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The Law of Confessions - The Voluntariness Doctrine

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THE LAW OF CONFESSIONS— THE VOLUNTARINESS DOCTRINE*

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I. INTRODUCTION

Few areas of criminal procedure have proven as complex as the law of confessions. Basic issues of self-incrimination and voluntariness have been increasingly complicated by Article 31 warnings[1] and the *Miranda-Tempia*[2] rights to counsel.[3] Technically speaking, compliance with the Article 31—*Miranda-Tempia* rights warnings is an issue distinct from the voluntariness of the associated statement. However, in practice the two have become so interrelated as to be virtually identical. This is particularly true in the military, for the *Manual for Courts-Martial*[4] has declared that "Obtaining [a] statement in violation of Article 31(b) or other warning requirements" is an example of "coercion, unlawful influence, and unlawful inducement."[5] In day-to-day practice, most prosecutors laying a

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[1] The UNIFORM CODE OF MILITARY JUSTICE arts. 1-140, 10 U.S.C. §§ 800-940 (1970) [hereinafter cited as UCMJ] provides the statutory framework for the military criminal law system. Article 31 of that Code prohibits compulsory self-incrimination, and requires any person subject to the Code to inform any individual suspected of an offense of certain rights before interrogating or requesting a statement of such individual. UCMJ art. 31(a) & (b).

[2] Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). In *United States v. Tempia* the United States Court of Military Appeals applied *Miranda* to military practice.

[3] *See generally* Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1 (1976).

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 140*a*(2) [hereinafter cited as MCM, 1969]. The Manual, promulgated by executive order, prescribes the procedures before courts-martial in conformity with the Uniform Code.

[5] MCM, 1969, para. 140*a*(2). This section was added as an interpretation of *Miranda*. U.S. DEP'T OF ARMY, PAMPHLET NO 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969 at 27-7 (1970) [hereinafter cited as DA PAM 27-2]. While this conclusion was not unreasonable when announced, it is clear that subsequent civilian cases have distinguished between confessions obtained

foundation for admission of an accused's statement understandably concentrate on the rights warnings and usually give little more than passing attention to common law or due process considerations of voluntariness. While this may normally be adequate, it can be suggested that we are not generally prepared to argue voluntariness issues.[6] This is likely to become particularly important in the near future as the Supreme Court appears embarked on a course designed to strictly limit *Miranda*.[7] While limitation or even elimination of this precedent will leave Article 31 intact, it is probable that the increased attention paid to voluntariness by civilian courts will cause a resurgence of military interest in the doctrine. Accordingly, it appears appropriate to review the voluntariness doctrine as it currently exists.

II. DEFINITIONS

A confession is a statement by an individual admitting all of the elements of a crime. Historically a confession took place before the court and was the equivalent of a conviction.[8] Distinct from a confession, an admission is a statement admitting facts relevant to proof of a crime but less than a confession. In terms of admissibility there is generally[9] no difference between an admission and a confession.[10]

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in violation of *Miranda* and confessions found to be involuntary on non-*Miranda* grounds. Consequences may differ as in the case of the effect of erroneous admission of a "bad" statement. *See* Section IX *infra*.

[6] In reality, the rights warnings serve as a valuable prosecutorial tool. If a valid waiver can be shown in court there appears to be an implicit assumption that the statement was voluntary in the common law sense. Without the warnings the prosecution would have to devote a much greater amount of time to proving voluntariness.

[7] *See, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974); Harris v. New York, 401 U.S. 222 (1971). *But see* Doyle v. Ohio, 423 U.S. 823 (1976).

[8] *See, e.g.*, W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS 421 (Beacon Press ed. 1962); 3 J. WIGMORE, EVIDENCE § 818 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

[9] In the past some jurisdictions distinguished between admissions and confessions for such matters as the effect of error in their admission at trial (admissions being more easily excused than confessions). While some differences may continue to exist in the states, *see, e.g.*, State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973); People v. Koch, 304 N.E.2d 482 (Ill. App. 1973), there appears to be no difference in their treatment under the Constitution. *See* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966). In this article reference to either admissions or confessions will include both possibilities unless otherwise indicated.

[10] Exculpatory statements are those that deny wrongdoing. They were treated differently from admissions or confessions at common law. However, because of their use for impeachment, constitutional doctrine treats them as admissions. Miranda v. Arizona, 384 U.S. 436, 476-77 (1966)

A judicial confession is simply a confession made in court, usually by an accused who has taken the stand. A judicial confession frequently takes place when an accused admits commission of one offense while denying responsibility for another, more serious offense. All other confessions are technically extrajudicial ones but are usually referred to merely as confessions.

Adoptive admissions are those admissions, by speech or conduct, which although made by another are adopted by a witness or an accused.[11]

III. AN INTRODUCTION TO THE ADMISSIBILITY OF CONFESSIONS

To successfully offer a confession into evidence, a counsel must comply with the hearsay rule, the voluntariness doctrine and the corroboration requirement. Admissions and confessions when made by a party to the trial are of course exceptions to the hearsay rule.[12] The voluntariness doctrine requires that admissions and confessions be shown to have been made voluntarily. The doctrine is designed to ensure the reliability of evidence and to protect against unfairness. The corroboration requirement demands that before a confession can result in a conviction, enough other evidence must be shown to substantiate the commission of an offense or to establish the

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[11] Also known as tacit admissions, admission by silence has proven troublesome because of the *Miranda* warning that a suspect has the right to remain silent. Of what probative value is the silence of a suspect regardless of the circumstances if he has just been warned of his right to say nothing? The Supreme Court has finally held that admissions by silence *after Miranda* warnings are inadmissible. Doyle v. Ohio, 423 U.S. 823 (1976). *See generally* Comment, *Adoptive Admissions, Arrest, and the Privilege Against Self-Incrimination: A Suggested Constitutional Imperative*, 31 U. CHI. L. REV. 556 (1964); Comment, *Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence*, 123 U. PA. L. REV. 940 (1975).

[12] The underlying rationale for the recognition of the admission and confession exception to the hearsay rule is unclear. It would seem to be based in part on the need for the evidence, as the declarant will be uncompellable due to the privilege against self-incrimination; and partially on the same reasoning that underlies the rule which renders declarations against interest admissible. However, there are a number of types of admissions, including exculpatory ones, which prove difficult to explain under either rationale, and it may be that the rule should be considered as not falling within any one theory. *See* State v. Kennedy, 135 N.J. Super. 513, 343 A.2d 783 (1975). The requirement that the statement come from a party to the trial can be highly troublesome both in theory and practice. For those jurisdictions which lack the declaration against penal interest exception to the hearsay rule, it can result in the exclusion of a confession made by an individual not on trial.

reliability of the confession.[13] In addition to the rules discussed above, statements offered should be offered in their entirety (or the opposition may complete the statement)[14] and where applicable, compliance with presentation rules[15] or rights warnings requirements must be shown.[16]

From the 17th Century, Anglo-American law has been concerned that confession evidence be "voluntary" in the sense that it is not obtained by coercive measures. The reasoning behind this concern has been twofold: that involuntary statements are prone to be unreliable, and that coercion of statements is fundamentally unfair. While the development of the rule will be traced in the next section, brief consideration of the reliability of confession evidence seems appropriate, as it may be the most contradictory form of evidence available in a criminal trial. On the one hand, its effect is so sweeping and damning that for all practical purposes it is conclusive of the issue of guilt. On the other, while the law recognizes that confession evidence is in one sense "preferred" evidence, it also recognizes that confessions are highly likely to be unreliable and accordingly are to be carefully controlled. While it is apparent that under certain circumstances most persons would confess to almost anything, it is difficult to gauge the extent to which interrogation methods that do not utilize torture do in fact result in unreliable admissions. There is a surprising paucity of literature, legal or psychological, on why confessions result.[17] However, the material that does exist makes it abundantly clear that despite the absence of the "third degree,"

[13] The majority rule requires independent evidence to establish the commission of an offense (the *corpus delicti* rule) and the minority rule requires only that other evidence be admitted to show the reliability of the confession. *See* Section VIII.E. *infra.*

[14] *See, e.g.,* Williams v. State, 542 P.2d 554 (Okla. 1975); MCM, 1969, para. 1 140*a*(6).

[15] *E.g.,* that the accused was brought before a magistrate within the required time period, a rule designed to ensure that an accused will be informed of his rights and not subjected to police questioning for too long a time before judicial intervention takes place. The military lacks such a rule at present. *See, e.g.,* Burns v. Harris, 340 F.2d 383 (8th Cir.), *cert. denied,* 382 U.S. 960 (1965).

[16] *See generally* Lederer, *Rights Warnings in the Armed Services,* 72 MIL. L. REV. 1 (1976).

[17] *See, e.g.,* Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42 (1968); Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors,* 77 YALE L.J. 300 (1967); Hall, *Police and Law in a Democratic Society,* 28 IND. L.J. 133 (1953); Horowitz, *Psychology of Confession,* 47 J. CRIM. L. C. & P.S. 197 (1956); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); Sterling, *Police Interrogation and the Psychology of Confession,* 14 J. PUB. L. 25 (1965); Summers, *Science Can Get the Confession,* 8 FORD. L. REV. 334 (1939); Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration,*

good police techniques[18] can obtain admissions from most people. What is particularly disturbing is that even accepted police techniques can result in false admissions.

One motive for confessing is clearly to attempt to avoid possible violence or to gain favors. Beyond this obvious reason are a number of others which include:

1) Desire to mitigate possible future punishment of self or others;[19]
2) Desire to clear conscience of known offense;
3) Desire for punishment;
4) Desire for public attention (*e.g.* notoriety);
5) Desire for recognition of personal status;[20]
6) Desire for approval by authority (*e.g.* police); or
7) Feelings of general guilt because of arrest.[21]

For many people the comparative isolation, fear, and embarrassment that are likely to accompany arrest and interrogation may well trigger, due to the factors listed above, a desire to admit details of real or imaginary offenses. Indeed one commentator has pointed out that the *Miranda* rights warnings may have the effect of encouraging confessions rather than preventing them, because they present the interrogator as a fair, impartial officer and yet (unless the suspect refuses to talk at all) do nothing to affect the ability of the underlying situation to suggest that a confession is required.[22] The number of false confessions is unknown but their existence is well docu-

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28 IND. L.J. 374 (1953); Note, *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). *See also* F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967); T. REIK, COMPULSION TO CONFESS 179-356 (1972 reprint).

[18] *See, e.g.*, F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967). Many of the techniques suggested by Professors Inbau and Reed in their 1962 edition have been said to have been used by Russian and Chinese interrogators. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 37, 40-41 (1965) [hereinafter cited as Sterling]. While this is not to suggest that they are improper, it may suggest their efficiency.

[19] Despite the usual inference, this factor applies to the innocent as well as to the guilty. When the future looks frightening, a suspect may well prefer to confess in return for a small sentence rather than chancing a major penalty.

[20] This factor is distinguished from the others as it may apply when an individual of some social standing suddenly reacts to the total loss of that status and desires the interrogators to treat him with some of his former respect. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 58-59 (1968) [hereinafter cited as Driver].

[21] These feelings of guilt need not be related to any offense and may stem simply from the belief of the individual that his arrest means that he *must* have done something. *See, e.g.*, Sterling, *supra* note 18, at 36.

[22] *See* Driver, *supra* note 20, at 59-61.

mented.[23] Whether their number is "sufficiently" substantial to cast general doubt on confession evidence is unknown.[24] The conclusion that can be drawn, however, is that confession evidence per se is at least partially suspect. A necessary result of this conclusion is that spontaneous confessions, made without any police questioning, may be no more reliable than confessions gained after hours or days of interrogation, for many of the factors will operate in the absence of even implicit coercion. However, to eliminate confessions would be to substantially increase police work. The ultimate balance is yet to be determined.

IV. THE HISTORICAL DEVELOPMENT OF THE VOLUNTARINESS DOCTRINE

Professor Wigmore found four stages in the English development of the law of confessions:[25] total acceptance of confession evidence until approximately 1750; limited exclusion of involuntary confessions from approximately 1750 to 1800; hypersensitivity to confessions resulting in almost wholesale exclusion;[26] and the current rule characterized in the United States by constitutional underpinnings. Differing slightly from Wigmore, Professor Levy finds that the voluntariness rule was at least partially recognized by 1726[27] and suggests that the pri-

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[23] *See, e.g.*, 3 WIGMORE, *supra* note 8, at 304 n.1.

[24] One may ask how many innocent men society would tolerate to be convicted as a consequence of unreliable confessions. It is particularly interesting to note that under Jewish Rabbinic law all confessions were inadmissible. *See, e.g.*, G. HOROWITZ, THE SPIRIT OF JEWISH LAW § 338 (1973). It would be an interesting experiment if a jurisdiction chose either to ban confession evidence entirely or to accept only derivative evidence.

[25] 3 WIGMORE, *supra* note 8, at § 817.

[26] *Id.* at §§ 820 & 820a. Wigmore postulates the following explanations for the English approach during the early 1800's: the character of suspect (lower social class with a subordination to authority); the absence of a right to appeal and the resulting difficulty of obtaining a rule of general application; the inability of the accused to take the stand in his own behalf. It is also probable that the large number of offenses carrying the death penalty in the first quarter-century may have motivated exclusion.

[27] Lord Chief Baron Geoffrey Gilbert, in his *Law of Evidence*, written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, "this Confession must be voluntary and without Compulsion; for our Law . . . will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation; and therefore Pain and Force may compel Men to confess what is not the truth of Facts, and consequently such extorted Confessions are not to be depended on." *Reprinted in* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 327 (1968).

mary justification for it was to prevent receipt of unreliable evidence. Although separate and distinct from the right against self-incrimination, the voluntariness doctrine plainly had its origins in the same complex of values and social conflicts that gave rise to the right. Because much of the objection to self-incrimination was based on opposition to torture-derived confessions, the groundwork was laid for exclusion of coerced confessions. Except during the period when exclusion of confession evidence may have served other purposes (such as mitigating overly severe sentences), the English voluntariness rule appears to have been based primarily on reliability grounds, although questions of fairness no doubt were also relevant. Although the right against self-incrimination per se had no remedy (for it only allowed an individual to remain silent, and once testimony was given the right was waived), the voluntariness doctrine created a remedy; for if an individual was compelled to confess, his statement could be excluded thus in effect attaching an exclusionary sanction to violations of the right against self-incrimination. This should not be misconstrued, for all coerced confessions were not inadmissible. Particularly during the 1700's in England, the question was one of apparent truthfulness rather than breach of a privilege.

As in the case of the right against self-incrimination, the voluntariness doctrine was transplanted to the American colonies. Formal recognition took place in Pennsylvania by 1792[28] at latest, for example. The common law voluntariness doctrine was the rule in the United States during most of the 19th Century, although presumably it did not carry with it the anti-confession bias common in England during the early 1800's. Despite the existence of the fifth amendment and later the fourteenth amendment (enacted in 1868), the Supreme Court failed to make use of constitutional rationales[29] until 1897 when the Court decided *Bram v. United States.*[30] In *Bram,* a murder case, the Court found the fifth amendment right against self-incrimination required reversal of the conviction due to the receipt in evidence of an involuntary confession. *Bram* was the high point of the application of the privilege

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[28] Commonwealth v. Dillon, 4 Dallas 116 (1792), *cited in* O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 23 (1973).

[29] The Court did apply the common law voluntariness test to federal cases. *See* Wilson v. United States, 162 U.S. 613, 621-25 (1896); Sparf v. United States, 156 U.S. 51, 53-56 (1895); Hopt v. Utah, 110 U.S. 574, 584-87 (1884).

[30] 168 U.S. 532 (1897). Interestingly, the Court in *Bram* considered and rejected the argument that police interrogation was per se coercive. *Id.* at 566-58.

against self-incrimination to confessions and the Court retreated from its holding in that case.[31] Professor Otis Stephens[32] states that in respect to its review of federal confession cases, the Supreme Court, while emphasizing the reliability test for coerced statements, began to swing towards concern about fair trial generally.[33] In 1936, the Court in the state case of *Brown v. Mississippi*[34] held that admission of a coerced confession into evidence violated the fourteenth amendment's requirement of due process. The facts in *Brown* cried out for reversal. A white Mississippi farmer had been murdered. In order to obtain a confession from one black "suspect," a deputy sheriff accompanied by a mob hanged him twice from a tree. Having refused to confess, he was released, rearrested a day or so later, and beaten. He then signed the desired confession. The two other black suspects, including Brown, were jailed and beaten until they too confessed as their captors desired. It is clear that in reversing the conviction the Supreme Court was motivated by the specific facts and the obvious injustice of the case. However, it is also likely that the Court's extension of due process standards to confessions was motivated by the *Wickersham Report*,[35] which had confirmed the use of the "third degree" (physical violence) and psychological coercion

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[31] This may have been due to the Court's holding in Twining v. New Jersey, 211 U.S. 78 (1908), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964), that the fifth amendment right against self-incrimination was inapplicable to the states. *But see* the Court's admission that the voluntariness doctrine is grounded in the same policies giving rise to the privilege against self-incrimination. Davis v. North Carolina, 384 U.S. 737, 740 (1966).

[32] O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 26 (1973). Professor Stephens' work is a good introduction to the development of the law of confessions in the United States for those lacking a substantial background in the subject. For a review of the development of the doctrine beginning with *Bram, see* Bader, *Coerced Confessions and the Due Process Clause,* 14 BKLYN. L. REV. 51 (1948); Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases,* 28 ARK. L. REV. 1 (1974); Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442 (1948); Kamisar, *What is an "Involuntary" Confession: Some Comments on Inbau and Reid's* Criminal Interrogations and Confessions, 17 RUTGERS L. REV. 728 (1963).

[33] *See, e.g.,* Ziang Sung Wan v. United States, 266 U.S. 1 (1924) (one week's incommunicado detention without arrest while ill with constant questioning; *held,* compulsion automatically required reversal).

[34] 297 U.S. 278 (1936). *Brown* held that a state conviction resting *solely* on a coerced confession required reversal. Later cases indicated that reversal was merited in almost all cases involving coerced confessions (the automatic reversal rule). *See* Chapman v. California, 386 U.S. 18 (1967); Payne v. Arkansas, 356 U.S. 560 (1958).

[35] NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [THE WICKERSHAM REPORT].

to obtain confessions across the country—particularly from the poor and disadvantaged. The Court's subsequent cases[36] tended to manifest a strong element of redress for racial discrimination as many poor blacks were the targets of brutal beatings designed to coerce confessions.

While the Court has consistently reaffirmed the voluntariness requirement of *Brown v. Mississippi*,[37] its actual application of the voluntariness doctrine has varied greatly. After *Brown*, the Court made use of its supervisory powers to require that federal defendants be promptly brought before magistrates, thus strictly limiting the time available for police interrogation.[38] In the state arena, the Court took an active role in preventing coerced confessions[39] and then turned temporarily to considering primarily the "trustworthiness"[40] of the coerced confession—a standard that emphasized reliability. Beginning in the mid-1950's the Court returned to its earlier philosophy and scrutinized confessions not so much from the perspective of reliability but more from the standpoint of the fairness of the procedure involved.[41] Ultimately the Court decided *Miranda v. Arizona*[42] which held that the innate coercion of custodial interrogation required that suspects be given rights warnings, including the right to counsel, to dispel the coercive effect. At present, the test used throughout the United States emphasizes

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[36] *See, e.g.*, Ward v. Texas, 316 U.S. 547 (1942); Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940) (lead case).

[37] 297 U.S. 278 (1936).

[38] McNabb v. United States, 318 U.S. 332 (1942).

[39] In Lisenba v. California, 314 U.S. 219 (1941), an exception and an unusually gruesome murder case, the Court upheld a coerced confession on the grounds that the defendant's will had not been overborne. The Court did state, however, that the aim of the due process requirement was "to prevent fundamental unfairness in the use of evidence, whether true or false." 314 U.S. at 236. The cynical reader must infer that had it not been for the nature of the crime involved, the case would have been reversed. In Ashcraft v. Tennessee, 322 U.S. 143 (1944), the Supreme Court recognized that psychological coercion, as well as physical brutality, could make a statement involuntary. *Ashcraft* also introduced the shortlived test of "inherent coercion," a test which looked to the nature of the police misconduct. The test, superseded by the "fair trial" test, eventually became a part of the contemporary voluntariness doctrine under a new name.

[40] Stein v. New York, 346 U.S. 156 (1953), *overruled*, Jackson v. Denno, 378 U.S. 368 (1964).

[41] *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954).

[42] 384 U.S. 436 (1966).

fairness rather than reliability and asks if the statement was the product of a free and unrestrained choice.[43]

V. THE VOLUNTARINESS DOCTRINE TODAY

Although the voluntariness doctrine has been greatly affected by the Supreme Court's decision in *Miranda v. Arizona,*[44] it retains vitality for determining the admissibility of confessions.[45] Determining the exact nature of the doctrine is difficult, however, in view of the ambiguity inherent in the term "voluntary."[46] Every individual jurisdiction in the United States has its own statutorily[47] or judicially derived definition of "voluntary." Generally the states will suppress confessions that are the product of coercion, threats, or improper inducements just as they would be suppressed under the common law. The state provisions may differ, however, in respect to what constitutes improper inducements, what effect is to be given to the suspect's age, mentality and similar attributes, and the effect to be given to other relevant factors. Regardless of the individual state test, the federal constitutional test is paramount.[48] Under

[43] *See, e.g.,* Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); United States v. Colbert, 2 U.S.C.M.A. 3, 6 C.M.R. 3 (1952). *See also* MCM, 1969, para. 140*a*(2).

[44] 384 U.S. 436 (1966).

[45] While the term voluntariness is still used, generally the voluntariness of a confession means that the rights warnings required by *Miranda* were properly given to the accused and that visible coercion was lacking. *See, e.g.,* MCM, 1969, para. 140*a*(2). However, the rights warnings are merely one component of voluntariness. *See, e.g.,* United States v. Chadwick, 393 F. Supp. 763 (D. Mass. 1975). The English continue to use a strict common law standard. *See* C. HAMPTON, CRIMINAL PROCEDURE AND EVIDENCE 436-38 (London 1973).

[46] *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 223-27 (1973).

[47] *See, e.g.,* Georgia: "To make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit or remotest fear of injury." GA. CODE ANN. § 38-411 (1974) and "The fact that a confession shall have been made under a spiritual exhortation, or a promise of secrecy, or a promise of collateral benefit, shall not exclude it." *Id.* § 38-412.

New York:

> A confession, admission or other statement is "involuntarily made" by a defendant when it is obtained from him. (a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or (b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him: (i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or (ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

N.Y. CODE CRIM. PROC. § 60.45.2 (McKinney 1971). *See generally* 3 WIGMORE, *supra* note 8, at § 831 n.2. Congress attempted to adopt the voluntariness doctrine (and avoid *Miranda*) in 18 U.S.C. § 3501 (1970).

[48] Obviously the state's test may be more beneficial to the accused in which case it is binding.

the due process clause, a court must determine whether a confession was "the product of an essentially free and unrestrained choice" by its maker.[49] If the individual's will was "overborne" by the interrogation, the resulting[50] confession will be involuntary and inadmissible. In determining the voluntariness of a statement, the trial court must look to "the totality of the circumstances" surrounding it. The primary purpose of the due process test is to ensure fairness; the truth or falsity of the resulting confession is irrelevant.[51] Of course the courts have assumed that voluntary statements are likely to be reliable ones.

While the due process test suggests a case by case approach that would seek to determine a causal connection between police[52] misconduct and a confession, analysis of the cases suggests that actually two separate rules are being applied.[53] In those cases where the misconduct appears extreme, as in cases of physical brutality, the courts will frequently find that the misconduct has rendered the statement involuntary per se.[54] In all other cases the courts will test the facts of the case to determine if the misconduct actually did overcome the will of the accused.[55] It is virtually impossible to set forth criteria,

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[49] *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 224-26 (1973); Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Rogers v. Richmond, 365 U.S. 534, 544 (1961). "Voluntary" clearly does not mean that the decision to confess must be made without any pressure or with full awareness of the actual situation. The pressures inherent in arrest or questioning, for example, are not enough to render a statement involuntary.

[50] It is possible for an individual to confess to clear his conscience even after improper pressure. The test in such a case will be whether the statement was the product of true remorse and intent, or was in fact the product of the improper pressure and thus involuntary.

[51] Rogers v. Richmond, 365 U.S. 534, 543-44 (1961). *See* MCM, 1969, para. 140*a*(2); *cf.* United States v. Tersiner, 47 C.M.R. 769 (AFCMR 1973) Of course, if a statement was obtained correctly but is likely to be false, the trial judge should exclude it.

[52] The voluntariness doctrine applies to confessions coerced by anyone. However, problems relating to improper threats and inducements are likely to pertain only to public officials because they are typically involved in such instances. *See* N.Y. CODE CRIM. PROC. § 60.45.2 (McKinney 1971). *See generally* 3 WIGMORE, *supra* note 8, at §§ 827-830. *But see* United States v. Carter, 15 U.S C.M.A. 495, 35 C.M.R. 467 (1965) (statement elicited in response to threats by heavyweight boxer held admissible on grounds that it was volunteered in an attempt to exculpate, rather than inculpate).

[53] *See* C. MCCORMICK, EVIDENCE 317-21 (2d ed. 1972); Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases,* 28 ARK. L. REV. 1, 30-31 (1974).

[54] *See, e.g.,* Brooks v. Florida, 389 U.S. 413 (1967) (15 days' solitary confinement on a restricted diet while naked); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (thirty-six hours of constant questioning by relays of interrogators).

[55] *See, e.g.,* United States v. Carmichael, 21 U.S.C.M.A. 530, 45 C.M.R. 304 (1972) (statement made after accused was led to believe that his failure to speak

other than torture, which will result in automatic exclusion. The situation is very much like the application of the famous *Rochin*[56] "shock the conscience" test used in search and seizure cases. Until the conscience is shocked one is unable to define the test.

The contemporary voluntariness doctrine consists of the due process standard complemented by those other rules, state and federal, which reinforce it. While the common law voluntariness doctrine was primarily concerned with the reliability of the statement, the areas addressed by a common law judge were not substantially different from those reviewed by a modern court applying constitutional and local rules. Thus the existence of coercion, threats and inducements in a case remains critically important. When considering the voluntariness issue using the totality of the circumstances test, a court must look to numerous factors. According to Wigmore,[57] among the factors to be considered are:

> The character of the accused (health, age, education, intelligence, mental condition, physical condition);
>
> Character of detention, if any (delay in arraignment, warning of rights, incommunicado conditions, access to lawyer, relatives and friends);
>
> Manner of interrogation (length of session(s), relays, number of interrogators, conditions, manner of interrogators); and
>
> Force, threats, promises or deceptions.

A. COERCION AND THREATS

Of all the possible forms of misconduct, the one most likely to result in automatic exclusion of a statement is physical coercion. Physical brutality, usually termed the "third degree," was of course at the heart of the Supreme Court's turn to due process standards[58] and is assumed not only to violate minimum standards of fairness but also to yield unreliable statements. When physical coercion is involved, it is generally irrelevant that the party responsible was not a policeman or

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would result in trial by Nationalist Chinese court rather than an Air Force court-martial held voluntary because of trial court's determination that it was not induced by the threat of foreign trial).

[56] Rochin v. California, 342 U.S. 165 (1952).

[57] 3 WIGMORE, *supra* note 8, at 352 n.11.

[58] *See* Sections IV & V *supra*.

public official.[59] Because of the extreme concern that accompanies charges of police brutality, a number of states require in such cases that the government call all material witnesses who were connected with the alleged confession.[60] When discussing coercion, any attempt to create separate and distinct categories is doomed to failure. While beating, hanging and flogging are clearly forms of illegal coercion, other forms of mistreatment can also be considered as being identical in effect. In *Stidham v. Swenson,*[61] the United States Court of Appeals for the Eighth Circuit found that solitary confinement for eighteen months in subhuman conditions prior to the offense, and return to those conditions after twenty-five interrogation sessions without any food or water over a four-day period constituted coercion and rendered the petitioner's confession involuntary. Courts have condemned as improper coercion denial of medical treatment,[62] sustained detention,[63] sustained interrogation,[64] handcuffing for lengthy periods,[65] and brutal detention,[66] to mention only a few possibilities.[67] Other

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[59] *See, e.g.,* N.Y. CODE CRIM. PROC. § 60.45.2(1) (McKinney 1971); Commonwealth v. Mahnke, 1975 Mass. Adv. Sh. 2897, 335 N.E.2d 660 (1975) (vigilante group); People v. Haydel, 12 Cal. 3d 190, 524 P.2d 866, 115 Cal. Rptr. 394 (1974); 3 WIGMORE, *supra* note 8, at § 833. Note the wording of UCMJ art. 31: "No person subject to this chapter"; and MCM, 1969, para. 150*b*: "A statement obtained from the accused by compelling him to incriminate himself is inadmissible against the accused regardless of the person applying the compulsion. . . ."

[60] *See, e.g.,* Smith v. State, 256 Ark. 67, 505 S.W.2d 504 (1974); Nabors v. State, 293 So. 2d 336 (Miss. 1974).

[61] 506 F.2d 478 (8th Cir. 1974). Stidham, imprisoned for robbery, was convicted of the murder of a fellow inmate during a prison riot. While the facts as portrayed by the majority are shocking, the dissent suggests an entirely different view. *Stidham* is an example of the difficulties sometimes caused by federal habeas corpus. The actual case had been affirmed by the Missouri Supreme Court thirteen years before the first federal attack was filed, making rebuttal of Stidham's charges difficult. Stidham had also charged he was beaten but the court discounted the allegation.

[62] *Cf.* Commonwealth v. Purvis, 485 Pa. 359, 326 A.2d 369 (1974).

[63] *Cf.* Stidham v. Swenson, 506 F.2d 478 (8th Cir. 1974); United States v. Acfalle, 12 U.S.C.M.A. 465, 469, 31 C.M.R. 51, 55 (1961) (The Government may not use its authority to order a servicemember to different geographical locations "as a coercive instrument for the purpose of removing him to a location at which he is effectively isolated and likely to succumb to police pressures."). While the issue may not yet be fully resolved, it would appear that the fact of an illegal arrest or detention will render a statement inadmissible. Wong Sun v. United States, 371 U.S. 471 (1963).

[64] United States v. Houston, 15 U.S.C.M.A. 289, 35 C.M.R. 11 (1965) ("persistent questioning over a five-day period" in conjunction with other factors sufficient to raise the issue of voluntariness).

[65] *See, e.g.,* People v. Holder, 45 App. Div. 2d 1029, 358 N.Y.S.2d 54 (1974).

[66] *See, e.g.,* Stidham v. Swenson, 406 F.2d 478 (8th Cir. 1974); United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1957).

[67] *See generally* 3 WIGMORE, *supra* note 8, at § 833.

forms of coercion such as loss of employment[68] may also render a statement involuntary. Whether specific conditions other than physical punishment will render a statement involuntary must depend upon the facts of each case, although certain factors are obviously likely to be weighed more heavily than others.

Coercion can of course also be supplied through threats inasmuch as coercion includes the psychological as well as the physical.[69] Refusal to supply medication;[70] threats of violence,[71] of removal of wife or children,[72] of arrest or prosecution of friends or relatives,[73] of continued detention[74] or of harsher consequences if a confession is not given,[75] may all constitute sufficient coercion to render a statement involuntary.[76]

B. PROMISES AND INDUCEMENTS

Like threats, promises and inducements may well result in involuntary confessions. Clearly a possibility of benefit may well result in an overborne will rendering a statement violative of due process. Under the common law test for voluntariness, which was mostly concerned with the reliability of the statement, some forms of inducements, such as religious appeals, were not considered likely to result in false or inaccurate confessions.[77] This may no longer be the case in view of the effect of *Miranda v. Arizona.*[78] In theory, any promise or inducement should be analyzed under the usual due process test. However, perhaps as a result of the common law heritage, many states will almost automatically suppress a confession that took place after a promise or inducement. Most improper promises tend to involve representations that the police will not arrest or

[68] Garrity v. New Jersey, 385 U.S. 493, 496-500 (1967).

[69] *Id.* at 496-97.

[70] *See, e.g.*, Northern v. State, 254 Ark. 549, 518 S.W.2d 482 (1975).

[71] *See, e.g.*, United States v. Fowler, 2 C.M.R. 336, 341 (ABR 1952) (threat of violence at hands of rape victim's relatives); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 140.3 & 150.2(6) (1975).

[72] *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528 (1963); People v. Richter, 54 Mich. App. 660, 221 N.W.2d 429 (1974).

[73] *See, e.g.*, People v. Helstrom, 50 App. Div. 2d 685, 375 N.Y.S.2d 189 (1975); People v. Haydel, 12 Cal. 3d 190, 524 P.2d 866, 115 Cal. Rptr. 394 (1974).

[74] *See, e.g.*, United States v. Jourdan, 51 C.M.R. 351 (AFCMR 1975).

[75] *See, e.g.*, Sherman v. State, 532 S.W.2d 634 (Tex. Crim. App. 1976) (threat by chief of police that accused would receive the death penalty if he didn't confess).

[76] *See generally* 3 WIGMORE, *supra* note 8, at § 833.

[77] *Id.* § 840.

[78] 384 U.S. 436 (1966). *Miranda* requires not only rights warnings but also that the suspect's decision to speak or not to speak not be affected in any way. Thus an exhortation to confess sin or to simply tell the truth is likely to be viewed as nullifying the right to remain silent and thus render a statement involuntary.

prosecute,[79] that leniency as to sentence will result,[80] or that friends or relatives will not be harassed, arrested or prosecuted.[81] Exhortations to tell the truth are not in violation of the traditional voluntariness test[82] although they may interfere with the *Miranda* rights warnings and invalidate a statement. Statements resulting from immunity or plea bargains will be inadmissible against the maker.[83] According to Wigmore, for

[79] *See, e.g.*, St. Jules v. Beto, 371 F. Supp 470 (S.D. Tex. 1974); United States v. White, 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964) (promise of administrative discharge); M.D.B. v. State, 311 So. 2d 399 (Fla. App. 1975); State v. Raymond, ___ Minn. ___, 232 N.W.2d 879 (1975). *But see* People v. Yerdon, 51 App. Div. 2d 875, 380 N.Y.S.2d 141 (1976) (confession held voluntary even though deputy sherriff told defendant first that he would not arrest him; statement was obtained after proper warnings and was voluntary). While promises to assist with bail would seem logically similar to promises not to prosecute or to grant leniency (although in theory the nature of the benefit can be presumed to be smaller than a failure to prosecute or to receive leniency, and frequently time spent in jail before trial will be longer than that spent after conviction), the cases seem generally to hold such promises insufficient to render statements involuntary. *See, e.g.*, People v. York, ___ Colo. ___, 537 P.2d 294 (1975); C. McCORMICK, EVIDENCE 323 (2d ed. 1972).

[80] *See, e.g.*, Freeman v. State, 258 Ark. ___, 527 S.W.2d 909 (1975) (implied promise of leniency found when prosecutor said that he couldn't promise anything but that defendant probably wouldn't get more than 21 years in jail if he confessed); People v. Pineda, 182 Colo. 385, 513 P.2d 452 (1973) (police said that things would go easier for the accused if he testified). People v. Ruegger, 32 Ill. App. 3d 765, 336 N.E.2d 50 (1975) (police conveyed the impression that they would "go to bat" for the accused in getting him probation). Statements that cooperation would be the best course or that cooperation would be reported do not appear to necessarily result in suppression of statements. *See, e.g.*, United States v. Pomares, 499 F.2d 1220 (2d Cir 1974); State v. Mullin, 286 So. 2d 36 (Fla. App. 1973); State v. Smith, 216 Kan. 265, 530 P.2d 1215 (1975); People v. Bulger, 52 App. Div. 2d 682, 382 N.Y.S.2d 133 (1976). These cases seem to assume that the effect of such an inducement is de minimis. Obviously the result will vary depending upon the exact facts of each case. There are cases that have excluded confessions after similar representations.

[81] *See, e.g.*, Jarriel v. State, 317 So. 2d 141 (Fla. App 1975) (police threat to arrest wife unless defendant confessed made resulting statement involuntary); Witt v. Commonwealth, 215 Va. 670, 212 S.E.2d 293 (1975) (defendant claimed that he confessed because of his belief that his pregnant wife would be arrested if he didn't; court found that even if the defendant drew the inference it was unreasonable and the confession was voluntary). Note that a defendant's belief that confession will assist a friend or relative, when held without any official representation to that effect will usually not invalidate a statement. *See, e.g.*, People v. Steger, 16 Cal. 3d 539, 546 P.2d 665, 128 Cal. Rptr. 161 (1976); Witt v. Commonwealth, *supra*.

[82] *See, e.g.*, State v. Rollwage, ___ Ore. App. ___, 533 P.2d 831 (1975) ("If you confess you'll feel better" held simply an admonition to tell the truth and proper); 3 WIGMORE, *supra* note 8, at § 832. *Cf.* United States v. Handsome, 21 U.S.C.M.A. 330, 45 C.M.R. 104 (1972).

[83] *See, e.g.*, Mobley *ex rel.* Ross v. Meek, 531 F.2d 924 (8th Cir. 1976) (Ross had confessed after making a plea bargain but then withdrew the agreement; *held* the confession was involuntary); State v. Hooper, 534 S.W.2d 26 (Mo. 1976); 3 WIGMORE, *supra* note 8, at § 834. *See also* United States v. Dalrymple, 14 U.S.C.M.A. 307, 34 C.M.R. 87 (1963) (promise of immunity).

such a promise to result in suppression it should be possible of fulfillment and thus its maker must have some influence.[84] An accused who *initiates* a bargaining session with authorities by offering a statement in return for some concession will not normally be heard to complain that his statement was involuntary.[85]

C. PSYCHOLOGICAL COERCION

It is well recognized that coercion need not be physical to be effective.[86] Indeed, most successful interrogation techniques are almost purely psychological,[87] a fact which proved a major cause for the Supreme Court's decision in *Miranda v. Arizona.* Whether holding a suspect incommunicado, helping him to excuse the offense, supplying sympathy, or using a "Mutt and Jeff" routine,[88] use of psychological techniques by interrogators may have a coercive effect. The courts have recognized that such coercion may render a confession involuntary just as physical coercion may. However, in this area determination of what actually did take place and what its effect should be is particularly difficult and a final judgment is likely to depend upon the character and background of the suspect.[89] In *State v. Edwards,*[90] the Arizona Supreme Court found that the police actions of using sympathy, stressing "sisterhood" between the female suspect and a female officer, and minimizing the moral seriousness of the charge, were in conjunction with other vio-

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[84] 3 WIGMORE, *supra* note 8, at §§ 827-830. The rule suggested is to examine each case individually to determine the relationship between the suspect and the promisor. *See also* State v. Hess, 9 Ariz. App. 29, 449 P.2d 46 (1969) (promise not to file a complaint held an improper inducement).

[85] *See, e.g.,* United States v. Faulk, 48 C.M.R. 185 (ACMR 1973).

[86] *See, e.g.,* Ashcraft v. Tennessee, 322 U.S. 143 (1944); United States v. Josey, 3 U.S.C.M.A. 767, 14 C.M.R. 185 (1954); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.4 (1975).

[87] *See, e.g.,* F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967); Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728 (1963).

[88] An interrogation routine usually utilizing two interrogators, one of whom is hostile and aggressive and the other sympathetic and somewhat passive. The intent is to build a sympathetic relationship between the suspect and the second interrogator. The same routine can be used with only one interrogator who will simply change his approach as necessary. The Court of Military Appeals found a statement extracted through the use of such a technique admissible in United States v. Howard, 11 U.S.C.M.A. 252, 256-57, 39 C.M.R. 252, 256-57 (1969).

[89] *See* Section VI *infra.*

[90] 111 Ariz. 357, 529 P.2d 1174 (1974).

lations[91] more than enough to result in an overborne will rendering the resulting confession involuntary. Similarly in *State v. Pruitt*,[92] the North Carolina Supreme Court found that the interrogation of Pruitt by three police officers took place in a police-dominated atmosphere characterized by repeated comments that the suspect's story had too many holes, that he was lying, and that they did not want to fool around. The court found that the fear, augmented by a threat that things would be rougher if he did not cooperate, necessitated exclusion of the resulting statement. The decision of a court will of course depend on the specific facts of each case. In *State v. Iverson*,[93] the Supreme Court of North Dakota sustained the admissibility of a statement given after an interrogation session attended by a bloodhound and which included a suggestion that Iverson take a lie detector test. Testing the circumstances of the interrogation, the past experience of the suspect with the law, and the suspect's rational participation in the session, the court found that the statements were voluntary.

D. DECEIT

The police have frequently used deceit to obtain confessions. Examples include misrepresenting that an accomplice has confessed,[94] misrepresenting the seriousness of the offense or condition of the victim,[95] misrepresenting that evidence has been found,[96] and disguising police officers.[97] While numerous courts and commentators have joined in condemning deceit,[98]

[91] Other factors included continuous interrogation, a request that the suspect take a polygraph (and stating that a refusal indicated guilt) and most important, due to *Miranda*, ignoring the suspect's request for counsel. The last factor alone would have required suppression.

[92] 286 N.C. 442, 212 S.E.2d 92 (1975).

[93] 225 N.W.2d 48 (N.D. 1974).

[94] *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969); People v. Houston, 36 Ill. App. 3d 695, 344 N.E.2d 641 (1976); Commonwealth v. Jones, 457 Pa. 423, 322 A.2d 119 (1974).

[95] *See, e.g., In re* Walker, 10 Cal. 3d 764, 518 P.2d 1129, 112 Cal. Rptr. 177 (1974); State v. Cooper, 217 N.W.2d 589 (Iowa 1974).

[96] *Cf.* State v. Oakes, 19 Ore. 284, 527 P.2d 418 (1974) (defendant told that guns found in his possession were on the "hot sheet").

[97] *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972) (police officer disguised as a cellmate); United States v. Hinkson, 17 U.S.C.M.A., 37 C.M.R. 390 (1967) (undercover agent attired as prisoner); *cf.* State v. McCorgary, 218 Kan. 358, ___, 543 P.2d 952, 957-58 (1975).

[98] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("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"); Hileman v. State, 258 Ark. ___, 535 S.W.2d 56 (1976); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 140.2 & 140.4(5) (1975).

most courts continue to sustain the admissibility of confessions obtained through its use. So long as the deceit does not nullify the *Miranda* warnings,[99] overcome another policy such as the right to counsel,[100] overbear the will of a person, or make it likely that a false statement might result,[101] a resulting statement is usually deemed voluntary and admissible.

E. THE POLYGRAPH

While the results of polygraph or lie detector examinations are not yet generally admissible in evidence, the polygraph itself plays a major role in law enforcement. Invited to clear themselves via the machine, numerous suspects submit to a polygraph examination only to be trapped by their own fears of the machines, occasionally augmented by police commentary.[102] Both the pretest and the examination itself tend to create fear and apprehension that result in the suspect confessing and throwing himself on the interrogator's mercy.[103] The test itself is voluntary and cannot be compelled. Article 31 rights are required and if a custodial situation exists, *Miranda* rights warnings are required; yet confessions continue. While at least one court has stated that "the situation a lie detector test presents can best be described as a psychological rubber hose," [104] courts across the country have ruled that the mere use of a polygraph will not render a confession involuntary.[105]

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[99] The decision to speak must be voluntary; once made, deception appears acceptable. There are a number of cases holding that subterfuge does not necessarily preclude a knowing waiver of rights. *See, e.g.*, State v. Cooper, 217 N.W.2d 589 (Iowa 1974); Commonwealth v. Jones, 457 Pa. 423, 322 A.2d 119 (1974) (being deceived that co-defendant had implicated him did not preclude a knowing waiver).

[100] *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964). *But see* Milton v. Wainwright, 407 U.S. 371 (1972).

[101] *See, e.g.*, United States v. McKay, 9 U.S.C.M.A. 527, 561, 26 C.M.R. 307, 311 (1958); *In re* Walker, 10 Cal. 3d 764, 777, 518 P.2d 1129, 1136-37, 112 Cal. Rptr. 177, 184-85 (1974). The due process test remains paramount. However, reliability is frequently discussed in deceit cases and occasionally appears to be the primary test.

[102] *See, e.g.*, United States v. Handsome, 21 U.S.C.M.A. 330, 45 C.M.R. 1041 (1972); Johnson v. State, 19 Crim. L. Rep. 2159 (Md. Ct. Spec. App. April 15, 1976).

[103] *See* United States v. Bostic, 35 C.M.R. 511, 523-24 (ABR), *petition for reconsideration denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965); United States v. Lane, 34 C.M.R. 744, 756 (CGCMR 1964).

[104] State v. Faller, ___ S.D. ___, 227 N.W.2d 433, 435 (1976).

[105] *See, e.g.*, Sotelo v. State, ___ Ind. ___, 342 N.E.2d 844 (1976); State v. Bowden, 342 A.2d 281, 285 (Me. 1975); People v. Wilson, 78 Misc. 2d 468, 478-79, 354 N.Y.S.2d 296, 307-08 (Nassau County Ct. 1974); Jones v. Commonwealth, 214 Va. 723, 204 S.E.2d 247 (1974).

What will create an involuntary statement, however, will be coercion to take the test,[106] or police misconduct.[107]

VI. THE NATURE OF THE SUSPECT

Under the federal due process test, a confession will be involuntary if the person being questioned was denied the ability to make a free choice—in short, if his will was overborne. A court dealing with a challenged confession must not only explore the nature of the alleged coercion or inducement, but if the case does not involve inherent coercion must weigh the character and background of the person interrogated. The totality of the circumstances thus includes the suspect. As a general rule it can be stated that questions of age, intelligence, and mental or physical condition are simply factors that must be considered in determining voluntariness.

The fact that a minor is involved in a confession will not as such make a confession inadmissible.[108] Age and understanding will, however, be substantial factors to be considered by judge and jury.[109]

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[106] *See, e.g.*, State v. Cullison, 215 N.W.2d 309 (Iowa 1974) (woman told that she should either submit to a medical examination or to a polygraph examination or the police would "leave no stone unturned" in their investigation). Tests in the military are voluntary and the suspect must be fully warned of his rights. Army Reg. No 195-6, Department of the Army Polygraph Activities, para. 1-5*d* (26 May 1976)

[107] Interestingly enough the courts, despite hostility to polygraphs, have not used accusations of lying or coaxing by police to invalidate confessions, but rather have tried to determine whether the suspect's will had been overborne. *See, e.g.*, State v. Bowden, 342 A.2d 281, 285 (Me. 1975).

[108] *See, e.g., In re* M.D.J., ___ D.C. App. ___, 346 A.2d 733 (1975); *In re* Mellott, 27 N.C. 81, 217 S.E.2d 745 (1975); Commonwealth v. Wilson, 458 Pa. 285, 329 A.2d 881 (1974).

[109] Age can be a determining factor. *See, e.g.*, United States v. Knoothuizen, 16 C.M.R. 573 (AFBR 1954) (statement of 19-year-old airman made in reliance on interrogator's promise not to prosecute held inadmissible); Commonwealth v. Eden, 456 Pa. 1, 317 A.2d 255 (1974) (14-year-old who had been sniffing glue with drug experience found to lack sufficient understanding of *Miranda* warnings for his confession to be voluntary). Some states have chosen to treat juvenile confessions in a different manner than adult statements. Thus in some states a minor may not make a statement unless he has consulted with a parent. *See, e.g.*, Weatherspoon v. State, 328 So. 2d 875, 876 (Fla. App. 1976) ("juveniles are afforded rights and considerations not available to adult offenders"); Crook v. State, 546 P.2d 648 (Okla. 1976) (statutory requirement that questioning be in the presence of guardian or legal custodian); Commonwealth v. Stanton, ___ Pa. ___, 351 A.2d 663 (1976). In others, a minor must be released to his parents or taken immediately to a juvenile court or detention home. Failure to do so will render the statement inadmissible. *See, e.g.*, State v. Wade, 530 S.W.2d 736 (Mo.), *as modified*, ___ S.W.2d ___ (1976); State v. Strickland, 532 S.W.2d 912 (Tenn. 1975). At least one case has found the statement to be inadmissible when it

The mentally retarded are in the same legal position as any other group of people. If a retarded individual is an adult, or a minor in a state without a special provision, the retardation will be considered as simply another factor going into the voluntariness equation.[110] Similarly, the mentally ill are considered able to make a knowing, intelligent decision to confess in the absence of a specific condition that would interfere with their ability to cope with reality to a significant extent.[111]

Physical illness as such is treated as any other factor and each case will be determined by its specific facts.[112] Difficulties exist in the areas of intoxication and drug abuse. The traditional rule for intoxication is that "proof of [voluntary] intoxication amounting to mania or such an impairment of the will and mind as to make the person confessing unconscious of the meaning of his words renders a confession so made by him inadmissible, but a lesser state of intoxication will not render the confession inadmissible."[113] Drug addiction per se does not make a confession involuntary.[114] However, withdrawal symptoms or threats or promises connected with withdrawal may make a statement inadmissible.[115] There appears to be a strong trend in the alcohol and drug cases towards emphasizing the reliability of the statement, perhaps to a greater extent than free choice. The law has never favored intoxication and it would

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was made at the urging of the minor's mother who had not been informed of the child's right to remain silent. Commonwealth v. Starkes, — Pa. —, 335 A.2d 698 (1975).

[110] *See, e.g.,* State v. Pyle, 216 Kan. 423, 532 P.2d 1309 (1975); Commonwealth v. Tucker, 461 Pa. 191, 335 A.2d 704 (1975) (19-year-old with second grade education, IQ of 75-79 and constitutional psychopath); State v. Ross, 320 So. 2d 177 (La. 1975) (low mentality and illiteracy); People v. Langston, 57 Mich. App. 666, 226 N.W.2d 686 (1975) (defendant mentally deficient and did not understand the situation; *held* his confession was involuntary).

[111] *See, e.g.,* United States v. Michaud, 51 C.M.R. 541 (ACMR 1975); Schade v. State, 512 P.2d 907, 916 (Alas. 1973); People v. Brown, 18 Crim. L. Rep. 2514 (Nassau County Ct. N.Y., Feb. 9, 1976) (internal pressures did not make confession involuntary).

[112] *See, e.g.,* Barnett v. State, 286 So. 2d 876 (Ala. Crim. App.), *cert. denied,* 51 Ala. 484, 286 So. 2d 890 (1973).

[113] Patterson v. State, 56 Ala. 359, 321 So. 2d 698 (1975), *citing* Carter v. State, 297 So. 2d 175 (Ala. Crim. App. 1975). *See also* United States v. Sikorski, 21 U.S.C.M.A. 345, 45 C.M.R. 119, 125-26 (1972); State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974); People v. Durante, 48 App. Div. 2d 962, 369 N.Y.S.2d 560, 561 (1975); State v. Saxon, 261 S.C. 523, 201 S.E.2d 114 (1973). *But see* State v. Lloyd, 538 P.2d 1278 (1975) (defendant in jail for detoxification could not understand *Miranda* warnings; statement suppressed).

[114] *See, e.g.,* Hayward v. Johnson, 508 F.2d 322 (3d Cir. 1975); United States v. Arcediano, 371 F. Supp. 457 (S.D.N.Y. 1974); People v. Delgado, 30 Ill. App. 3d 890, 892-93, 333 N.E.2d 633, 635-36 (1975); Fred v. State, 531 P.2d 1038 (Okla. 1975).

[115] *See, e.g.,* United States v. Monroe, 397 F. Supp. 726 (D.D.C. 1975).

appear that in this area as well, an intoxicated individual is considered to have waived his right to make a truly free and intelligent choice. However, if the alcohol or drug has rendered an individual peculiarly susceptible to some form of pressure, that factor will be taken into account.

VII. THE EXCLUSIONARY RULE

An involuntary confession is normally inadmissible in evidence. Further, in most cases any evidence gained through the involuntary statement will also be inadmissible.[116] The exclusion of derivative evidence under the "fruit of the poisonous tree" doctrine is necessitated by the desire to prevent improper police conduct as well as by doubt as to the propriety of courts' using illegally obtained evidence. While exclusion of coerced or induced statements may also be justified on the ground that the evidence itself is unreliable, the same conclusion does not necessarily flow from possible use of derivative evidence.[117] Accordingly, the ban on derivative evidence must be presumed to stem from policy considerations rather than reliability grounds. While an involuntary statement will not automatically prevent a subsequent, voluntary interrogation from producing admissible evidence, the Court of Military Appeals has sug-

[116] *See generally* 3 WIGMORE, *supra* note 8, at § 859. Interestingly, MCM, 1969, para. 150*b* attempts to limit exclusion of *derivative* evidence to cases where "compulsion was applied by, or at the instigation or with the participation of, an official or agent of the United States, or any State thereof or political subdivision of either who was acting in a governmental capacity." While this rule has been ascribed to Murphy v. Waterfront Comm., 378 U.S. 1 (1964), DA PAM 27-2, *supra* note 5, at 27-36, it is more likely that it is the product of United States v. Trojanowski, 5 U.S.C.M.A. 305, 17 C.M.R. 305 (1954). The interpretation is questionable. In *Trojanowski*, the Court of Military Appeals felt that little purpose would be served by extending the Article 31(d) exclusionary rule to service personnel acting as private citizens. In reaching this conclusion the court ignored the possibility that Congress had intended to extend individual rights beyond the minimal constitutional level by the enactment of Article 31 of the Uniform Code. More importantly, the legislative history suggests that Congress interpreted the phrasing of the military exclusionary rule, Article 31(d), to include derivative evidence. In the Hearings on the Uniform Code conducted on Article 31, Mr. Smart, a committee staff member, explained: "Subdivision (d) [of Article 31] makes statements *or evidence* obtained in violation of the first three subdivisions inadmissible. . . ." *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 984 (1949) (emphasis added).

[117] Derivative evidence (which could include proceeds of crime, weapons or equipment used to accomplish the crime, other witness, *etc.*) should usually be perfectly reliable and not susceptible to the doubts that accompany possibly inaccurate or false statements. Note that the key theoretical difference between the fourth amendment exclusionary rule and the fifth amendment rule is that questions of reliability are completely absent from questions of illegal search and seizure which generally supply "hard" evidence such as crime proceeds.

gested that it will be difficult to overcome the taint resulting from the first involuntary statement.[118]

VIII. THE VOLUNTARINESS DOCTRINE AT TRIAL

A. STANDING

Because an involuntary statement must usually be excluded from evidence, the rule has evolved that before a party may challenge the admissibility of a statement on voluntariness grounds, he must have an adequate personal interest in its suppression. This requirement, known as standing, has been held to mean that a defendant can only object to a statement made by himself. Thus the general rule is that an accused is unable to challenge a statement made by or evidence derived from another person although offered to prove the guilt of the accused.[119] This can be particularly important in cases involving accomplices. Presumably this limitation is designed to balance the rights of the individual on trial against the societal interest in allowing as much probative evidence to be brought before the jury as possible.[120] One possible exception to the rule may exist, however. In *LaFrance v. Bohlinger,*[121] the United States Court of Appeals for the First Circuit determined that where the prosecution had attempted to impeach its own witness with an allegedly coerced confession, the trial court should have determined the voluntariness of the confession even though it had not been made by the defendant. The court's reasoning was primarily that "[t]he due process requirements of a fair trial clearly extend to matters dealing with a witness' credibility."[122] While the court limited its expansion of the traditional standing rule, the case does suggest that due process considerations may allow an accused to occasionally challenge statements made by other parties.

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[118] United States v. Seay, 24 U.S.C.M.A. 7, 10, 51 C.M.R. 57, 60 (1975).

[119] *Cf.* Alderman v. United States, 394 U.S. 165, 174 (1969) (fourth amendment electronic eavesdropping case).

[120] Standing to challenge illegal searches and seizures appears to be broader, perhaps because the right involved is primarily one of privacy.

[121] 499 F.2d 29 (1st Cir. 1974).

[122] *Id.* at 34. In *LaFrance*, a Massachusetts habeas corpus case, the statement involved was alleged to be a police fabrication signed by an accomplice in jail while he was "strung out on drugs." It is questionable whether the court's decision would have been the same if a case of unlawful inducement had been claimed. Interestingly, the circuit court determined that despite the state rule requiring jury determination in the event of a ruling adverse to the defense by the trial judge on the voluntariness issue, only a decision by the trial judge was needed for this type of voluntariness issue.

B. BURDENS

The .general rule throughout the United States is that the prosecution must prove a confession or admission to have been voluntarily made before it can be received into evidence.[123] While the burden of proof is on the government, what has occasionally been called the burden of going forward is unclear. It appears that in many American jurisdictions, the defense must raise the issue of voluntariness or risk waiving the issue.[124] Once the defense has properly raised an objection, the government will be put to its burden. The degree to which the defense must object is unclear. As a matter of practice, it seems likely that many if not most jurisdictions shift the burden immediately upon defense objection or upon a recital of the nature of the alleged coercion or inducement. In other jurisdictions, the defense appears to have to present some evidence on the question before the prosecution must prove voluntariness.[125] Some states assume that confessions are prima facie involuntary until proven otherwise;[126] in such a jurisdiction the prosecution will have to prove voluntariness even in the absence of defense objection. The *Manual for Courts-Martial* requires the prosecution to prove the voluntariness of a statement unless the

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[123] *See generally* Jackson v. Denno, 378 U.S. 368 (1964); MCM, 1969, para. 140*a*(2); 3 WIGMORE, *supra* note 8, at § 860. Some states had rules which held that confessions were prima facie admissible and placed the burden on the defense to show them to be involuntary. *See* 3 WIGMORE, *supra*, at § 860 n.5. However, these rules seem invalidated by the Supreme Court's decision in Lego v. Twomey, 404 U.S. 477, 489 (1972), holding "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." However, *see* note 126 *infra*. The prosecution additionally has the burden of showing that the proper Article 31—*Miranda-Tempia* rights warnings were given.

[124] *See, e.g.*, FED. R. CRIM. P. 12; United States v. Carter, 431 F.2d 1093, 1096-97 (8th Cir. 1970); Jacobsen v. California, 431 F.2d 1017, 1018-19 (9th Cir. 1970) (in both cases the judge instructed the jury on voluntariness but failed to consider the issue himself). *See also* United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975):

> Logic dictates that a pretrial motion to suppress filed by an accused does in fact cast the burden upon the movant to present facts necessary to sustain his position. While the defendant must first present evidence in support of his motion to suppress which satisfies his burden of challenging the legality of the confession, we have recognized that the Government *must then* carry the countervailing burden of proving a waiver of the constitutional privilege against self-incrimination

Id. at 1135. *Cf.* United States v. Yamashita, 527 F.2d 954 (9th Cir. 1975); People v. Hawkins, 58 Mich. App. 69, 226 N.W.2d 851 (1975); State v. Blanchard, 527 S.W.2d 37 (Mo. App. 1975); State v. Helker, 88 N.M. 650, 545 P.2d 1028 (1975). *But see* Wainwright v. Sykes, 528 F.2d 522 (5th Cir. 1976) (construing the Florida rule as rejecting waiver for failure to object).

[125] *Cf.* United States v. Crocker, 510 F.2d 1129, 1135 (10th Cir. 1975). *See* note 124 *supra*. The degree of objection or evidence required of the defense varies by jurisdiction; the degree to which the defense may be required to present evidence is unclear.

[126] *See, e.g.*, Jones v. State, 292 Ala. 126, 290 So. 2d 165 (1974).

defense expressly waives the issue.[127] This would appear to place the burden of going forward in courts-martial on the prosecution rather than on the defense. Consequently a defense failure to raise the issue should certainly not result in waiver[128] unless the defense subsequently adopts the statement and argues it to the court. The contemporary practice has the defense counsel raising the voluntariness issue, usually by motion, in a procedure closely akin to that used in civilian courts. This optional technique is to be encouraged as it precludes a possible error by the prosecution which could require a mistrial. From the defense standpoint, it also has the advantage of attempting to raise the issue at a more advantageous time than the prosecution might choose. However, the procedure is not a required one under the Manual.

The nature of the prosecution's burden of proof has been settled only recently. In *Lego v. Twomey,*[129] the Supreme Court held that the government must prove voluntariness using a preponderance of the evidence standard.[130] While this specifies the minimum constitutional rule, a number of jurisdictions are requiring the government to prove voluntariness beyond a reasonable doubt.[131] The military uses a combined preponderance and reasonable doubt test.[132]

Some states have also required that in certain cases, usually those raising the issue of physical coercion or improper inducement, the prosecution must call all material witnesses rather than picking those it prefers to testify.[133]

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[127] MCM, 1969, para. 140*a*.

[128] United States v. Graves, 23 U.S.C.M.A. 434, 50 C.M.R. 393 (1975) (failure of defense counsel to raise voluntariness issue did not result in waiver; trial judge should have instructed sua sponte).

[129] 404 U.S. 477 (1972).

[130] *Id.* at 489.

[131] *See, e.g.,* Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973); State v. Peters, 315 So. 2d 678, 682 (La. 1975); State v. Bowden, 342 A.2d 281, 285 (Me. 1975); State v. Washington, 135 N.J. Super. 23, 342 A.2d 559 (1975).

[132] Military courts-martial use a two-part test. The trial judge determines if the confession is voluntary using a preponderance standard, *cf.* United States v. Mewborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1964), and then, on defense request, will instruct the court members that they must be able to find the confession voluntary beyond a reasonable doubt before they can consider it. MCM, 1969, para. 140*a*(2). Unlike the defense, the prosecution does not get a second chance if the judge holds against it using the preponderance standard.

[133] *See, e.g.,* Russey v. State, 257 Ark. 570, 519 S.W.2d 751 (1975); Evans v. State, 285 So. 2d 786 (Miss. 1973); *cf. In re* Lamb, 61 Ill. 2d 383, 336 N.E.2d 753 (1975). *See* Section V.A. *supra.*

C. PROCEDURE

There are two basic, constitutionally permissible procedures to determine the voluntariness of statements—the "orthodox" rule and the "Massachusetts" rule.[134] Under the orthodox rule, the trial judge determines the voluntariness of the statement out of the presence of the jury and his determination is conclusive.[135] Under the Massachusetts rule, in use in the military,[136] the trial judge makes a first determination out of the jury's presence[137] and then if the finding is against the defendant will instruct the jury that before it can consider the statement in evidence it must first determine the voluntariness of the confession or admission.[138] Thus under the Massachusetts rule, the accused receives two determinations. Under federal statute[139] it appears that all civilian federal courts are required to apply the Massachusetts rule.[140] While the orthodox rule is simpler and more efficient, at least one court has found it "contains aspects of harshness inconsistent with the general administration of criminal law . . . [attaching] to the preliminary determination of the court an aura of infallibility which . . . is not consistent with the general concepts of the right to jury trial."[141] Instructions to the jury in jurisdictions following the Massachusetts rule should not inform the jury that the judge has already determined the statement to be voluntary for such an instruction may prejudice the jury.[142]

Traditionally the military procedure to determine voluntariness was to litigate the issue when the challenged statement was offered into evidence. This is still possible, although the more usual procedure is for the defense[143] to raise the issue in an

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[134] *See generally* Jackson v. Denno, 378 U.S. 368 (1964). In *Jackson* the Court invalidated the "New York" rule under which the trial judge made a preliminary determination of voluntariness but which required him to submit the issue to the jury unless "in no circumstances could the confession be deemed voluntary." 378 U.S. at 377. *See generally* 3 WIGMORE, *supra* note 8, at § 861.

[135] *See, e.g.*, State v. Langley, 25 N.C. App. 298, 212 S.E.2d 687 (1975).

[136] MCM, 1969, paras. 53*d*(1) & 140*a*(2).

[137] *See* FED. R. EVID. 104(c): "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury."

[138] *See, e.g.*, Ross v. State, 504 S.W.2d 862 (Tex. Crim. App. 1974); State v. Harbaugh, 132 Vt. 569, 578, 326 A.2d 821, 827 (1974).

[139] 18 U.S.C. § 3501(a) (1970).

[140] *See, e.g.*, United States v. Barry, 518 F.2d 342 (2d Cir. 1975).

[141] State v. Harbaugh, 132 Vt. 569, 579, 326 A.2d 821, 827 (1974).

[142] *See, e.g.*, United States v. Bear Killer, No. 75-1814 (8th Cir., April 16, 1976); Dempsey v. State, 277 Md. 134, 147, 355 A.2d 455, 463 (1976); People v. Cwikla, 45 App. Div. 2d 504, 360 N.Y.S.2d 33 (1974).

[143] As the *Manual for Courts-Martial* indicates that the burden, in the absence of an express waiver, is on the prosecution to show the voluntariness of a statement,

Article 39(a) session before the trial judge and out of the presence of the court members. Inasmuch as the military lacks a formal suppression motion,[144] the issue is usually raised before plea by a motion for appropriate relief in the nature of a motion to suppress. The trial judge may, in his discretion, hear the motion or may treat the matter as an objection to the evidence sometime after plea. As the judge will make his determination out of the presence of the court members in any event, the only issue here is one of timing. Postponement may be desired by the prosecution for if the accused should plead guilty, perhaps under the influence of a plea bargain, all confession and search and seizure issues will be waived.[145] While this clearly saves a great amount of judicial time and effort, it does frequently force an accused to choose between a good pretrial agreement and a possible challenge to a confession. It can be suggested that the choice is not one of those which the law should prohibit. While the voluntariness doctrine does concern itself with police misconduct (to a much greater extent than reliability), alternate forms of attacking improper military procedures to obtain confessions exist[146] and the reliability consideration should not be relevant to guilty plea cases. The balance between the possible "chilling effect" and procedural efficiency has not yet been determined by the Court of Military Appeals.

D. PROOF

Once the issue has been raised,[147] the prosecution has the burden of proving the voluntariness of the statements of the accused which have been offered into evidence. Normally this compels the government to call at least one witness to the actual taking of the confession who will testify to the surrounding circumstances and will attempt to show a completely voluntary act on the part of the accused. Because of the Article 31—*Miranda* rights warnings, usually this proof will follow, some-

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MCM, 1969, para. 140*a*, the prosecution should raise this issue. However, it is more likely that the defense will be the first to do so in practice.

[144] *Cf.* United States v. Mirabel, 48 C.M.R. 803 (ACMR 1974).

[145] This is true even if the issue has been litigated before plea. United States v. Dusenberry, 23 U.S.C.M.A. 287, 49 C.M.R. 536 (1975).

[146] Under military law, coercion of a confession is a criminal offense. UCMJ art. 98. While no such prosecution is recorded in the reported cases, the remedy exists and perhaps needs only additional publicity, although the probability of prosecution of military police may be deemed minimal. *See generally* Lederer, *Rights Warnings in the Armed Services*, 72 MIL. L. REV. 1, 8-9 (1976).

[147] In the military an accused may take the stand for the limited purpose of denying that any statement was made at all, MCM, 1969, para. 140*a*(3), or for the limited purpose of contesting the voluntariness of a statement. MCM, 1969, para. 140*a*(2).

times in an almost incidental fashion, the showing that those requirements were properly complied with. The defense will of course attempt to show a different picture of the interrogation. To minimize questions of proof, increased interest is being shown in recording police interrogations via either tape recording, movie or videotape. While videotape use will not resolve all questions and will require proper authentication procedures, it appears most likely to moot the usual battle as to what actually did take place at the interrogation.

E. THE CORROBORATION REQUIREMENT

The same reluctance to convict defendants on the basis of confession evidence which helped give rise to the voluntariness doctrine gave rise to the corroboration requirement. Originally dealing primarily with crimes of violence, the rule requires that before a confession or an admission[148] may result in a conviction the statement must be corroborated by independent evidence.[149] Thus the courts have imposed an additional reliability check on confession evidence. Two primary corroboration rules exist in the United States. Under the majority rule, independent evidence must substantiate the *corpus delicti*, or in other words show that a criminal act has in fact occurred.[150] Independent evidence is not needed to show the identity of the perpetrator.[151] Under the minority rule, used by the civilian federal courts[152] and the military,[153] independent evidence must be received to show that the confession is trustworthy. As McCormick suggests,[154] the civilian federal courts have tended

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[148] There is no difference in treatment between confessions and admissions in the federal courts, Opper v. United States, 348 U.S. 84, 90-92 (1954), although some jurisdictions may apply the rule only to confessions.

[149] *See generally* C. MCCORMICK, EVIDENCE § 158 (2d ed. 1972), 8 J. WIGMORE, EVIDENCE §§ 2070-2075 (3d ed. 1940).

[150] *See, e.g.*, Tanner v. State, 57 Ala. App. 254, 327 So. 2d 749 (1976) (testimony showing that 988 tires were missing from inventory with value of $33,000 corroborated the confession of the defendant); People v. Ruckdeschel, 51 App. Div. 2d 861, 862, 380 N.Y.S.2d 163, 164 (1976) (failure of independent evidence to show a larcenous taking from the victim resulted in insufficient corroboration and compelled reversal of conviction for first degree robbery); Davis v. State, 542 P.2d 532 (Okla. 1975) (independent evidence established that a dead body was found and the death was shown to have occurred as a result of multiple stab wounds, corroborating the confession).

[151] *See, e.g.*, People v. Reeves, 39 Cal. App. 3d 944, 946-47, 114 Cal. Rptr. 574, 575-76 (1974). Usually this is the element of proof supplied by the confession.

[152] *See, e.g.*, Smith v. United States, 348 U.S. 147 (1954); Opper v. United States, 348 U.S. 84 (1954); United States v. Wilson, 529 F.2d 913, 915 (10th Cir. 1976).

[153] MCM, 1969, para. 140*a*(5); United States v. Crider, 45 C.M.R. 815 (NCMR 1972).

[154] C. MCCORMICK, EVIDENCE § 159 (2d ed. 1972).

to confuse the standards and frequently require that the *corpus delicti* be shown.[155] Because that standard almost always also establishes the trustworthiness of the confession, the difference between the two standards tends to be purely academic. Corroboration need not be shown beyond a reasonable doubt[156] and may in some jurisdictions, including the military, allow admission of evidence not normally admissible.[157] The presence of sufficient evidence to corroborate a confession is a question for the trial judge in some jurisdictions,[158] and for the jury in others.[159] The minimum constitutional requirement thus remains unsettled although in the light of *Jackson v. Denno,*[160] presumably a judicial determination is adequate. Traditionally the corroboration requirement has applied only to extrajudicial confessions and accordingly the rule will not apply to confessions made during trial by court-martial.[161]

F. THE BRUTON *RULE*

The *Bruton* rule is the outgrowth of joint trials of co-accused individuals in which one accused has made a confession that implicates another. In *Bruton v. United States,*[162] the Supreme Court held that the admission into evidence of a confession by one defendant that implicates a co-defendant deprives the second accused of his sixth amendment right to confrontation unless the first accused takes the stand and can be cross-examined about the incriminating statement. The two usual cures for the *Bruton* problem are severing the cases of the co-defen-

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[155] *See, e.g.,* United States v. Danilds, 528 F.2d 705, 707-08 (6th Cir. 1976); United States v. Fleming, 504 F.2d 1045, 1048-49 (7th Cir. 1974).

[156] *See, e.g.,* Green v. State,____Ind. App.___, 304 N.E.2d 845 (1973).

[157] *See, e.g.,* United States v. Stricklin, 20 U.S.C.M.A. 609, 44 C.M.R. 39 (1971) (hearsay evidence).

[158] *See, e.g.,* Felton v. United States, 344 F.2d 111 (10th Cir. 1965); State v. Kelley, 308 A.2d 877, 885 (Me. 1973).

[159] *See, e.g.,* Burkhalter v. State, 302 So. 2d 503 (Miss. 1974). The Court of Military Appeals has been unable to resolve this problem definitively and has held in United States v. Seigle, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973), that the issue is for the trial judge alone unless the evidence is "substantially conflicting, self-contradictory, uncertain, or improbable," in which case the court must, on defense request, instruct the court members on the issue.

[160] 378 U.S. 368 (1964).

[161] MCM, 1969, para. 140*a*(5). *See also* Manning v. United States, 215 F.2d 945, 950 (10th Cir. 1954). According to the Manual, the corroboration requirement also "does not apply to statements made prior to or contemporaneously with the act" or to statements admissible under another hearsay exception. MCM, 1969, para. 140*a*(5).

[162] 391 U.S. 123 (1968), *overruling* Delli Paoli v. United States, 352 U.S. 232 (1957) (which had sustained the propriety of a limiting instruction in such cases).

dants or redacting[163] the confession. The *Bruton* problem does not arise in a court-martial by judge alone,[164] when the maker of the confession takes the stand or if the co-defendant has also made a similar confession.[165] The courts have retreated from the original decision in *Bruton* and its long term vitality is open to question. A number of cases[166] have found *Bruton* errors to have been harmless beyond a reasonable doubt and thus not reversible error.

IX. THE AUTOMATIC REVERSAL RULE

While every effort is made by the trial judiciary to prevent error from occurring at trial, error of various types is frequent, especially in the admission of evidence. While most error will be scrutinized for the likelihood of prejudice to the accused, the Supreme Court has promulgated a general harmless error rule dealing with violations of federal constitutional rights. In *Chapman v. California,*[167] the Court indicated that a violation of such a constitutional right must result in reversal of the conviction involved unless the error could be shown to have been harmless beyond a reasonable doubt. Most interestingly, however, the Court stated in addition that its "prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." [168] This phrase is the source of what has been termed the "automatic reversal rule." Under the rule, error involving such a basic right cannot be tested for prejudice and the conviction must be reversed regardless of the amount of untainted evidence properly admitted against the accused. Because the Supreme Court cited a coerced confession case[169] as an example of a basic constitutional right, a number of jurisdictions[170]

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[163] Redaction is the deletion of all references to the co-accused. *See, e.g.,* MCM, 1969, para. 140*b*. Because this may be practically impossible in many cases it is a limited solution. For a general discussion of this issue in the military context, *see* Corrigan, *Prejudicial Joinder—The Crazy-Quilt World of Severances,* 68 MIL. L. REV. 1 (1975).

[164] United States v. Aponte, 45 C.M.R. 522 (ACMR 1972).

[165] *See* United States *ex rel.* Stanbridge v. Zelker, 514 F.2d 45, 48-49 (2d Cir. 1975), *cert. denied,* 423 U.S. 872 (1976).

[166] *See, e.g.,* Brown v. United States, 411 U.S. 223 (1973); Schneble v. Florida, 405 U.S. 427 (1972).

[167] 386 U.S. 18 (1967).

[168] *Id.* at 23.

[169] Payne v. Arkansas, 356 U.S. 560 (1958). Payne, a 19-year-old black, was charged with the murder of his white employer. Held incommunicado for three days, denied food for long periods, he was threatened with mob violence if he failed to confess. The Supreme Court reversed his conviction.

[170] *See, e.g.,* United States v. Wagner, 18 U.S.C.M.A. 216, 39 C.M.R. 216 (1969)

have adopted a rule under which any case involving an improperly admitted confession[171] will be reversed automatically. Unfortunately the true meaning of the *Chapman* case is unclear.

The Court's reference to *Payne v. Arkansas* in *Chapman* can be read as creating an automatic reversal rule applicable to coerced confessions. However, even if one accepts that conclusion, it is unclear whether the rule should extend to other forms of involuntary confessions[172] (such as those obtained through improper inducements) or to confessions obtained through violations of the warning requirements of *Miranda v. Arizona*.[173] While the practical difference between the *Chapman* harmless error rule and the automatic reversal rule is extremely small in any event, future civilian clarification of this perplexing issue[174] can be anticipated.

The Court of Military Appeals, using *Chapman* as its basis, applies an automatic reversal rule to courts-martial in which a confession or admission has erroneously been admitted.[175] While the court's original reasoning may have been faulty, recent cases[176] suggest a nonconstitutional basis for the rule that is highly persuasive. The court has stated[177] that "while it

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McKinley v. State, 37 Wis. 2d 26, 154 N.W.2d 344 (1967). *See generally* 3 WIGMORE, *supra* note 8, at § 863 n.1.

[171] California has distinguished between confessions which will invoke the automatic reversal rule and admissions which will not. People v. Stout, 66 Cal. 2d 184, 57 Cal. Rptr. 152, 424 P.2d 704 (1967).

[172] The Supreme Court failed to apply the automatic reversal rule to a violation of Massiah v. United States, 377 U.S. 201 (1964) in Milton v. Wainwright, 407 U.S. 371 (1972) (admissions made by defendant to a police officer posing as a cellmate found to constitute harmless error when improperly admitted at trial) and to violations of the sixth amendment *Bruton* rule. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969). It may well be that an automatic reversal rule is not constitutionally required for any case.

[173] The majority rule appears to be that the automatic reversal rule does not apply to violations of the *Miranda* warnings requirements (although the usual *Chapman* harmless error rule does). *See, e.g.*, Smith v. Estelle, 519 F.2d 1267 (5th Cir. 1975); Null v. Wainwright, 508 F.2d 340, 343 (5th Cir. 1975); State v. Hudson, 325 A.2d 56 (Me. 1974); State v. Persuitti, 133 Vt. 354, 339 A.2d 750 (1975).

[174] *See generally* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR (1970); Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519 (1969); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988 (1973); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814 (1970); Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

[175] *See, e.g.*, United States v. Kaiser, 19 U.S.C.M.A. 104, 41 C.M.R. 104 (1969).

[176] United States v. Ward, 23 U.S.C.M.A. 572, 50 C.M.R. 837 (1975); United States v. Hall, 23 U.S.C.M.A. 549, 50 C.M.R. 720 (1975).

[177] United States v. Ward, 23 U.S.C.M.A. 572, 575 n.3, 50 C.M.R. 837, 840 n.3 (1975).

will apply the usual constitutional harmless error rule to constitutional violations, a higher standard must be applied in cases in which a violation of Article 31 rights has occurred. This reasoning recognizes the congressional interest in according service personnel greater procedural protection than that available to the general population, presumably to offset conditions peculiar to military life.

X. CONCLUSION

The admissibility into evidence of confessions and admissions has been of concern to Anglo-American lawyers since at least the 17th Century and the voluntariness doctrine has been the major tool through which the law has attempted to regulate the use of these statements. In recent years, however, there has been an understandable if misguided tendency to presume that the comparatively recent Article 31-*Miranda* rights warnings have subsumed the voluntariness doctrine. While the importance of Article 31 cannot be overestimated, it should be apparent that the American voluntariness doctrine both complements and expands Article 31. As the military tends to reflect civilian legal trends, there is every reason to believe that as *Miranda* is undercut by the Supreme Court the voluntariness doctrine will take on added importance. Expanded use of the voluntariness doctrine will have the effect of increasing the emphasis that both the defense and prosecution must place on the circumstances surrounding the taking of a statement. Whether for present or future practice, this doctrine merits increased attention by judge advocates.