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Compelled Confession: A Case against Admissibility

Gregory K. Thoreson

The Compelled Confession: A Case Against Admissibility

Modern confession law arises out of the United States Supreme Court's 1966 opinion in *Miranda v. Arizona*.[1] In *Miranda*, the Court held that the fifth amendment requires police to inform a criminal suspect, prior to interrogation, of his right to remain silent and his right to an attorney.[2] If the suspect invokes either of these rights, the Court will presume that his interests have been adequately protected.[3] When a suspect waives his rights and submits to an interrogation without consent, however, confession law becomes operative to determine whether subsequent statements are admissible as evidence.[4]

If a suspect confesses after a waiver of his *Miranda* rights,[5] an issue arises as to whether the confession was voluntary.[6] Yet, in attempting to determine the admissibility of a confession, courts have been unable to articulate a voluntariness standard which is both viable and efficient. To be "viable," a standard must prevent the possibility that an innocent suspect will confess; to be "efficient," a standard must not unduly burden the investigative functions of the police. Attempting to accommodate these countervailing concerns, courts have created a "totality of the circumstances" standard.[7]

This note addresses whether courts should consider the "practicality" of police efficiency when faced with the possibility that an innocent person might be coerced to confess. Part I explains the

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1 384 U.S. 436 (1966).

2 *Id.* at 444. *See also* Note, *Police Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167, 1170 (1979). The defendant "must be warned of his right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney." 384 U.S. at 444.

3 384 U.S. at 444-45. The Court stated that the prosecutor could not use the defendant's exculpatory or inculpatory statements made in custodial interrogation unless proper procedural safeguards were taken to ensure that the privilege against self-incrimination was not violated. *Id.* at 444.

4 The waiver of *Miranda* rights is the most common instance in which the question of voluntariness must be decided. But because *Miranda* rights are only triggered when a suspect is in custody and being interrogated, it is possible for statements made outside this scope to be challenged on voluntariness grounds. *See, e.g.*, United States v. Traficant, 558 F. Supp. 993, 995 (N.D. Ohio 1983).

5 384 U.S. at 444. According to the Court, a defendant could validly waive any or all of these rights as long as the waiver was made voluntarily, knowingly and intelligently. *Id.* The defendant, however, after waiving his rights, can re-invoke them if at any time during the interrogation he indicates that he wishes to speak to an attorney. *Id.* at 444-45.

6 The voluntariness test has also been adopted by the courts for determining the validity of a waiver of *Miranda* rights. *See, e.g.*, Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972), United States v. Nash, 414 F. Supp. 1213 (S.D. Tex. 1976).

7 *See* notes 25-43 *infra* and accompanying text.

policy objectives underlying confession law. In light of these objectives, Part II discusses the "totality of the circumstances" admissibility standard and critiques that standard's practical application. Part III proposes a new standard based upon *Bram v. United States*.[8] Under this standard courts would not weigh the totality of the circumstances. Rather, because the prevention of improper confessions is paramount to the concerns of police efficiency, the *Bram* test renders invalid all confessions where *any* "improper influence" has been exerted. Finally, part IV examines several psychologically coercive interrogation techniques and their continued viability under the *Bram* test. This note concludes that the *Bram* standard, unlike the totality of the circumstances test, effectively protects individual rights in a method consistent with the United States Constitution.

I. The Policy Objectives of a Standard for Voluntariness

Two policy concerns underlie confession law. First, confession law should protect *individual* rights by preventing the possibility that an innocent suspect may improperly confess. Second, confession law should strive to protect *society's* economic and safety interests by promoting crime control.[9]

The first policy objective—avoiding a mistaken confession—is based upon two constitutional provisions: (1) the individual's privilege against compelled self-incrimination, and (2) the individual's right to due process of law. The privilege against compelled self-incrimination arises from the belief that using a compelled statement against its maker offends the person's inherent dignity.[10] Literally, this fifth amendment privilege protects a person only from being compelled to be a witness against himself in a criminal case.[11] The privilege, however, has been interpreted "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[12] In modern law, the privilege has been credited for protecting innocent persons from unjustified convictions,[13] for encouraging respect for

8 168 U.S. 532 (1897).

9 Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275, 344.

10 *Id.* at 333 n.214; MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 118, at 287 (3d ed. 1984).

11 U.S. CONST. amend. V. Historically, the privilege functioned to prevent the use of physical force to extract confessions. MCCORMICK, *supra* note 10, at 286.

12 384 U.S. at 467.

13 MCCORMICK, *supra* note 10, at 286-87. The authors note that an innocent suspect, under the strain of accusation, may become confused and give an erroneous impression of guilt. *Id.* at 287. The privilege against compelled self-incrimination gives the accused the opportunity to forego all conversations with the police and thereby avoid this problem. *Id.*

the judicial system by removing the temptation for perjury,[14] and for encouraging witnesses to come forward by removing the possibility that they will be compelled to incriminate themselves.[15]

Courts have held that in order to find a fifth amendment violation, the government must have compelled a suspect to make an incriminating testimonial communication.[16] But because every confession is, by its nature, an incriminating communication, protecting the individual from compulsion becomes the focus of the fifth amendment as a protective device in confession law.[17]

Like the privilege against compelled self-incrimination, due process of law also focuses on compulsion. The due process clause, however, differs from the fifth amendment because it focuses more on police activity rather than the suspect's activity. Accordingly, in the area of confession law, the Supreme Court has interpreted the due process clause to require that a confession be excluded if the methods used to extract the confession offend fundamental principles of justice.[18] Thus, the due process clause manifests an underlying belief that "obtaining a self-incriminating statement from a person in an impermissible way is a violation of his inherent dignity."[19]

"Crime control" is the countervailing policy of confession

14 *Id.* at 286. It encourages respect because if a suspect were required to testify he would have a significant incentive to perjure himself. *Id.* It also forces prosecutors to use evidence which is more reliable than a confession. *Id.*

15 *Id.* at 287.

16 United States v. Wade, 388 U.S. 218, 222-23 (1967).

17 For a discussion of the question of what amounts to compulsion, see notes 73-118 *infra* and accompanying text. In South Dakota v. Neville, 459 U.S. 553 (1983), the Supreme Court held that mere compulsion is not sufficient to trigger a suspect's fifth amendment rights. Rather, the compulsion must be "impermissible." *Id.* at 562.

18 *See* Haynes v. Washington, 373 U.S. 503, 513 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963). The Court has warned that the means used to extract confessions must reflect the belief that our criminal justice system "is an accusatorial and not an inquisatorial system." Rogers v. Richmond, 365 U.S. 534, 541 (1961).

19 Dix, *supra* note 9, at 337. The use of such a statement against the accused is a violation of his fifth amendment rights. *Id. See* notes 9-17 *supra* and accompanying text.

In addition to this, a confession obtained through an impermissible tactic might be unreliable. At common law, reliability was the only concern in determining admissibility. Note, *supra* note 2, at 1172-73. Currently, however, reliability as an independent objective of confession law does not exist. Rogers v. Richmond, 365 U.S. 534, 544 (1961). It is still an objective, however. Dix, *supra* note 9, at 329. The Supreme Court's present stance on the issue of reliability is expressed in Jackson v. Denno, 378 U.S. 368 (1964).

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; . . . ."

Id. at 385-86 (citations omitted).

law.[20] " 'Fear of crime is destroying some of the basic human freedoms which any society is supposed to safeguard—freedom of movement, freedom from harm, freedom from fear itself.' "[21] Proponents of the crime control argument believe that the dangers to the public inherent in widespread criminal activity justify enhancing police powers.[22] Scholars have argued that the magnitude of this social and economic problem justifies a narrow interpretation of the Bill of Rights.[23] This argument implies that a narrow reading of the Bill of Rights, giving the police more extensive powers, would limit the crime problem and allay the safety concerns of society.[24]

Thus, the goals of confession law are clear. The possibility that an innocent suspect may confess should be guarded against by protecting the suspect's right against compelled self-incrimination and his right to due process of law. The countervailing goal of society's interests in safety, freedom of movement, and freedom from fear are manifested in a concern for crime control. The accommodation of these two goals has led the courts to their present standard for determining the admissibility of a confession: the totality of the circumstances test.

II. The Totality Standard and its Application

Under the current standard for voluntariness, a court must determine whether, under the totality of the circumstances, the defendant's will has been overborne such that his confession is not of his free choice.[25] In terms of coercion, the test focuses on two factors: (1) the defendant's ability to resist coercive interrogation tactics, and (2) the specific police interrogation techniques.[26]

In evaluating a defendant's ability to resist, courts generally focus on the personal characteristics of the individual. This subjective approach requires consideration of characteristics such as

20 Dix, *supra* note 9, at 344.

21 Levine, *"The Great Executive Hand of Criminal Justice": The Crime Problem and the Activist Judge*, 7 HAST. CONST. L.Q. 907, 967 (1980) (quoting NATIONAL COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 16 (1970)).

22 D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 99 (1967).

23 Levine, *supra* note 21, at 963.

24 A related argument, arising out of *Miranda*, questions the propriety of using confession law to protect a suspect who has voluntarily, knowingly and intelligently waived his right to counsel and his right to remain silent. *See* Michigan v. Mosely, 423 U.S. 96, 108-09 (White, J., concurring). Proponents of this view suggest that excluding confessions made after a voluntary waiver deprives "the fact-finding process of highly probative information for no reason at all." *Id.* at 111.

25 Procunier v. Atchley, 400 U.S. 446, 453 (1971) (citing Davis v. North Carolina, 384 U.S. 737 (1966); Haynes v. Washington, 373 U.S. 503 (1963); Spano v. New York, 360 U.S. 315 (1959); Ashcraft v. Tennessee, 322 U.S. 143 (1944)).

26 *See* 22 AM. JUR. 2D *Proof of Facts* § 2, at 549 (1980). *See also* Steele, *Developments in the Law of Interrogations and Confessions*, 1 NAT'L J. CRIM. DEF. 111, 130 (1970).

age,[27] intelligence,[28] and physical illness[29] to determine whether the specific individual's will was overborne. Notably, courts have also considered factors such as the defendant's race or ethnic background and his prior contact with the police.[30]

In addressing the police interrogation techniques, courts generally emphasize the possible presence of coercion in these methods. Psychological coercion is a common tactic often found in the form of promises of leniency,[31] threats of additional punishment,[32] and promises or threats regarding relatives or friends.[33] Other forms of psychological coercion include requiring a polygraph test during the interrogation,[34] forcing the suspect to strip for the inter-

27 Lunnermon v. Peytin, 310 F. Supp. 323 (W.D. Va. 1970); 22 AM. JUR. 2D, *supra* note 26, at 551-52; *See also* Lederer, *The Law of Confessions—The Voluntariness Doctrine*, 74 MIL. L. REV. 67, 85 (1976).

28 *See* 22 AM. JUR. 2D, *supra* note 26, at 552. *See also* Lederer, *supra* note 27, at 86 (arguing that mental retardation should only be one factor in the totality test for determining voluntariness).

Several federal cases have relied on the defendant's mental illness or lack of education in determining the voluntariness of a confession. *See, e.g.*, Sims v. Georgia, 389 U.S. 404 (1967); Reck v. Pate, 367 U.S. 433 (1961); Rush v. Ziegle, 474 F.2d 1356 (5th Cir. 1973); United States v. White, 451 F.2d 696 (5th Cir. 1971), *cert. denied*, 405 U.S. 998 (1972); Boulden v. Holman, 385 F.2d 102 (5th Cir. 1962), *reh'g denied*, 393 F.2d 932, *reh'g denied*, 395 F.2d 169 (1968), *vacated on other grounds*, 394 U.S. 478 (1969). List compiled from Annot., 4 A.L.R.4TH 16, 25-30 (1981).

In some instances courts have ruled that the mental deficiencies of the defendant were so great that the defendant was totally incapable of understanding the meaning of his confession and therefore any resulting confession was involuntary. *See, e.g.*, Cooper v. Griffin 455 F.2d 1142 (5th Cir. 1972), United States v. Nash, 414 F. Supp. 1213 (S.D. Tex. 1976). Both cases dealt with the voluntariness of a *Miranda* waiver.

29 Lederer, *supra* note 27, at 86. Professor Lederer argues that physical illness should be a factor in determining the voluntariness of a confession. *Id.* However, if the illness is self-induced, as in intoxication, the general rule is that the defendant is considered to have waived his right to make a voluntary and intelligent choice as to whether or not to confess. *Id.* at 86-87. This does not mean that the police should be free to coerce if the defendant is intoxicated. Proof of other factors is still permissible to show that the confession was involuntary when considering the totality of the circumstances.

30 *See, e.g.*, United States v. Smith, 574 F.2d 707 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978) (17 year old's confession held voluntary despite his low I.Q. because of numerous prior contacts with police). *See also* 22 AM. JUR. 2D, *supra* note 26, at 553.

31 Lederer, *supra* note 27, at 81. A promise of leniency, in order to render a confession involuntary, should be capable of being fulfilled. If it is not, the maker of the promise will most likely have no influence. 3 J. WIGMORE, EVIDENCE § 828, at 442 n.1 (Chadbourn rev. 1970)

32 *See* 22 AM. JUR. 2D, *supra* note 26, at 554.

33 *Id.* at 555-59. The theory of rendering confessions involuntary due to such a threat is based on the supposition that the relationship between the defendant and the threatened relative is such that the threat will be a sufficient inducement for the confession. *Id.* at 556. See also Annot. 80 A.L.R.2D 1428, 1431 n.14 (1961) for cases concerning this matter.

34 *See* Lederer, *supra* note 27, at 84. The polygraph tends to create apprehension in the suspect thereby placing doubt on the true voluntariness of the suspect's statements. *Id.* Several courts have looked at this differently and have held that coercion to take the polygraph test will render a confession involuntary but the mere presence of the polygraph should not. *Id.* at 84-85.

rogation,[35] and deceit.[36]

The practicality of the totality standard has been criticized. One such criticism is that the flexibility of the totality standard is often used to avoid rigorous inquiry into the details surrounding the confession.[37] For example, in *Johnson v. Hall*,[38] the United States Court of Appeals for the First Circuit relied on the defendant's numerous previous contacts with the police in finding his confession voluntary.[39] The court of appeals believed that this sole factor outweighed evidence suggesting that the defendant had a limited education, that he had been denied sleep, that he was physically injured, and that he had been alone with several police officers during "suggestive and incriminating" lineups.[40] Thus, without supporting its rationale, the court focused on one factor to the exclusion of others.

A second criticism of the totality test focuses on the problems which arise in the use of such a subjective standard with no defined guidelines.[41] First, the test's application leads to inconsistent results because courts have not uniformly determined the weight to be accorded each factor.[42] Second, the subjectivity of the standard administratively burdens the Supreme Court because lower courts have been unable to apply the standard.[43]

III. The *Bram* Test

The practical shortcomings of the totality test suggest the need for a new standard which would eliminate the subjectivity, lack of uniformity, and administrative difficulties incurred under the ap-

35 *See* 22 AM. JUR. 2D, *supra* note 26, at 562-63.

36 Lederer, *supra* note 27, at 83-84.

37 Dix, *supra* note 9, at 303. One commentator has argued that the courts will only pay slight attention to a defendant's characteristics, focusing mainly on the objective police interrogation tactics when determining voluntariness. Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109, 137 (1978). Arguably, courts will also avoid inquiry into police practices when a notable characteristic of the defendant dominates the factual setting. *See* notes 38-40 *infra* and accompanying text.

38 605 F.2d 577 (1st Cir. 1979).

39 *Id.* at 581.

40 *Id.*

41 Dix, *supra* note 9, at 294. Professor Dix attributes this problem to the "totality of the circumstances" test. As the lower courts had to begin applying the standard to police misconduct which was not blatant (i.e., psychologically coercive as opposed to physically abusive) the "line" of demarcation became difficult to decipher. *Id.*

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

Haynes v. Washington, 373 U.S. 503, 515 (1963).

42 *See* Note, *supra* note 37, at 136.

43 *See* Dix, *supra* note 9, at 295. *See also* Note, *supra* note 2, at 1176.

proach.[44] Moreover, the new standard should reflect the policy considerations underlying confession law, favoring individual constitutional rights when those rights clash with the interests of crime control.[45]

The basis of this standard is *Bram v. United States*, an 1897 case.[46] In *Bram* the first mate of an American ship was charged with the murder of several crew members.[47] After arrest, Bram made incriminating statements to the authorities.[48] The Court found these statements involuntary, holding:

> [A] confession, in order to be admissible, must be free and vol-

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44 Both the Supreme Court and Congress have attempted to achieve this goal. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court attempted to objectify the subjective standards of the totality test. The Court was concerned with both the complexity and the coercive atmosphere of the interrogation process. *See* Note, *supra* note 37, at 116. Holding that the fifth amendment applied to the states through the due process clause of the fourteenth amendment, the *Miranda* Court held that the fifth amendment requires the police to apprise a suspect of both his right to remain silent and his right to an attorney. 384 U.S. at 444.

Under the *Miranda* test, a court makes two inquiries. First, a court considers whether counsel was present at the interrogation or whether the right to counsel was validly waived. Dix, *supra* note 9, at 327. Second, a court considers the validity of any waiver of the right to remain silent during the interrogation. *Id.* The court must find that both waivers were voluntarily, knowingly and intelligently made. 384 U.S. at 475. If the warnings were not given or the waivers were invalid, any resulting confession is to be deemed involuntary and therefore inadmissible. *Id.* at 444-45.

Congress has also sought to objectify confession law. 18 U.S.C. § 3501(b) (1982) requires that the judge consider the time elapsing between arrest and arraignment, and whether the defendant knew or was advised of his rights to remain silent and to the assistance of cousel. This last criteria differs from *Miranda* because it considers the warning or failure to warn of constitutional rights as only one factor which a judge must consider when determining voluntariness. Thus, its constitutionality is questionable as the holding in *Miranda* is based on constitutional grounds.

Under 18 U.S.C. § 3501(c) (1982), a confession is presumed involuntary if it is obtained more than six hours after the arrest of the defendant if he has not been brought before a magistrate at that time. This is a rebuttable presumption and the court should consider factors such as transportation and the nearest available magistrate.

These efforts have provided the defendant with an additional constitutional safeguard. These efforts, however, do not actually address the criticisms of the totality approach. In United States v. Curtis, 568 F.2d 643 (9th Cir. 1978), the court held that issues of voluntariness and compliance with *Miranda* are separate constitutional defenses and even though a statement is obtained after *Miranda* warnings are given, it may still be inadmissible if involuntarily given. *Id.* at 647. One author argued that as a practical matter, the defendant's due process voluntariness argument is of no significance because the old voluntariness test has become the new standard for determining the validity of a waiver of *Miranda* rights. Note, *supra* note 2, at 1181. If the *Miranda* rights have been validly waived the resulting confession is presumed voluntary. *Id.* The author also argues that the voluntariness standard as applied to *Miranda* waivers has been relaxed making it easier for the police to obtain the waiver. *Id.* Once the waiver is obtained, the police are relatively free to use any coercive tactic to secure a confession.

45 *See* notes 10-19 *supra* and accompanying text.

46 168 U.S. 532 (1897).

47 *Id.* at 537.

48 *Id.* at 539.

> untary: 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 . . . . *A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.*[49]

Courts have traditionally applied only *Bram's* first statement regarding threats and promises.[50] This statement reflects the understanding that threats and promises create pressure which unfairly impairs the suspect's ability to make a rational choice.[51] Logically, this rationale should extend beyond the realm of threats and promises since other interrogation tactics also apply pressure which impairs a suspect's ability to make a rational choice.[52]

Nevertheless, the Supreme Court[53] and the federal courts of appeals[54] have rejected a broad application of *Bram*. Rather, these courts continue to apply the totality test. According to these courts, to apply *Bram* with "wooden literalness"[55] could come "at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being com-

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49 *Id.* at 542-43 (emphasis added).

50 White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 620 (1979).

51 *Id.*

52 *See* notes 73-118 *supra* and accompanying text.

53 In Hutto v. Ross, 429 U.S. 28 (1976), the Supreme Court held that the test for voluntariness is whether the confession resulted from any sort of threat or violence, any direct or implied promise, or through the exertion of any improper influence. *Id.* at 130. The Court, however, failed to restate the second portion of the *Bram* decision which holds that since the law cannot measure the impact of the influence, any influence at all renders a confession involuntary.

54 A survey of the most recent decisions in the courts of appeals shows that four circuits rely on the *Bram* test as interpreted by *Hutto*. The courts' analyses in these cases, however, manifest a "totality" approach although the totality test is never mentioned. *See* United States v. Gonzales, 736 F.2d 981, 982 (4th Cir. 1984) (citing Grades v. Boles, 398 F.2d 409, 411 (4th Cir. 1968) as controlling on the issue of the voluntariness standard in the Fourth Circuit); United States v. Fisher, 700 F.2d 780, 781 (2d Cir. 1983); Jones v. Cardwell, 686 F.2d 754, 757 (9th Cir. 1982) (citing United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981) as controlling on the issue of the voluntariness standard in the Ninth Circuit); United States v. Raddatz, 592 F.2d 976, 978 (7th Cir. 1979) (case reached court of appeals on a procedural matter, but the court cited *Bram* as the controlling test for voluntariness in the Seventh Circuit).

The remaining circuits apply the "totality of the circumstances" test. *See* Miller v. Fenton, 741 F.2d 1456, 1465-66 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3724 (U.S. Apr. 9, 1985) (No. 84-5786); Leon v. Wainwright, 734 F.2d 770, 772 (11th Cir. 1984); Rachlin v. United States, 723 F.2d 1373, 1377 (8th Cir. 1983); United States v. Davis, 617 F.2d 677, 686-87 (D.C. Cir. 1979); Johnson v. Hall, 605 F.2d 577, 581 (1st Cir. 1979); United States v. Traficant, 558 F. Supp. 993, 995 (N.D. Ohio 1983); United States v. Thorp, 498 F. Supp. 1202, 1203 (D. Colo. 1980).

55 United States v. Ferrara, 377 F.2d 16 (2d Cir. 1967).

pelled to testify against himself."[56]

These courts fail to recognize that applying the literal language of *Bram* would solve the problems of the totality test and, at the same time, accommodate the goals of confession law. First, with respect to the questions regarding the administration of the totality test, the *Bram* standard would exclude a confession if any degree of influence had been exerted.[57] Accordingly, this standard avoids the need for a detailed analysis of the facts[58] because a finding of any improper influence will render the confession involuntary.[59] Thus, unlike the totality test, the *Bram* standard's single rule affords ease of application, reduces arbitrariness and subjectivity, and provides guidelines for courts to follow.[60]

Second, and more importantly, the *Bram* standard reflects the constitutional objectives of confession law.[61] The premise underlying *Bram* is that the law cannot adequately measure the effect of coercion on a particular suspect and, accordingly, cannot determine how much influence is harmful. Thus, under *Bram*, a court will exclude a confession which results from *any* improper influence.[62] This result is mandated by a plain reading of the fifth amendment, and, while the *Bram* standard is not required by the fourteenth amendment, it does no violence to that amendment's meaning.

The fifth amendment—one of the two constitutional bases of confession law—states, "no person . . . shall be *compelled* to be a witness against himself in any criminal case."[63] The Supreme Court's totality test, however, does not fully proscribe compulsion. Rather, the test only prohibits a lesser degree of "impermissible" compulsion.[64] In effect, the totality test reduces fifth amendment protections in favor of enhancing crime control.

The Supreme Court has reasoned that an "expansive" view of the fifth amendment would do little to protect a person's right against compelled self-incrimination and would severely hamper legitimate law enforcement efforts.[65] This mitigation of the fifth amendment's protection is unjustifiable, however. First, the effectiveness of day-to-day police activity is not relevant to the fifth

56 Oregon v. Elstad, 53 U.S.L.W. 4244, 4248 (U.S. Mar. 4, 1985).

57 *See* note 49 *supra* and accompanying text.

58 *See* note 37 *supra* and accompanying text.

59 Notes 73-118 *infra* and accompanying text deal with "improper influences" and their effect on the voluntariness of a confession.

60 *See* notes 41-43 *supra* and accompanying text.

61 *See* notes 10-19 *supra* and accompanying text.

62 *See* note 49 *supra* and accompanying text.

63 U.S. CONST. amend. V (emphasis added).

64 *See* note 17 *supra* and accompanying text.

65 Oregon v. Elstad, 53 U.S.L.W. 4244, 4248 (U.S. Mar. 4, 1985).

amendment's constitutional protection.[66] Courts should *recognize* the constitutional rights granted to individuals and not impede those rights.[67] Second, it is not the proper function of the courts to decide that crime control objectives outweigh constitutional rights.[68] Rather, such policy decisions should be made by the legislature or by constitutional amendment.[69] Finally, courts should not act as super-legislatures. They should adhere to the plain test of the Constitution and not stray to accommodate whatever transient policies are currently in the public eye.[70] Thus, an objective reading of the fifth amendment—one not colored by the extra-constitutional concerns of crime control—supports *Bram*'s rule that *any* improper influence in the interrogation process should render the resulting confession involuntary.

Viewed in this light, due process—the second constitutional underpinning of confession law—is overshadowed. The fourteenth amendment requires only "fundamental fairness" in the government's interrogation process.[71] Because courts balance fundamental fairness, the protection afforded by the fourteenth amendment will be far less than the protection afforded by a plain reading of the fifth amendment. Because the totality of the circumstances test developed mainly through interpretations of the fourteenth amendment,[72] replacing that test with the *Bram* standard will restore the previously eroded fifth amendment basis of confession law. Accordingly, the *Bram* test satisfies the full constitutional requirements of both the fifth and fourteenth amendments by invalidating all confessions resulting from any improper influence in the interrogation process.

IV. Interrogation Techniques and the *Bram* Test

The *Bram* test focuses on identifying "coercive" interrogation tactics. Attempting to protect the defendant's rights, the *Bram* stan-

66 Levine, *supra* note 21, at 963.

67 *Id.*

68 *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). Although Justice Rehnquist may not apply this rationale in this instance, he has recognized that the advancement of socially acceptable goals through the judiciary offends the democratic process. *Id.* at 704. The only viable basis for fundamental moral judgments is the "individual conscience." *Id.* A judge's conscience judgments are not better than the conscience judgments of individuals. *Id.*

69 *Id.* at 699. "The Constitution . . . was designed to enable the popularly elected branches of government . . . to keep abreast of the times." *Id.* The judiciary should not take over where the legislature left off even if a pressing social problem exists. *Id.* at 699.

70 Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971). "If we have constitutional rights and liberties already . . . the Court need make no fundamental value choices in order to protect them." *Id.* at 5.

71 *See* note 18 *supra* and accompanying text.

72 *See* Note, *supra* note 37, at 114-18.

dard requires the interrogator to maximize the suspect's ability to make a fully informed choice concerning the confession.[73] This is accomplished by allowing the suspect complete mental freedom[74] so that he will be aware that he has rights and may assert those rights.[75]

Accordingly, the interrogator must not give the suspect the impression that his legal status will improve or deteriorate depending upon whether he cooperates.[76] Further, if the interrogator makes the defendant feel more guilty[77] or less guilty,[78] he deprives the suspect of complete mental freedom. This amounts to coercion and should render a resulting confession involuntary.

Psychologically coercive interrogation techniques, the primary method of impairing a suspect's mental freedom, fall into two categories: rational appeals and emotional appeals.[79] Rational appeals are those which prey on the victim's sense of logic, manipulating his reasoning process in an effort to coerce a confession. Emotional

73 *See* Dix, *supra* note 9, at 343. "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." *Id.* Professor Dix also argues that this objective has "permeated" the case law in that constitutional "voluntariness" cases often regard the defendant's awareness of his legal and factual status as important. *Id.* at 331.

74 Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 881 (1979). Professor Grano retreats from a strict mental freedom approach. He proposes that the test for voluntariness should be whether the degree of impairment of the suspect's mental freedom should excuse him from being held accountable for his confession. *Id.* at 883-84.

75 Dix, *supra* note 9, at 331.

76 White, *supra* note 50, at 621. Professor White makes this statement in the context of threats and promises. By analogy, this rule is applicable to other coercive interrogation techniques. *See* notes 83-118 *infra* and accompanying text.

77 Horowitz, *The Psychology of Confession*, 47 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 197, 203 (1956). In his article, Professor Horowitz talks of limiting the subject's "space of free movement" as a prerequisite to obtaining a confession. *Id.* at 199. He outlines five steps interrogators should take to limit the suspect's psychological "space of free movement." First, the interrogator should make the suspect believe that he has been accused. *Id.* This factor combined with the second step, the suspect's perception of authority held by the interrogator, does two things: it limits the suspect's space of free psychological movement and places the suspect on the defensive psychologically. *Id.* Once the defendant is placed on the defensive with his psychological freedom limited, the interrogator should attempt to further limit this freedom. The interrogator can accomplish this through the third and fourth steps: presenting the suspect with evidence of his guilt (factual or fictional) and reducing the accused's friendly forces. *Id.* at 201-03. This creates the final element of Horowitz's argument, guilt. *Id.* at 203. The accused should believe he has caused a negative act. *Id.* The only alternative left to the suspect is confession. *Id.* As the accused's space of freedom becomes smaller and smaller it becomes easier for his mind to continue in this direction than it is to turn back. *Id.* at 204. At this point, his mind should accept confession without resistance. *Id.*

78 Other authors suggest that rather than attempting to increase the guilt feelings of the suspect, the interrogator should attempt to reduce guilt feelings. This can be accomplished by reducing the moral seriousness of the crime. Sterling, *Police Interrogations and the Psychology of Confession*, 14 J. PUB. L. 25, 39 (1965).

79 Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 50 (1968).

appeals look toward the suspect's character. They affect his pride, guilt, and fears.

There are three types of rational appeals. The first type, threats or promises, is designed to "apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice."[80] Threats or promises may be express or implied.[81]

Under the totality test, the existence of threats and promises does not necessarily mandate exclusion of a resulting confession.[82] On the other hand, threats and promises offend the *Bram* standard because they deny the suspect complete mental freedom. The threat or promise leads the suspect to believe that his legal position (or that of a friend or relative) will somehow be affected by his cooperation. This denies the suspect the opportunity to make a fully informed and rational decision.

Deception, the second type of rational appeal, has several manifestations.[83] An interrogator may attempt to coax a confession by presenting the suspect with fabricated physical evidence tending to prove his guilt.[84] Or, the interrogator may use the accomplice confession ploy.[85] Under this technique, the interrogator plays one suspect against another.[86] The interrogator tries to bluff a confes-

80 White, *supra* note 50, at 620. There are two separate types of threats which will put psychological pressure on a suspect. The distinction is based upon whether the threats relate directly to the suspect's legal status. *Id.* at 617-23. Threats relating to the defendant's legal status include threats of continued detention, excessive bond, maximum sentences, and reporting a noncooperative attitude to the prosecuting attorney. Lederer, *supra* note 27, at 80. Threats which do not relate to the defendant's legal status generally include threats to arrest or prosecute friends or relatives. 22 AM. JUR. 2D, *supra* note 26, at 555-56. The problem with threats and promises is twofold. The first problem is the threat or promise itself. The second problem is that the suspect might infer a reciprocal promise on the part of the interrogator not to carry out the threat if the defendant cooperates. *See* White, *supra* note 50, at 619 (discussion of the interrogation of John Biron). Thus, the threat to push for the maximum sentence might amount to an implied promise of leniency in return for cooperation.

81 *Id.* at 618-19. Professor White gives the example of the accused being placed in a lineup where he is identified by fictitious witnesses who implicate him in other crimes. *Id.* at 618. The implied threat is that if the accused does not confess to the crime charged, he will be prosecuted for crimes he did not commit. *Id.* at 619.

82 Miller v. Fenton, 741 F.2d 1456 (3d Cir. 1984) (repeated promises to get the defendant psychiatric help if he confessed were not sufficient to render the confession involuntary), *cert. granted*, 53 U.S.L.W. 3724 (U.S. Apr. 9, 1985) (No. 84-5786).

83 Lederer, *supra* note 27, at 83-84.

84 Note, *supra* note 2, at 1195. *See also* Note, *supra* note 37, at 130. Essentially, the interrogator attempts to convince the suspect that the evidence against him is overwhelming and that he should make it easy on himself by confessing. *Id.* at 130. According to Professors Inbau and Reid, this technique will cause a guilty person to attempt to explain the evidence while an innocent suspect will merely reassert his innocence. F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 104 (2d ed. 1967).

85 Note, *supra* note 2, at 1194; United States *ex rel.* Hall v. Director, Dep't of Corrections, 578 F.2d 194 (7th Cir. 1978).

86 *See* F. INBAU & J. REID, *supra* note 84, at 84-91. This ploy is usually used as a last resort. If the bluff fails and the suspect knows his accomplice has not confessed, the inter-

sion out of the first suspect by intimating that the suspect's cohort has already confessed and implicated the accused in his statement.[87] Finally, the interrogator may either present the suspect with a fictitious eyewitness to the crime[88] or have a fake eyewitness identify the suspect in a lineup.[89] In each situation, the tactic is designed to show the accused that the evidence against him is sufficient to convict him and that a confession is advisable.[90]

The totality test permits deception in certain instances.[91] Under the *Bram* standard, however, these tactics may never be used.[92] If the police have overwhelming evidence against the accused, they need not interrogate him to obtain a confession.[93] Conversely, if the evidence is not overwhelming, the interrogator's fabrication of evidence amounts to psychological coercion.[94] Deceptive practices distort the suspect's view of reality thereby denying him his right to complete mental freedom.[95]

The third type of rational appeal involves a misrepresentation of the charge against the suspect.[96] In a murder case—the most common scenario for this appeal—the interrogator tells the suspect that the victim is still alive, leading the suspect to believe that his crime is only assault.[97] On the other hand, the interrogator may misrepresent the charge by having fictitous eyewitnesses associate

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rogator will no longer have the psychological edge. *Id.* at 90. At this juncture, the interrogation becomes pointless. *Id.*

87 *Id.* at 84-85.

88 Note, *supra* note 2, at 1196. Once again there is the danger that the suspect will realize that the interrogator is bluffing and the problem that a confession is really not necessary if the interrogator "can piece together the real story." *Id.*

89 *Id.* at 1197. For a criticism of this tactic, see note 88 *supra*.

90 *See* Note, *supra* note 37, at 130.

91 *See, e.g.*, Miller v. Fenton, 741 F.2d 1456 (3d Cir. 1984) (holding a confession voluntary when police told the defendant that he had already been connected with the incident; in fact they had no such information), *cert. granted*, 53 U.S.L.W. 3724 (U.S. Apr. 9, 1985) (No. 84-5786); United States *ex rel.* Hall v. Director, Dep't of Corrections, 578 F.2d 194 (7th Cir. 1978) (holding a confession voluntary when an interrogator misled the defendant into believing his cohorts had confessed).

92 *See* Note, *supra* note 2, at 1196-97.

93 *Id.*

94 The deception fogs the suspect's perception of his factual and legal situation. It thereby affects his ability to make a fully informed and rational choice as to whether to confess. *See* notes 73-78 *supra* and accompanying text.

95 *See* note 73 *supra* and accompanying text.

96 White, *supra* note 50, at 611. *See also* Note, *supra* note 37, at 125-26. The constitutionality of such a tactic has been questioned. In order for a defendant to confess he must intelligently waive his right to remain silent. An intelligent waiver of this right requires that the defendant be apprised of the "crucial" facts in the case. If the charge against him has been misrepresented, he cannot be aware of all the "crucial" facts and therefore cannot intelligently waive his right to remain silent. Commonwealth v. Jones, 457 Pa. 423, 435, 322 A.2d 119, 126 (1974) (cited in Note, *supra* note 37, at 125 n.87).

97 Miller v. Fenton, 741 F.2d 1456, 1468 (3d Cir. 1984) (Gibbons, J., dissenting), *cert. granted*, 53 U.S.L.W. 3724 (U.S. Apr. 9, 1985) (No. 84-5786).

the suspect with additional offenses.[98] The interrogator hopes to convey the message that the suspect's failure to cooperate will be met with prosecution for crimes he may not have committed.[99]

Although the totality test has permitted misrepresentation,[100] both methods would be psychologically coercive under *Bram*. The inherent deceit in either scenario clouds the suspect's understanding of the facts and consequences involved[101] and thereby distorts his capacity to make a fully informed and well reasoned decision.[102]

Three types of common interrogation techniques can be considered emotional appeals.[103] In the first technique, appropriately entitled "feigned empathy,"[104] the interrogator either shows sympathy for the suspect, flatters him, or acts friendly toward him.[105] The interrogator, acting as a friend, then condemns the victim or the suspect's accomplice in an effort to shift the blame from the suspect and make it easier for him to confess.[106] This technique often leads the suspect to believe that his comments will be confidential, thus distorting the suspect's perception of his right to remain silent.[107] Therefore, because the suspect does not clearly understand his legal rights, he is unable to rationally choose whether to confess.[108]

In the second type of emotional appeal, the "Mutt and Jeff" routine,[109] one interrogator, "Jeff," acts friendly toward the subject and tries to put him at ease.[110] The second interrogator, "Mutt,"

98 White, *supra* note 50, at 618.

99 *Id.* at 619. The New Haven study shows that this method is commonly used. Note, *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1546 (1967).

Arguably, this latter form of misrepresentation amounts to an implied threat. *See* White, *supra* note 50, at 619. "In effect, the police say to the suspect, 'Confess to the crime you are charged with, or you will find yourself being prosecuted for crimes that you did not commit.' " *Id.* This might lead the suspect to believe his legal position will be worse if he does not confess, thus offending the objectives of the *Bram* test. *See* note 76 *supra* and accompanying text.

100 Miller v. Fenton, 741 F.2d 1456, 1468 (3d Cir. 1984) (Gibbons, J., dissenting) (police officers assertion that victim was still alive was insufficient to render the resulting confession involuntary), *cert. granted*, 53 U.S.L.W. 3724 (U.S. Apr. 9, 1985) (No. 84-5786).

101 *See* note 75 *supra* and accompanying text.

102 *See* note 73 *supra* and accompanying text.

103 Driver, *supra* note 79, at 50.

104 Note, *supra* note 37, at 121.

105 Driver, *supra* note 79, at 50.

106 *Id.* Professor Driver notes two of the more interesting interrogation sequences. In the first scenario, the detective compliments the inexperienced burglar on the "professional" quality of his crime. In the second, the interrogator attempts to lay the blame on the victim of a rape by stating, "Say, she's pretty nice. I probably would have done the same thing myself. . . . She probably let you have it your way, and now she's mad at you." *Id.* at 50 n.45 (citing Note, *supra* note 99, at 1544-45).

107 Note, *supra* note 37, at 125.

108 *See* note 73 *supra* and accompanying text.

109 White, *supra* note 50, at 625. *See also* Driver, *supra* note 79, at 51.

110 White, *supra* note 50, at 625.

then berates the suspect and acts in a hostile manner.[111] This makes it easier for Jeff to obtain the confession.[112] The danger is that a nervous and confused suspect might interpret Mutt's overtures as threats of physical mistreatment—especially when Jeff is not in the room.[113]

Finally, the interrogator may appeal to the suspect's emotions by reducing the moral seriousness of the charge.[114] This generally reduces the suspect's guilt feelings and eases the confession.[115] This is coercive, however, because the suspect is not acting with a true awareness of his situtation.[116] Again, the danger is that as the interrogator distorts the suspect's perception of reality, he reduces the suspect's mental freedom.[117] Under *Bram*, this offends the suspect's constitutional rights and should therefore render any resulting confession inadmissible.

All of these interrogation ploys, although effective methods for obtaining confessions, violate the *Bram* standard's heightened respect for the suspect's constitutional right against compelled self-incrimination and his right to due process of law. Accordingly, an interrogator, perhaps unknowingly, may coerce an involuntary confession from a suspect through the use of these ploys.[118] Because the goal of confession law is to prevent this, these tactics should be

111 *Id.*

112 According to Professors Inbau and Reid, it is Mutt's "beration" of the suspect that makes Jeff's sympathy more effective. F. INBAU & J. REID, *supra* note 84, at 63. The suspect will want to avoid any further confrontations with Mutt so he confesses to Jeff. White, *supra* note 50, at 626-27. The *Miranda* opinion labeled a variation of the "Mutt and Jeff" routine an interrogation "ploy." 384 U.S. at 452. It then condemned the use of "patent psychological ploys," *id.* at 457, thus, implying that the "Mutt and Jeff" routine was inherently coercive. White, *supra* note 50, at 626.

113 White, *supra* note 50, at 627. There is also the possibility that Jeff's friendly attitude will lead the suspect to believe that his words will not be used against him, thus distorting his perception of his true legal position. *See* text accompanying notes 107-08 *supra*.

114 *See* Sterling, *supra* note 78, at 39. *See also* F. INBAU & J. REID, *supra* note 84, at 37-39.

115 F. INBAU & J. REID, *supra* note 84, at 37-38. For example, the authors suggest that, when interrogating a thief, the interrogator should mention that most people will steal if given the opportunity. *Id.* at 37. The interrogator should also back this statement up by citing empirical studies which tend to show this. *Id.*

116 *See* note 75 *supra* and accompanying text.

117 *See* note 74 *supra* and accompanying text.

118 Our criminal justice system is based upon the principle that it is better to let ten guilty persons go free than it is to convict one innocent person. Professor Horowitz argues that guilt feelings in the suspect will lead to confession. Horowitz, *supra* note 77, at 203. He also states that innocent persons may harbor guilt feelings when they are "placed under a cloud of accusation." *Id.* Thus, an interrogation tactic which makes an innocent suspect feel guilty could coerce a confession.

A more likely scenario involves the use of a promise of leniency. *See* notes 80-82 *supra* and accompanying text. The promise places pressure on a suspect's ability to make a rational choice. White, *supra* note 50, at 620. This, coupled with the inherently coercive atmosphere of the interrogation process could "diminish significantly the suspect's ability to evaluate" the worth of the promise. *Id.* at 621. This could lead an innocent person to confess. *Id.*

proscribed within the framework of confession law as suggested by the *Bram* standard.

V. Conclusion

Modern confession law generally applies only in instances where the suspect has validly waived his right to an attorney and his right to remain silent. In these instances, confession law attempts to prevent the possibility that an innocent suspect will confess, yet not overburden the crime control function of the police. The totality of the circumstances test combines these goals in an effort to formulate a workable standard. The totality test, however, is not the best solution because it offends the public policy underlying the criminal justice system and is a difficult standard for courts to apply. The *Bram* test, on the other hand, provides for more efficient application. Also, because *Bram's* goal is to exclude the possibility that an innocent suspect will confess to a crime, it is not offensive to the public policy underlying our criminal justice system. To adopt the *Bram* standard, the courts must lower the threshold requirements of the fifth amendment by realizing that crime control alone is not a sufficient mitigating factor.

Once the *Bram* standard is adopted, interrogators will be required to allow a suspect complete mental freedom and therefore ensure his ability to make a fully informed and rational decision regarding a confession. To guarantee this mental freedom certain interrogation techniques, while presently permissible under the totality approach, would be impermissible under *Bram*. Eliminating these interrogation techniques is consistent with the *Bram* standard's ultimate goal of removing even the remote possibility that an innocent suspect will confess.

Gregory K. Thoreson