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MISTAKE, IGNORANCE, EXPECTATION OF BENEFIT, AND THE MODERN LAW OF CONFESSIONS

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I. INTRODUCTION

The factors that influence a person suspected of a criminal offense either to admit or deny guilt are obviously complex and difficult to discern and analyze. Notwithstanding the sustained attention the law has given to the subject of confessions,[1] the legal effect of a demonstration that certain factors have influenced the decision to confess is far from clear. This confusion persists even now that the law has apparently passed through the transitional period extending from the "voluntariness" test of the past to the *Miranda* rules of the present. Despite the establishment of *Miranda v. Arizona*[2] as the major legal doctrine relating to confessions and incriminating statements, the impact of a defendant's state of mind at the time of confession on the admissibility of that confession into evidence remains painfully unclear.

This Article is an examination of the legal significance of several

1. The term "confession" will be used interchangeably with "self-incriminating statement." Despite occasional holdings to the contrary, it seems well established that legal rules relating to statements admitting all elements of a criminal offense also apply to admissions of less than all elements and to statements intended to be exculpatory that ultimately become evidence of guilt. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 476-77 (1966); Bram v. United States, 168 U.S. 532, 541-42 (1897). There appear to be no policy grounds for drawing distinctions between such statements.

The corpus delicti rule is sometimes phrased as a requirement of admissibility, demanding that the prosecution introduce independent proof of the corpus delicti before the defendant's confession may be introduced. *See, e.g.*, State v. Weis, 92 Ariz. 254, 260, 375 P.2d 735, 739 (1962), *cert. denied*, 389 U.S. 899 (1967). It is generally agreed, however, that the trial judge may, without committing reversible error, exercise his discretionary power over the order of evidence and accept a confession subject to later proof of the corpus delicti by other evidence. *See, e.g.*, State v. Hernandez, 83 Ariz. 279, 320 P.2d 467 (1958). The functional effect of the rule, then, is to impose a requirement concerning the total proof necessary to sustain a conviction rather than to define the foundation necessary for the introduction of a confession. *See* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 158, at 346-47 (2d ed. 1972). The "law of confession," as used in this Article, does not include the corpus delicti rule, the requirement of corroboration, or similar matters.

2. 384 U.S. 436 (1966); *see* text accompanying note 82 *infra*.

possible characteristics of a confessing defendant's state of mind: his ignorance or mistake concerning the facts or the law relating thereto (whether influenced by affirmative and intentional deception by law enforcement authorities, by good faith promises and representations of such persons, or by other factors) and reliance upon expectations that he will in some way benefit from the confession. The thesis presented here is that the lack of clarity in regard to these issues results from the selection of legal vehicles manifestly inappropriate for dealing with the underlying problems and that such selection has been due largely to an unwillingness to deal specifically with the issues. The current approach needs to be replaced—or at least supplemented—by a more direct analysis of the problems related to confessions. At the same time, more careful attention must be directed to the long-term objectives that can be furthered by rules concerning the admissiblity of confessions and the procedural means by which these objectives can be implemented at minimal cost.

The subject matter of this Article is of critical importance because of the manner in which our criminal justice system processes defendants. In the vast majority of jurisdictions, a defendant is likely to obtain a dispositional advantage by cooperating with prosecution authorities, and the earlier such cooperation begins, the greater the advantage is likely to be. In a significant number of circumstances involving confessions, however, defendants are ignorant or mistaken about their full factual situation,[3] the law relating to that situation,[4] or the legal effect of their decision to confess.[5] While the precise extent of this misapprehension cannot be documented, it is likely that criminal defendants are often required to choose whether or not to confess at a time when they are ignorant of significant factors relating to the tactical wisdom of confessing. Yet this is also when the failure to begin cooperating by confessing—for whatever reason—may well adversely affect their ability to achieve the most lenient disposition if they are later found guilty.

3. *See, e.g.*, Layton v. State, — Ind. —, 301 N.E.2d 633 (1973) (defendant testified that when he confessed to an assault, he was unaware that the victim had died).

4. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964) (defendant admitted participation in a shooting, apparently unaware that under the law of parties his participation made him liable for the shooting itself).

5. For example, in one study, forty-five percent of the defendants interviewed believed that an oral statement made to police could not be used in court against them. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENVER L.J. 1, 15-16 (1970).

Initially, it is necessary to recognize that there are at least three dimensions to the problem of the defendant's conscious awareness at the time he makes a self-incriminating statement. The first dimension is the subject of this awareness. The defendant may have—or may lack—a certain awareness concerning the facts of the incident, the law that determines whether or not there was criminal activity involved, the law that determines his liability for criminal activity, the evidence available to prove his liability for the incident, or other matters that may affect whether he will be convicted and how he will be punished. The second dimension is the extent of this awareness. The defendant simply may not have addressed the matter and thus lack any awareness; he may have an accurate understanding of the matter; or finally, he may have an inaccurate or incomplete understanding. The third dimension is the cause of this awareness or lack of awareness. Although there are obviously countless factors involved, for present purposes the most important are the defendant's previous "life experiences," his reliance upon well-known or widely disseminated practices, any affirmative action by law enforcement officers, and the failure of law enforcement officers to correct an apparent or suspected misapprehension or state of ignorance.

In regard to the first dimension, this discussion will be limited to the defendant's awareness of the factual circumstances bearing upon the tactical wisdom of confessing, such as those matters enumerated in the preceding paragraph. This awareness must be distinguished from his awareness of other matters, such as the sympathy the interrogating officers may have for him, his prior activities, or his present plight. Those matters are better regarded as part of the question whether the law should exploit—or, if a misunderstanding concerning this sympathy is intentionally created, manipulate—a suspect's emotional reaction to a situation that he fully understands on an intellectual level. That question, while undoubtedly an important one, is beyond the scope of the present discussion. Thus no effort is made to deal with issues presented by interrogations involving no deception with respect to the factual circumstances of a suspect's situation but in which officers—accurately or not—indicate emotional sympathy for anyone confronted with a situation similar to that leading to the commission of the crime under investigation.

This Article will begin by tracing generally the development of the law of confessions and then will return to examine more specifically

the way in which the subject's conscious awareness has been treated during the various stages of this evolution. Thereafter, attention will be focused on the need to define and refine the matter and on the various considerations that need to be taken into account; one way in which existing law can be modified in order to accommodate these considerations will be discussed.

II. The Evolution of American Confession Law

Contemporary legal rules relating to the admissibility of confessions —including those rules concerning ignorance, mistake, and reliance— have roots deep in English common law. Examination of these origins is necessary not only to determine the content and basis of present doctrines, but also to gauge the effectiveness of various approaches in dealing with the manner in which self-incriminating statements are obtained and used to secure criminal convictions. Because the confused state of current doctrines is, in fact, the direct result of complex historical development, the several doctrines that constitute the law of confessions can be understood only if examined in light of that history. This evolution of confession law can be broken down into three discernible periods: development of the original common law requirement of voluntariness; embodiment of part or all of the voluntariness requirement within the constitutional imperatives of due process; and recent efforts to replace or supplement traditional doctrines with objective standards.

A. *The Voluntariness Requirement in English and Early American Law*

In early English practice, confessions made "under threats and promises"[6] were inadmissible,[7] although the use of an approver's con-

6. "Threats" and "promises" have not always been easy to distinguish from each other or from those communications not creating fatal defects in a confession. When a communication relates to the future processing of a case, it is difficult to determine whether it is a "promise" that some benefit will result from confession or a "threat" that some disadvantage will flow from the absence of confession. "Threat" seems to carry with it, however, the prediction of unlawful force or pressure. For purposes of this discussion, "promises" will be used to describe communications conveying the impression to subjects that they will benefit from confessing, whether that benefit consists of enjoying something they would not otherwise enjoy or escaping a misfortune they would otherwise experience. "Threat," on the other hand, will be used to describe a communication conveying the impression that improper pressures, whether physical or psychological, will be exerted if the subject declines to confess. A "threat," then, must involve communication of willingness to do something the threatener cannot properly do;

fession (made with the expectation that pardon would result) against the approver in certain circumstances[8] suggests that this early prohibition against "promises" was not absolute. In any case, there is no doubt that the rationale for this rule of inadmissibility was the perceived unreliability of such statements:

> [A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[9]

During the nineteenth century the rule, especially the prohibition against promises of benefits, was applied with vigor by the English courts. Confessions were held inadmissible for having been made in response to inducement if the defendant had been informed simply that it would be better if he told the truth.[10]

"promises," on the other hand, may—but need not—communicate a willingness to deal with the subject in a manner which is permissible under the law, often in the form of a discretionary action such as choice of sentence. This terminology is likely to assist clear analysis; it is not, however, necessarily consistent with the use of these terms in judicial opinions.

7. Lord Mansfield, in The King v. Rudd, 168 Eng. Rep. 160, 161 (K.B. 1775) noted:

> The instance has frequently happened, of persons having made confessions under threat or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial.

8. An approver was a person indicted for a crime who confessed his own guilt and testified against at least two accomplices. If he met all the requirements, the approver was entitled to a pardon. The process was a risky one, however. If the approver failed to disclose the entire truth, if his testimony established that he was a principal, if he was unable to recount fully and accurately his initial statement, or if his accomplices were not convicted, the approver was convicted on the basis of his confession and put to death. *See* The King v. Rudd, 168 Eng. Rep. 160, 162-63 (K.B. 1775).

9. The King v. Warickshall, 168 Eng. Rep. 234, 235 (K.B. 1783).

10. *See, e.g.*, Regina v. Rose, 18 Cox Crim. Cas. 717 (Cr. Cas. Res. 1898) (employer said to defendant, " 'You had better tell me about all the corn that is gone,' " and " 'it would be better' " for him to tell the truth); Regina v. Mansfield, 14 Cox Crim. Cas. 639 (N.P. 1881) (fifteen-year-old domestic servant girl accused by constable of setting fire to haystack, said to her mistress, " 'If you will forgive me I will tell you the truth,' " and mistress replied, " 'Ann, did you do it?' "); The Queen v. Croydon, 2 Cox Crim. Cas. 67 (N.P. 1846) (attorney said to defendant, " 'I dare say you had a hand in it; you may as well tell me about it' "); Rex v. Partridge, 173 Eng. Rep. 243 (N.P. 1836) (complainant told defendant, " 'I should be obliged to you if you would tell us what you know about it; if you will not, we of course can do nothing; I shall be glad if you will' "); Rex v. Thomas, 172 Eng. Rep. 1273, 1274 (N.P. 1834) (person said to one of several suspected robbers in custody, " 'You had better split, and not suffer for all of them' "); Rex v. Mills, 172 Eng. Rep. 1183 (N.P. 1833) (constable said to defendant in custody for theft, " 'It is of no use for you to deny it, for there is the man

Nevertheless, several exceptions combined to ameliorate, to some extent, the effect of the general rule. "Spiritual admonitions," for instance, were held to have no impact upon the admissibility of a confession if they did no more than draw the defendant's attention to the spiritual benefits to be derived from the confessing.[11] Inducements or promises made by a person who was not in a position of authority with respect to the defendant or his case were sometimes considered to have no effect upon the admissibility of a statement,[12] although the early case law reveals no uniformity on the subject.[13] Finally, some justices

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and boy who will swear they saw you do it' "); Rex v. Enoch, 172 Eng. Rep. 1089 (N.P. 1833) (guard told woman arrested and charged jointly with man for murder "that she had better tell the truth or it would lie upon her, and the man would go free"); Rex v. Dunn, 172 Eng. Rep. 817 (N.P. 1831) (private person told defendant that "he had better tell where he got it"); Rex v. Kingston, 172 Eng. Rep. 752 (N.P. 1783) (surgeon, called in, told defendant charged with attempted murder, "[Y]ou are under suspicion of this, and you had better tell all you know").

The English rule apparently remains very much the same. *See, e.g.*, Regina v. Zaveckas, [1970] 1 All E.R. 413, 414 (C.A. 1969) (defendant said to officer, " 'If I make a statement, will you give me bail now?' " and officer replied, " 'Yes' "); Regina v. Northam, 52 Crim. App. 97 (C.A. 1967) (defendant, on bail for one housebreaking, was questioned about another; he raised the possibility of accepting responsibility for second and having it taken into consideration on sentencing for the first rather than having an indictment and detention on a separate charge; officer indicated the police would not oppose this).

11. *See, e.g.*, Rex v. Wild, 168 Eng. Rep. 1341, 1341-42 (Cr. Cas. Res. 1835) (constable said to defendant, " '[N]ow kneel you down by the side of me and tell me the truth . . . . I [am] going to ask . . . a very serious question, and I [hope you will] tell the truth in the presence of the Almighty. Did these children fall into the pit?' " [statement held "strictly admissible," but judges "much disapproved of the mode in which it was obtained"]); Rex v. Gilham, 168 Eng. Rep. 1235 (Cr. Cas. Res. 1828) (prison chaplain prayed with defendant and persuaded him that it would be to his spiritual advantage to confess).

12. *See, e.g.*, R. CROSS, EVIDENCE 448 (2d ed. 1963). *See* Rex v. Gibbons, 171 Eng. Rep. 1117, 1117-18 (N.P. 1823) (confession, given to surgeon some time after person "having no authority of any sort" told defendant "she had better tell all," held inadmissible).

13. In Rex v. Spencer, 173 Eng. Rep. 338 (N.P. 1837), an unidentified person told the defendant he had better confess. When the confession was offered, the trial judge noted a division of opinions on the admissibility of such confessions, but indicated a willingness to accept it. *Compare* Rex v. Gilham, 168 Eng. Rep. 1235 (Cr. Cas. Res. 1828), *cited in* note 11 *supra, with* Rex v. Kingston, 172 Eng. Rep. 752 (N.P. 1783), *cited in* note 10 *supra.* Apparently, actual authority was unnecessary if the defendant reasonably believed that the person had authority. *See* Regina v. Frewin, 6 Cox Crim. Cas. 530 (Cent. Crim. Ct. 1855) (confession, made to coworker who told defendant it would be a good deal better for him to confess, was inadmissible because although coworker had not contacted him on behalf of employer, defendant might reasonably have supposed that coworker had acted on employer's behalf).

believed that the offering of an inducement unrelated to the contemplated criminal proceedings did not affect the admissibility of a confession;[14] this question was not resolved until 1966 when the House of Lords held that the collateral nature of an inducement did not prevent it from rendering a confession inadmissible.[15] The expectation of benefit that would render a confession involuntary, however, had to be based upon specific and identifiable promises or representations; a mere showing that the defendant anticipated reaping a benefit in the litigation was insufficient.[16]

Despite the substantial number of involuntary confession cases heard in English courts during the nineteenth century, there was little case law considering the effect of official deception. The early treatise writers agreed, however, that official deception would not render a statement inadmissible,[17] citing an unreported case in which the defendant confessed after being falsely told that his alleged accomplices were in custody.[18] Further support for this interpretation of the early position was available in several cases holding that confessions given to persons who had promised not to reveal them were not inadmissible.[19]

This, then, was the common law background of confession law that laid the basis for current doctrine. In determining the admissibility of a statement, the English courts emphasized the defendant's conscious awareness at the time of confessing. Thus, expectation of a specific benefit in the criminal proceedings—especially if this was induced by

14. *See, e.g.*, Rex v. Lloyd, 172 Eng. Rep. 1291 (N.P. 1834) (telling defendant that if he made statement he could see his wife, who was also in custody for same offense, did not render statement inadmissible).

15. Commissioners of Customs and Excise v. Harz, [1967] 1 A.C. 760, 818-21 (1966).

16. *See, e.g.*, Regina v. Warren, 11 L.T. (o.s.) 516, 12 J.P. 571 (N.P. 1848) (confession prefaced by statement of defendant, " 'I shall confess, for I think it will be better for me,' " admissible because no inducement held out to defendant to render it involuntary). *See also* Rex v. Godinho, 7 Crim. App. 12 (1911) (confession by defendant, made in hope that king would pardon him, admissible because no one held out hope of pardon).

17. 2 S. PHILLIPS & I. ARNOLD, A TREATISE ON THE LAW OF EVIDENCE 559 (5th Am. ed. 1868); H. ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 43-44 (2d Am. ed. T. Granger 1840); 2 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 49 (4th Am. ed. 1832).

18. Rex v. Burley, *discussed in* sources cited note 17 *supra*. Starkie reports that the conviction "was approved by all the judges." T. STARKIE, *supra* note 17, at 17 n.(*m*).

19. *See, e.g.*, Rex v. Thomas, 173 Eng. Rep. 154 (N.P. 1836); Rex v. Shaw, 172 Eng. Rep. 1282 (N.P. 1834).

the representations of a person in a position of lawful authority in the criminal prosecution system—rendered the statement subject to objection. But the common law authorities did not reach the more subtle aspects of a defendant's understanding—or misunderstanding—of the facts surrounding his alleged offense, the evidence available tending to prove his guilt, or the admissibility of that evidence. In fact, it is arguable that the common law's preoccupation with "inducements" served to divert attention from these matters.

The common law rule declaring inadmissible a confession induced by promise of benefits was generally adopted in the United States, but it was applied with considerably less enthusiasm. This somewhat begrudging attitude was evidenced by the requirement, generally accepted, that any promise or inducement be offered by a person in a position of authority[20] and that it be related to the criminal charges involved before the confession would be considered inadmissible.[21] But perhaps more important, the American courts tended generally, but not uniformly, to require a more positive and direct promise of a benefit or inducement than the English courts had demanded.[22] Thus, despite

20. *See, e.g.*, United States v. Stone, 8 F. 232 (C.C.W.D. Tenn. 1881) (private detective representing party injured in crime was not a person in authority because only prosecuting attorney could bring criminal action). There was some reluctance to rely on this requirement, however, as evidenced by numerous cases that found inducements or promises by private persons insufficient to require suppression of the confession, but on grounds other than the private nature of the person making the promise or inducement. *See, e.g.*, State v. Grant, 22 Me. 171 (1842); State v. Hardee, 83 N.C. 619 (1880); State v. Mitchell, 61 N.C. 447 (1868).

21. *See, e.g.*, State v. Hardee, 83 N.C. 619 (1880) (witness' promise to marry defendant if he would tell her about crime had no reference to charges and therefore did not affect admissibility of statement); State v. Tatro, 50 Vt. 483, 490 (1878) (promise by jailer that defendant could be with other prisoners if he confessed was a promise of a "collateral boon" and did not affect admissibility of statement).

22. *See, e.g.*, Commonwealth v. Morey, 67 Mass. 461, 462 (1854) (telling defendant that "it was better for all concerned in all cases for the guilty party to confess" and that confession would be "considered honorable" but would make no difference in legal proceedings did not affect admissibility); State v. Grant, 22 Me. 171 (1842) (statement that one of two brothers should confess to save other did not render statement inadmissible); Rice v. State, 22 Tex. Ct. App. R. 654, 656, 3 S.W. 791, 792 (1887) (rejecting approach of earlier cases and holding that statement by owner of stolen property that " 'it would go better with him' " if defendant confessed was not a sufficiently "positive" promise of benefit). *But see* Commonwealth v. Taylor, 59 Mass. 605, 606 (1850) ("any direct or implied promise" would invalidate statement; thus comment by officer that if any part of disclosure was of benefit to the government, he would use his influence to have it go in defendant's favor invalidated statement). The cases decided shortly after the turn of the century showed an even clearer rejection of the earlier English approach. *See, e.g.*, State v. Marty, 52 N.D. 478, 486, 203 N.W. 679, 682

acceptance of the general rule, its application was less likely to render a confession inadmissible in the United States than it was in nineteenth, or even twentieth, century England.

In contrast to their relative restraint in applying the general rule with respect to induced confessions, the American courts adopted uncritically and enthusiastically the commentators' interpretation of the common law relating to official deception. To the Americans, this interpretation embodied the principle that fraud—and therefore mere mistake as well—in regard to information that a defendant considered in deciding to confess would have no effect upon the admissibility of the confession.[23] The decisions did not explain the willingness to embrace this principle, but the general hostility of American courts toward legal impediments to the admissibility of confessions probably played an important role.

Some courts minimized the effect of the common law rule by adopting its rationale as a limiting factor. Thus, one can discern in the American cases a trend toward inquiring whether the inducement or promise was such that, considering the circumstances, a reasonable likelihood of a false statement was presented.[24] This trend was in

(1925) (sheriff's statement that " 'the court generally would consider a man pleading guilty,—that the sentence would be lighter' " did not invalidate statement); State v. Allison, 24 S.D. 622, 625, 124 N.W. 747, 748 (1910) (sheriff's statement that " '[t]he best thing you can do is to tell the truth, and you might get out of it to-day' " did not render statement inadmissible). Again, however, the trend was not uniform. *See* People v. Heide, 302 Ill. 624, 626, 135 N.E. 77, 78 (1922) (telling defendant that if he told the truth he would be taken to the state attorney's office, and the state attorney would "do the best for him" rendered statement inadmissible, since "any degree of influence" renders statement inadmissible under Illinois law). *Cf.* People v. Klyczek, 307 Ill. 150, 138 N.E. 275 (1923) (merely telling defendant it would be better to tell the truth does not render statement inadmissible, but it would have this effect if a suggestion of some benefit is added).

23. *Cf., e.g.*, King v. State, 40 Ala. 314 (1867) (falsely telling defendant that his accomplice had been arrested and shot did not affect confession); State v. Fredericks, 85 Mo. 145 (1884) (false statement that defendant's accomplice was in custody did not render statement inadmissible); State v. Mitchell, 61 N.C. 447 (1868) (statement made to another prisoner was not rendered inadmissible by the other prisoner's informing defendant that one prisoner could not testify against another prisoner).

24. *See, e.g.*, Laub v. State, 24 Ariz. 175, 178, 207 P. 465, 466 (1922) (advising defendant to tell the truth and telling him it would be better to do so does not automatically render statement inadmissible, but real question is "whether, considering all the circumstances, the statement . . . may be relied upon as probably stating the truth"); State v. Guie, 56 Mont. 485, 490, 86 P. 329, 331 (1919) ("If the inducements of the confessing party are such that the prospects of bettering his situation by speaking even falsely would appeal to him, as a reasonable person, as the better alternative to remain-

clear contrast to the majority of English cases, which excluded all statements made pursuant to an inducement. The basis of the English practice appears to have been a belief that some inducements would create an unacceptable risk of a false statement, and the task of distinguishing those inducements that did create such a risk from those that did not was a task too difficult to undertake.

Infrequently, courts recognized that the danger of unreliability was not the sole basis for screening confessions. The Supreme Court of Arkansas, for example, stated:

> Another ground for excluding confessions induced by threats, or by hope of reward, has been called "the fox hunter's reason." This proceeds not only upon the ground that testimony obtained under such circumstances is unreliable, but upon a spirit of fairness to the accused.[25]

It is likely, however, that there was a broader but unacknowledged awareness that exclusion was justified on grounds other than reliability. This was evident in some of the early deception cases where courts, although upholding the admissibility of statements obtained by deception, sometimes condemned the underlying conduct of the police. These opinions seemed to indicate frustration at the lack of a more appropriate vehicle for dealing with the problem.[26] To some extent the courts engrafted the trustworthiness rationale onto the deception doctrine by indicating that deception would render a statement inadmissible if—but only if—the deception created a danger of an inaccurate statement.[27]

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ing silent, then the confession ought not to be received as evidence against him, because it is testimonially untrustworthy").

25. Pearrow v. State, 146 Ark. 201, 207, 225 S.W. 308, 310 (1920).

26. *See, e.g.*, People v. Dunnigan, 163 Mich. 349, 128 N.W. 180 (1910) (although it was "reprehensible" to have person offer to convey message to defendant's wife and then turn message over to authorities, this did not render admission contained in message inadmissible); McIntosh v. State, 105 Neb. 328, 337, 180 N.W. 573, 576 (1920) (sheriff's false statement to defendant that other participant had made an affidavit but "was not playing square," "while hardly commendable," did not render defendant's statement inadmissible); *cf.* People v. Buffom, 214 N.Y. 53, 108 N.E. 184 (1915) (although confession obtained by deceit is not inadmissible, if it forms basis for conviction it is necessary to guard carefully against errors that may have contributed to jury's conclusion that confession was accurate).

27. *See, e.g.*, Rutherford v. Commonwealth, 59 Ky. 387, 390 (1859) (where defendant was told that if he could establish that he had no money dealings with victim, " 'he would get clear,' " and defendant then made statement to that effect, this statement was inadmissible; the representation tended to produce such a statement, whether true or not); People v. Utter, 217 Mich. 74, 80, 185 N.W. 830, 832 (1921) (placing undercover agent in jail with defendant did not render statement made to agent inadmissible because

B. *The Development of a Constitutional Requirement of Voluntariness*

The unwillingness of the United States Supreme Court to confront the true issues in confession cases was evidenced as early as 1884 when the first such case, *Hopt v. Utah*,[28] reached the Court. There, the Court apparently considered the admissibility of a confession in a federal criminal trial to be entirely a matter of federal evidence law with no constitutional overtones. Noting that the admissibility of such statements "so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases,"[29] the Court—with obvious relief—concluded that "[i]t is unnecessary in this case that we should lay down any general rule on the subject" since the admission of the statement at issue in the case "can be sustained upon . . . the weight of authority."[30] That "authority" was summarized as establishing that a confession of guilt was admissible unless

> the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.[31]

Subsequent cases continued to treat the issue as one of evidence law and elaborated to some extent upon the "authority" approved in *Hopt* by holding that mere advice to a defendant to tell the truth was not a "promise" within the meaning of the rule[32] and that neither the simple fact of custody[33] nor the failure to warn a defendant that a statement would be used against him[34] rendered a statement inadmissible.

These cases served as a mere prelude to the difficulties that arose

"[t]here was no proof or claim of any promises by [the agent] tending to induce a false confession"); Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923) (trick which has no tendency to produce any confession except a true one does not invalidate statement).

28. 110 U.S. 574 (1884).
29. *Id.* at 583.
30. *Id.*
31. *Id.* at 585.
32. *See* Sparf v. United States, 156 U.S. 51, 55-56 (1895).
33. Pierce v. United States, 160 U.S. 355, 357 (1896).
34. *See* Wilson v. United States, 162 U.S. 613, 623-24 (1896).

after *Bram v. United States*[35] was decided in 1897. Bram, the first mate of a ship, was convicted of the murder of the ship's captain, the murder occurring while the ship was at sea. After suspicion focused on Bram, he was confined by the crew and delivered to the chief of police at Halifax, Nova Scotia. Before being returned to the United States, Bram was interrogated by a detective from the Nova Scotia police force. This conversation with the detective—although only indirectly incriminating, if at all, since it consisted of a denial of guilt—was admitted at Bram's trial. On appeal, this admission was asserted as error.

In contrast to the earlier discussions of admissibility of self-incriminating statements in terms of evidence law, the Court began its analysis in *Bram* with the broad assertion that

> [i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."[36]

The fifth amendment, in turn, was described as a crystallization of the law of confessions existing at the time the Constitution was adopted.[37] The Court stated that the "principle by which the admissibility of the confession of an accused person is to be determined is expressed in the textbooks"[38] and cited with approval a passage from Russell's *Treatise on Crimes and Misdemeanors* that stated the rule:

> "[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[39]

Another passage cited by the Court, taken from Hawkins' *Treatise of the Pleas of the Crown*, clearly regarded the unreliability of these confessions induced by promises or threats to be the basis for their inadmissibility.[40]

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35. 168 U.S. 532 (1897).
36. *Id.* at 542.
37. *Id.* at 543.
38. *Id.* at 542.
39. *Id.* at 542-43, *quoting* 3 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th Eng. ed. 1896).
40. *Id.* at 547, *quoting* 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 3, n.2 (6th ed. 1787).

The Court's application of this constitutional rule is puzzling, however. Apparently, the Court found in the record adequate proof of both improper threats and an impermissible promise and considered that either the threats or the promise would alone be sufficient to render the statement inadmissible. The detective testified that before or during the interrogation he had stripped Bram and searched him. In addition, he said to Bram:

> "Bram, we are trying to unravel this horrible mystery . . . . Your position is rather an awkward one. I have had Brown [another crew member] in this office and he made a statement that he saw you do the murder."[41]

Noting decisions making silence in the face of accusations admissible evidence, the Court held:

> the result [of the detective's statement] was to produce upon [Bram's] mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself.[42]

Therefore the statement was inadmissible because it was a "threat." But the Court also relied upon an alternative theory. The detective testified that he had stated to Bram:

> "I am satisfied that you killed the captain . . . . But . . . some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders."[43]

The Court acknowledged that this statement could be interpreted as suggesting that a confession naming accomplices would lift the "moral weight resulting from concealment"[44] from Bram's shoulders. So interpreted, there would be no improper inducement because it would be within the exception that a mere admonition to tell the truth, emphasizing the moral or spiritual benefits flowing from such action, did not render a statement inadmissible. But, the Court concluded, under all the circumstances the detective's remarks "imported a suggestion of some benefit as to the crime and its punishment"[45] that might be derived

41. *Id.* at 539.
42. *Id.* at 562.
43. *Id.* at 564.
44. *Id.*
45. *Id.* at 564-65.

from Bram's making a statement; therefore, the remarks constituted an impermissible inducement.

Bram appeared to adopt as a matter of constitutional law, then, a rule that an incriminating statement is involuntary and its admission violates the fifth amendment's prohibition against compelled self-incrimination if the defendant made the statement in response to a representation by a person in authority that the defendant would thereby receive some sort of benefit in the disposition of his case. The Court expressly reserved the question of whether an inducement would have a similar effect if offered by a person not in a position of authority[46] and apparently left open the effect of a mere "moral inducement."[47] Moreover, on the facts presented, the finding of an improper inducement suggests that the Court believed the Constitution required the same broad definition of "inducement" that the mid and late nineteenth century English courts had applied.

Although the language used in the opinion implies that the decision was based on constitutional grounds, the constitutional significance of *Bram* is uncertain. The Court in several subsequent cases involving challenges to admission of confessions in federal criminal trials did not even refer to a possible constitutional basis for the confession rule that was applied.[48] In *Stein v. New York*,[49] the Court stated that *Bram* represented only an exercise of the Court's supervisory power and was "not a rock upon which to build constitutional doctrine."[50] Although this observation was made in the context of a discussion about whether the erroneous admission of a confession always required reversal rather than in the context of an examination of the standard for determining admissibility, the Court was correct in its conclusion that it could properly regard its constitutional analysis of the admissibility of confessions in cases appealed from federal trials as "mere dicta" since there already existed a federal evidentiary requirement of voluntariness.

Supreme Court review of state decisions involving the admission of

46. *Id.* at 559.

47. *See id.* at 564.

48. *See, e.g.*, Ziang Sung Wan v. United States, 266 U.S. 1, 14-17 (1924); Perovich v. United States, 205 U.S. 86, 91 (1907). *But cf.* Powers v. United States, 223 U.S. 303, 313-14 (1912) (rejecting fifth amendment argument that defendant's voluntary testimony at preliminary hearing before United States Commissioner was inadmissible because defendant not advised that it might be used against him).

49. 346 U.S. 156 (1953).

50. *Id.* at 191, n.35.

self-incriminating statements did not begin until 1936 when the Court held that although the privilege against compelled self-incrimination did not apply to the states, the due process clause nevertheless required that state criminal convictions must not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[51] This requirement was violated if compulsion by torture was used to extort a confession that was the sole basis upon which a conviction was obtained.[52] Although the later decisions clearly regarded the mere use in evidence of involuntary confessions as abhorrent to the constitutional mandate,[53] the early cases seemed to find such confessions improperly admitted only when the conviction rested upon them.[54] The significance of this change is unclear. By regarding the conviction as resting entirely or largely upon the defective confession, however, the Court could more easily accommodate confession cases within the then-prevailing constitutional doctrine, which had not yet become enamoured of the exclusionary rule as a device for enforcing constitutional standards of conduct. It seems likely that the later change reflected a belief that using, as well as obtaining, the confession violated important values. This belief was not, however, articulated.[55] In any event, the decisions soon embraced a constitutional rule that the use of an "involuntary" confession in a state criminal trial would—perhaps in all cases—invalidate the resulting conviction.[56] It has been pri-

51. Brown v. Mississippi, 297 U.S. 278, 285 (1936).

52. *See id.* at 285-87.

53. *See, e.g.*, Brooks v. Florida, 389 U.S. 413, 415 (1967); Watts v. Indiana, 338 U.S. 49, 54-55 (1949); Aschraft v. Tennessee, 322 U.S. 143, 155 (1944).

54. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 240 (1940) ("To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol"); Brown v. Mississippi, 297 U.S. 278, 286 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction . . . was a clear violation of due process").

55. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596, 605 (1944):

> A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt.

This statement again begs the question. Why will a civilized society not infer guilt from a confession induced by torture? Because the inference is likely to be inaccurate? Because drawing such inferences will encourage law enforcement investigators to engage in torture in the future? Or because the drawing of the inference will itself again violate the defendant's dignity, a dignity that has already suffered at the hands of the law?

56. *See generally* Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962).

marily in the context of these decisions involving state convictions that the voluntariness rule has evolved.[57]

This development of the voluntariness rule has had two interrelated facets. First, there has been an expansion of the kinds of situations covered by the doctrine. Thus the condemnation of physical brutality in the initial decisions[58] was followed by an invalidation of statements obtained by psychological coercion[59] and ultimately by a prohibition against use of any confession obtained while the defendant's "will [was] overborne."[60] Second, there has been a corresponding expansion of the rationale for the exclusion of statements under the rule. Initially, the expressed rationale for exclusion was the potential unreliability of the statements.[61] The Court, however, soon acknowledged that factors other than potential unreliability were at issue and justified the expanded application of the rule upon the basis of those factors.[62] But the failure to define precisely these "other" factors has been a major cause of our legal doctrine's continuing inadequacy in dealing effectively with ignorance, mistake, and reliance.[63]

Of course, the existence of this expanding constitutional rule did not foreclose the application of evidentiary requirements of voluntariness, which continued to be available as limitations upon the admissibility of incriminating statements. The interrelationship between local evidentiary requirements and the constitutional rule, however, was never made explicit. Indeed, state courts often regarded the two as identical. In *Lisenba v. California*,[64] the Supreme Court recognized that the existence of the constitutional requirement did not foreclose the states from adopting, as a matter of local evidence law, varying tests for deter-

57. It might be expected that the *Bram* test, arising directly from the fifth amendment privilege against compelled self-incrimination, would be more stringent than the *Brown* standard applicable to the states, since the latter lacked the fifth amendment foundation and rested only upon the fourteenth amendment's due process standard. But by 1966, the Court was able to state: "The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court." Miranda v. Arizona, 384 U.S. 436, 464 n.33 (1966).

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

59. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944).

60. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

61. *See* text accompanying note 40 *supra.*

62. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary").

63. *See* text following note 93 *infra.*

64. 314 U.S. 219 (1941).

mining the admissibility of confessions. Moreover, the Court suggested that the two doctrines were based upon different policy considerations that might lead to differences in their substances:

> The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession.[65]

Nevertheless, the decisions of the Supreme Court, the state courts, and the lower federal courts failed to distinguish how—if at all—the criteria differed in substance.

Similarly, the Court did not address the meaning of "fundamental unfairness" as this phrase was used in the rationale for the due process standard. It may have meant only that defendants had a right to have their convictions rest upon evidence which, as a category, was reliable. Involuntary confessions, then, would be inadmissible because as a group they tended, more than other confessions, to be unreliable. Or, the right to "fairness" may have meant the right to be free from coercive police conduct that, as a general matter, created an unacceptable risk of producing untrue confessions. To discourage such conduct, all involuntary confessions would be excluded, whether particular confessions could be proved accurate or not.[66] In the alternative, the language may have meant that some value other than accuracy in trial outcome underlay the constitutional standard. The decisions were of little help, however, in determining what this value was—if in fact such an independent consideration was operative at all. All of these interpretations of the "fairness" language are consistent with the Court's holding in *Rogers v. Richmond*[67] that the admissibility of a particular confession had to be determined by a standard of "voluntariness"

65. *Id.* at 236.

66. *See* Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 753-59 (1963). Professor Kamisar noted this distinction and concluded that the Court was applying both concepts. Some confessions, he asserted, have been held inadmissible because, on the facts, there was substantial doubt about their reliability; others were held inadmissible because although there was little doubt about the reliability of the confession at issue, the tactics used in obtaining it created a significant risk that unreliable statements would be obtained in other cases if such tactics were repeated.

67. 365 U.S. 534 (1961). *See also* Haynes v. Washington, 373 U.S. 503, 518 (1963) (error to tell jurors they might consider involuntary confession if it was corroborated).

rather than a standard taking into account the probable truth or falsity of the statement.[68]

This ambiguity of rationale was easily hidden in the kind of analysis the voluntariness test came to require. As Justice Frankfurter summarized in *Culombe v. Connecticut*:[69]

> No single litmus-paper test for constitutionally impermissible interrogation has been evolved . . . .
>
> Each of [the] factors, in company with all of the surrounding circumstances . . . is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

But making "everything" relevant—and nothing necessarily determinative—also eliminated the necessity for specific discussion of the legal effect of single factors. Relieved from the necessity of addressing the significance of each factor, the Court tended to explain its results in the broad, often meaningless, "overbearing of the will" or the "totality of the circumstances" language. This, of course, greatly reduced the pressure to explain specifically why particular characteristics of a case were significant and thus facilitated avoidance of what would undoubtedly have been difficult analyses.

The state courts continued to struggle with the question of what representations invalidated a statement and continued to reject attacks based on a defendant's ignorance or mistake about factual material, even if the mistake was due to intentional deception by law enforcement agents.[70] Some courts purported to apply a requirement that,

68. Commentators have disagreed on the extent to which the Court actually committed itself to the proposition that a confession might be involuntary for reasons unrelated to either the reliability of the specific confession at issue or the potential reliability of other confessions obtained under similar circumstances. *Compare* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 417 (1954) (Court had, by 1954, already gone beyond protecting interests in accuracy), *with* Kamisar, *supra* note 66, at 754-55. Professor Kamisar was convinced that the Court would hold a confession inadmissible solely on the basis of sufficiently offensive police misconduct even if there was no likelihood of false confession under the circumstances. He believed, however, that the Court's cases could all be read as resting upon the danger perceived by the Court that the particular police conduct created an unacceptable risk of stimulating false confessions, even if there was little or no doubt about the accuracy of the confessions in the specific cases before the Court.

69. 367 U.S. 568, 601-02 (1961) (footnote omitted).

70. *See* cases cited note 122 *infra*.

in order for the statement to be inadmissible, the promise, representation, or deception had to be likely to induce an inaccurate confession.[71] But, in general, the state courts treated the matter as one of state evidence law rather than one of federal constitutional law. When cases were cited, they were almost inevitably state cases; little or no reference was made to United States Supreme Court decisions.[72]

C. *The "Objective" Standards*: McNabb-Mallory *and* Miranda

As the Court began to deal with more subtle aspects of official interrogation and confessions, and as it became more concerned with protecting the suspect's interests, a definite dissatisfaction with the voluntariness test developed. This dissatisfaction seemed to have two facets: the first, one of administration, and the second, one of substance. Because the voluntariness test required courts to reach a conclusion based upon an evaluation of the totality of the circumstances surrounding the confession, it provided a poor vehicle for developing specific legal rules for police interrogators to follow. As long as police conduct was grossly inappropriate, there was little problem; the early cases involving beatings and clearly indicated that such physical mistreatment was improper. But when the Court began considering the impact of less blatant conduct upon defendants, the decisions provided little guidance on how close interrogators could come to "the line" without crossing it.

This dearth of clear principles became more apparent in *Culombe v. Connecticut* when Justice Frankfurter, writing for the Court, made an obvious attempt to consolidate and clarify the law of voluntariness.[73] Chief Justice Warren, concurring, pointed out the ineffectiveness of the effort:

> The opinion which announces the judgment of the Court in the instant case . . . is in the nature of an advisory opinion, for it attempts to resolve with finality many difficult problems which are at best only tangentially involved here. The opinion was unquestionably written with the intention of clarifying these problems and of establishing a set of principles which could be easily applied in any coerced-confession situation. However, it is doubtful that such will be the result, for while three members of the Court agree to the general principles enunciated by the

71. *See* cases cited notes 119 (promises and representations) & 124 (deception) *infra.*

72. *See* cases cited note 117 *infra.*

73. *See* text accompanying note 69 *supra.*

> opinion, they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion. This being true, it cannot be assumed that the lower courts and law enforcement agencies will receive better guidance from the treatise for which this case seems to have provided a vehicle.[74]

In addition to its dissatisfaction with the lack of guidance provided by the voluntariness principles, the Court was also displeased with the manner in which the doctrine was being judicially administered. The need for the Court continually to accept a substantial number of confession cases in order to reverse state and lower federal court decisions imposed a heavy burden. Undoubtedly, this state of affairs was frustrating for the Court, especially since it indicated that the lower courts were not following the Court's lead in applying the test with vigor.[75] Yet the nature of the doctrine was such that the Court could do little to change the situation by exercising its appellate supervision beyond deciding cases in ways re-indicating the Court's view that the rule should be applied with a different "attitude." Thus the rule imposed a significant administrative burden on the Court, but provided an inadequate return for the expenditure of time and effort required to discharge this burden.

With respect to the second facet of the Court's dissatisfaction—that of substance—the Court apparently perceived a change in the underlying problem; its concern was no longer focused upon blatant police misconduct, such as physical violence. As the discussion in *Miranda v. Arizona*[76] made clear, the Court was concerned with more subtle influences, such as what it perceived as the inherently coercive nature of any custodial interrogation. Much of the Court's agitation related to the manipulation of the subject's emotional condition—probably what the Court meant by "psychological coercion," a phrase often used in its decisions. These were not the only dangers, however, that the Court recognized as deserving its solicitude. Noting that law enforcement manuals suggested that subjects be offered "legal excuses" for the crime, the Court in *Miranda* seemed apprehensive that the decision

74. 367 U.S. at 636.

75. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519 (1968) (confession held involuntary although counsel for petitioner had not raised issue, suggesting Court's willingness to apply rule in cases where counsel involved believed point not worth argument). *See generally* Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 95-104 (1966).

76. 384 U.S. 436 (1966).

to confess would be made under a mistaken view of the law governing the facts admitted.[77] Deceptive police practices, such as having fictitious witnesses identify the suspect, were noted with obvious displeasure,[78] although significantly, the Court failed to identify the reason for disapproval. Nevertheless, a thorough reading of the *Miranda* opinion leaves little doubt that the Court was offended at the prospect of a suspect's making the decision to confess on the basis of an inaccurate awareness of the facts relating to his case (including the availability of witnesses who could identify him as the perpetrator) and of the law determining the criminal significance of these facts. These problems would exist despite any awareness the suspect might have of his abstract legal right to be free from illegal coercion designed to compel him to make an incriminating statement.

The voluntariness test was an inadequate vehicle for dealing with these dangers because the decisions rested on the combined effect of several or more of them and therefore failed to address the legal effect of each danger individually. Not only was the voluntariness test apparently ineffective in meeting those problems at which it had traditionally been aimed, but in addition, it appeared even less able to deal with the major concerns that had subsequently developed in the confession area.

With respect to federal law enforcement, the Court's response came in 1943 in *McNabb v. United States*.[79] Exercising its supervisory powers, the Court held that a statement should be excluded if it was obtained during an "unnecessary delay" in presenting an arrested defendant before a magistrate. In *Mallory v. United States*,[80] the Court confirmed that this "unnecessary delay" included delay for purposes of conducting interrogation. These decisions reflected a basic shift in approach to the problem of custodial interrogation. Abandoning its exclusive reliance upon case-by-case analysis to determine the voluntariness of statements made during custodial interrogation, the Court substituted a blanket rule, which it viewed as greatly reducing the opportunity for custodial interrogation. Following this shift in approach to federal law enforcement—whether because this *McNabb-Mallory* doctrine was effective in practice or whether for other reasons—the volun-

77. *See id.* at 451, 455.
78. *Id.* at 453.
79. 318 U.S. 332 (1943).
80. 354 U.S. 449 (1957).

tariness test in Supreme Court case law came to be used entirely as a vehicle for reviewing state litigation.

Finally, in 1966,[81] with regard to state law enforcement activity, the Court took a step analogous to that taken in federal practice. The decision, *Miranda v. Arizona*, undoubtedly reflected both the Court's dissatisfaction with the voluntariness test as a framework for reviewing state use of confessions and the Court's desire to substitute a more effective and less burdensome approach to protecting those interests endangered by custodial interrogation. In *Miranda*, the Court established that defendants subjected to custodial interrogation had a right to have a lawyer present during such interrogation and a right to be informed, before any interrogation, of both this right to have a lawyer present and the right to remain silent.[82] This rule, like the *McNabb-Mallory* rule, was considered to be objective and easy to apply and to reduce greatly the opportunities for inappropriate interrogation.

It is not clear whether the Court contemplated that *McNabb-Mallory* and *Miranda* would completely end the necessity for applying the voluntariness rule to particular fact situations;[83] obviously, they have

81. In 1964 in Escobedo v. Illinois, 378 U.S. 478, the Court had found a constitutional deficiency in the use of a confession obtained after the subject had been denied consultation with his attorney despite his specific requests to do so and the attorney's vigorous attempts to gain access to the subject during the interrogation. Uncertainty about the significance of this decision was minimized by the more definitive decision in *Miranda*.

82. 384 U.S. at 444-45. Doctrinally, the Court also recognized that despite the absence of explicit legal authority stating that the police could not compel self-incriminatory answers during a period of custodial interrogation, the fifth amendment privilege against compelled self-incrimination was infringed by coercive police interrogation tactics. *Id.* at 458-66. But it is unlikely that this doctrinal development had any impact upon the Court's holding; consider in this regard the insignificance of the doctrinal basis for the voluntariness rules discussed in note 57 *supra*.

83. The confusion is best illustrated by those cases holding that a waiver of the *Miranda* rights also constitutes a waiver of the right to prompt presentation before a magistrate. *See, e.g.*, United States v. Poole, 495 F.2d 115 (D.C. Cir. 1974); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970). *Contra*, United States v. Keeble, 459 F.2d 757 (8th Cir. 1972), *rev'd on other grounds*, 412 U.S. 205 (1973). *See also* United States v. Mandley, 502 F.2d 1103 (9th Cir. 1974); United States v. Lopez, 450 F.2d 169 (9th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972) (per curiam). Waiver, as it is used in these decisions, cannot be defined as a knowing relinquishment of a right, since there is nothing in the *Miranda* warnings or the required waiver that tends in any way to assure that the subject is aware of his right to prompt presentation. If, however, the *Miranda* rights are viewed as a means of dealing with the same problem as prompt presentation, it is not unreasonable to conclude that compliance with *Miranda* makes compliance with prompt presentation requirements unnecessary. This argument, of course, ignores the other functions served by the

not. Under *Miranda*, both the right to the presence of counsel and the right to remain silent are "waivable," although the waiver must be "voluntary."[84] Experience has shown that in the vast majority of cases in which self-incriminating statements have been made during custodial interrogation, no lawyer has been present;[85] therefore, a potential question can exist as to the validity of both the waiver of the right to counsel and the waiver of the right to remain silent.

Moreover, several other developments in confession law have also contributed to the increasing importance of the voluntariness determination. In *Harris v. New York*,[86] the Court held that a statement obtained without compliance with *Miranda* could nevertheless be used for impeachment purposes if the defendant took the stand at trial. The Court noted, however, that no question concerning the "trustworthiness" of the statement was raised,[87] thus suggesting that if a statement were inadmissible into evidence for a reason based on unreliability, it would be inadmissible for impeachment as well. Involuntariness, of course, has traditionally been regarded as suggesting unreliability. Thus in any case in which there has arguably been noncompliance with *Miranda* and the defendant has taken the stand at trial, voluntari-

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requirement of prompt presentation, including pretrial release, formal notice of the charges, *Miranda* warnings being given by a person who may not be intimately integrated into the law enforcement agency having custody of the subject, and perhaps most important, concrete demonstration that the police recognize legal limitations upon their right or ability to keep the subject in custody. Whether these functions are sufficiently important to justify punishing noncompliance with the prompt presentation requirement by applying the exclusionary rule governing self-incriminating statements, or whether the exclusionary rule is even an appropriate device to enforce such compliance, may be questioned. But the demonstrable fact that waiver doctrine can be distorted by courts to avoid facing these issues (and the underlying problem of the relationship between *Miranda* and the right to prompt presentation) suggests that the waiver doctrine is insufficiently defined in existing law.

The lower courts have also been somewhat confused about the relationship between the old voluntariness test and *Miranda*. For an example of such a case, see Commonwealth v. Jones, 457 Pa. 423, 322 A.2d 119 (1974), in which the court analyzed a challenge based on coercion and deception as raising only an involuntariness claim. Ignoring the requirement that a waiver be voluntary, the court commented, "There is no claim that the confession is inadmissible under . . . Miranda v. Arizona . . . ." *Id.* at — n.7, 322 A.2d at 124 n.7. Compare this approach with the court's analysis of deception as raising an issue regarding the "knowing" nature of a waiver of Miranda rights. *Id.* at —, 322 A.2d at 126-27.

84. 384 U.S. at 444, 475-76.

85. *See generally* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

86. 401 U.S. 222 (1971).

87. *Id.* at 224.

ness questions are likely to be raised if statements by the defendant are admitted for impeachment.[88] In addition, federal legislation enacted in 1968[89]—and copied by some state legislatures[90]—purports to reinstate voluntariness as the sole test for the admissibility of a self-incriminating statement. This legislation is, of course, of doubtful constitutionality, but unless and until it is definitively struck down, it makes voluntariness in the traditional sense a potential issue in any confession case.

In summary, then, American courts early adopted the common law voluntariness rule as an evidentiary requirement for the admissibility of confessions. To some extent, the constitutional requirement of due process incorporated the substance of this rule, but the case law is unclear in showing to what extent the nuances of common law rule—especially those of concern here—were raised to constitutional level. The relationship of the fifth amendment voluntariness requirement, applied to the federal government, and the general due process standard, applied to the states, further complicated the doctrinal matter. After lengthy experience with the voluntariness standard—or standards—as the major constitutional doctrine for prohibiting perceived impropriety in interrogation, the Supreme Court found both substantive and procedural deficiencies in it. The Court apparently intended largely to

88. This proposition has been recognized by a number of courts. *See, e.g.*, People v. Nudd, 12 Cal. 3d 204, 209, 524 P.2d 844, 847, 115 Cal. Rptr. 372, 375 (1974) ("the determination of voluntariness is still necessary under *Harris* when the statement is offered for impeachment"); State v. Joseph, 10 Wash. App. 827, 520 P.2d 635 (1974) (hearing to determine voluntariness of statement still required after *Harris* before statement could be admitted for impeachment purposes); Upchurch v. State, 64 Wis. 2d 553, 219 N.W.2d 363 (1974) (remanding for determination of self-incriminating statement admitted for impeachment); *cf.* LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974) (if defendant makes substantial claim that the witness' statement offered to impeach witness was coerced, government must prove lack of coercion by preponderance of evidence). Much of the dispute has been over the procedure that must be followed in such cases. Specifically, courts are split on the necessity of conducting a preliminary inquiry into the voluntariness of statements offered for impeachment purposes. *Compare* State v. Retherford, 270 So. 2d 363 (Fla.), *cert. denied*, 412 U.S. 953 (1973) (no error in permitting use of statement for impeachment without first determining voluntariness) *and* State v. Brice, 17 N.C. App. 189, 193 S.E.2d 299 (1972), *cert. denied*, 283 N.C. 258, 195 S.E.2d 690 (1973) (lack of voluntariness inquiry before use of statements for impeachment did not make conviction defective), *with* Upchurch v. State, *supra* (defendant had right to statutory hearing on voluntariness of statement before it was admitted for impeachment) *and* State v. Joseph, *supra* (same).

89. Act of June 19, 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 210 (codified at 18 U.S.C. § 3501 (1970)).

90. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1599 (Supp. Pamphlet 1973).

replace the voluntariness standard with objective requirements that did not deal directly with interrogation techniques or the subjective response of a defendant to such actions but instead provided procedural protections which the Court was willing to rely upon to deal with the underlying problem. Because these protections can be readily waived, however, they have been only minimally implemented, and the requirement that the waiver be "voluntary" suggests that many cases of challenged waiver will require application of the very doctrine the recent decisions intended to retire.

This doctrine of voluntariness has been the traditional vehicle for consideration of ignorance, mistake, and expectation of benefit in the law of confessions. Because of the confused evolution of the doctrine from a matter of common law evidence law to several federal and constitutional rules, the extent to which contemporary confession law simply restates traditional common law notions is not clear—a problem addressed in the next section. But the history of confession law leaves little doubt that developing constitutional doctrine largely accepted the common law approach to these matters without carefully examining the competing considerations that bear on the issues and, of course, without attempting as effective an accommodation of those interests as possible.

III. The Relevance to "Voluntariness" of Ignorance, Mistake, and Reliance on Expectations

It is clear that under current law the doctrine of "voluntariness" is the major vehicle for determining the legal status of a self-incriminating statement, whether the specific issue posed is the adequacy of the waiver of the privilege against compelled self-incrimination or the adequacy of the waiver of the procedural incidents of that right, such as the presence of counsel during interrogation. To understand the role of ignorance, mistake, and reliance in current confession law, then, it is necessary to trace the significance given to these factors in the development of voluntariness, first as a standard for determining the constitutional admissibility of a statement, and second as a standard for judging the validity of a waiver of the *Miranda* rights.

A. *Pre-*Miranda *Voluntariness*

Bram v. United States[91] may be read as adopting a liberal interpretation of the inducement rule as a matter of constitutional law, but the

91. *See* text accompanying notes 35-47 *supra.*

significance of the decision is far from clear. Despite the language used by the Court, there has been substantial doubt expressed whether the decision must—or should, if flexibility exists—be regarded as a constitutional rule.[92] Further, it is unclear to what extent the decision resulted solely from the inducement involved, since the facts also evidenced the sort of pressure that might invalidate the statement under the "totality of the circumstances" approach.[93] Unfortunately, the Court has not since spoken to the significance of promises that a temporal benefit related to the anticipated prosecution will flow from the making of a self-incriminating statement; thus *Bram* remains the sole depository of the law on this problem.

Similarly, the case law subsequent to *Bram* is of relatively little help in regard to other single factors. This circumstance is largely the result of the necessity of determining the "voluntariness" of a statement on the "totality of the circumstances." Such an analysis makes it difficult to ascertain the legal significance of each of the factors involved, even if it is clear that the factors at issue were among the "circumstances" which were "totaled" to show "involuntariness." The early cases exhibit ambiguity even concerning the necessity that a confessing defendant be aware of his legal right to decline to make an incriminating statement. In *Wilson v. United States*,[94] decided in 1896, the Court held a statement admissible although no warning of the right to decline to make a statement had been given. The Court noted that the defendant had not testified that he was unaware of his right to remain silent, but did not comment on the legal effect such evidence would have had.[95] An identical analysis was applied in *Powers v. United States*,[96] decided in 1912, when the defendant's argument was unquestionably one of constitutional inadmissibility. The implication, of course, was that "voluntariness" as a constitutional standard requires awareness of the legal right to remain silent, but the defendant bears the burden of at least coming forward with evidence establishing ignorance of that right.[97] In more recent cases, the Court has emphasized characteristics of confessing defendants that suggest a high likelihood

92. In State v. Doyle, 147 La. 973, 996, 84 So. 315, 333 (1920), *Bram* was described as "highly exceptional" and an "unsafe guide" for future decision.

93. *See* text accompanying notes 35, 41-45 *supra*.

94. 162 U.S. 613 (1896).

95. *Id.* at 624.

96. 223 U.S. 303, 313-14 (1912).

97. This was not, however, the interpretation given the pre-*Miranda* voluntariness cases in a recent analysis by the Court. *See* text accompanying note 132 *infra*.

that the persons were, or were not, aware of the legal right to remain silent or of the factors or law necessary to decide whether to exercise that right.[98] But the cases do not expressly hold that if the facts established unawareness of these matters, exclusion of a confession would be required for that reason alone under the constitutional test.

This approach is best illustrated by *Gallegos v. Colorado*,[99] in which a fourteen-year-old boy had been convicted of murder, largely on the basis of a formal confession signed after five days of detention by juvenile authorities. The facts, insofar as they suggested traditional coercion, were unimpressive. The boy had been asked, along with his two brothers, to sit in a police car with officers and discuss the crime; he almost immediately made an oral confession and repeated it again the next day. Although he was not placed in the "regular" juvenile program during his detention, he ate and communicated with other youths. His mother was not permitted to see him when she came to the facility on one occasion, but the evidence indicated she would have been permitted to visit him during regular visiting hours had she tried. There was no sustained questioning, and before taking the written confession, the officer advised the boy of his right to remain silent and to be represented by counsel; but the boy specifically indicated that he did not want an attorney.

In a four-to-three decision, however, the Court held the confession involuntary on the "totality of the circumstances," stressing the boy's youth, the failure of authorities to provide the parents with immediate access to the boy, the failure to take the boy immediately before the juvenile court, and the lack of advice from a lawyer or friend.[100] The discussion strongly suggests that the Court was influenced by what it perceived as the high likelihood that the boy did not have sufficient information and capacity to make a well-informed and soundly reasoned tactical choice whether or not to confess:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible

98. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (defendant had no prior experience with criminal law); Culombe v. Connecticut, 367 U.S. 568, 620-21, 625 (1961) (defendant was a mental defective of moron class); Crooker v. California, 357 U.S. 433, 440 (1958) (fact that defendant had attended the first year of law school suggested his confession was voluntary); Harris v. South Carolina, 338 U.S. 68, 70-71 (1949) (defendant was illiterate).

99. 370 U.S. 49 (1962).

100. *Id.* at 55.

> only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.
>
> . . . He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.[101]

This discussion leaves little doubt that what the Court perceived to be of great importance was the boy's lack of understanding of the factual, legal, and tactical implications of confessing versus declining to confess.[102] But what explains the Court's unwillingness to promulgate a specific rule that the absence of such understanding would always render a statement "involuntary?" It seems most likely that the Court was deterred by what it anticipated would be the frequent—and time-consuming—litigation, the difficult burden that would be placed on prosecutors who would regard proof of such understanding to be part of the essential foundation for admission of a confession, and the ultimate inability of the courts, in many cases, to arrive at a reasonably reliable reconstruction of the subject's actual state of mind at the time of the confession. On the facts of *Gallegos*, however, such a subjective, difficult, and costly inquiry could be avoided because there was an objective characteristic of the boy—his youth—that could be relied upon to establish a sufficiently high probability of lack of understanding to justify a determination of involuntariness. Conceptually, lack of knowledge has always been of vital, and perhaps essential, importance, but the flexibility of the voluntariness rule has been used to avoid significant inquiry into the matter except where there was objective evidence from which knowledge, or the lack of it, could be inferred.[103]

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101. *Id.* at 54.

102. *See* King, *Developing a Future Constitutional Standard for Confessions*, 8 WAYNE L. REV. 481 (1962). King saw the decision resting "almost solely upon the accused's lack of knowledge and appreciation of his constitutional rights" and argued that the same analysis could be applied to cases involving adults. "From both the viewpoint of logic and policy, the new standard should be extended to all cases involving lack of knowledge or appreciation of rights." *Id.* at 487-88. King, however, underestimated the Court's reluctance to require prosecutors routinely to delve into the depths of a defendant's awareness as a prerequisite for obtaining admission of a confession.

103. In Blackburn v. Alabama, 361 U.S. 199 (1960), the Court held involuntary a confession given by a defendant who was clearly mentally ill. Although acknowledging

In regard to inducements labeled as "collateral" under the evidentiary rule because they consisted of benefits unrelated directly to the outcome of the criminal prosecution itself, the Court's approach has been inconsistent. In *Lynumn v. Illinois*,[104] the determination of involuntariness was influenced by evidence that the defendant, a woman, had been told that if she did not cooperate, her children would be taken from her. But in *Stein v. New York*,[105] decided ten years earlier, the court held a confession admissible, relying upon the fact of the defendant's having confessed after obtaining promises that his father would be released from custody and his brother would not be considered to have violated parole:

> [T]he spectacle of [the subject] naming his own terms for [his] confession, deciding for himself with whom he would negotiate, getting what he wanted as a consideration for telling what he knew, reduces to absurdity his present claim that he was coerced into confession.[106]

Where affirmative police deception has affected the defendant's conscious perspective of his situation, the Court has also floundered. Several cases suggested that such deception is legally offensive, but left considerable doubt about the effect of mere deception on voluntariness. In *Leyra v. Denno*,[107] police represented that they were providing defendant with a physician to treat a painful sinus problem. In fact, the physician was a psychiatrist skilled in hypnosis—and interrogation—who questioned defendant for one and one-half hours. Although the deception involving the doctor's purpose and professional specialty seems to have been a factor in the determination of involuntariness, the sustained nature of the interrogation, the promises of benefits, and the skills of the interrogator also entered into the decision and may alone be regarded as sufficient to support the finding. In *Spano v. New York*,[108] police caused an officer who was a long-time friend of the defendant to urge confession and falsely to represent that the defendant's refusal to confess placed the officer's job in jeopardy and

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the possibility that the defendant had confessed during a lucid interval, *id.* at 208, the Court apparently regarded the evidence of severe mental illness persuasive enough to justify rejecting the possibility. Again, however, the Court was not dealing with the awareness of a "normal" person, but rather the state of mind of a subject who was agreed to have been distinctly "abnormal."

104. 372 U.S. 528 (1963).
105. 346 U.S. 156 (1953).
106. *Id.* at 186.
107. 347 U.S. 556 (1954).
108. 360 U.S. 315 (1959).

would cause hardship to the officer's pregnant wife and children. Also contributing to "the totality of the situation,"[109] however, were eight hours of sustained interrogation by a number of skillful persons, a subject who was young, foreign-born, and without a prior police record, and police refusal to permit the defendant to consult with an attorney he had already retained.

Given these indications of disapproval of deception, the decision in *Frazier v. Cupp*[110] is surprising. Frazier had been arrested for a murder and had been informed of his right to an attorney and that a statement could be used against him. As the questioning began, the interrogating officer falsely represented that the person with whom Frazier had told police he had been on the night of the killing had been brought in and had confessed. When the officer sympathetically suggested that perhaps the victim had provoked the fight by making homosexual advances, Frazier began to confess, but indicated a desire to speak with an attorney before saying more; he was persuaded to continue, however. Because of the timing of the incident, *Escobedo v. Illinois*[111] applied to the case, but *Miranda v. Arizona*[112] did not.[113] *Escobedo* was held inapplicable because Frazier's request to consult an attorney was not clear and unambiguous. Turning to voluntariness, the Court stressed that partial warnings of constitutional rights were given the defendant, the questioning was short (about one hour), and he was "a mature individual of normal intelligence."[114] Then, in one terse sentence and without citing authority, the Court stated: "The fact that the police misrepresented the statements that [Frazier's companion] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[115] There was no discussion

109. *Id.* at 323.

110. 394 U.S. 731 (1969). Superficially, Rogers v. Richmond, 365 U.S. 534 (1961), might be regarded as a deception case. During Rogers' interrogation, a police officer falsely represented that Rogers' wife would also be brought in for questioning. The fatal defect which the Court found in the admission of the confession was the trial judge's reasoning that the "pretense" of bringing the wife to the station had no tendency to produce a false confession. *Id.* at 541. But properly read, *Rogers* is not a deception case. The substance of the police action was to threaten coercion; *see* note 6 *supra*. The officer's lack of intention to carry out the threat was insignificant compared to his making it.

111. 378 U.S. 478 (1964), *discussed in* note 81 *supra*.

112. *See* text accompanying notes 81 & 82 *supra*.

113. The nonretroactivity of *Miranda* and *Escobedo* was determined in Johnson v. New Jersey, 384 U.S. 719 (1966).

114. 394 U.S. at 739.

115. *Id.*

of what more would have been needed to render the statement inadmissible or why the facts before the court were insufficient. No reasons for giving deception, ignorance, or mistake any—or no—legal effect in this context were offered.

As observed above, the state and lower federal courts generally accepted the common law rule—including the position that a promise of benefit would, as well as the position that a deception would not, render a statement inadmissible—although there was a discernible tendency to apply the exclusionary branch of the rule with less enthusiasm than did the English courts.[116] Despite the development of the federal due process doctrine, however, the state courts tended to apply voluntariness as if it were a matter of state law. In discussing those aspects of voluntariness considered herein, state courts tended overwhelmingly to cite prior state decisions rather than decisions of the Supreme Court.[117]

The state courts' approaches to the problem of promises of benefits were inconsistent. Some continued to apply a requirement that the promise be one tending to stimulate an unreliable confession, even after *Rogers v. Richmond*[118] appeared to render this an inappropriate consideration in the determination of constitutional voluntariness; such courts often found promises inadequate to invalidate the statements at issue.[119] Others—obviously hostile to the rule—simply held that com-

116. *See* text accompanying notes 23 *supra.*

117. *See, e.g.*, State v. Brauner, 239 La. 651, 658-59, 119 So. 2d 497, 499-500 (1960); State v. Woodruff, 259 N.C. 333, 337, 130 S.E.2d 641, 644 (1963). In Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962), the court cited United States Supreme Court decisions in regard to other considerations arguably bearing on voluntariness, but made no such references in rejecting defendant's argument that deception invalidated his statement. *But cf.* State v. Ely, 237 Ore. 329, 332, 390 P.2d 348, 349 (1964) ("our own cases, as well as those decided in the federal courts" require exclusion of involuntary confessions).

118. *See* text accompanying note 67 *supra.*

119. *See, e.g.*, Frazier v. State, 107 So. 2d 16, 21, 25 (Fla. 1958) (statement by deputy that if defendant confessed " 'it would be easier on you,' or 'the easiest way would be to tell it' " did not invalidate statement because "[t]here is no clear showing that the inducement . . . was of a nature calculated, under the circumstances, to induce a confession irrespective of its truth or falsity"); Robinson v. State, 247 Miss. 609, 612, 613, 157 So. 2d 49, 50-51 (1963) (telling defendant that the police "had the deadwood," on him, that his companions had confessed, and " '*the thing to do is to square yourself, not only with* [the police] *but with the Man Upstairs, and if you don't do that, you are not trying to help yourself*' " did not meet test) (emphasis original). In State v. Mullin, 249 Iowa 10, 85 N.W.2d 598 (1957), the court held inadmissible the statement of defendant, charged with entering the home of the victim, assaulting her, and taking money. An officer told defendant, " 'More mercy is going to be granted to you by the

munications to suspects did not constitute "direct" "promises" and therefore found no need to limit otherwise the scope of the rule's application.[120] But still other decisions applied the rule with relative vigor and excluded statements made after communications that other courts either would not have labeled as "promises" or "representations of benefits" or, at most, would have labeled as promises or misrepresentations "not likely to induce an untrue statement."[121]

In regard to deception by law enforcement officers, most lower courts continued to hold that it did not render a statement inadmis-

authorities if you tell the truth.'" *Id.* at 13, 85 N.W.2d at 600. Exclusion was required because

> it is perfectly clear that the language was sufficient to justify the accused in a belief that if he confessed he would be given more lenient treatment, special consideration by the prosecuting authorities and the court, than he would if he denied his guilt and was found guilty in the eventual trial.

Id. at 18, 85 N.W.2d at 602-03. But there was no discussion of why this language would induce an inaccurate statement, the criterion specifically adopted by the court. In Fisher v. State, 379 S.W.2d 900 (Tex. Crim. App. 1964), the defendant's confession was also held inadmissible, but here the court carefully explained its reasoning. The defendant was suspected of stealing five tires from the service station at which he worked, and the owner had told defendant that if he admitted the theft, the owner would help pay for the tires if they had been sold and would not call the police, press charges, or fire the defendant. (The owner was also a minister.) The Court explained:

> In concluding that . . . promises made . . . were likely to cause appellant to speak untruthfully, we point out that appellant had at least two prior convictions on his record and would, it seems, be inclined to admit a crime he had not committed which would not be prosecuted, rather than risk the loss of his freedom for life if he were prosecuted. Also, in this regard, appellant's job was also in jeopardy had he not admitted the theft, whereas he had reason to believe there was no danger in admitting it.

379 S.W.2d at 902-03.

120. *See, e.g.*, Hargett v. State, 235 Ark. 189, 190-91, 357 S.W.2d 533, 534 (1962) (officer's statement to defendant that "'I would help him all I could'" was not made conditional upon giving of statement and, although "[t]he issue is not free from difficulty," would not invalidate statement); Milton v. Cochran, 147 So. 2d 137 (Fla. 1962), *cert. denied*, 375 U.S. 869 (1963) (statement by police officer that only way to avoid death penalty would be by making a statement did not "alone" invalidate statement); People v. Hartgraves, 31 Ill. 2d 375, 381, 202 N.E.2d 33, 36 (1964), *cert. denied*, 380 U.S. 961 (1965) (officer's statement to defendant that "'[i]t would go easier for him in court if he made a statement'" was not a direct promise of leniency and did not invalidate statement).

121. *See, e.g.*, State v. Brauner, 239 La. 651, 119 So. 2d 497 (1960) (police proposal that if defendant showed them where marijuana was and identified source, they would see about making it easier on him, speak to the district attorney, and probably get him a suspended sentence rendered defendant's confessions involuntary and therefore inadmissible under code provision); State v. Woodruff, 259 N.C. 333, 130 S.E.2d 641 (1963) (sheriff's statement that if defendant was involved in crime, the sheriff "'would certainly try to help him'" rendered statement inadmissible); State v. Nelson, 63 N.M. 428, 321 P.2d 202 (1958), *cert. denied*, 361 U.S. 877 (1959) (statement by police chief that

sible,[122] although there were occasional expressions of condemnation, and such deception was sometimes regarded as a "factor" in the voluntariness inquiry.[123] Some courts—again despite *Rogers*—continued to require that the deception be one tending to induce an untrue statement and to find—often without explanation—that the deception at issue was not of that sort.[124]

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under state law a murderer who confessed could not be given death penalty was direct inducement and required exclusion); State v. Ely, 237 Ore. 329, 390 P.2d 348 (1964) (where father of molested child, school superintendent, and principal of school where defendant was employed all told defendant that if he made a statement they would not prosecute, statement was invalid; defendant had been warned of right not to make statement, told it could be used against him and in any case would end his teaching career in state, and informed that there was no guarantee that someone else would not prosecute him).

122. *See, e.g.*, State v. Hofer, 238 Iowa 820, 28 N.W.2d 475 (1947); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

123. *See, e.g.*, United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955) (confronting defendant with three disguised police officers who identified him as driver of vehicle involved in robbery would not alone vitiate confession, but it did aggravate lengthy, incommunicado interrogation and contributed to finding of involuntariness); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962) (practice of having nonwitness represent himself as witness to crime and purport to identify defendant as perpetrator emphatically disapproved, but held not to render statement inadmissible).

124. In People v. Castello, 194 Cal. 595, 602, 229 P. 855, 857 (1924), the California Supreme Court adopted the position that deception would not invalidate a confession " 'if the artifice or fraud employed was not calculated to procure an untrue statement.' " But no error was found in use of a statement that followed police officers' false representation that they could introduce the defendant to persons who saw him steal the property at issue; there was no discussion of why this failed to meet the criterion adopted. The test was applied in People v. Atchley, 53 Cal. 2d 160, 346 P.2d 764 (1959), *cert. dismissed*, 366 U.S. 207 (1961), where a statement was held admissible despite the police officers' having the defendant's insurance agent interrogate defendant to obtain a self-incriminating statement without revealing that the agent was acting on behalf of law enforcement officers. Leyra v. Denno, 347 U.S. 556 (1954), *discussed in* text accompanying note 107 *supra*, was distinguished on the unexplained basis that *Leyra* involved "mental coercion" while the case at bar did not. *See also* People v. Thompson, 133 Cal. App. 2d 4, 15, 284 P.2d 39, 46 (1955) (representation by police that they had more proof of defendant's participation in crime than they actually had did not render statement inadmissible because "there is no indication that the attitude of the officers was calculated to procure or did procure any untrue statement").

Other courts reached similar results, usually without helpful explanation. *See* State v. Hofer, 238 Iowa 820, 828, 28 N.W.2d 475, 479 (1947) (failure to inform defendant that victim of assault had died did not render statement inadmissible because even deception does not invalidate statement if "means employed are not calculated to procure an untrue statement"); Commonwealth v. Johnson, 372 Pa. 266, 273, 93 A.2d 691, 694, *cert. denied*, 345 U.S. 959 (1953) (failure to tell defendant, who had removed rails from railroad track, that his action had caused two deaths "manifestly was not designed or calculated to obtain an untrue confession" and thus did not render statement inadmis-

Two characteristics of the state and lower federal court cases stand out. One is the inconsistency of approach and result; the other is the failure to regard *Rogers* as precluding consideration during voluntariness determinations of the tendency of a factor to induce untrue statements. There are two apparent explanations for these characteristics. One is that these courts continued—despite the *Bram* line of Supreme Court decisions—to consider voluntariness a matter of state law in which state tribunals were not bound to accept the approach of the Supreme Court. The other—and more likely—explanation is that although a statement rendered involuntary by coercion was recognized as offending federal constitutional standards, there was a general belief that the federal voluntariness standard had not preempted the matters of deception or promises or representations of benefit. Despite *Bram* —or perhaps because of its ambiguous rationale—these considerations continued to be regarded as part of local voluntariness law existing independent of the federal constitutional standard.

The pre-*Miranda* voluntariness cases contain a number of weaknesses. Mechanically, they fail to identify specifically the legal effect of factors such as deception, ignorance, and mistake, with the possible exception of ignorance or mistake concerning the existence of the abstract legal right to remain silent. Conceptually, they fail to distinguish between the nature of the defendant's conscious awareness of the facts and law pertaining to his situation and other factors—either characteristics of the defendant himself or of his environment at the time of the confession—that may influence his decision whether or not to confess. This conceptual failure, in turn, has led to further confusion. Thus, ignorance or mistake concerning the crime under investigation appear to be relevant, but never controlling—even when ignorance or mistake may be a significant factor in the subject's decision to confess. The implication is that such ignorance or mistake would render a confession involuntary if the decision to confess was also affected by other factors, presumably those in the category of influences rather than awareness, but would not if those improper influences were absent. This is absurd. Whether confessions made in ignorance of certain matters relevant to the subject's tactical best interests should be discouraged or rejected when offered as evidence is a completely different question

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sible, although defendant was facing unpleasant incarceration in southern jail and may have preferred to undergo conviction and punishment for what he believed was minor Pennsylvania offense in order to avoid jail term).

from the appropriate approach to be taken with respect to the effect of threats of unlawful violence, physical illness, or the lack of sleep upon confessing subjects. There is no basis for attempting to interrelate the two matters as traditional voluntariness doctrine attempted to do, and the effort to do so has simply obscured the need to address specifically and directly such problems as ignorance, mistake, deception, expectation of benefit, and promises.

In summary, then, the Supreme Court in its pre-*Miranda* voluntariness cases did not adequately address the legal significance of ignorance, mistake, deceit, or reliance upon expectation of benefit. The state and lower federal court analyses were little better and unquestionably inconsistent. In fact, the entire doctrine of voluntariness arguably contained little of value for either stimulating or guiding the structured consideration of these issues that was clearly demanded.

B. Miranda *and Following*

After *Miranda v. Arizona* there are two situations in which the voluntariness issue might arise. Unless an attorney is present during interrogation, the defendant must have waived his right to the presence of counsel. And, even if interrogation is appropriate—that is, if counsel is present or there has been a valid waiver—it must be clear that there has also been an adequate waiver of the right not to respond—that is, of the fifth amendment privilege against compelled self-incrimination.[125] The two waivers have not often been distinguished, with the unfortunate result that there has sometimes been a failure to focus directly on the critical point in the interrogation process.[126] Within the *Miranda* decision itself, the Court referred several times to the requirement that the waivers be "voluntary"[127] or that the defendant have

125. *Cf.* Miranda v. Arizona, 384 U.S. 436, 474 n.44 (1966) (addressing the requirements for a waiver of the right to remain silent when an attorney is present and interrogation continues after the defendant asserts a desire to remain silent).

126. In Collins v. Brierly, 492 F.2d 735, 739 (3d Cir. 1974) (en banc), the court held that the signing of a written waiver form which purported to waive the right to counsel as well as indicate a willingness to make a statement had "no legally compulsive effect." It is true, of course, that a waiver of the privilege may be withdrawn before the maker incriminates himself, *see* Stevens v. Marks, 383 U.S. 234, 243-44 (1966), and therefore a person signing the form cannot be compelled to make the promised statement. To the extent, however, that signing the form permits police to interrogate without the presence of counsel, it has a definite "legal" effect. Whether or not it is "compulsive" is less clear, although the emphasis in *Miranda* upon the inherently coercive nature of interrogation without counsel suggests that it should be so regarded.

127. 384 U.S. at 444, 476.

"knowingly and intelligently"[128] waived his rights, thus indicating that the phrases are interchangeable. But in the Court's short discussion of the requirements for a "voluntary," "knowing," or "intelligent" waiver, there is a suggestion that the Court may have altered the concept of voluntariness: "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."[129] If this was intended to alter the general assumption that deceit would not make a waiver invalid, it also raises the possibility that ignorance or mistake caused by factors other than intentional deception may now have greater legal effect than was previously the case.

Although the Court has not subsequently dealt with "voluntariness," "intelligence," or "knowledge" in the context of confessions, these concepts were treated in the context of a waiver of the fourth amendment right to be free from unreasonable searches and seizures in *Schneckloth v. Bustamonte*.[130] Unfortunately, the holding in that case perpetuated and perhaps reinvigorated the traditional confusion surrounding "voluntariness" analysis. The Court defined the issue narrowly: whether the prosecution, as part of its task of proving the validity of a consent to search, must demonstrate that the subject was aware of a legal right to refuse.[131] After analyzing the pre-*Miranda* confession cases, the Court concluded that:

> [t]he significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion. . . . In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative.[132]

Turning to the situation before it, the Court stressed that defining "voluntariness" in the context of search and seizure, as in the confession context, involved a fair accommodation of the competing considerations.[133] The Court then discussed a number of considerations that

128. *Id.* at 444, 475, 479.
129. *Id.* at 476 (emphasis added).
130. 412 U.S. 218 (1973).
131. *Id.* at 222-23.
132. *Id.* at 226-27.
133. *Id.* at 227, 229.

militated against imposing a requirement of proof of awareness. First, even where no probable cause exists, consent searches serve a valuable and legitimate law enforcement purpose and are often to the ultimate benefit of the person searched.[134] Second, the difficulties of proving a person's subjective understanding would make the burden on prosecutors a significant one.[135] Although this problem could be alleviated by requiring a warning analogous to that required by *Miranda* in the interrogation context, this would be "thoroughly impractical."[136] And third, consent searches are generally conducted in situations not presenting the inherent pressure of custodial interrogation that was significant in *Miranda*.[137]

At this point, the Court turned to the task of reconciling its holding with traditional waiver doctrine. Acknowledging that the standard of *Johnson v. Zerbst*[138] (frequently applied to waiver of constitutional rights) required awareness of the right given up, the Court observed that this standard has been applied only to those constitutional rights given a defendant to assure him a "fair"—apparently defined as accurate—trial.[139] *Miranda* presented such a case and thus the Court regarded meeting the *Johnson* standard there to be "a necessary prerequisite to a finding of a valid waiver."[140] Since fourth amendment rights are extended to protect the interest in privacy and not that of a fair trial, however, the Court held the *Johnson* standard inapplicable to the consent search situation.[141]

The holding of *Schneckloth* is, of course, open to objection. First, it settled little. The case held only that the prosecution has no burden of proving awareness of the fourth amendment right and did not address a defendant's right to come forward with evidence that he lacked such awareness. Since awareness of the right is relevant to voluntariness, apparently awareness—or the lack of it—may be proved, but the case leaves consent search law in the same shape as confession law: There is no basis for determining when, if ever, awareness must be established or under what circumstances lack of awareness will invalidate consent. Moreover, it is arguable that the Court grossly over-esti-

134. *Id.* at 228.
135. *Id.* at 230.
136. *Id.* at 231.
137. *See id.* at 232, 240.
138. 304 U.S. 458 (1938).
139. 412 U.S. at 237.
140. *Id.* at 240.
141. *Id.* at 242.

mated the difficulties prosecutors would experience in proving awareness and the impracticalities involved in giving subjects a brief warning prior to obtaining consent to search.

Nevertheless, the significance of the discussion for confession law is apparent. The majority opinion regards *Miranda* as having established an awareness requirement for waiver of—seemingly—both the right to remain silent and its incidental right to have counsel present during police interrogation, a requirement not found in the constitutional voluntariness cases of the past. But many questions remain unanswered about the things of which a defendant must be aware and what significance, if any, the reasons for a lack of awareness may have. Is it sufficient that a defendant is aware of the existence of an abstract legal right to remain silent? Or, is it necessary that he be aware of some—or all—of those matters that are obviously essential to apply properly that knowledge to his own situation? If the latter, the defendant needs to be aware of the facts surrounding the investigation, the law applicable to his own potential liability, the tactical advantages of consultation with an attorney and of immediate cooperation with authorities, and perhaps more. To some extent, the discussion in *Schneckloth* suggests a relatively broad definition of required awareness. In arguing that it would not be possible to apply the *Johnson* standard to the consent search situation, the Court stressed that under the *Johnson* test "there must be examination into the knowing and understanding nature of the waiver"[142] and that "in the informal, unstructured context of a consent search,"[143] a police officer could not make the type of examination required. Such an examination would not be necessary if all that was required was an awareness of the abstract legal right. It would be a reasonable requirement, however, if the *Johnson* standard necessitated the defendant's having a reasonable awareness not only of the legal right itself but also of the facts needed to make a reasonable decision whether or how to exercise the right.

The lack of adequate guidance provided by the Supreme Court decisions is obvious when one notes the lack of uniformity in the post-*Miranda* state and lower federal court decisions that deal with ignorance, mistake, and reliance. A particularly troublesome question is whether a defendant must understand the warnings, which *Miranda* requires be given him, in order for there to be an effective waiver. De-

142. *Id.* at 244.
143. *Id.* at 245.

spite the language of *Miranda* (and the later discussion in *Schneckloth*), the courts have been unreceptive to arguments that waivers are invalid when the defendant fails to understand his rights after being given the *Miranda* warnings.[144] The only specific burdens imposed upon the prosecution to show such awareness are the basic *Miranda* requirements of proof of the warnings and proof of the usually mechanical waiver. There have been several exceptions, however. The District of Columbia Circuit, in *United States v. Frazier*,[145] held that "the Government's burden of proof includes, in addition to the fact of such a warning a showing—if the issue is raised—that the person warned was capable of understanding it."[146] On the facts of the case—including expert testimony concerning the defendant's intelligence—the court found evidence of ability to understand, but the court ignored the possibility that the defendant had not actually understood the warnings. Since the defendant had objected to the officer's notetaking, it seems likely that, notwithstanding the warnings, he did not understand that what he *said* could be used against him. Despite prodding by the dissent,[147] the majority of the court failed to consider the issue.

This issue of understanding was addressed, however, by the Ohio Supreme Court in *State v. Jones*.[148] Finding no adequate waiver where the defendant had specifically refused to sign a written waiver form and had refused to speak if anything was written down, the court formulated a rule that would provide guidance for interrogating police officers:

> [W]hen a defendant subsequently acts in such a way as to reasonably alert an interrogating officer that the warnings given have been misapprehended, the officer must, before any further questioning, insure

144. *See, e.g.*, Mitchell v. United States, 434 F.2d 483, 488 (D.C. Cir.), *cert. denied*, 400 U.S. 867 (1970) (defendant understood admissibility of oral statements); Klinger v. United States, 409 F.2d 299, 308 (8th Cir.), *cert. denied*, 396 U.S. 859 (1969) (waiver valid despite refusal to sign written waiver, defendant explaining that he did not " 'sign anything without a lawyer' "); State v. Carpenter, 211 Kan. 234, 505 P.2d 753 (1973) (waiver valid despite refusal to sign written form). Of course, the facts may show a refusal to give a written statement for reasons other than a misunderstanding of the warning. *See* Commonwealth v. Canales, 454 Pa. 422, —, 311 A.2d 572, 573 (1973) (waiver valid where defendant's remark that he would sign nothing but would give " 'a statement from me to you only' " and " 'it will be your word against mine' " indicated that defendant knew statement would be admissible, but expected to prevail on question of whether it was in fact made).

145. 476 F.2d 891 (D.C. Cir. 1973) (en banc), *cert. denied*, 414 U.S. 911 (1974).

146. *Id.* at 896.

147. *Id.* at 900-01.

148. 37 Ohio St. 2d 21, 306 N.E.2d 409 (1974).

that the defendant fully and correctly understands his Fifth Amendment rights.[149]

The court did not consider the situation in which a defendant may misapprehend his rights but does not act in a manner that would alert law enforcement personnel to his misapprehension. Nevertheless, it appears that the court would be unreceptive in such a situation to an attack upon his waiver. If this is correct, the position taken by the court is one best viewed as condemning improper police conduct—that is, interrogating a defendant when he is not aware of his rights—rather than one implementing a waiver standard—that is, requiring actual awareness, whether or not objectively evidenced at the time.

The ineffectiveness of the current law as a guide for articulating either the legal standard or the factual investigation required in particular cases is demonstrated by the courts' treatment of the legal effect of various abnormalities. Some of these abnormalities may affect a subject's awareness of the facts and law relating to his condition or may affect the manner in which he evaluates and decides to act on those facts of which he is aware. There is general agreement that mental illness or retardation is a factor relevant to the validity of *Miranda* waivers.[150] The discussions often purport to define the issue as being whether the defendant, by virtue of his condition, was unable to understand the warnings[151] or to appreciate fully the situation in which he found himself[152] and the effect of confessing.[153] But the reported appellate decisions reveal an unwillingness to undertake a critical and thorough examination of the real significance of these conditions. Rather, the courts invalidate a confession on the basis of psychological

149. *Id.* at 26-27, 306 N.E.2d at 412. Alternatively, such action by a defendant might be regarded as an effort to invoke the right to be free from interrogation except in the presence of an attorney. *Cf.* People v. McClendon, 48 Mich. App. 552, 210 N.W.2d 778 (1973) (defendant's refusal to sign written waiver form should have put officer on notice that defendant may have been exercising his right to remain silent, and further interrogation was improper in the absence of other evidence tending to establish waiver).

150. *See, e.g.*, Schade v. State, 512 P.2d 907 (Alaska 1973) (mental illness one factor to be considered); State v. Basden, 19 N.C. Ct. App. 258, 198 S.E.2d 494 (1973) (subnormal mental capacity important factor but not controlling).

151. *See, e.g.*, Lowery v. State, 51 Ala. App. 387, 391, 286 So. 2d 62, 65-66 (Crim. App. 1973).

152. *See, e.g.*, State v. Collins, 297 A.2d 620, 627-29 (Me. 1972) (emphasis on contact with reality).

153. *See, e.g., id.* at 629 (emphasis on awareness of and appreciation for "what was involved and at stake"); Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973) (emphasis on understanding the significance of statement).

abnormality only if the defendant exhibited specific behavior making it abundantly clear that he was virtually out of contact with reality at the time of the statement.[154]

In regard to intoxication, there is disagreement about even the abstract criteria. A number of courts purport to apply the old rule that intoxication short of "mania" has no effect upon the admissibility of a confession.[155] Others acknowledge that intoxication is a factor that must be considered—along with everything else—but the opinions reveal little insight into what specific effect the intoxication must be found to have in order for the statement or the waiver of *Miranda* rights to be defective.[156] Those courts that have specifically considered the requisite effect have split. Some apparently require that the intoxication render a defendant unable to make a coherent statement of his activities.[157] Others seem to demand that the defendant have been unable to understand the factual content of his statement.[158] Finally, a few

154. *See, e.g.*, State v. Collins, 297 A.2d 620, 629 (Me. 1972) (although defendant was nervous, withdrawn, depressed, needed minor tranquilizers, had been hospitalized in past, and was subject to changes in mood, his statement admissible because "defendant had always been fully in touch with reality, acted and spoke rationally and otherwise showed by his conduct that he was fully aware of, and appreciated, the nature and quality of what was involved and at stake"); Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973) (although defendant was paranoid schizophrenic, statement admissible since no evidence that this prevented him from understanding the significance of the inculpating statement and no evidence that police took unfair advantage of this condition). *Cf.* Lowery v. State, 51 Ala. App. 387, 389, 286 So. 2d 62, 64 (Crim. App. 1973) (where hysterical female defendant was taken to physician for an unidentified "shot for her nerves" and was still crying one and one half hours later when she admitted the crime, there was inadequate evidence that she understood the warnings). In Schade v. State, 512 P.2d 907, 916-17 (Alas. 1973), the admission of a statement was upheld despite testimony of a psychiatrist that the defendant was a paranoid schizophrenic and that his confession was partly the result of his paranoid thought processes which led him to believe he could "outsmart" authorities by phrasing his confession in subjunctive terms. The court commented, "Where, as here, there is scanty evidence of delusions or hallucinations at any particular time, or of a complete psychotic break with reality, it becomes difficult to ascribe the confession to mental illness." *Id.* at 917 n.14.

155. *See, e.g.*, Stewart v. State, 49 Ala. App. 681, 275 So. 2d 360 (Crim. App. 1973); State v. Logner, 266 N.C. 238, 243, 145 S.E.2d 867, 871 (1966) (defining mania as "so drunk as to be unconscious of the meaning of his words"), *cited with approval in* State v. McClure, 280 N.C. 288, 290, 185 S.E.2d 693, 695 (1972).

156. *See, e.g.*, United States v. Arcediano, 371 F. Supp. 457 (D.N.J. 1973) (intoxication only one factor to consider in determining voluntariness under *Culombe* test).

157. *See, e.g.*, Williams v. State, 491 S.W.2d 862, 866 (Tenn. Crim. App. 1973) (confession made during state of drug or narcotic intoxication is admissible if "at the time accused was capable of making a narrative of past events, or of stating his own participation in the crime").

158. *See, e.g.*, State v. Saxon, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973) (state-

recognize that intoxication will render waiver of *Miranda* rights ineffective if, as a result of the intoxication, the subject failed to understand the rights.[159] There is little or no support for the proposition that a waiver is invalid if, because of intoxication, a subject failed to perceive accurately his tactical situation or the facts to which his *Miranda* rights applied. The appellate cases indicate an unwillingness to evaluate critically the effect of intoxication upon a defendant's awareness and a tendency to hold statements inadmissible for reason of intoxication only in the very exceptional cases in which the defendant's obvious condition at the time of the confession leaves no doubt that he was totally out of contact with reality.[160]

Perhaps the unsatisfactoriness of the present doctrine governing intoxication is best illustrated by a recent decision of the Kentucky Court of Appeals, *Britt v. Commonwealth*.[161] Faced with determining the validity of a waiver of *Miranda* rights and the admissibility of a self-incriminating statement of a defendant who had registered .22 per cent blood alcohol content on a breathalizer test, the court concluded that " 'voluntariness' is too elusive a concept to be a satisfactory criterion."[162] Recognizing that reliability or trustworthiness of a state-

ment inadmissible only if defendant was so intoxicated that he did not realize what he way saying).

159. *See, e.g.*, People v. Dagge, 10 Ill. App. 3d 726, 295 N.E.2d 336 (1973) (intoxication a factor to be considered in determining whether defendant understood and waived *Miranda* rights); Lonquest v. State, 495 P.2d 575, 582 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972) (intoxication will invalidate waiver if defendant "was unaware of his rights and unable to make an intelligent waiver").

160. Statements in the following cases were held admissible: United States v. Arcediano, 371 F. Supp. 457 (D.N.J. 1974) (reliance upon defendant's refusal to speak with local officers and conditions he imposed on willingness to speak to F.B.I. agents); State v. Clark, 110 Ariz. 242, 517 P.2d 1238 (1974) (defendant appeared to be able to understand warnings and manufactured incorrect version of events); People v. Dagge, 10 Ill. App. 3d 726, 295 N.E.2d 336 (1973) (reliance upon defendant's ability to stand without assistance, weakness of odor on breath, and lack of slurred speech or bloodshot eyes); State v. Heather, 498 S.W.2d 300 (Mo. Ct. App. 1973) (reliance upon fact defendant's answers had corresponded to questions arresting officer asked); State v. Smith, 476 P.2d 802 (Ore. Ct. App. 1970) (defendant's memory of events, as proved by his testimony of events of interrogation, overcame other evidence of extreme intoxication). In comparison, the court in United States v. Guaydacan, 470 F.2d 1173 (9th Cir. 1972), refused to admit a confession given by defendant who appeared to be under the influence of drugs and beer and who had to be picked up from the floor for the administration of warnings. In addition, however, the officer had threatened to jail and charge the defendant's entire family; it is thus unclear to what extent the outcome depended upon the intoxication.

161. 512 S.W.2d 496 (Ky. Ct. App. 1974).

162. *Id.* at 500.

ment is irrelevant if "coercion" is alleged, the court nevertheless held that the likelihood of a statement's accuracy is a vital factor in determining its admissibility when it has been challenged on grounds of volitional incompetence or mental incapacity.[163] The court then proceeded to adopt the view that a statement by an intoxicated subject is inadmissible only if the subject had hallucinations or had begun " 'to confabulate to compensate for his loss of memory,' " because only then would the truth of the statement become suspect.[164] Despite the innumerable decisions on the subject, the court regarded itself as without guidance from federal constitutional decisions and free to return to the trustworthiness rationale as the basis for formulating a criterion.[165]

It is arguable that this reluctance on the part of many courts to deal specifically with the effect of psychological abnormality and intoxication upon the awareness of a confessing suspect is due, at least in part, to the difficulty that is anticipated in any such inquiry.[166] In the case of intoxication, at least, there is also a feeling that by becoming intoxicated, a subject has rendered himself worthy of less judicial concern than that to which he would be entitled under other circumstances. Nevertheless, it appears that incorporation of the language and analysis of the old voluntariness test into the *Miranda* waiver doctrine has enabled—if not encouraged—courts to avoid addressing the legal effect of certain characteristics of a confession situation and, instead, hide the lack of analysis under a broad, but vague, totality of the circumstances test for voluntariness.

Where the issue concerns knowledge of matters other than the abstract meaning of the warnings themselves, the courts have been even more unreceptive to arguments that particular confessions should not have been admitted.[167] In *State v. Braun*,[168] for example, A and B were arrested. A confessed and police told him that his confession would be admissible against B if it was repeated in B's presence; this was not correct. A and B were permitted to confer, and A told B that

163. *Id.* at 499.

164. *Id.* at 500.

165. *Id.*

166. *See* Lonquest v. State, 495 P.2d 575 (Wyo.), *cert. denied*, 409 U.S. 1006 (1972) (discussing difficulties of determining impact of intoxication upon a defendant).

167. *See, e.g.*, Layton v. State, — Ind. —, 301 N.E.2d 633 (1973) (the waiver before confessing to assault was valid even if defendant was unaware of victim's death because *Miranda* requires awareness only of the incident under investigation, not of the specific consequences of the behavior).

168. 82 Wash. 2d 157, 509 P.2d 742 (1973) (en banc).

he—A—intended to repeat the confession in B's presence and that it would be admissible. B then waived his rights and made a statement. In a confused discussion, the court upheld B's conviction, suggesting that the misstatement of law had not influenced B, but also implying that this sort of mistaken view of the law of evidence would not invalidate a waiver even if the misstatement had an influence on the decision to confess.[169] Although there is some evidence of general judicial discomfort if a defendant has confessed in ignorance of a major fact greatly affecting the seriousness of the acts admitted, apparently only the Pennsylvania Supreme Court has specifically adopted a requirement that the defendant be told—if he is not already aware—of "the general nature of the transaction giving rise to the charges."[170]

Despite the language in *Miranda*, the state and lower federal courts have generally continued to hold that mistake caused by affirmative police deception does not invalidate a waiver or the resulting confession.[171] Frequently, the courts rely on *Frazier*,[172] with no recognition that *Miranda* apparently altered the applicable test for determining the effectiveness of a waiver.[173] In many instances, the opinions evidence both confusion concerning the appropriate criterion to apply and discomfort with the results apparently required by existing doctrine.

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169. *Id.* at 162-63, 509 P.2d at 745-46.

170. *See* Commonwealth v. Richman, — Pa. —, —, 320 A.2d 351, 355 (1974) (waiver of right to counsel at lineup), *citing* Commonwealth v. Collins, 436 Pa. 114, 121, 259 A.2d 160, 163 (1969) (defendant who apparently remained in car during robbery confessed while unaware that murder had been committed; waiver invalid because "an intelligent and understanding waiver of the right to counsel is impossible where the defendant has not been informed of the crime which is being investigated"). The significance of *Collins* as precedent had earlier been questioned. *See* Commonwealth v. Cooper, 444 Pa. 122, 278 A.2d 895 (1971). Where the defendant is aware of the offense under investigation, no police "warning" is required. *See, e.g.*, Commonwealth v. Boykin, 450 Pa. 25, 298 A.2d 258 (1972) (where defendant knew police were investigating child's death, not necessary to tell her specific degree of crime suspected); Commonwealth v. Cooper, 444 Pa. 122, 297 A.2d 108 (1971) (defendant telephoned police to tell them he had killed victim).

171. *See, e.g.*, State v. Braun, 82 Wash. 2d 157, 509 P.2d 742 (1973). *See also* Hopkins v. State, 19 Md. App. 414, 311 A.2d 483 (1973) (alternative holding) (confession admissible despite evidence that detective falsely told defendant that a participant in robbery-murder had implicated him and detective's admission that she had led defendant to believe that the state had more evidence than in fact it did); State v. Stubenrauch, 503 S.W.2d 136 (Mo. Ct. App. 1973) (alternative holding) (confession admissible even if officer falsely told defendant that others had implicated him).

172. *See* text accompanying notes 110-115 *supra.*

173. *See, e.g.*, Hopkins v. State, 19 Md. App. 414, 311 A.2d 483 (1973); State v. Stubenrauch, 503 S.W.2d 136 (Mo. Ct. App. 1973).

The recent decision by the Supreme Court of Pennsylvania in *Commonwealth v. Jones*[174] is illustrative. The court was faced with the admissibility of a statement given by Jones after an interrogating detective had contradicted Jones' exculpatory statement with a statement allegedly made by another suspect; in fact, no such other statement had been made. First, the court acknowledged that "confessions resulting from a subterfuge that is likely to produce an untrustworthy confession" must be excluded,[175] but it did not make clear whether this is a local evidentiary or a federal constitutional requirement. Without explanation, the court declared it was unconvinced the deception at issue was likely to cause an untrustworthy confession.[176] Then, citing *Spano*[177] and *Leyra*,[178] the court commented that the Supreme Court "has offered another rationale for invalidating confessions"—apparently as a matter of due process—and stated firmly that "where the subterfuge [used to obtain a confession] is so reprehensible as to offend basic societal notions of fairness, the confession . . . should be excluded."[179] Without discussing what characteristics of deception would render it "reprehensible," the court summarily concluded that the deception in the case before it was not "so reprehensible as to invalidate the confession as offensive to basic notions of fairness,"[180] citing *Frazier*. Finally, the court separated a third issue: "whether the subterfuge employed by the police precluded the accused from making a knowing and intelligent waiver" of fifth amendment rights under *Miranda*.[181] Although carefully noting that it did not "condone deliberate misrepresentation of facts supplied to an accused at a time when he must elect to waiver [*sic*] a Constitutional right," the court concluded that even an intentional misrepresentation of the evidence available would not "so distort the factual situation confronting [the subject] as to render his waiver unknowing and unintelligent."[182] This conclusion followed from a distinction the court made between awareness of the nature of the constitutional right being waived—which it considered necessary for a valid waiver—and awareness of the amount

174. 457 Pa. 423, 322 A.2d 119 (1974).
175. *Id.* at —, 322 A.2d at 126.
176. *Id.*
177. *See* text accompanying note 108 *supra.*
178. *See* text accompanying note 107 *supra.*
179. 457 Pa. at —, 322 A.2d at 126.
180. *Id.*
181. *Id.*
182. *Id.* at —, 322 A.2d at 127.

of evidence against the accused—which apparently it did not consider essential to waiver.[183] The court, however, cited no authority whatsoever for the distinction and did not attempt to defend it on grounds of sound policy. Nor, for that matter, did the court direct its attention to the Supreme Court's *Miranda* language that seemingly condemned trickery in obtaining a waiver.[184] The discussion by the court, however, highlights the major defect of current confession doctrine generally—the ill-defined and perplexing relationship between the evidentiary voluntariness test, the constitutional requirement of voluntariness, and the waiver standard—as well as the defects, more particularly, of the deception doctrine. While deception seems to be "relevant" to all three standards, its specific relationsip to them is, at best, ambiguous. In addition, the use of deception to obtain a self-incriminating statement has caused the courts unquestionable discomfort; yet existing doctrine provides no adequate vehicle for concrete judicial expression of this attitude.

With respect to the area of confession law dealing with reliance upon expectation of benefit, the Supreme Court's decision in *Brady v. United States*,[185] has had a significant effect. By holding there to be no constitutional defect in a guilty plea entered in response to a promise of dispositional advantage, the Court effectively "legitimized" plea bargaining. Although it cited *Bram* and apparently continued to regard *Bram* as good law, the Court distinguished police interrogation from the guilty plea situation: "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel . . . ."[186] On the basis of the protections available to a person pleading guilty and not available to one confessing without counsel, the Court reached a result different from that in *Bram*. But this treatment of *Bram* clearly raises

183. *Id.* at —, 322 A.2d at 126. The distinction is arguably inconsistent with the Pennsylvania court's insistence that the subject be aware of the offense for which he is being investigated. *See* note 170 *supra* and accompanying text. Perhaps the court regards a requirement that the suspect be informed of the crime under investigation as one capable of delineation and understanding by law enforcement agencies, while a requirement addressing the suspect's awareness of the nature and quality of the evidence available to the police could not be transformed into easy-to-apply rules that law enforcement agencies might be expected to observe. But this reasoning would not, of course, argue strongly against a rule prohibiting affirmative police deception with respect to the evidence available.

184. *See* text accompanying note 129 *supra.*

185. 397 U.S. 742 (1970).

186. *Id.* at 754.

doubts that it has survived *Miranda.* If the provision of counsel precluded a promise of benefit from invalidating a guilty plea, does counsel's presence during interrogation also preclude a promise made then from invalidating a confession? If so, does the waiver of the right to have counsel present have the same effect? If so, does this result hold true even if the waiver itself was induced by the promise? If the last query is answered affirmatively, the matter has become circular. The promise is deprived of its traditional effect because the assistance of counsel makes it unnecessary to regard promises of benefit with hostility. Yet the same result is reached without counsel if the promise has the effect of inducing the subject to waive the presence of counsel —the very procedural protection that justifies giving legitimacy to promises of dispositional advantage in the first place.

On the assumption that the promise doctrine is part of the voluntariness test that determines the validity of a waiver under *Miranda,* most state and lower federal courts have simply applied the traditional test[187] —with some indication of an increasing reluctance to find a "fatal" promise.[188] But several courts have seen more significant problems.

187. *See, e.g.,* United States v. White, 493 F.2d 3, 5 (5th Cir. 1974) (in "otherwise non-coercive atmosphere," single remark by officer that it would be helpful if defendant gave a statement was insufficient to invalidate statement); People v. Pineda, — Colo. —, —, 513 P.2d 452, 453 (1973) (en banc) (comment of officer to defendant that " 'it would be easier for us to work on and also himself if he would tell us exactly what had happened' " was an implied promise which rendered statement inadmissible); State v. Watson, 82 N.M. 769, 770, 487 P.2d 197, 198 (Ct. App. 1971) (officer's observation that " 'we can go to trial with one state witness and one defendant or two defendants . . . . [Y]ou can go ahead and talk to me here or [I] book you and I will go home' " was an implied promise of leniency and required exclusion of confession); Commonwealth v. Eiland, 450 Pa. 566, 573-74, 301 A.2d 651, 654 (1973) (officer's telling defendant that he should confess "to 'make it light on himself' " and that he could " 'quite possibly make out better than the others' " if he confessed was one factor in decision that on totality of circumstances, confession was result of "subtle but nonetheless powerful form of impermissible psychological coercion").

188. *See, e.g.,* Wallace v. State, 290 Ala. 201, 275 So. 2d 634 (1973) (officer's comment was only an exhortation to tell truth and did not make statement inadmissible where officer said he could not promise defendant anything but that if the probation officer asked if defendant had given a statement and defendant had done so, officer would tell probation officer about it); State v. Millin, 286 So. 2d 36 (Fla. App. 1973) (remark by officer that he could not promise anything but that he would let the judge and jury know if defendant cooperated "did not amount to a promise of leniency, but only that his cooperation would be made known" and did not require exclusion of statement). Other cases have taken the position that the promise did not affect the decision to confess. *See, e.g.,* United States v. Brandon, 467 F.2d 1008 (9th Cir. 1972) (even if defendant was told that he could obtain release on own recognizance if he made statement, trial court finding that this did not overbear his will was supported by the evi-

In *Pontow v. State*,[189] the defendant waived his *Miranda* rights and discussed a possible plea bargain with the assistant district attorney. He finally agreed to confess to a series of crimes in return for a commitment to be charged with only one. After apparently undergoing a change of heart, the defendant unsuccessfully sought suppression of the confession. The Wisconsin Supreme Court, in affirming the conviction, acknowledged *Bram*, but asserted that the promise cases had all involved coercive police practices in conjunction with the promises.[190] In addition, plea bargaining had been approved both in the Wisconsin court's own opinions and in those of the Supreme Court.

> The question remains, however, of whether it is improper under any circumstances for the police and prosecutor to engage in confession bargaining with an unrepresented defendant. . . .
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> . . . .
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> . . . [W]e think it inappropriate to lay down a rule that forbids the prosecutor from discussing the disposition of charges with a defendant who manifestly prefers to negotiate on his own behalf. The confession bargain will be subjected to severe *post hoc* scrutiny.[191]

A promise made by a prosecutor during confession bargaining was a factor to be considered in determining voluntariness and in deciding whether the difficult burden that *Miranda* places upon a prosecutor who offers a confession from an unrepresented defendant had been met.[192]

The *Pontow* court's analysis of precedent is clearly subject to criticism. Although it is true that *Bram* itself involved facts arguably constituting "coercion" as well as a promise, the historical background and subsequent application of the rule by other courts has left little doubt that by traditional analysis, a promise alone—without coercive police practices—is sufficient to render a statement invalid. But the court's functional approach to the policy issue—whether, in the modern confession bargaining process with existing procedural protections, there is justification for condemning such negotiations between defendants and law enforcement officials—is much more attractive. Of course,

dence); Smith v. State, 20 Md. App. 577, 591-92, 318 A.2d 568, 578 (1974), *cert. denied*, 95 S. Ct. 828 (1975) (detective's observation that court might take into consideration defendant's version that fire was accidental did not influence defendant's decision to confess).

189. 58 Wis. 2d 135, 205 N.W.2d 775 (1973).

190. *Id.* at 138-39, 205 N.W.2d at 777.

191. *Id.* at 141-42, 205 N.W.2d at 778-79.

192. *Id.* at 143, 205 N.W.2d at 779.

not all courts have seen the question as posing this complex query. For instance, in *United States v. Springer*,[193] the Seventh Circuit held admissible a confession given by the defendant after an F.B.I. agent told him that the United States attorney and the court would know if the defendant cooperated, but no promises could be made. The court, suggesting that promises of leniency are now irrelevant, declared: "No public policy should castigate a confession of crime merely because it may have been prompted by the hope that cooperation might achieve or increase the chances of a lenient sentence."[194] This position, of course, is entirely inconsistent with the common law rule and the apparent constitutional doctrine of *Bram*.

Probably the most articulate brief against the approach of the Wisconsin Supreme Court is the decision in *Grades v. Boles*,[195] a pre-*Miranda* case. There, as in *Pontow*, the defendant negotiated his own plea-confession bargain, but apparently he was far less successful than Pontow had been. Holding the resulting confession inadmissible, the court commented, "In effect, what the State here seeks to condone is a species of plea bargaining shorn of any of the essential safeguards mandated for true plea bargaining."[196] The court then emphasized the lack of either the presence of counsel or an effective waiver of counsel; although after *Miranda*, giving the warnings will normally avoid this deficiency, the prevalence of waivers results in there seldom being actual assistance of counsel. In addition, the court noted that in the confession bargaining situation, a defendant is often forced to make a decision without an adequate opportunity to think the matter over. Finally, the court pointed out that the dangers of a bargained-for confession are greater than those of a plea. In a plea situation, there is protection afforded by the requirement of an open court hearing and the possibility under some circumstances, a plea may be withdrawn; a confession, however, is always prejudicial, even if subsequently disclaimed.[197]

In any event, it is clear that the promise of benefit rule presents special problems in the modern context, where the rule must be reconciled with both the *Miranda* right to counsel and the legitimacy of plea bargaining. The existing case law, however, provides little guidance for interrelating the three matters.[198]

193. 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).
194. *Id.* at 1347.
195. 398 F.2d 409 (4th Cir. 1968).
196. *Id.* at 413.
197. *Id.*
198. Michigan v. Tucker, 417 U.S. 433 (1974) is disturbing evidence of the flexibil-

IV. A NEEDED REDEFINITION OF THE PROBLEM

As shown in the discussion above, confession doctrine has neither provided certainty nor adequately identified or resolved the conflicting considerations involved when a confession has been influenced by ignorance, mistake, deception, or expectation of benefit. *Miranda* was apparently intended to be the definitive decision in the area, but the difficulties that state and lower federal courts have had in treating traditional, as well as new, problems after *Miranda* demonstrate the inefficacy of its approach. The fundamental problem with *Miranda*, of course, is that it avoided the substantive issues. Instead of dealing specifically with the legal effect of deception or promise, the Court chose to sidestep the problems by providing a procedural incident to the underlying constitutional right, apparently in the hope that involvement of attorneys in the interrogation process would somehow stimualte solution of the problems.[199] The result, however, was not actually to in-

ity remaining in confession law and the willingness of the Court to exercise this flexibility in a manner minimizing the value of the law as a guide for future conduct. Petitioner had objected to testimony of a witness who had been located by means of information obtained from the petitioner in violation of the *Miranda* requirements. Because the Court found no violation of petitioner's privilege against self-incrimination, but only violation of the procedural safeguards "associated with" that privilege, the Court assumed that admissibility of the statement depended on an analysis different from that required had a violation of the privilege itself been shown. Balancing the interests involved, the Court determined that the sum of the arguments in favor of admitting the evidence in question outweighed the arguments for excluding it. This balance was clearly affected by certain facts: arguably there had been minimal noncompliance with *Miranda*, the statement was taken before *Miranda* was decided and therefore the noncompliance was "understandable," and the statement itself was not used against the petitioner. The decision strongly suggests that a case-by-case, balancing-of-the-interests test is being used to determine admissibility of evidence obtained in violation of procedural requirements related to—but not a basic part of—constitutional rights. Such an approach, of course, would have all of the deficiencies of the voluntariness test, deficiencies which the objective *Miranda* test was apparently intended to cure. If this reading of *Tucker* is correct, the law now contains the defects of both approaches and arguably the benefits of neither.

199. The approach of the Court in *Miranda* enabled the authors of a leading text on police interrogation techniques, which was extensively cited in *Miranda* to illustrate the dangers of police interrogation, to comment in their subsequent second edition:

> As we interpret . . . Miranda v. Arizona, all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used after the recently proscribed warnings have been given to the subject under interrogation, and after he had waived his self-incrimination privilege and his right to counsel. The Court's critical comments about the procedures we advocated were, we believe, for the purpose of establishing the necessity for the warnings rather than as a condemnation of the procedures themselves.

F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS at vii (2d ed. 1967).

volve lawyers but rather to bring waiver of counsel problems into prominence and thereby to repose traditional issues in a new context.

What are needed are specific and direct decisions considering the effect that various circumstances surrounding the making of a confession have on the admissibility of that confession.[200] Only some of those circumstances will be addressed here, those related to ignorance, mistake, reliance on expectation of benefit, and deceit. But even in regard to these, it will be necessary to identify carefully the ultimate or long-term objectives so that the undertaking has direction, to investigate fully all potential vehicles for accommodating the conflicting interests so that accommodation can be achieved most effectively, and to identify and evaluate all considerations relevant to the decisions so that the decisions reflect as full an accommodation of all relevant factors as is possible.

A. *The Interrelationships of the Doctrines*

In order for an approach to even a small area of confession law to be coherent, the approach must first resolve the ambiguities existing with respect to the interrelationships of the three relevant standards: the evidentiary requirement of voluntariness, the traditional due process standard, and the new "objective" *Miranda* rules. Only if the basic structure of the doctrinal framework is clarified can there be any realistic expectations that a rational rule will be developed.

The *Miranda* rights to counsel and silence and the requirement that warnings of these rights be given to the subject are appropriately taken as the benchmark. Unquestionably, a suspect should have a right to remain silent, but it is not so clear which considerations should be prevented from influencing his decision to exercise that right. Despite disagreement on the requirements for waiver and whether further controls over the interrogation process are needed, there seems little doubt that emphasis should continue to be placed upon providing representation during interrogation, since there is a generally acknowledged need for the assistance of counsel throughout the criminal justice system.

Under the *Miranda* scheme, two things may be waived: the procedural incidents of the right to remain silent and the right itself. Un-

200. This, of course, is not a new insight. Other commentators have recognized the unfortunate effect of traditional doctrine and have called for reform. *See, e.g.*, Kamisar, *supra* note 66, at 759 ("The real reasons for excluding confessions have too long been obscured by traditional language. The time has come to unmask them and to build from there").

doubtedly, the waiver of the right to remain silent is related to the traditional voluntariness test. *Miranda*, then, has simply added the necessity of inquiring into the validity of a waiver of the right to counsel. In any particular case, there should be several inquiries: (1) Was counsel present during interrogation? If not, was there a "voluntary" waiver, as that phrase is used in the traditional voluntariness test *and* as possibly modified by *Miranda* and subsequent developments? (2) Was there a valid waiver of the privilege to remain silent during interrogation, whether or not counsel was present? Both of these waivers must be "voluntary" and "intelligent," but once these inquiries have been made, there is neither need nor justification for another inquiry under the label of "due process voluntariness." This inquiry has been subsumed under those inquiries detailed above.[201]

Whether there has been a violation of a right to prompt presentation and whether that violation should or does demand exclusion of a related self-incriminating statement is an independent inquiry. Whether the inquiry should be made, and if so, how the standard should be defined, is beyond the scope of this discussion. Nevertheless, it must be kept in mind that this area is distinguishable and that its treatment demands analysis beyond that given above.[202]

Finally, the role of the common law evidentiary standard must be determined. At one point, it may have been true that the evidentiary rule took into account only factors that tended to indicate unreliability, while the due process standard was broader and considered factors that demanded condemnation for reasons unrelated to the likelihood that they would produce inaccurate confessions. There has never been uni-

201. Fitting the inquiry required by *Harris* into this scheme is somewhat difficult, because that case seems to assume a "voluntariness" test that is distinguishable from the *Miranda* issues. *See* text accompanying notes 86 & 87 *supra*. But the two can be accommodated if the inquiry required by *Harris* when a confession is offered for impeachment involves the voluntariness of the waiver of the privilege against compelled self-incrimination, rather than the waiver of the right to representation. It is certainly arguable that involuntariness of the waiver of the privilege is more likely to indicate unreliability than is involuntariness of the waiver of the incidental procedural right to counsel. In the alternative, *Harris* might be interpreted to require a showing that the statement challenged is unreliable, rather than simply a showing that the statement is involuntary under the traditional standard. In other words, it might be reasonable, for purposes of the *Harris* inquiry, to abandon the prohibition against inquiring into the reliability of the specific statement at issue, *see* text accompanying notes 67 & 68 *supra*, and to direct attention to whether or not the facts suggest that the specific statement offered is inaccurate.

202. *See* note 83 *supra*.

versal acceptance, however, of this distinction.[203] Moreover, it is difficult to identify any significant difference between the state evidentiary rules and the due process standard that can be attributed to this difference in function. Perhaps this distinction permits a variation in the enthusiasm with which the test is applied. That is, state courts may apply the evidentiary standard with greater, but not less, enthusiasm than the federal courts apply the constitutional standards. But such differences are simply not the stuff of which legal rules can be made or with which legal rules can meaningfully work. Nor is there a discernible difference in the factors taken into account by the federal evidentiary rule and the state rules. For example, in applying the federal standard, the Supreme Court has not—except for *Bram*—shown any inclination to give more weight than do state courts in applying their evidentiary standards to deception that is offensive but creates no danger of falsification or to promises of leniency that provide no incentive to fabricate a statement.

On balance, the existence of two doctrines—the common law evidentiary rule and the due process requirement—serves little or no purpose; the two should be regarded as merged.[204] Thus inquiries into the validity of the *Miranda* waivers should also eliminate the necessity for any inquiry into the voluntariness of the statement under local evidence law. States should not, of course, be barred from adopting other rules relating to confessions and interrogation. But these should be adopted as distinct and specific rules, not as an aspect of a voluntariness test. A state should remain free, for example, to adopt a rule that excludes confessions made during continued custody violating a right to prompt presentation before a magistrate. This rule should be a separate rule, however, to be applied in addition to—and not as part of—the requirement that the *Miranda* waivers be "voluntary."

B. *The Objectives to be Pursued*

A fundamental difficulty with the law of confessions has been the failure of courts and commentators to identify the underlying objec-

203. *See* text following note 64 *supra*.

204. The federal judiciary could not, of course, prevent the continued application of local voluntariness tests by state courts. Implementation of this suggestion would require that state courts abandon their evidentiary rules in recognition of the practical, if not doctrinal, preemption by *Miranda*. This, however, is not always recognized. *See* note 83 *supra*.

tives of limitations placed upon the manner in which confessions may be obtained and used. Although the assurance of reliability[205] is still an objective, there can be no doubt that the underlying concern now extends much further. On the other hand, there seems little merit to the *Miranda* detractors' suggestion that the objective of current legal doctrine is to eliminate confessions entirely from the criminal process.[206] It is interesting that even the briefs in *Miranda* were of little value in identifying objectives. The most sophisticated brief arguing for additional limitations suggested that the Court's objective should be the relatively traditional one of protecting subjects from "coercion," which was defined as creating the impression that "the police have a right to an answer, and, indeed, to what the police regard as the 'correct' answer."[207] This is far too narrow a view.

Justice Frankfurter, in his extensive discussion in *Culombe v. Connecticut*, recognized the complexity of the problem when he identified the divergent positions that must be accommodated with the voluntariness rule:

> At [one] pole is a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime. Cardinal among them, also, is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that, in Hawkins' words, a prisoner is not "to be made the deluded instrument of his own conviction."[208]

But Justice Frankfurter—and Hawkins—beg the question. When, and why, is a person "exploited" for information to condemn him or, in Hawkins' languge, made the "deluded instrument of his own conviction"? Neither jurist addresses this question. Yet unless it is resolved, a major policy basis and an important objective of the law of confessions remains ambiguous.[209]

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205. *See* text accompanying note 40 *supra*.

206. *See* Ervin, *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125, 126 (1967).

207. Brief for The American Civil Liberties Union as Amicus Curiae at 156, Miranda v. Arizona, 384 U.S. 436 (1966).

208. 367 U.S. at 581, *quoting* 2 W. HAWKINS, A TREATISE OF PLEAS OF THE CROWN 595 (8th ed. 1824).

209. *See also* Blackburn v. Alabama, 361 U.S. 199, 207 (1960). The Court in *Black-*

There is widespread agreement that the decision to confess is often the functional equivalent of a decision to plead guilty.[210] Thus, it can be argued that a major objective of the law of confessions should be to make certain that a person confessing is afforded the same opportunities as a person pleading guilty who has not previously confessed. Plainly, the law's objective in the guilty plea situation is to assure that defendants plead guilty with full knowledge of the results that may follow, of the alternatives available, and of the comparative costs and advantages of pursuing these alternatives.[211] A major objective of the

burn stressed that refusal to accept a confession made while the suspect was insane could be justified either on the ground of the unreliability of such a statement or on the basis of "simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion." Typically, there was no discussion of why the state "should" not take advantage of insane persons in this manner, *i.e.* what interests would be infringed by doing so.

210. *Cf.* Miranda v. Arizona, 384 U.S. 436, 466 (1966). *See also* Michigan v. Tucker, 417 U.S. 433, — (1974) ("The natural concern which underlies many of these decisions [dealing with the privilege against compelled self-incrimination other than at the trial of the case] is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage").

211. *See* Boykin v. Alabama, 395 U.S. 238 (1969) (finding constitutional error in the acceptance of a guilty plea without an affirmative showing that it was being entered intelligently and voluntarily). *See also* North Carolina v. Alford, 400 U.S. 25 (1970) (suggesting that where the defendant denies guilt of the crime, a guilty plea may constitutionally be accepted only if there is also a "strong factual basis for the plea" in the record). In McCarthy v. United States, 394 U.S. 459 (1969), the Court held that where a plea is offered to a charge that encompasses lesser included offenses, Rule 11 of the Federal Rules of Criminal Procedure requires the judge to ascertain that the defendant understands the difference between the greater and lesser charge and how that difference applies to the facts at issue; it is not clear whether a similar requirement is embodied within due process standards. *Cf.* Fontaine v. United States, 411 U.S. 213 (1973) (even though plea was accepted in full compliance with Rule 11 and constitutional standards, it was open to attack on the ground that it was induced by "a combination of fear, coercive police tactics, and illness, including mental illness"); Santobello v. New York, 404 U.S. 257 (1971) (where defendant entered plea in reliance upon prosecution's promise not to make sentence recommendation and promise not kept, defendant was constitutionally entitled to relief). *But cf.* McMann v. Richardson, 397 U.S. 759 (1970) (defendant who pled guilty with reasonably competent legal advice could not attack plea by claiming unawareness that confession in state's possession was arguably subject to challenge); Brady v. United States, 397 U.S. 742 (1970) (guilty plea entered in belief that it was only available way to avoid possibility of death sentence was not rendered unintelligent or involuntary when belief was inaccurate). These latter cases must rest on an assumption that the need to assure finality of convictions outweighs the value of preventing convictions based on guilty pleas that are not voluntary and intelligent (as those phrases are used in the text). They do not stand for the proposition that it is unnecessary to take reasonable precautions against a defendant's entering a guilty plea under a mistaken apprehension about whether evidence in the possession of the prosecution is subject to attack or whether the plea is necessary to secure a tactical advantage.

law of confessions, then, should be regarded as assuring that a person who confesses does so with as complete an understanding of his tactical position as possible. This, of course, would require awareness not only of his abstract legal rights, but also of his practical ability to implement those rights in light of his factual situation and of the tactical wisdom of asserting them.[212]

Although it has been largely unarticulated, the desire to ensure that a confessing defendant makes a fully informed and reasoned choice has permeated the case law. Despite the professed reliance on the need to assure reliability, the early promise of benefit cases probably rested to a significant extent upon the perceived unfairness of encouraging a defendant to give up his trial rights. And the constitutional voluntariness cases, even if the analysis in them was confused, clearly regarded as important both the defendant's awareness of his legal and factual status and his ability to judge his own tactical best interests. With respect to the rights defined in *Miranda*, that case and *Schneckloth* strongly suggest that the requirement that there be a "voluntary" waiver of these rights means that attention must be focused even more directly upon the defendant's conscious awareness. Seemingly, an important factor in this inquiry is the defendant's awareness of all of the major facts relevant to an assessment of his tactical position.[213]

These cases are of minimal importance, however, in formulating a rule for determining the admissibility of confessions—a determination which should focus on future situations. If a newly adopted confession rule appeared to threaten severely the finality of many past convictions, the rule could—and probably should—be applied only prospectively. *See* Desist v. United States, 394 U.S. 244 (1969).

212. One author suggests that the rationale best explaining the coerced confession cases is that since a confession has such a pervasive impact upon the trial system, "no confession obtained under circumstances not compatible with an accusatorial, adversary system should be admitted into evidence." *See* Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 325 (1964). The objective suggested in the text is consistent with this rationale, but fleshes out the "circumstances not compatible with an accusatorial, adversary system." *But cf.* Robinson, *Massiah, Escobedo, and Rationale for the Exclusion of Confessions*, 56 J. CRIM. L.C. & P.S. 412, 424 (1965) (discussing seven possible justifications for limiting admissibility of confessions and concluding that "the reach of current confessions exclusion doctrine can be justified only in terms of protecting the interests of guilty defendants desiring to avoid conviction").

213. A similar situation troubling the courts has been the failure of Internal Revenue Service investigators to inform fully taxpayers who are being investigated that an investigation has become one in which the Service contemplates criminal as well as civil penalties. Generally, this shift in objective is implemented by having a Special Agent from the Intelligence Division participate in the interviewing or interrogation. Federal courts have repeatedly held that where the subject is not in custody, no *Miranda* warnings need

Emphasis upon this aspect of the defendant's awareness is consistent with the policies underlying the privilege against compelled self-

be given. *See, e.g.*, United States v. Beckwith, 510 F.2d 741 (D.C. Cir.), *cert. granted*, 95 S. Ct. 2627 (1975). These holdings, however, have often been accompanied by statements that incriminating statements obtained by fraud, deceit, or trickery are inadmissible, whether or not the subject was in custody at the time of the statement. *See, e.g.*, United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970). *See also* United States v. Marra, 481 F.2d 1196, 1203 (6th Cir.), *cert. denied*, 414 U.S. 1004 (1973); United States v. Lehman, 468 F.2d 93, 105 (7th Cir.), *cert. denied*, 409 U.S. 967 (1972); United States v. Stribling, 437 F.2d 765, 772 (6th Cir.), *cert. denied*, 402 U.S. 973 (1971). The deceit generally relied upon by defendants challenging confessions made during such investigations is the failure to inform the subject of the shift in the nature of the investigation. Courts have been reluctant, however, to find that this failure constitutes the sort of deceit that invokes the rule. This is especially true if the new investigator identified himself as a Special Agent, whether or not the subject understood that involvement of a Special Agent indicated that criminal prosecution was being contemplated. *See, e.g.*, United States v. Marra, *supra*; United States v. Lehman, *supra*; United States v. Stribling, *supra* (over dissent). In United States v. Prudden, *supra*, the court rejected an argument that the failure to inform the subject of the nature of the investigation plus the general atmosphere of friendliness and cordiality generated by the agents constituted sufficient deceit to invoke the rule. *See also* United States v. Bland, 458 F.2d 1 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972) (Special Agent's failure to identify himself as such was not *material* fraud, because record shows that defendant did not understand significance of involvement of Special Agent and therefore was not misled); United States v. Tonahill, 430 F.2d 1042 (5th Cir.), *cert. denied*, 400 U.S. 943 (1970) (Special Agent's failure to explain significance of his involvement to defendant, an experienced criminal lawyer, or to defendant's accountant did not constitute the clear and convincing showing of material fraud necessary to invoke the rule).

The Seventh Circuit has ruled that *Miranda* warnings must be given to a taxpayer at the first contact after the case has been transferred to the Intelligence Division for possible criminal prosecution—even if the interrogation is noncustodial. This rule is based upon the conclusion that the danger of the taxpayer incriminating himself because of a "misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so" is as great in the noncustodial tax investigation context as in the custodial traditional criminal investigation. *See* United States v. Dickerson, 413 F.2d 1111, 1113-17 (7th Cir. 1969). *But cf.* United States v. Beckwith, *supra* (refusing to extend *Miranda* to interrogations in noncustodial circumstances after investigation "focused" on suspect who was given modified warnings; interrogation found not coercive or misleading); United States v. Sicilia, 475 F.2d 308, 310 (7th Cir.), *cert. denied*, 414 U.S. 865 (1973) (declining to extend *Dickerson* rule to criminal investigation where inquiry had "focused" on suspect who was not yet in custody). The Seventh Circuit position seems clearly based upon the assumption that the fifth amendment and *Miranda* are designed to protect a suspect's ability to make a well-informed tactical choice:

> We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. . . .

incrimination.[214] In addition, it avoids the absurdity of restricting attention to abstract legal rights when it is generally acknowledged that factual information and tactical considerations may be fully as important in implementing those rights as their theoretical existence. Of course, recognition of this awareness as the objective of the law does not mean that specific rules relating to confessions must implement this goal to the maximum logical extent. It has traditionally been recognized that the law relating to confessions is a compromise among competing considerations, only one of which is the protection of the subject's interests.[215] Moreover, this somewhat limited implementation of the awareness objective is in accord with the fifth amendment privilege, which has been recognized as less extensive than its policy foundations logically might suggest.[216]

Several arguments could be made against accepting the proposition that the law of confessions should seek to assure that pretrial confessions are made under circumstances maximizing the subject's ability to make a reasoned tactical choice.[217] One, of course, is based upon

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. . . [I]t is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe.

United States v. Dickerson, *supra* at 1114, 1116. The same danger obviously concerns other courts whose opinions indicate significant discomfort with the failure to protect adequately this ability of the suspect.

214. The privilege is based in part on an almost metaphysical notion that encouraging a person to participate in his own "downfall," *i.e.* his criminal conviction, is inconsistent with the person's inherent dignity as a human being, whether or not he is guilty. *See* McCORMICK, *supra* note 1, § 118, at 252. Fully informed choice seems a logical way to define the choice a person should have about whether he is to be permitted to degrade his own dignity.

215. *See* text accompanying note 208 *supra.*

216. *See* Schmerber v. California, 384 U.S. 757, 762 (1966) (scope of privilege does not coincide with the "complex of values it helps to protect").

217. The discussions rejecting a broad objective for the law of confessions have not been helpful. In Collins v. Brierly, 492 F.2d 735 (3d Cir. 1974), for example, the court in dicta rejected a requirement that the warning include the crime under investigation. The object of the Supreme Court decisions, the court asserted, is to enable a suspect to "make a rational decision, not necessarily the best one or one that would be reached only after long and painstaking deliberation." *Id.* at 738. But the court devotes no effort to explaining how a decision made in ignorance of the operative facts (as contrasted with the law) can be "rational." Perhaps one key to this court's position is its comment that "it may be argued forcefully that a choice by a defendant to forego the presence of counsel at a police interrogation is almost invariably an unintelligent course of action." *Id.* at 738-39. If, of course, any waiver is certain to be against the subject's best

precedential authority, both from the common law doctrine and from the constitutional voluntariness test. But there are several reasons why precedent should be given minimal respect here. As indicated in the earlier discussion, the common law rule—if, in fact, it was a well-established rule—developed at a time when police misconduct was not viewed with the abhorence that it is today. In addition, there is no evidence that the English common law rule represented a thoroughly considered position. To the contrary, it is arguable that the refusal to give ignorance or official deception any legal effect was an effort to balance a stringent, and perhaps unrealistic, prohibition against promises and inducements. The development of the American common law evidences no greater reflection on the underlying policy considerations, and the development of constitutional doctrine consisted of little more than a long-standing and apparently intentional refusal to consider directly specific factors such as ignorance and mistake. The complete lack of analysis and supporting discussion in the only Supreme Court case considering deception is unfortunately representative of the quality of case law precedent. Greater emphasis should be placed instead on the statements in *Miranda* and *Schneckloth* that suggest the significance of ignorance and deception rather than relying on the ill-considered and uncritically accepted common law authorities. In view of the general lack of agreement on the extent that ignorance, mistake, or deception give rise to constitutional issues, the whole matter should

tactical interests, the objective proposed in the text is inherently inconsistent with the present law's position that a valid waiver can be made. It may be that if the position advocated in the text were implemented effectively, far fewer valid waivers would be found. But in the absence of reliable evidence to the contrary, it seems wise to assume—as the Court undoubtedly did in *Miranda*—that in a significant percent of the cases, waiver of the rights to counsel and to remain silent would be to the subject's tactical advantage, or at least not to his tactical disadvantage.

One other aspect of the *Collins* opinion offers insight into the motivation of those courts that have exhibited hostility to the position advocated in the text. The court at one point refers to the argument that information concerning the offense must be "included in the pre-interrogation litany." *Id.* at 739. This suggests that the entire warning-waiver requirement is regarded as a meaningless technicality and therefore does not deserve further development. The empirical evidence tends to support the assumption that the warnings and the waiver requirement are unlikely to increase the quality of the choice which a subject perceives as available to him. This may, however, not be inherent in the approach of *Miranda* but rather due to the failure of the courts to define realistically the information that must be conveyed to the subject and the understanding that must exist before a waiver may be made. At least until a more promising approach appears, it seems unwise to continue to work with the law of confessions on the assumption that it serves no legitimate function.

be regarded as one particularly appropriate for de novo analysis and resolution.

Practical objections could also be raised. Conceivably, the inquiry required to implement this objective—that is, a reconstruction of the subject's state of mind at a past time—is so difficult, time consuming and unlikely of success that the possible beneficial results are outweighed by the time and energy consumed in the necessary investigations. But this objection overlooks the potential for creative use of procedural devices to avoid unjustified litigation; this potential is discussed in detail in the next section.

A related argument might go to the possibly undefinable scope of inquiry that acceptance of such an objective might require. Since an almost limitless number of factors could be relevant to a subject's tactical advantage, it is arguable that a rule focusing upon his ability to make a reasoned tactical choice provides no logical basis for defining —or limiting—the factors legally relevant. The result, according to this line of reasoning, would be a rule as unmanageably broad and flexible as the traditional voluntariness test. As noted above, however, acceptance of the objective does not require adopting a legal criterion for admissibility of confessions that demands awareness of every factor helpful to the making of a reasoned tactical decision. Rather, accepting the objective would simply focus attention on these matters and suggest that the criterion should be drafted with them in mind. There may well be legitimate considerations that would justify selecting only a limited number of factors relevant to the tactical decision and identifying them as legally relevant to the admissibility of the confession.

The final argument against the position advocated here is essentially a philosophical one. It can be argued that although the law should seek to prevent certain factors from influencing a suspect's decision to confess, one who is guilty of a criminal offense has no legitimate basis for withholding an admission of guilt to minimize the likelihood of his conviction or the severity of the penalty he will receive. Thus the law should not seek to further his ability to maximize his tactical advantage, even if it is desirable to eliminate the effect of certain influences, such as physical pain and discomfort. This argument, of course, takes issue with the basic premise of the position suggested above. The choice must be made intuitively and depends almost entirely upon the view that is taken of the importance of the individual's dignity. There can be little doubt that the ability to control or at least affect one's own

destiny is part—if not the essence—of the dignity of the individual and similarly that it is desirable that this characteristic be respected in others. But the question is whether this respect needs to be shown by minimizing state exploitation of the subject's inability to choose whether or not to confess in order to lessen the unpleasantness that destiny holds for him. Perhaps it can be argued that one who engages in criminal activity thereby reduces his intrinsic value sufficiently that such exploitation by the state is no longer unacceptable. But, of course, rules relating to interrogation and confessions may also influence the way in which innocent, but suspected, persons are treated and may occasionally govern a situation in which an innocent suspect resolves the tactical dilemma in favor of confessing in order to minimize the impact of a seemingly inevitable conviction. In addition, it can be asserted that commission of an offense does not so alter a person's inherent worth that such exploitation is justified; indeed, this is an underlying assumption of the privilege against compelled self-incrimination. The matter is not, however, susceptible to logical debate or empirical inquiry and thus is a matter that must be resolved according to an intuitive definition of human dignity.

The case law also suggests another objective which might be expressly recognized. Since the development of the exclusionary rule, much of the emphasis of search and seizure doctrine, as well as confession doctrine, has been on the value of the legal rules in preventing improper police activities. The result has not infrequently been discouragement generated by the apparent inability of rules of evidence to control the behavior of law enforcement agencies. A careful review of the development of confession law suggests that while deterring improper methods of interrogation is certainly one legitimate objective of this body of doctrine, preventing the use of certain self-incriminating statements is an independent objective defensible on its own merits. The early involuntariness cases stressed the offensiveness of permitting a conviction to rest upon a coerced confession,[218] and later cases are not at all inconsistent with the early cases in this respect.[219] Preventing

218. *See* text accompanying note 47 *supra.*

219. *See, e.g.*, LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974). In the course of holding the defendant constitutionally entitled to challenge the voluntariness of a statement offered to impeach, the court stated:

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case.

Id. at 34.

the use of certain confessions may be based upon the theory that reliance on such evidence depreciates the image of the criminal justice system in the eyes of the community and consequently makes it more difficult for the system to function effectively. The nonuse may also be based upon the essentially intuitive notion that making use of "dirty" evidence is wrong and to be avoided, whether or not specific disadvantages demonstrably flow from considering such evidence.

In addition, there seems to be a feeling that although obtaining a self-incriminating statement from a person in an impermissible way is a violation of his inherent dignity, using that statement to the person's disadvantage is a significantly incremental violation of that dignity. This feeling is consonant with the notions underlying the privilege against compelled self-incrimination, which abhor not only the application of coercion itself but also the use of compelled testimony.[220] As are the sentiments about the exploitation of a subject's lack of knowledge at the time he confesses, this feeling is a largely intuitive notion and is based upon the perceived offensiveness of causing a person to participate in a process leading to his own detriment, even if the participation is of the relatively indirect sort involved in using a self-incriminatory statement against the speaker.

In opposition to accepting the prohibition against the use of certain confessions as a major objective of confession law are several arguments—the utilitarian one emphasizing the cost of sacrificing reliable evidence of an accused's guilt and the intuitive assertion that whatever an individual's dignity involves, it is not offended by such indirect participation in his own downfall. Not much helpful discussion can be had concerning the second argument. The first is really related to the second and is basically the proposition that reliable evidence should not be ignored in the determination of guilt or innocence unless there is an important reason fo doing so. Whether or not there is sufficient basis for rejecting certain statements depends upon how one measures the effect on a defendant's dignity of using the statements and, of course, how one evaluates the likelihood that exclusion of the statements will prevent similar confession situations from arising in the future, as well as the importance of preventing such situations.

220. The fifth amendment language itself refers to a person being a "witness" in "any criminal case." U.S. CONST. amend. V. Compared to the historical roots of the privilege, extension of the privilege to situations outside the criminal defendant's own trial has been relatively recent. *See* MCCORMICK, *supra* note 1, § 116.

While the matter cannot be regarded as free from doubt, it seems that the emphasis in the case law with regard to self-incriminating statements and the offensiveness, perceived by many persons, of using improperly obtained evidence together constitute sufficient justification for making avoidance of use of improperly obtained statements an important objective of confession law. Recognition of this objective as independent of the objective of deterring the improper acquisition of statements will assist in clarifying the analysis required by the problems of concern here.

C. *The Means*

Much of the discussion here has proceeded on the assumption that the only methods of dealing with confessions affected by promises, deception, ignorance, or mistake are blanket rules invalidating the confessions. This assumption, however, ignores creative use of several procedural devices: special evidentiary requirements and the burdens of producing evidence and of persuasion.

The burden of persuasion, of course, is the burden of establishing the facts at issue[221]—in this context, the defendant's awareness or the lack of it and its effect upon his decision to confess. Making lack of awareness controlling but placing the burden of establishing this fact on the defendant avoids many of the problems anticipated by those who disfavor increasing the prosecution's burden and who fear that court time will have to be allocated to litigate nonmeritorious cases. The evidentiary standard itself can also be manipulated. Thus if there is a need to take special care to avoid creating new impediments for the prosecution, a burden of proof by clear and convincing evidence or even of proof beyond a reasonable doubt can be used.

As a procedural device which controls only whether or not a matter is put in issue, the burden of coming forward with, or of "producing," the evidence is distinguishable from the burden of proof.[222] If the burden of proof is placed upon one party, the effect of this action can be mitigated by imposing upon the other party the burden of coming forward with evidence. Thus, the first party is put to the trouble of meeting his burden only when the other party has already produced a significant amount of evidence on the issue.

Finally, special proof requirements may be imposed. For example,

221. *See* McCORMICK, *supra* note 1, § 336, at 784.
222. *Id.*

a defendant might be required to come forward with evidence other than his own testimony in order to raise the issue of his actual awareness of the meaning of the warnings. The decision of the Ohio Supreme Court in *State v. Jones*, discussed above,[223] can be read as imposing such a proof requirement. Arguably, the court there regarded the difficulties of inquiring into a defendant's actual understanding as so great that in order to raise the issue, a defendant would be required to come forward with an especially persuasive type of evidence, that is, his own conduct at the time of the interrogation from which his lack of understanding could be inferred.

The imposition and distribution of these burdens and requirements is a complex matter that should be influenced by several considerations. One is the statistical likelihood that the facts will actually coincide with the version of one of the parties; a burden may be placed upon the party whose version is less likely to be accurate.[224] Another consideration is the relative access of the parties to the evidence needed to resolve the issue; a burden may be placed upon that party who has greater access to the facts or who can probably produce evidence with less effort or expense.[225] Last is the potential need to discourage costly and unjustified litigation; a burden may be placed upon those defendants who, if not restrained by such a device, might produce as a group an unacceptable amount of litigation.[226]

The three procedural devices can be placed on a continuum according to the heavy-handedness with which they further the considerations identified in the preceding paragraph. A requirement of some specified type of evidence is likely to be the most difficult to meet and, therefore, would impose the most prophylactic barrier to the success of those upon whom it is placed. The burden of proof is probably somewhat less restrictive, depending partly on the standard of proof demanded. Finally, the burden of coming forward with evidence is clearly the least difficult of the three to meet.

If these devices are carefully distributed among the parties, various combinations of objectives can be achieved. For example, it may be desirable to avoid litigation when little evidence is available, but to impose a severe burden upon one party in those situations in which evidence on the issue can be obtained. To achieve these objectives, the

223. *See* text following note 148 *supra.*

224. *See* McCORMICK, *supra* note 1, § 337, at 787.

225. *See* MODEL PENAL CODE § 1.12(3)(c) (P.O.D. 1962).

226. *See* McCORMICK, *supra* note 1, § 337, at 786-87.

burden of coming forward with evidence could be placed on the party with best access to the evidence, and the burden of proof (and perhaps a requirement of specified evidence) could be placed on the other party. Thus in those cases in which there was little evidence available on the issue, the first party would fail to sustain its burden of producing evidence; in those cases in which the first party succeeded—but only in those cases—the second party would bear a heavy burden of proof on the issue.

Some constitutional limitations exist upon the manner in which these procedural devices can be distributed, but these limitations are flexible. For example, although the prosecution has the burden in criminal litigation of proving guilt beyond a reasonable doubt, yet in regard to specific issues, the burden of proof may be shifted to the defendant if this is "just" and does not subject the defendant to "hardship or oppression."[227] Apparently, this means that two conditions must be present for shifting the burden. First, once the prosecution has proved those elements upon which it bears the burden, the statistical likelihood that the facts on the remaining issue or issues are consistent with guilt must at least be greater than fifty percent. Second, the shift of burden to the defendant must presumably serve some legitimate function, such as compelling defendants to produce evidence on matters in which they have sole or at least much greater access to the facts.[228]

Supreme Court case law has unfortunately largely ignored these procedural matters. It is at least clear that the prosecution has the burden of proving the voluntariness of a confession, although the preponder-

227. Morrison v. California, 291 U.S. 82, 88-89 (1934).

> [W]ithin limits of reason and fairness the burden of proof may be lifted from the state . . . and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Id. *See also* Mullaney v. Wilbur, 95 S. Ct. 1881 (1975) (due process precludes requiring manslaughter defendant to prove sudden provocation); Stump v. Bennett, 398 F.2d 111, *cert. denied,* 393 U.S. 1001 (1968) (due process violated by placing burden of alibi on defendant).

228. This conclusion is also reflected in the constitutional doctrine that a presumption used in criminal litigation will violate due process standards unless the presumed fact is more likely than not to exist if the proved fact exists, see Leary v. United States, 395 U.S. 6, 36 (1969), and perhaps unless there is proof beyond a reasonable doubt that the presumed fact will exist, *cf.* Turner v. United States, 396 U.S. 398, 416-18 (1970).

ance of evidence standard is all that is constitutionally required.[229] Apparently, the same rule also applies to a waiver of rights under *Miranda*. Less clear, however, are the burdens under the fourth amendment's prohibition against unreasonable searches and seizures and under the attendant exclusionary rule. In *Schneckloth*, the Court apparently accepted the proposition that the prosecution bears the burden of proof when it seeks to justify a search by claiming that consent thereto was voluntarily given.[230] In *United States v. Matlock*,[231] the Court noted that it had no occasion to consider whether the trial court committed error in placing the burden of proof—apparently in regard to the entire issue of the reasonableness of the search—on the prosecution and in defining that burden as one of proof by the greater weight of the evidence.[232] But there has been no recognition that the Constitution may possibly direct or permit a careful definition and distribution of the various sub-burdens in order to achieve maximum value at minimal cost.[233] Even if it is constitutionally necessary that the burden of proof be placed on the prosecution, there is sufficient flexibility in doctrine to permit some redistribution of that burden and of the burden of production on particular subissues. In fact, it is likely and reasonable that there is more flexibility in regard to collateral matters such as voluntariness determinations than there is in regard to those issues relating directly to guilt or innocence.

The state and lower federal courts have shown more initiative in the search area. Although there are some jurisdictions in which the entire burden of proving the unreasonableness of a contested search lies on the defendant,[234] in most jurisdictions the prosecution has the burden

229. *See* Lego v. Twomey, 404 U.S. 477 (1972).

230. 412 U.S. at 222.

231. 415 U.S. 164 (1974).

232. *Id.* at 167-69, 177-78 & n.14.

233. This failure has extended to other areas as well, including the substantive criminal law. In deciding the so-called "strict liability" cases, the Court has never addressed a compromise which would make state of mind an element but put it into issue only when and if the defendant comes forward with evidence that he lacked the requisite awareness. *See, e.g.*, United States v. Freed, 401 U.S. 601 (1971); Morissette v. United States, 342 U.S. 246 (1952); United States v. Balint, 258 U.S. 250 (1922); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910).

234. *See, e.g.*, MONT. REV. CODES ANN. § 95-1806(f) (1969) ("The burden of proving that the search and seizure were unlawful shall be on the defendant"). *See also* State v. Maxwell, 502 S.W.2d 382, 386 (Mo. Ct. App. 1973) ("It is the movant who has the burden of presenting evidence to sustain his contentions that the search and seizure was unlawful"). Some cases reflect confusion on the question of who has the burden. *Compare* Clemons v. State, 501 S.W.2d 92, 93 (Tex. Crim. App. 1973) ("The

of establishing the propriety of the search.[235] But if the prosecution shows that the search was made pursuant to a warrant, a number of courts have held that the burden then shifts to the defendant to establish that the warrant was insufficient.[236] Arguably, this shift is justifiable if one accepts the propositions that most warrants are issued in a manner consistent with fourth amendment standards (a presumption of official regularity) and that the affidavits on which warrants are issued are readily available, thereby affording both parties equal access to the operative facts. Similarly, the defendant has been held to have the burden of proving facts giving him standing to assert the impropriety of a search and seizure[237] and to have the burden of producing by affidavit such facts as are within his knowledge indicating the need for further inquiry into the validity of a search warrant.[238] Although the prosecution still has the burden of proving the reasonableness of a pre-flight airport search of passengers, a defendant asserting that such searches were being exploited for an improper purpose has been held to have at least the burden of coming forward with evidence indicating that there may have been such an exploitation.[239] There have also been suggestions that the consent to search must be proved by a specific kind of evidence, that is, an express statement or some overt act from which a desire to forego exercise of personal rights can be ascertained.[240] Finally, courts have recognized that even if the prosecution

burden was on [the defendant] to establish that he was the victim of an unlawful search and seizure") *with* Valerio v. State, 494 S.W.2d 892, 897 (Tex. Crim. App. 1973) (burden is upon prosecution to establish consent by clear and convincing evidence). These cases seem not to recognize the different subissues or the value of assigning separately the burden for each subissue. *Valerio,* for example, involved consent, an issue on which there is general agreement that the prosecution has the burden of proof. But *Clemens* involved standing, an issue on which some courts do place the burden on the defendant.

235. *See, e.g.,* United States v. Cooks, 493 F.2d 668 (7th Cir. 1974); People v. Boorem, 519 P.2d 939 (Colo. 1974); Mann v. State, 292 So. 2d 432 (Fla. App. 1974).

236. *See, e.g.,* United States v. Various Gambling Devices, 478 F.2d 1194, 1199 (5th Cir. 1973) ("Since claimant concedes that the seizure was made under a warrant, he bears the burden of establishing the illegality of the search"); Russ v. Camden, 506 S.W.2d 529 (Ark. 1974); State v. Baca, 84 N.M. 513, 505 P.2d 856 (1973); State v. Nearing, 16 Ore. App. 30, 517 P.2d 308 (1973).

237. *See, e.g.,* Holloway v. Wolff, 351 F. Supp. 1033, 1035-36 (D. Neb. 1972), *rev'd on other grounds,* 482 F.2d 110 (8th Cir. 1973); People v. Trusty, 516 P.2d 423, 425 (Colo. 1973).

238. *See* State v. Wright, 266 Ore. 163, 167, 511 P.2d 1223, 1225 (1973).

239. *See* United States v. Mitchell, 352 F. Supp. 38, 43-44 (E.D.N.Y. 1972), *aff'd,* 486 F.2d 1397 (2d Cir. 1973).

240. *See* Hardy v. State, — Ala. App. —, —, 297 So. 2d 399, 401 (Ala. Crim. App.

bears the burden of proof when the issue is contested before or during trial, a defendant who seeks post-conviction relief assumes the burden of establishing the impropriety of challenged policy activity.[241]

Certainly, it can be argued that if greater care were taken in defining the burdens and requirements upon parties litigating the admissibility of confessions, the issues could be more carefully defined and the legal materiality of various matters more clearly established without imposing undue procedural or practical burdens upon prosecutors.

D. *The Considerations*

To evaluate adequately potential rules determining the types of ignorance, mistake, and expectation of benefit that should invalidate a self-incriminating statement, all relevant considerations must be identified. Categorization, here as elsewhere, is largely a matter of subjective preference, but the following matters undoubtedly need to be taken into account:

1. *Maximization of Subject's Ability To Make Fully Informed Tactical Choice*

Acceptance of the objective proposed above, of course, renders this a major consideration. Full implementation would direct the condemnation of confessions made in ignorance of, or under a misapprehension concerning, any matter of fact or law relating to the decision to confess. On the other hand, it would not require condemnation of statements made in return for promises of benefits or in the expectations of benefits if the promises were kept or the expectations were realized. The difficulty, however, of assuring that only realistic expectations and promises are relied upon may lead to further development of a protective rule. If it is accepted that only an experienced attorney can adequately advise a defendant on the reasonableness of promises or expectations, full implementation of this consideration may well direct that no statement be considered unless made after consultation with an attorney.

2. *Avoidance of Use of Improperly Obtained Statements*

It was argued above that independent emphasis should be placed

1974) ("[T]he State must prove that the consent [to search] be evidenced by a statement or some overt act by the owner sufficient to indicate his intent to waive his rights").

241. *See, e.g.*, Johnson v. State, — Ind. —, 313 N.E.2d 542, 545 (1974).

upon the use of improperly obtained statements as contrasted with the discouragement of the actions or circumstances which rendered their making improper. In terms of resolving the problems posed here, this proposition suggests that although attention shuld be devoted to those doctrinal rules that will most effectively discourage improper investigation and interrogation techniques, it is also necessary to consider whether using a statement would constitute a significantly incremental infringement of the defendant's dignity, even if exclusion holds little promise of discouraging future improper police activities. In some situations, the evidentiary value of the statements may outweigh the incremental infringement of dignity caused by their use; nevertheless, the value of preventing the use of statements in some circumstances must be recognized as an independent objective.

3. *Assuring Accurate Trial Outcome*

The need to assure that only reliable self-incriminating statements are used is, of course, still an important consideration. Vigorous implementation of this consideration might direct that all statements made without full awareness of the circumstances or under an expectation of benefit—however stimulated—be condemned, even though in some cases, ignorance and expectation of benefit do not pose significant dangers of unreliability. Whether those situations that do pose such dangers can be identified and adequately discouraged without a blanket rule seems the critical consideration.

4. *Efficient Law Enforcement*

Of course, the major countervailing consideration to the factors outlined above is the effective ascertainment of guilt or innocence of suspects. This consideration suggests that any interrogation technique that does not unduly offend important values should be permitted unless there is no need for further evidence of guilt. Since it may be significantly less costly in terms of resource allocation to seek a self-incriminatory statement even if other evidence is available, "need" should be defined to include only legitimate law enforcement needs.

5. *Discouraging Undesirable Police Conduct*

To the extent that undesirable police conduct is the focus of the rule, emphasis should be placed upon the responsibility of law enforcement personnel for ignorance or misapprehension. Implementation of this

consideration would direct condemnation of statements obtained by use of police deception (assuming it is regarded as undesirable) or by the failure of law enforcement officers to correct what a reasonably alert person would perceive as a misapprehension. This consideration does not address itself, however, to the appropriate position to be taken when a statement is made in ignorance or under a misapprehension for which law enforcement personnel have no responsibility.

6. *Provision of Guidelines for Police Activity*

Rules affecting the admissibility of evidence are obviously also guidelines for those seeking such evidence. It is important, therefore, that rules relating to confessions either contain reasonably precise and discernible guidelines for police action or that they hold the promise for developing such guidelines. This consideration, of course, militates against the approach of the voluntariness rule and *Miranda*-waiver combination. On the other hand, this consideration also suggests that if the subject of an inquiry is so complex or difficult to deal with that a discernible rule, easy of application, cannot be anticipated, the law ought not make the effort to establish one. For example, a reasonable argument can be made that it will be so difficult to identify those facts of which a defendant under interrogation must be aware that realistic guidelines for specifying them are unlikely to be developed, and therefore the matter should not be considered in promulgating rules for confessions.

7. *Administrative Practicability*

As the administrative dissatisfaction with the voluntariness rule demonstrates, it is necessary that rules relating to confessions be sufficiently discernable and definable that trial courts have workable guidelines for deciding specific cases and appellate courts have similar standards for reviewing trial court judgments. As in the preceding consideration, this consideration suggests that the rule be limited to those areas in which it is reasonable to expect such rules to be developed.

8. *Avoidance of Excessive Litigation "Costs"*

The time that will be taken litigating issues raised under any contemplated rule is a necessary consideration. A rule that invites numerous claims must be evaluted in light of the cost of separating meritori-

ous claims from nonmeritorious ones; the extent to which claims can be expected to be meritorious is, of course, important. Thus, this consideration militates against a rule that would enable a large percent of criminal defendants to put prosecutors and courts to a troublesome task of litigating what will usually be nonmeritorious claims. The nature of the inquiries that a contemplated rule necessitates is also relevant. Thus if extensive litigation will be required in a large number of cases in order to resolve the issues opened up by a rule, this outcome militates against adoption of the rule. In view of the difficulty of recreating "state of mind," arguably, the inquiries necessitated by determinations involving a defendant's conscious awareness at the time of interrogation are especially susceptive to the objections this consideration offers. To some extent, though, these objections can be met by the creative allocation of burdens of persuasion and production and the imposition of special evidentiary requirements.

E. *An Accommodation*

The need to deal more adequately with the legal effect of ignorance, mistake, and reliance upon expectations of benefit that surround the making of a self-incriminating statement is clear. Since the initial formulation of the common law rule, the reliance factor has been stressed, unfortunately at the expense of the other factors in the trilogy. The voluntariness test—both as a rule of evidence and as a constitutional doctrine—apparently continued this approach, but tended to merge these factors with other matters unrelated to the subject's awareness in a confusing and unsatisfactory "totality of the circumstances" test. The *Miranda* waiver doctrine may focus more directly and specifically upon the subject's awareness, as indicated in *Schneckloth*, but the decisions in the state and lower federal courts demonstrate that it is still far from clear exactly who needs to prove what when the validity of waiver is challenged on these grounds.

The analysis above suggests the need to separate "awareness" from the other factors traditionally lumped together with it in the voluntariness analysis. In addition, this analysis emphasizes that the defendant's understanding of the facts and the law is distinguishable from his possible reliance upon expectations of benefit. The latter generally concerns the defendant's prediction of how discretionary authority will be exercised by police, judges, prosecutors, and others, and since it there-

fore differs from simple awareness of existing facts, it can beneficially be considered separately.

Analysis will also be furthered if the objective of making the defendant's decision whether or not to confess as fully informed and reasoned as possible is recognized as a major objective of the law of confession. Adoption of this objective almost necessarily leads to the conclusion that exploitation of a subject's ignorance or mistake—and certainly the creation of such ignorance or mistake—is inappropriate and should be condemned insofar as this can be done without incurring excessive countervailing costs. Moreover, this is true whether the ignorance or mistake concerns the existence of an abstract legal right, the law relating to implementation of that right, or facts that influence the tactical decision to exercise that right. Although reliance upon an expectation of benefit would remain a necessary area of inquiry if the awareness objective were adopted, the objective suggests the inappropriateness of the traditional approach which regarded any such reliance in invalidating a statement if the reliance was based upon a promise or representation by a person in authority—even if the promise or representation was kept or accurate. This conclusion follows because the traditional approach would, if fully enforced, often prevent a defendant from making that decision which is to his maximum tactical advantage. Focusing on the tactical nature of the decision to confess, then, leads to the conclusion that the traditional approach is too narrow insofar as it emphasizes reliance upon expectation of benefit but ignores mistake and deceit. It is also too inflexible insofar as it condemns reliance upon even reasonably accepted and kept promises and accurate representations of tactical advantage.

1. *Ignorance or Mistake*

The most appropriate resolution of the issue posed by ignorance or mistake is to require that a defendant have an accurate perception of the basic facts and law concerning his potential liability in order that a waiver of his rights to remain silent and to the presence of counsel be valid. Given the likelihood that defendants will in fact usually have such information, as well as the need to avoid forcing prosecutors to take steps routinely to establish such awareness, it would be reasonable to require a defendant to come forward with credible evidence of his lack of awareness if he wished to challenge a confession on that ground. Thus, in order to lay the foundation for the admissibility of a confes-

sion, the prosecution would need to do no more than is presently required, that is, prove the giving of the warnings and the fact of waiver. No inquiry into the defendant's awareness would be necessary—and no proof of such awareness by the prosecution required—unless the defendant himself produced sufficient evidence to raise a reasonable doubt that he had the requisite awareness.

A more difficult question is whether the type of evidence necessary to raise the issue should be limited to the subject's conduct, at the time of interrogation, which would indicate to a reasonable person that the subject was unaware of critical facts or legal matters. Limiting the evidence in this manner would serve several functions. It would minimize a defendant's ability to develop and present falsified proof because all evidence developed after the interrogation would be ignored. It would also reduce the burden upon prosecutors by putting them to their proof only when this especially reliable evidence was available. Moreover, this limitation would arguably confine ligitation concerning the subject's awareness to those situations in which evidence permitting reasonably reliable resolution of the issue was available. Where, for example, the proof consists only of defendant's testimony that he was unaware of critical facts or legal matters and testimony by prosecution witnesses that the defendant appeared to understand the situation, the likelihood of reliable resolution of the issue may be so low that the matter should not be litigated; with such a limitation, it would not be litigated. Finally, a limitation of this kind would advance the consideration of providing rules to govern police conduct. When a subject has by some statement or act manifested his lack of understanding, it is reasonable to expect interrogating law enforcement officials to respond by taking further actions to make the subject aware of the relevant facts or law. But if the subject has given no indication of his ignorance, it is perhaps unrealistic to expect officers to discern whether or not he is in fact ignorant. This appears to have been the rationale for the court's apparent demand in *State v. Jones* that the defendant establish his lack of understanding of the warnings by an act "reasonably alert[ing] an interrogation officer that the warning must have been misapprehended."[242]

On the other hand, limiting the type of evidence sufficient to put the matter in issue might sometimes artificially restrict a defendant's

242. 37 Ohio St. 2d 21, 27, 306 N.E.2d 409, 412 (1974). *See* text accompanying notes 148 & 149 *supra.*

ability to establish the basic defect in his confession. In addition, it is not clear that administrative efficiency strongly argues in favor of the limitation. If there is no evidence other than the defendant's after-the-fact testimony concerning his ignorance, an attack upon the admissibility of the statement will normally be ineffective; defense counsel would be aware of this and therefore unlikely to raise the issue in an illusory hope of success. Although stressing the need to avoid demanding the impossible of police agencies is obviously appropriate, it does not follow that countervailing considerations—such as respect for defendant's actual capacity for informed self-determination—are less important. Sometimes these considerations outweigh the need for practical demands of the police and should require exclusion of a statement obtained under circumstances which police could not have been expected to alter. The difficulties of the police in discerning ignorance not objectively manifested and the difficulties of the prosecution in later recreating the defendant's "informed" mind could both be drastically minimized, however, if there was an initial requirement that the defendant be informed of the operative facts and law. This requirement could appropriately be added to the *Miranda* warnings and would oblige the police first to determine the basic facts and law relating to the subject's liability, second to inform the subject of these, and third to correct any misconceptions made apparent in regard to these matters. If this is done, the likelihood that subjects will have the requisite knowledge seems high enough to justify allocating the burden of production to the defendant in the manner suggested above.[243]

243. If the police fail to inform a suspect of these facts, the issue whether the prosecution should be permitted to salvage a statement by establishing that the subject was already aware of the facts poses a difficult question. *See* Miranda v. Arizona, 384 U.S. 436, 468-73 n.43 (1966) (statement inadmissible despite knowledge of rights if subject not warned of right to silence and that anything said may be used against him and of right to presence of attorney, but failure to inform subject of right to state-provided counsel will not render statement inadmissible if there was no doubt at time as to his ability to provide his own counsel). Such an opportunity should be afforded the prosecution if this would not, under the circumstances, create a loophole endangering the entire scheme, if the element of the scheme involved is not regarded as sufficiently important to justify an absolute exclusionary rule, or if, weighing these factors, the danger of a damaging loophole in an important part of the scheme is outweighed by the value of using the statements.

It is arguable that giving the prosecution the opportunity to prove knowledge when there was no furnishing of information to the defendant would create an incentive to ignore the requirement of conveying the information. This would be especially true in those situations in which the officers have no hope of obtaining a statement if the subject is aware of the facts. Moreover, knowledge of the facts may be as important a part

This accommodation of the considerations is desirable for several reasons. First, it makes clear that a knowing, voluntary waiver can only be made with that information—whether factual or legal—necessary to a reasoned tactical decision. It recognizes the obvious fact that the most important variables in determining the tactical wisdom of confessing are not likely to be the abstract law but rather the factual context to which the law applies. Therefore, this accommodation at least provides the basis for a rational relationship between waiver doctrine and the underlying objectives of the law of confessions.

Second, the accommodation is unlikely to impose an unrealistic burden on law enforcement agencies. In most cases, there will be no difficulty in determining what facts need to be disclosed if those facts are available to the interrogating agency. For example, if the victim of an assault has died or is in serious condition, this fact must be disclosed. If the subject's involvement in a scheme may make him liable for the crime of another person through the law of parties or a felony-murder rule, that doctrine of law must be explained. In some cases, the facts may be so complex that a reasonable law enforcement officer cannot determine what needs to be revealed. In such a case, the proposed rule would not permit a waiver of the right to counsel or the right to remain silent. This is appropriate. If the officer cannot master the facts well enough to apply the rule, there is a high likelihood that the subject cannot master them well enough to make an adequate decision about waiver; thus any self-incriminating statement would be made without the information that should be required. The same result would be reached if an important fact is unavailable to the police, for example, if they are unaware of the condition of the victim of an as-

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of the overall scheme as knowledge of the rights to remain silent, to prevent self-incrimination by avoiding oral statements, and to presence of counsel during interrogation; therefore, by analogy, *Miranda* suggests no such salvage opportunity should be available. On the other hand, it can reasonably be asserted that subjects generally will be aware of the facts; thus, providing the prosecution with an opportunity to salvage a statement is unlikely to result in admission of many, if any, statements actually made in ignorance of the operative facts. In addition, in view of the offensiveness of rejecting a statement made with knowledge of both the abstract legal rights and the tactical considerations involved in the subject's situation, the cost of denying the prosecution such an opportunity seems extremely high. On balance, it would seem reasonable to permit the prosecution to prove such awareness and thus save a statement that would otherwise be inadmissible for failure to inform the subject of the factual situation. The burden should be upon the prosecution, of course, and should be heavy, perhaps one of clear and convincing evidence that the subject was aware of the information at issue.

sault. In such situations, no waiver should be permitted because no adequately informed tactical choice can be made.[244]

244. The position of American Law Institute's *Model Code of Pre-Arraignment Procedure* on deception is unclear. An early uncirculated draft apparently attempted to define some deceptive interrogation practices that might be prohibited, but this approach was abandoned in later drafts. The rationale given is unconvincing. First, the commentary suggests, efforts to deal with some forms of deception might create the impression that the Institute approves of other forms. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.4, Comment at 356 (P.O.D. 1975). This impression, of course, could have been avoided by an express statement that specified prohibitions were not intended to be exhaustive. Further, the commentary notes that a flat bar to all deception would result in an inquiry into the motivation of interrogating officers (which is apparently regarded as undesirable for unstated reasons) and might cause exclusion of statements which "many would consider not unfairly obtained." *Id.* This, of course, is merely a statement of an unwillingness or inability to define those sorts of deception that should be regarded as "fair." That the ALI simply refused or found itself unable to face the critical question is confirmed by the reporter's expression of belief that "the issue of deception is one which should be left to the courts to pass upon as part of the broader inquiry which they must make" under the prohibition in § 140.4(b) against "any . . . method which, in light of [the subject's] age, intelligence, and mental and physical condition, unfairly undermines his ability to make a choice whether to make a statement . . . ." *Id.* In other words, the Code would leave the courts to develop further a body of case law which has already demonstrated judicial inability or unwillingness to tackle the problem. It is difficult to evaluate the ALI's efforts to overcome the obstacles, however, because the ALI refuses to permit outsiders access to the preliminary draft containing the efforts that were abandoned before the formulation of the circulated drafts.

In several limited ways, the Code does address the issue of deception. Section 140.2 prohibits misrepresentations that a subject is legally obligated to make a statement. This, of course, reflects clearly existing constitutional law and probably beyond dispute is desirable policy. Section 140.6 prohibits any action "which is designed to, or which under the circumstances creates a significant risk that it will, result in an untrue incriminating statement by an arrested person." This language restates the position, taken by a number of American courts, which has proved inadequate to implement the underlying policies demanding vindication. Section 150.2(9) prohibits the use of a statement induced in the absence of counsel if the statement "deals with matters that are so complex or confusing that, in light of such person's age, intelligence, and mental and physical condition, there is a substantial risk that such statement may be misleading or unreliable *or its use may be unfair* . . . ." (Emphasis added.) (Inducing such statements is not, however, condemned.) When use is unfair is, of course, unclear. The accompanying note indicates the test may be whether admission "may prejudice the fair presentation of [a] defense," but makes clear that the mere fact that a lawyer would have advised against the making of the statement—that is, that making it was tactically unwise—is not enough. *Id.*, Explanatory Note § 150.2, at 66. No effort is made to elaborate helpfully on "fairness," and the note discussion, when it becomes specific at all, tends to suggest that accuracy and evidentiary reliability are the touchstones. This approach, as the text of this Article argues, misses much of the point.

The ALI has apparently made some effort to deal with the problem. But faced with the task of defining when deception that has no tendency to induce an inaccurate statement should be condemned, the Institute simply abandoned much of the task and, to

2. *Reliance Upon Expectation of Benefit*

Reliance upon expectations of benefits is a somewhat different problem. Again, this situation presents a defendant with a need to make a tactical decision. In addition, however, the resolution of this matter must be harmonized with a confession/plea bargaining system in which early cooperation with law enforcement officials is likely to be a significant advantage in obtaining lenient disposition. It seems appropriate to treat separately those situations in which the defendant's expectation is based upon promises or representations made by law enforcement or prosecution personnel and those in which it is not.

Where there has been no such promise or representation, a confession should be inadmissible if it was made in reasonable reliance upon an *unrealized* expectation of a benefit relating to the processing or outcome of the criminal prosecution. Such a rule is appropriate because of the general assumption—often a correct one—that cooperation by confessing will lead to such benefits. The criminal justice system, by perpetuating and perhaps encouraging the practice leading to these assumptions, should be required to assure that the practice is followed in particular cases.[245] Where the anticipated benefit is collateral in a broad sense, that is, unrelated to the prosecution or criminal justice system personnel, the possibilities become so diverse and difficult to categorize that their effect must be ignored for practical reasons. Even though the expectations of benefits may have been considered collateral under the traditional voluntariness rule, if the benefits are related to criminal justice system personnel—as, for instance, more favor-

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the extent that it persevered, lapsed into the same vague phraseology that the courts have been hiding behind for years.

245. Several courts have held that a determination of involuntariness cannot be based upon evidence that, on the basis of past experience with law enforcement agencies and stories related by friends, the defendant believed that he would be mistreated if he did not make a statement. *See, e.g.*, People v. Jackson, 41 Ill. 2d 102, 242 N.E.2d 160 (1968); Commonwealth v. Moore, 443 Pa. 364, 279 A.2d 179 (1971). In *Moore*, this holding was justified on the ground that the prosecution would be unable to meet effectively such evidence because the names of those alleged to have been involved in the earlier incidents would often not be available or those involved would be unlikely to recall reliably the circumstances. Whatever the merits of these decisions, they can be distinguished. The availability of more favorable treatment in return for cooperating in one's conviction, as well as the awareness of this availability, is arguably more widespread and reliably documented than police abuse in obtaining a statement. A defendant's testimony that he relied upon an expectation of such benefit is therefore more likely to be both accurate and reasonable than testimony that the defendant relied upon the expectation that he would be abused if he declined to make a statement.

able treatment in jail pending disposition of the case—the expectations should nevertheless bring the rule into play.

Again, it would be appropriate to require the defendant to come forward with reasonable evidence of his reliance and of his failure to realize the anticipated benefit in order to raise the issue when there has been no promise or representation made to him. This would avoid compelling prosecutors to prove routinely a "negative" involving difficult-to-develop factual material. When the defendant has, by his own testimony or other proof, made a credible case of reasonable reliance and disappointment, the prosecutor would have the duty of meeting the issue and would bear the burden of proof. Because of the relatively few situations in which the issue will actually be raised, the duty is unlikely to be overly burdensome.

Where the expectation is based upon a promise or a representation, whether express or implied, by law enforcement or court personnel, a different approach may be justified because of the clearer responsibility of the criminal justice system as well as the greater ability of the chosen procedure to affect future similar situations. Several possibilities exist. Drawing upon the guilty plea analogy, the rule could insist either that the bargain be kept or that the subject be entitled to withdraw his confession and proceed to trial free of its spectre.[246] The danger in the confession-bargain situation is not simply that of noncompliance, but also that of overreaching in the bargaining process. Thus, a second alternative would be to provide subsequent judicial review of the bargain by authorizing courts to suppress a confession if the promise was not kept, the representation was inaccurate, or if the bargain was the product of overreaching by law enforcement personnel. Developing standards for determining what constitutes "overreaching" may well be so difficult, however, that no reasonable result can be expected. No such standards have yet been developed for the plea bargaining process, despite a general recognition that the danger of overreaching by overcharging exists.[247]

246. *See* Santobello v. New York, 404 U.S. 257 (1971).

247. The AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Standard 3.9(e) (1971) provides: "The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial." For discussion of the standard, see the accompanying commentary. The standard, of course, does not deal with charges that could be supported with evidence but either would not result in incremental penalties or, if such penalties could be

A final possibility would be to require the presence and assistance of counsel—that is, make the right counsel nonwaivable *if* confession bargaining is carried out.[248] Although the basic assumption—that

obtained, would not have been brought unless trial was otherwise contemplated. Thus, the standard does not deal with the troublesome situations.

Section 350.3(3) of *A Model Code of Pre-Arraignment Procedure* would also prohibit charging or threatening to charge a crime not commonly charged in the jurisdiction for the conduct involved. The same section would prohibit threatening the defendant that if he pleads not guilty his sentence may be more severe than that imposed in similar cases on defendants who plead guilty. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(3)(b), (c) (P.O.D. 1975). Again, this avoids the main issue. The Code carefully steers clear of prohibiting charges or threats of charges that are not statistically unusual but are frequently employed to "encourage" pleas of guilty, and it does not prohibit representations to a specific defendant that his sentence will be less severe if he pleads guilty than if he stands trial.

248. An analogous argument can be made that following formal charge, no custodial interrogation can take place in the absence of counsel even if the right to presence of counsel is waived. *See* McLeod v. Ohio, 381 U.S. 356 (1965), *rev'g per curiam* 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964). The defendant, who had been indicted for murder, made a confession while riding in a car with a deputy sheriff and an assistant prosecutor; he had made no request for counsel. The Ohio Supreme Court found the confession to be voluntary and therefore affirmed the conviction. In reversing this judgment, the United States Supreme Court simply cited Massiah v. United States, 377 U.S. 201 (1964). *Massiah* had found a violation of the right to counsel in the use of an incriminating statement elicited from the defendant by an informer after the defendant had been indicted. Together, *Massiah* and *McLeod* can be read as prohibiting all post-indictment interrogation unless an attorney is present. The court in United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632 (3d Cir.), *cert. denied*, 395 U.S. 923 (1969), nearly accepted this interpretation when it held that "*Massiah* commands an absolute right to counsel after indictment, thereby vitiating the validity of all oral communications between the defendant and the police made in the absence of counsel." *Id.* at 636. But the court then hedged by adding, "[O]nly a clear, explicit, and intelligent waiver may legitimate interrogation without counsel following indictment." *Id.* Most courts have held post-indictment statements made in the absence of counsel to be admissible if there was a valid waiver. *See, e.g.*, United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971); United States v. De Loy, 421 F.2d 900 (5th Cir. 1970).

Support for the proposition advanced in the text is also available in the cases—admittedly a minority of those resolving the question—holding that a valid waiver of *Miranda* rights cannot be made in the absence of counsel if counsel is already involved in the case. *See, e.g.*, State v. Witt, 422 S.W.2d 304 (Mo. 1967); People v. Arthur, 22 N.Y.2d 325, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) ("Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel").

Unfortunately, discussions of these issues generally proceed without consideration of the underlying policy questions: Are the dangers which the presence of counsel is intended to reduce significantly greater following indictment or involvement of counsel to justify making the presence of counsel nonwaivable? Or, following involvement of

involvement of counsel will avoid overreaching—may be unrealistic, this approach nevertheless seems best suited to the task. Under such a rule, any statement made in response to a promise or representation —whether concerning a collateral matter or not—would be inadmissible unless counsel was present and participated in the bargaining process. Occasionally the rule and the difficulty of obtaining representation may result in a defendant being deprived of the tactical advantage of early confession. In view of the danger of overreaching, however, this seems an acceptable cost.

Procedurally, this last alternative would best be implemented by requiring the prosecution to prove that no offer or promise was made if it offered a statement obtained without counsel present. Generally,

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counsel or indictment, is the mechanical difficulty of making counsel available sufficiently reduced so that a reasonable balancing of the benefits versus the costs demands that the right be regarded as nonwaivable? It is likely that this inadequacy of discussion is partially due to the failure of confession law to identify specifically the impermissible police tactics and unacceptable conditions relating to self-incrimination.

Some analogous help is provided by the guilty plea process. Although the cases are split, a majority of recent decisions have held that a guilty plea entered pursuant to plea bargain is invalid if the defendant was unrepresented during the bargain. *See, e.g.*, Gallarelli v. United States, 441 F.2d 1402 (3d Cir. 1971); Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963). *But cf.* Gotcher v. Beto, 444 F.2d 696 (5th Cir. 1971); People v. Bowman, 40 Ill. 2d 116, 239 N.E.2d 433 (1968). *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1276-78 (1975).

Standard 4.1(b) of the *Standards Relating to the Prosecution Function* would permit a prosecutor to engage in plea, and presumably "confession," bargaining directly with a defendant who refused to be represented by counsel. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 247. The commentary urges prosecutors to be careful to determine that an effective waiver of counsel has been made, and the Standard itself notes:

> the prosecutor would be well advised . . . to request that a lawyer be designated by the court or some appropriate central agency . . . to be present at such discussions.

The commentary does not discuss the rationale for this position, but merely states that an exception to the prohibition against negotiating directly with a defendant "must be made, of course," for these situations. Even if the appropriateness of this standard is accepted, the same position might not be taken with regard to confession bargaining by police. The lack of professional standards and education might distinguish police from prosecutors and justify a prohibition against police-defendant bargaining despite an allowance of prosecutor-defendant bargaining. Nevertheless, the advice given by the standard to prosecutors bargaining directly with defendants should be made mandatory. Defendants cannot be made to accept or even to listen attentively to legal advice, but efforts can be made to give them the opportunity. Appointment of an attorney to be present and object to what he perceives as an unwise bargain would not harm the defendant who is hostile to representation, and it might well benefit those nonhostile defendants who passively indicate a willingness to forego representation.

this proof would simply involve asking a few additional questions of the witness called to testify concerning the admissibility of the confession itself; thus, the burden upon prosecutors would not be significantly increased. If the defendant came forward with evidence of a promise or representation, the issue would be joined, and given the prosecution's access to the facts, its control over the interrogation system, and the great need to discourage noncounseled bargaining, the burden of proof would appropriately be placed on the prosecution.

The effect of such a rule might be mitigated by permitting the prosecution to place a confession into evidence even though it was induced by promise or representation if the prosecution could establish that the defendant was as capable as a reasonably experienced attorney would have been to maximize the defendant's tactical advantage under the particular circumstances. This burden might be met, for example, by proof that the defendant was fully informed of the facts, had significant experience with the administration of criminal justice in the jurisdiction, had the intellectual and personal capacity to drive as effective a bargain as an experienced defense attorney, and knew when he had achieved the best offer he was likely to get from the prosecution or police. The danger, of course, is that this standard might be broadly applied in practice and the exception would consume the general prohibition against uncounseled, bargained confessions. On balance, it seems unwise to include such a provision.[249]

249. The *Model Code of Pre-Arraignment Procedure* would not prohibit the making of promises during interrogation but would make inadmissible any statement induced by a promise of "leniency for, or an improvement in the legal situation of, [the person] or another in whom such person is interested," unless the subject had access to counsel "for a period adequate to obtain advice concerning such inducement and the making of such statement." A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.2(8) (P.O.D. 1975). This refusal to prohibit promise making is justified in the accompanying note with the assertion that in "many" situations, the need to solve other crimes or apprehend or convict other persons warrants inducing statements by promises. *Id.*, Explanatory Note § 150.2, at 65. Thus the Code assumes that it is permissible to exploit a person's perception of his tactical situation and "use" him to solve pending crimes or to locate subjects, as long as he is not subjected to the "ultimate" exploitation of being convicted on the basis of this statement. Perhaps there may be situations in which the need for such information does warrant this sort of exploitation. But the Code provides no basis for believing that such need exists in most cases, or even in a sufficiently large percentage of cases; there is thus no justification for the blanket rule that the Code embraces. Defining those circumstances in which manipulating a subject with promises of leniency is warranted would undoubtedly be a difficult task, but the Code does not establish the impossibility of the effort or even indicate why such an undertaking would be sufficiently difficult to justify its abandonment.

3. *Requirement of Custody and Interrogation*

In the areas both of reliance upon expectations and of ignorance or mistake, this analysis has been based on the assumption that the most appropriate development in the law of confessions would be further expansion and definition of the *Miranda* approach: a requirement that certain information be conveyed to the subject, encouragement but not absolute insistence upon the presence of counsel during the making of a self-incriminatory statement, and a standard for a legally effective waiver of the rights to have counsel present and to avoid self-incrimination. Although the *Miranda* decision extended this approach only to situations in which there has been custodial interrogation,[250] it is by no means clear that the rules proposed above should be applied only to situations in which there is both custody and interrogation.

It would seem especially inappropriate to require custody. The custodial requirement in *Miranda* was based on the Court's conclusion that only in such situations do the "inherently coercive" pressures requiring protection appear. Yet the discussion here has emphasized the need to distinguish between consideration of the subject's conscious awareness, on the one hand, and factors influencing his decision on how to act, on the other.[251] Where the concern is with assuring adequate awareness rather than with preventing impermissible factors to influence the decision to act, custody or the lack thereof is irrelevant. Because exploiting ignorance is offensive whether it occurs when the subject is in custody or otherwise, the above rules should be applied to noncustodial as well as custodial situations.

Whether the rules should be limited to those situations in which there is interrogation is a more difficult question. Insofar as requiring an interrogation is designed to limit the rule to those situations in which inherent coercion exists, the requirement is as inapplicable here as is that of custody. On the other hand, the very considerations underlying the rule in *Miranda*—the demand that suspects be treated with respect for their inherent dignity—suggests that a person who volunteers a self-incriminating statement should not be prevented from carrying out his desire to make such a statement, however ill-based his decision may

250. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

251. This would be easier if the case law recognized the distinction between what the suspect must have been aware of and whether improper influences affected his decision of how to act upon his awareness. The traditional analyses fail to separate the two issues. *See* second paragraph of text following footnote 124 *supra*.

be. Moreover, practical considerations urge the same result. The picture of law enforcement personnel restraining a person who enters a station offering to confess or their holding hands over their ears to avoid listening to his statement is scarcely an appealing one.

The matter may appear otherwise, however, if the exploitation with which the law ought to be concerned is viewed as including not only the taking of the statement but also its subsequent use in evidence. Merely listening to the fruits of an ill-advised decision to confess may perhaps involve exploitation of a sort that should be avoided, but certainly the subsequent use of that statement constitutes a significant incremental exploitation of the original ignorance.[252] Thus it appears reasonable to apply the rules discussed above, whether or not interrogation occurred. If a person volunteers or successfully makes a statement without being informed of the operative facts, law enforcement personnel need not take efforts to restrain or prevent this, but must seek another usable statement—if they desire one—after there has been compliance with the rules. For example, if a person enters a police station and confesses to participation in a robbery which the police, but not the subject, know also involved a killing, his initial statement will not be admissible. A subsequent statement will be, however, but only *if* (in addition to complying with other requirements) the officers inform the subject of the death and his potential liability for it *and*, in order to avoid the second statement being the fruit of the first, insure that he understands his initial statement is not admissible against him.

Adoption of rules such as those proposed here can reasonably be expected to evoke opposition and vocal complaint of the sort that greeted the initial *Miranda* decision. In addition, there may well be a transitional period in which police failure to comply—whether because of ignorance, ill-will, or whatever—will lead to exclusion of statements under disturbing circumstances. If the rules are implemented effectively, however, there is little likelihood that the total effect upon criminal investigation will be serious. In those few cases in which tenable issues are raised, the applicable legal doctrines will focus directly on the issue and will provide a more effective vehicle for its resolution than present voluntariness law.

V. CONCLUSION

The modern law governing admissibility of self-incriminating state-

252. *See* text accompanying notes 218-20 *supra.*

ments has roots deep in English common law doctrine. From the initial articulation of these legal doctrines, emphasis has been placed upon certain aspects of the defendant's conscious awareness at the time he confessed. Early common law evidence doctrine emphasized—arguably unduly—whether the statement was made in the expectation of achieving some temporal benefit, but ignored any failure to understand the operative facts, even if this lack of understanding was the result of intentional deception by law enforcement personnel. Constitutional doctrine, apparently accepting uncritically the approach of the common law evidence doctrine, developed into a confused amalgam of standards. Although the Supreme Court recognized that the objectives of the constitutional standard went beyond the common law rule's concern with excluding unreliable statements, the Court never developed a meaningful distinction between the two doctrines. When the requirement of voluntariness was supplemented—or supplanted—by the objective tests, the accompanying waiver doctrine and the necessity that waivers be voluntary, in turn, reintroduced the substance of the common law and constitutional doctrines as major aspects of confession law. In the post-*Miranda* context, however, voluntariness issues apparently require that more specific attention be directed to a defendant's conscious awareness than earlier doctrine required.

Running throughout the law of confessions has been a concern with the defendant's ability to make a reasonably informed tactical choice in deciding whether or not to make a self-incriminating statement. Assurance of such an ability should now be expressly recognized as a major objective of the law of confessions. It can be convincingly argued that the foundation for admission of a self-incriminating statement should include evidence that the police informed the defendant of the major facts and law relating to his potential criminal liability, whether or not the subject was in custody or was interrogated. Moreover, if a defendant comes forward with reasonable evidence that he was unaware of a matter of fact or law when he confessed and that such ignorance impeded his ability to make a reasonably informed tactical decision about confessing, the prosecution should have the burden of proving that the defendant did possess adequate understanding. Similarly, by coming forward with evidence, a defendant should be able to force the prosecution to prove that a confession was not made in reasonable reliance upon an expectation of benefit if the prosecution offers the confession at trial. Unless an attorney acting for, or on behalf

of, the defendant was present, no statement made in response to a promise or representation of benefit should be admissible. If counsel was not present when the statement was made, the prosecution should have the burden of proving the lack of any such promise or representation. These additional rules would directly address matters of confession law that have long been left ambiguous and would resolve them consistently with the desirable objectives of legal limitations upon the admissibility of confessions but without imposing undue burdens upon investigating law enforcement agencies and prosecutorial personnel.