation. The privilege is not unlimited, however.

The privilege to make an arrest carries with it "the privilege of using all reasonable force to effect it,"[276] assuming that the arrest is lawful. The reasonable force privilege, although permissive, also sets limits on the manner in which arrest may be effected.[277] In much the same way, the privilege to conduct interrogations should contain a "reasonable force" limitation, which one might refer to as the "tolerable pressure" privilege. The reasonable force privilege strikes a balance in favor of the preservation of life and limb, as against the state's interest in apprehending fleeing criminals. The tolerable pressure privilege would strike a balance in favor of human dignity over the state's interest in extracting a confession, an interest whose value has been widely questioned anyway.[278] The direct beneficiaries of the standard would be the innocent suspects who presently have little if any protection against police abuse during interrogation.[279]

This proposed privilege would necessarily imply that any conduct in excess of that allowed by the privilege is tortious.[280] As in the case of the reasonable force privilege,[281] whether the pressure applied is excessive would be a question of fact. The relevant factors would include the seriousness of the crime, the apparent certainty of the suspect's guilt at the time of interrogation, the *need* for a confession, for example, was a confession necessary in order to help prevent further loss of life or property, and the defendant's prior experience with the police. A "silent factor," and perhaps the most important consideration, is whether the defendant was convicted of the crime in question. The factor is "silent" because presumably few suspects who have been convicted of the crime in question would venture to persuade a jury that they were tort victims who should receive considerable damages, and thus this factor would ordinarily not be visible. The tort remedy is designed primarily to benefit the innocent; the guilty can find solace in the exclusionary rule.

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276. W. PROSSER, *supra* note 248, § 26.

277. Generally speaking, the type of crime determines the amount of force that can be used; for example, an officer may use more force in arresting a violent felon than in arresting a misdemeanant. *Id.*

278. *See, e.g.*, Weisberg, *supra* note 157, at 181.

279. In extreme cases involving a significant restraint on liberty, a citizen may have a cause of action under 42 U.S.C. § 1983 (1976). *See* Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir. 1970); 20 DE PAUL L. REV. 984 (1971).

280. If the plaintiff in fact suffered severe mental distress. *See* text accompanying notes 264-65 *supra*.

281. W. PROSSER, *supra* note 248, § 26, at 134.

Tort liability based on conduct that exceeds the tolerable pressure privilege would not deter effective interrogation. Tortious conduct occurs only when the police act in an extreme and outrageous manner.[282] Any argument that the privilege should extend to all police conduct[283] during interrogation in order not to chill police work is countered by the consideration that abuse of police power is particularly extreme and outrageous precisely because of the policeman's power over his victim.[284] The Supreme Court recognized this point in *Bivens v. Six Unknown Named Agents.*[285] In *Bivens* the court indicated that, because of a government agent's power, the relationship between a citizen and a government agent who has harmed him[286] is much different from the relationship between two private citizens in an analogous situation. In the Court's words, "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.[287] The *Bivens* Court went on to hold that the fourth amendment violation at issue gave rise to a federal cause of action for damages. In the present context, however, the Court's rationale supports the proposition that the abuse of police authority, because of its unique capacity for harm, is a factor that weighs heavily in favor of limiting the policeman's privilege. Police privileges have been created in order to protect legitimate societal interests. The legitimate interests in custodial interrogation should not, however, grant the police a license to conduct themselves in an outrageous manner that would be extremely tortious under any other circumstances. At some point, individual human dignity outweighs the law enforcement interest in aggressive interrogation; at some point society's hired interrogator becomes an individual tortfeasor. Tactics that falsely confront a person with proof of his guilt go beyond that point. Interrogation by itself, including perhaps direct accusation of guilt, is frightening enough, but at least the innocent person retains some faith that the confusion will soon disperse. His greatest hope lies in the lack of any evidence against him. But when the police confront him with "proof," they shatter his hope. Most people, fortunately,

282. This Note assumes that the infliction of severe emotional distress would ordinarily be the basis of tort liability. *See generally* note 235 *supra.*

283. Of course, no privilege protects the police from liability for assault and battery that occurs during an interrogation.

284. *See* RESTATEMENT, *supra* note 235, § 46, Comment e.

285. 403 U.S. 388 (1971).

286. Bivens sued six Federal Bureau of Narcotics agents in tort for the emotional distress he suffered in an allegedly unlawful search of his home. *Id.* at 389-90.

287. 403 U.S. at 392.

can only imagine the psychological devastation experienced by a person in that situation.

Thus, this Note maintains that police trickery may give rise to a cause of action for outrageous conduct causing severe emotional distress. The common law tradition would impose the burden of liability on the individual officer; that tradition "has been that a police officer is subjected to a liability as if he was a private individual,"[288] while the governmental unit is immune. More particularly, it is clear that a police officer can be held liable for the infliction of severe emotional distress in the course of his duties.[289] This Note, however, adopts the position of Professor Kenneth Davis that the governmental unit should be liable for the torts of its police officers.[290]

Davis argues that personal liability, because it is "sporadically imposed" and often lags years behind the abuse, does not deter the police from misconduct.[291] Moreover, plaintiffs may be dissuaded from such lawsuits by the simple reason that individual policemen are unlikely to be financially responsible.[292] Davis observes that police abuses thrive under the present system that theoretically holds police officers liable for their torts. In order to deter police abuses there must be incentives for the top officials of a department to crack down on misconduct that threatens the loss of departmental funds. Policemen will respond to the dictates of their superiors because the enforcement in this context will be "steady, swift, and sure;" personal liability, on the other hand, is a "hit-or-miss" treatment of the symptoms.[293]

A system of governmental liability would also respond to the fears of those who believe that individual tort liability, despite its infrequency,[294] is too strong of a deterrent, because the threat of personal liability may lead a policeman to restrain himself excessively to the detriment of the public's interest in law enforcement.[295] The threat of departmental sanctions is a much better deterrent because its "swiftness and sureness" assure a level of general observ-

288. K. DAVIS, *supra* note 269, § 26.03; *see* RESTATEMENT, *supra* note 235, § 895D (1979).

289. *E.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954). In fact, section 46 of the *Restatement* contains an illustration of a police officer's liability for the tort. RESTATEMENT, *supra* note 235, § 46, Comment k, Illustration 19.

290. K. DAVIS, *supra* note 269, § 26.03.

291. *Id.*

292. *Id.* § 26.02.

293. *Id.* § 26.03.

294. Tort suits against individual policemen are increasingly popular, however. *See* Schmidt, *Recent Trends in Police Tort Litigation*, 8 URB. LAW. 682 (1976).

295. *See* K. DAVIS, *supra* note 269, § 26.03 at 522.

ance, while the absence of any threat of devastating economic loss ensures[296] that the individual policeman will not be unduly chilled in the exercise of his duties. This Note acknowledges that the widespread recognition of this type of governmental liability for the common law torts of police officers may be some distance in the future.[297] The immunity of municipalities, however, has been eroding for some time.[298] Thus it is not unrealistic to expect such liability to develop.

Finally, a word should be said about the measure of damages. Assessing damages for tortious conduct during an interrogation is somewhat difficult because a suspect is likely to be very distressed even by a perfectly lawful interrogation. In other words, it is difficult for a plaintiff to show how much of his distress was caused by the tortious aspects of his interrogation. Although such damages obviously could not be measured with absolute precision, juries make equally difficult decisions every day. In a trickery case, the plaintiff's testimony and cross-examination should demonstrate to some degree his emotional condition prior to and following the trickery. Furthermore, punitive damages may be based on the outrageousness of the defendant's conduct, with little regard to the measure of the plaintiff's actual injuries.[299] Punitive damages are critical in this context because they should provide the bulk of whatever deterrent effect tort liability will have, as well as the bulk of the plaintiff's recovery.

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296. In an extreme case the officer may suffer severe economic injury by losing his job.

297. Prosser states that such liability will probably never be generally accepted. W. PROSSER, *supra* note 248, § 132.

298. *See id.* § 131, at 984-86. Although it was based on statutory grounds, the Supreme Court's recent decision in Monell v. Dept. of Social Services, 436 U.S. 658 (1978), holding that local governments are not immune from suit under 42 U.S.C. § 1983, is a dramatic example of the erosion of municipal immunity. The *Monell* Court emphasized, however, that the muncipality's liability must be based on some municipal policy in violation of the statute; the Court explicitly rejected any notion that liability could be based on *respondeat superior.* For example, the city is not liable under 42 U.S.C. § 1983 simply because one of its officers violates the statute; the violation must be pursuant to some municipal policy in order for the municipality to sustain liability. *Id.* at 691-95.

299. W. PROSSER, *supra* note 248, § 2. Punitive damages are not ordinarily assessed against municipalities. *Id.* n.91. However, if tort law is to provide a deterrent to police misconduct, the better policy is to assess punitive damages against the municipality. *See* text accompanying notes 288-96 *supra.* This is especially true because the governmental unit is in a position to exert great control over its officers' conduct. The majority of courts follow this approach in regard to the liability of a private corporation for punitive damages resulting from acts of its employees in the scope of employment. *See* W. PROSSER, *supra* note 248, § 2, at 12.

VII. CONCLUSION

In sum, *Miranda* has not been successful in curbing psychologically coercive police interrogation because very few suspects are prepared to assert their *Miranda* rights, and *Miranda* asserts no control whatsoever over the interrogation following a waiver. *Mincey v. Arizona,* however, suggests the due process clause as a vehicle for controlling abusive police practices. The problem with the old due process voluntariness standard was its subjectivity; thus this Note proposes an objective standard. Police trickery, defined as any technique that affirmatively confronts a suspect with false evidence of his guilt, is a violation of this standard, because it is inherently coercive, and because of the high risks that it will be used against innocent suspects. The prohibition of trickery on due process grounds, and the resulting application of the exclusionary rule, are further justified by the lack of any reason to believe that trickery is a significantly effective tool in the arsenal of criminal investigation. Finally, this Note submits that in extreme cases of intentional trickery, the victim should be able to recover in tort for the infliction of mental distress. The better policy is for the governmental unit, not the individual policeman, to bear the burden of liability.

Prosser, in referring to the development of recovery for mental distress in tort, writes that the law is in a process of evolution "the ultimate limits of which cannot as yet be determined."[300] This Note submits that recovery for mental distress caused by police trickery is not beyond those "ultimate limits;" rather, as Prosser states, "it is the business of the law to remedy wrongs that deserve it."[301] In both criminal procedure and tort law, police trickery is a wrong that deserves it.

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300. W. PROSSER, *supra* note 248, § 12, at 50.
301. *Id.* at 51.