THE INVOLUNTARY CONFESSION AND THE RIGHT TO DUE PROCESS: IS A CRIMINAL DEFENDANT BETTER PROTECTED IN THE FEDERAL COURTS THAN IN OHIO?

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INTRODUCTION

OHIO CIVIL LIBERTARIANS have long claimed that a criminal defendant is likely to have his due process rights better protected in the federal courts than in Ohio courts. One measure of that protection is how the courts respond when a defendant alleges that his confession was involuntary and thus not properly admissible as evidence at his trial. The central issue then is whether the Ohio courts have kept as much in step with the United States Supreme Court as have the federal courts in their revisions of what is the proper test of voluntariness of a confession.

Of particular concern is to what extent the Ohio courts and the federal courts have altered their approach to voluntariness since Miranda v. Arizona. In spite of its detailed attention to the formalities of warning and waiver, Miranda emphasizes traditional voluntariness as a still vital substantive issue. Further, that the Miranda procedural requirements did not end the Court's concern with voluntariness per se is evident in Davis v. North Carolina, where the Court considers failure to advise an accused according to the Miranda requirements "a significant factor in considering the voluntariness of statements later made." To admit an involuntary confession as evidence against the accused is to violate the Fourteenth Amendment requirement of due process of the law. It is according to this principle that the Ohio courts and the federal courts must bear scrutiny.

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2 Id. at 476.
4 Id. at 740.
I. Voluntariness: A Changing Concept
As Developed by the United States Supreme Court

A. The Reliability Theory

Ever since the early English common law, whether a confession is voluntary has depended upon whether it was "forced from the mind by the flattery of hope, or by the torture of fear." 6 It is deceptively simple, however, to say that an involuntary confession is one induced by threats or promises. The more important issue is why such a confession should be inadmissible as evidence. The earliest Supreme Court answer was that the confession is likely to be untrue. 7 Adopting the English view, the Court explained that "inducements of a temporal nature, held out by one in authority" or "threat or promise ... operating upon the fears or hopes of the accused" would make the truth of the statement unreliable. 8

Although the reliability theory prevailed for many years to come, the Court's language nonetheless continued to define very broadly what would make a confession involuntary. "[T]he true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." 9 The definition of voluntariness that continues in the present day to be quoted most often, with both approval and disapproval, is that in Bram v. United States, 10 requiring that the statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or indirect promises, however slight, nor by the exertion of any improper influence." 11

Although the nineteenth-century definitions are broad, the cases early in this century focused on physical violence against the accused, the kind of treatment that would indeed be likely to produce an untrue confession. The defendant had been physically abused in Brown v. Mississippi, 12 the first case in which the Court set aside a state conviction because admitting the confession violated due process. It was not until Chambers v. Florida, 13 a case involving persistent interrogation during a week of incommunicado detention, that the Court held psychological coercion capable of producing an involuntary confession.

During this period the Court stressed the need to analyze "the circum-

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7 Hopt v. Utah, 110 U.S. 574 (1884).
8 Id. at 585.
10 168 U.S. 532 (1897).
11 Id. at 542-43, quoting with approval, 3 Russell on Crimes 478 (6th ed. 1880).
12 297 U.S. 278 (1936).
13 309 U.S. 227 (1940).
stances out of which the alleged confessions came,"¹⁴ including the defendant's background and experience as well as the "circumstances . . . surrounding confinement."¹⁵ These factors, of course, would not matter except that they might bear upon how easily a defendant would fall victim to threats or promises, that is, how likely they would be to induce from him an untrue confession. The Court's concern then with extraneous factors about the defendant reveals its coming to acknowledge the difficulties inherent in the reliability theory. It was not enough to determine the factual issue of whether threats or promises were made. The Court had produced for itself an enormously complicated test that required weighing the strength of the inducements against that of the individual accused. While the factors to be weighed might be at least somewhat concrete, the reliability test of a confession was after all quite subjective.

Thus prior to the 1960's, the Court's treatment of voluntariness was marked by gradual shifts in theory that might well be viewed as its attempts to solve the problems caused by the subjective reliability test. As the Court began to stress reliability less, it stressed more the deterrence of improper police activity. As it stressed physical violence less, it stressed psychological inducements more. The result was to give up subjective analysis of the defendant in favor of objective analysis of police activity to see if it was "inherently coercive,"¹⁶ such as to produce a confession that would be involuntary as a matter of law. The whole period reveals ever more attention to voluntariness as a requirement of Fourteenth Amendment due process.

_Lisenba v. California_¹⁷ marks the real transition from the reliability theory to the deterrence theory. Although the Court here affirms a conviction, finding that police practices had not coerced the confession, the opinion makes a point of distinguishing between the concern of evidentiary rules against admitting involuntary confessions and the concerns of due process. While the aim of the former is "to exclude false evidence," the due process aim is "to prevent fundamental unfairness in the use of evidence, whether true or false."¹⁸

**B. The Deterrence Theory**

Three years after _Lisenba_, the Court first articulated its "inherently coercive" analysis in _Ashcraft v. Tennessee_.⁹ Here thirty-six hours of questioning without sleep produced a confession found involuntary as a matter

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¹⁵ 309 U.S. at 239.
¹⁶ 322 U.S. at 154.
¹⁷ 314 U.S. 219 (1941).
¹⁸ Id. at 236.
¹⁹ 322 U.S. 143 (1944).
of law. Other cases of the same period reveal the Court’s intention to avoid having to make subjective judgements about what happened behind the closed doors of interrogation rooms, especially since trial records tended to be sketchy or contained only swearing contests between the police and the accused. It was far easier to look to quantitative matters such as length of interrogation or demonstrable infirmities of the accused.

It was in particular to reinforce the deterrence theory that *Haley v. Ohio* and other cases developed the automatic reversal rule. Eighteen years before *Miranda*, Justice Frankfurter wrote in *Haley*:

> [W]e cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them. They may not become a cloak for inquisitorial practices and make an empty form of the due process of the law . . . .

*Stein v. New York* attempted to modify the deterrence theory and revive the reliability theory, insisting that the “limits [of permissible interrogation methods] depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.” However, elsewhere the opinion suggests that some kinds of pressure would be unacceptable despite a given defendant’s ability to resist. More important, *Stein* was overruled by *Jackson v. Denno*.

The Supreme Court returned to powerful denunciation of illegal police methods in *Spano v. New York* and especially in *Rogers v. Richmond*. It is especially noteworthy that the grounds for the Court’s ruling the confession involuntary in *Rogers* did not involve length of interrogation or peculiar infirmities of the accused. What the Court stressed was that Rogers was tricked into confession by the Assistant Chief of Police, who pretended in his presence to call other officers and direct them to prepare to take into custody the defendant’s wife.

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21 See, e.g., *Davis v. North Carolina*, 384 U.S. 737 (1966) (low intelligence); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (moron mentality); *Haley v. Ohio*, 332 U.S. 596 (1948) (black person, only fifteen years of age, questioned in early morning for five hours by relays of police, while his mother and lawyer were not allowed to see him).

22 332 U.S. 596 (1948).

23 Id. at 601.

24 346 U.S. 156 (1953).

25 Id. at 185.


As expressed in *Rogers*, the test of voluntariness is not based at all on subjective assessment of facts about a particular defendant; rather, the question is a hypothetical one: "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."\(^{29}\)

In *Rogers* the Court denounces the reliability test of voluntariness as unacceptable under the Fourteenth Amendment due process requirements. Indeed in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement.\(^{30}\)

This view makes the automatic reversal rule justifiable, given the unfairness of sustaining a conviction based on an improper standard of voluntariness. As the *Rogers* Court stresses, the trial record may be entirely inadequate insofar as different evidence might have appeared in the record if a different standard had been used. The Court noted:

> [F]indings of fact may often be . . . influenced by what the finder is looking for. Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them.\(^{31}\)

In other words, a defendant should not have to suffer either from an unconstitutional standard applied to test his confession, or from an inadequate record used on review to establish what standard was applied. Since the inadequate trial record is typical, automatic reversal becomes the only way to insure due process protection.

### C. The Balancing Theory

*Rogers* was the Court's high water mark of concern with police methods at the almost complete expense of concern for the truth of the confession. Such a view was bound not to last. Subjective tests might be troublesome, but purely "objective" ones no more satisfactorily measure voluntariness. Recognizing that more than one value contributes to the requirements

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\(^{29}\) *Id.* at 544.

\(^{30}\) *Id.* at 541.

\(^{31}\) *Id.* at 547.
of due process, the Court in the early 1960's turned partially backwards to balance "a complex of values,"\textsuperscript{32} including: (1) protecting the defendant against having an untrue confession used as evidence against him; (2) protecting his privilege not to incriminate himself; (3) discouraging "police practices that are generally likely to result in unreliable evidence"; (4) discouraging "police practices which are unacceptable on grounds other than the unreliability of the resulting evidence," mainly because they affront human dignity; and (5) preserving the defendant's trial rights, on the theory that a confession in effect waives the right to require the state to meet its burden of proof beyond a reasonable doubt.\textsuperscript{33} Reliability was again clearly beginning to weigh in the balance.

In addition to \textit{Blackburn v. Alabama},\textsuperscript{34} where the "complex of values" was first announced, other cases reflecting these same balancing principles were \textit{Culombe v. Connecticut},\textsuperscript{35} \textit{Lynumn v. Illinois},\textsuperscript{36} and \textit{Haynes v. Washington}.\textsuperscript{37} \textit{Haynes} is particularly illustrative of the balancing theory working to the advantage of a defendant. Haynes' confession was made after half an hour of interrogation the evening of his arrest and an hour and a half more the next morning, during which he was told he could call his wife only if he cooperated and confessed. Haynes had prior criminal history sufficient to give him knowledge of police procedure (knowledge which some courts cite to show that the defendant's will could not easily be overborne), yet the Court found he had "no reason not to believe that the police had ample power to carry out their threats."\textsuperscript{38}

Perhaps the most accurate assessment of the balancing theory's effect is that "[s]trong' personal characteristics rarely, if ever, 'cure' forbidden police methods; but 'weak' ones may invalidate what are generally permissible methods."\textsuperscript{39} The theory is attractive because it is comprehensive and fair in principle. But it was also destined to fail. Perhaps the "complex of values" to be balanced proved after all too cumbersome. In \textit{Culombe} the Court, attempting to apply the balancing tests, produced no majority opinion; it took Justice Frankfurter sixty-two pages to announce the judg-

\begin{itemize}
\item \textsuperscript{32} Blackburn v. Alabama, 361 U.S. 199, 207 (1960).
\item \textsuperscript{33} C. McCormick, \textit{Handbook of the Law of Evidence} §148, at 315-16 (2d ed. 1972).
\item \textsuperscript{34} 361 U.S. 199 (1960).
\item \textsuperscript{35} 367 U.S. 568 (1961).
\item \textsuperscript{36} 372 U.S. 528, 531 (1963) (confession held involuntary where accused told it would "go easier" for her if she confessed, and her children would not be taken from her if she "cooperated").
\item \textsuperscript{37} 373 U.S. 503 (1963).
\item \textsuperscript{38} Id. at 514, citing Lynumn v. Illinois, 372 U.S. 528, 534 (1963).
\item \textsuperscript{39} Kamisar, \textit{What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions}, 17 Rutgers L. Rev. 728, 738 (1963).
\end{itemize}
ment, attempting to explain the due process analysis for voluntariness as divisible into three phases.\textsuperscript{40}

D. The Current Focus on Procedure

It is not surprising then that the 1960's saw the Court return to its easier, if not more satisfactory, concentration on procedure instead of subjective substantive questions. \textit{Jackson v. Denno},\textsuperscript{41} overruling \textit{Stein v. New York},\textsuperscript{42} establishes the required independent preliminary court ruling on voluntariness. \textit{Escobedo v. Illinois}\textsuperscript{43} insists that a waiver of rights must be not only voluntary but also “intelligent and knowing,”\textsuperscript{44} which suggests the need not only to be informed of rights, but also to know the legal significance of making a statement. On the heels of \textit{Jackson} and \textit{Escobedo}, the Court remanded \textit{Boles v. Stevenson}\textsuperscript{45} to district court for a hearing on voluntariness expressly because the record did not show whether the trial judge had ruled explicitly on voluntariness or, if he had, what standard he had used. \textit{Sims v. Georgia}\textsuperscript{46} explains the trial judge's duty further, indicating that he “need not make formal findings of fact or write an opinion” but that the record must show “with unmistakable clarity”\textsuperscript{47} that he has made a finding of voluntariness.

\textit{Miranda v. Arizona}\textsuperscript{48} marks the pinnacle of the Court's attention to procedure, but the \textit{Miranda} opinion makes clear that traditional voluntariness remains an issue. The opinion also clearly anticipates prosecutorial attempts to make the formalities of a waiver resolve all questions about voluntariness. The Court correctly predicts that henceforth, voluntariness tests would be applied more to the waiver than to the confession itself. While allowing effective waiver of the rights enunciated in the opinion, the Court requires, as in \textit{Escobedo}, that “the waiver [be] made voluntarily, know-

\textsuperscript{40} The explanation reads in typical part:
First, there is the business of finding the crude, historical facts, the external “phenomenological” occurrences and events surrounding the confession. Second, because the concept of “voluntariness” is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal “psychological” fact. Third, there is the application to this psychological fact of standards for judgement informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances. 367 U.S. at 603.

\textsuperscript{41} 378 U.S. 368 (1964).
\textsuperscript{42} 346 U.S. 156 (1953).
\textsuperscript{43} 378 U.S. 478 (1964).
\textsuperscript{44} Id. at 490 n. 14.
\textsuperscript{45} Id. at 490 n. 14.
\textsuperscript{46} 379 U.S. 43 (1964). In this case the defendant was led to the building where the corpse of the mutilated victim was found. When defendant resisted entering, the police gave him the choice of going in or explaining to them what he knew about the murder.
\textsuperscript{47} 385 U.S. 538 (1967).
\textsuperscript{48} Id. at 544.
\textsuperscript{49} 384 U.S. 436 (1966).
ingly, and intelligently.\textsuperscript{49} The Court says further that lengthy interrogation or incommunicado detention would be grounds for a presumption of involuntary waiver.

Moreover, 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. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.\textsuperscript{50}

\textit{Miranda} also places the burden of proving voluntary waiver on the state "[s]ince the state is responsible for establishing the isolated circumstances under which the interrogation takes place . . . .\textsuperscript{51}

Thus, while \textit{Miranda} still leaves to the lower courts the necessity of deciding voluntariness, and even broadens the category of prohibited inducements to include not only threats and trickery but also cajoling, the opinion gives the courts no more settled test of voluntariness than previous Supreme Court case law provided. It is no wonder then that the history of lower court assessments of confessions has been riddled with inconsistencies, after \textit{Miranda} as well as before.

\section*{II. Voluntariness in the Ohio Courts}

\subsection*{A. Before \textit{Miranda}}

The history of Ohio case law on voluntariness begins with \textit{Spears v. State},\textsuperscript{52} a case still quoted with approval and one which antedated even \textit{Warickshall's Case}\textsuperscript{53} in its liberalism towards defendants.

A confession induced by hope or fear, excited in the mind of the prisoner by the representations or threats of any one, is not to be considered as voluntary. The question in every case, where a confession has followed representations or threats, is, was it produced by them?

. . . If the representations or threats were made by . . . a person having authority or control over the prosecution or the accused, it is to be presumed that the confession was produced by [them], unless it appear that their influence was totally done away before the confession was made . . . If satisfied . . . that the confession was produced by the representations or threats, the court cannot receive it in evidence, because the prisoner had sufficient mind or knowledge to detect the ground-

\begin{itemize}
  \item \textsuperscript{49} \textit{Id.} at 444.
  \item \textsuperscript{50} \textit{Id.} at 476.
  \item \textsuperscript{51} \textit{Id.} at 475.
  \item \textsuperscript{52} 2 Ohio St. 583 (1853).
  \item \textsuperscript{53} 168 Eng. Rep. 234 (K.B. 1783).
\end{itemize}
lessness of the representations or threats; for the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to have believed, but what did he believe?24

What is most remarkable about this passage is its refusal to let a defendant’s prior criminal history be used against him as evidence that he is too familiar with police tactics to be easily induced to make an involuntary confession. A court operating according to the reliability theory would never produce such an opinion, subjective though its test might be. It was Price v. State25 that imposed the reliability theory on Ohio courts; Rufer v. State26 put the burden of proof on the defendant to show that his confession was involuntary.

The reliability theory persisted in Ohio, the courts relying on it heavily as a means of resolving swearing contests. Sometimes it appeared that the police could even admit to making statements clearly amounting to threats or promises without the confession being held involuntary. The police only had to be careful to recite expressly that they had made no threats or promises. In Burchet v. State,57 the prosecuting attorney admitted on the stand that he told the accused “that it would be easier for him if he told the truth,”58 but he also said he made no threats or promises. Holding the confession admissible, the court said: “The rule is . . . that the fact that false representations were employed to induce a confession does not deprive the state of the right to use such confession where it does not appear that the fraud practiced was calculated to do otherwise than elicit the truth.”59

Even after the United States Supreme Court began moving from the reliability theory to the deterrence theory, the Ohio decisions continued to find ways out of holding confessions inherently coerced. One way out was to distinguish the cases on their facts, counting up the number of hours of interrogation and finding the total significantly shorter than that in Ashcraft v. Tennessee,60 conceded to be controlling.61 However, the easiest way out was not to believe the defendant’s testimony as to involuntariness. In State v. Powell,62 the court said the trial judge need not exclude a

54 2 Ohio St. at 583-84 (syllabus).
55 18 Ohio St. 419 (1868).
56 25 Ohio St. 464 (1874).
57 35 Ohio App. 463, 172 N.E. 555 (1930).
58 Id. at 465, 172 N.E. at 556.
59 Id. at 466, 172 N.E. at 556, following Price v. State, 18 Ohio St. 419 (1868).
60 322 U.S. 143 (1944).
confession when the only evidence of its involuntariness at the preliminary hearing was the defendant's evidence.\textsuperscript{63}

In \textit{State v. Scarberry},\textsuperscript{64} the court claimed to be following the rules established in \textit{Spears} and \textit{Rufer}. Yet the court affirmed a murder conviction, holding voluntary and in violation of no constitutional rights a confession elicited after a three-hour interrogation that had been preceded by striking the defendant in the face. The court concluded that the three hours of interrogation attenuated the effect of the striking. In support of the affirmance, the opinion emphasizes the trial judge's determination that the confession was true. This case was decided in 1961, the same year as \textit{Rogers v. Richmond}.\textsuperscript{65} After that date no court, federal or state, could meet the requirements of Fourteenth Amendment due process if it used the reliability standard alone to find a confession voluntary.

Two more Ohio cases involved trials before \textit{Miranda}, although their review came after \textit{Miranda}. In \textit{State v. Cron},\textsuperscript{66} the court affirmed the voluntariness of a confession made by a defendant who claimed that he did not have enough to eat, and that he was drowsy from seconal, so that he did not know what he was saying. His interrogation lasted two and one half hours. The court in its detailed findings of voluntariness stresses two things: his statement was perfectly consistent with other evidence, and he was intelligent enough to be an army sergeant in charge of thirty men.

Saying that a confession is consistent with other evidence is, of course, only a thinly disguised way of saying that it is reliable. The shift in language, which became common during this period, reveals some acknowledgment that the reliability theory was no longer acceptable. It also reveals that the court using the veiled language still regards reliability as a significant measure of voluntariness. Thus the apparently gratuitous reference to the defendant's intelligence or other signs of sophistication becomes buttressing material, added to demonstrate that the reliability test has not been used alone.

In the second case tried before \textit{Miranda} but reviewed subsequent to it, \textit{State v. Cowans},\textsuperscript{67} failure to meet the \textit{Miranda} requirements, an inadequately-fed defendant, and four hours of interrogation did not amount to a due process violation. A later confession did result in reversal, however,

\textsuperscript{63} The defendant also lost her swearing contest in \textit{State v. Klumpp}, 15 Ohio Op. 2d 461, 175 N.E.2d 767 (Cl. App. 1960), where she said police told her that if she made a statement the worst she could be charged with was manslaughter.

\textsuperscript{64} 114 Ohio App. 85, 180 N.E.2d 631 (1961).

\textsuperscript{65} 365 U.S. 534 (1961).

\textsuperscript{66} 14 Ohio App. 2d 76, 236 N.E.2d 671 (1967).

\textsuperscript{67} 10 Ohio St. 2d 96, 227 N.E.2d 201 (1967).
even though found voluntary, because the defendant was denied his demand to see an attorney. This defendant also had been promised leniency if he cooperated.

B. After Miranda

After Miranda, the emphasis shifted much more to warnings and waiver. In State v. Perry, the court held voluntary the defendant's statements volunteered after he was apprehended while fleeing the crime. There was no interrogation; the police, according to the court, were under no duty to interrupt to give Miranda warnings. It was not until the morning following the arrest, however, that the defendant signed a waiver and confession. He denied having been given warnings then and insisted he confessed only to avoid threatened injury. There was a preliminary hearing on voluntariness, but the reviewing court appears to have focused more on the circumstances surrounding the earlier oral statement than the written one, even though the latter statement was found voluntary.

The extent to which Ohio cases have allowed procedural formality to supersede substantive questions about voluntariness is shown in the implication in Perry, that if a judge admits evidence of a confession at trial, the very act of admitting the evidence is sufficient to meet the Jackson requirement that the court independently make a finding of voluntariness. If this is true, then there is little hope for the poor defendant who happens to have his case tried before a sleepy or unsympathetic judge, especially if his counsel is sleepy too. The prosecution offers the confession. The defense fails to object. The confession is then admitted without so much as a nod from the judge. Yet, under Perry, it is possible to say that the judge has independently found the confession voluntary. Such a possibility clearly shows the need for the automatic reversal rule, for the record in such a case will give no indication whatsoever of the grounds on which the confession was "found" voluntary.

The same sort of perfunctory judgment occurred in State v. Wigglesworth, where the court affirmed a murder conviction, simply asserting that the Miranda warnings were given and, apparently therefore, the confession was voluntary.

The only recent Ohio case that shows comprehensive understanding of the dictates of Miranda regarding both the waiver of rights and the voluntariness of the confession is not an Ohio Supreme Court case. Although

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68 14 Ohio St. 2d 256, 237 N.E.2d 891 (1968).
69 Id. at 265, 237 N.E.2d at 896.
the Court of Appeals in *State v. Utsler* claims to be following the dictates of the Ohio Supreme Court in *Perry* and *Wigglesworth*, it goes to great lengths to make clear that is possible to sign a waiver and still make an involuntary confession.

The *Utsler* court spells out four distinct questions, all of which together determine the effectiveness of waiver of *Miranda* rights:

(1) Did the accused understand his position of peril, . . . in danger of imprisonment for a long time? (2) Did he understand what his legal rights were in this position? (3) Did he have the mental ability to avoid giving up these legal rights? (4) Did he have the mental ability under all the circumstances to avoid answering the questions?

Aside from *Utsler*, which almost seems to be an aberration in its clear presentation of well understood law, there are three cases, spanning the years 1965-1972, that most accurately show the current application of the law on voluntariness in Ohio. The first is *State v. Arrington*. The defendant here had counsel but initiated a conversation with the police and prosecuting attorney and said he did not want counsel present. The trial judge held a suppression hearing and found that the defendant had been fully informed of his rights, was aware of them, and had intelligently waived them. He concluded that the confession was voluntary, putting the burden on the defendant to prove involuntariness. The confession was presented to the jury for a final determination. The defendant was convicted, and the Ohio Supreme Court upheld the conviction.

When the defendant subsequently sought habeas corpus in the district court, that court remanded the case to the state court for a new determination of voluntariness on the ground that it had been error to put the burden of proof on the defendant. Such placement of the burden was found in conflict with *Jackson v. Denno* and *Sims v. Georgia*.

However, habeas corpus was ultimately denied, and the Sixth Circuit Court of Appeals affirmed the denial in *Arrington v. Maxwell*, being satisfied that the confession was voluntary for the following reasons: (1) the defendant asked to speak to the prosecutor; (2) the defendant had

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72 The arson conviction here was reversed for failure to meet the preliminary hearing requirements. Thus, the court did not reach whether the "high-grade mental defective" defendant, who signed a waiver, made a voluntary confession.

73 21 Ohio App. 2d at 173, 255 N.E.2d at 866.


75 378 U.S. 368 (1964).

76 385 U.S. 538 (1967).

77 409 F.2d 849 (6th Cir. 1969).
counsel; (3) the prosecutor told him he could remain silent and his state-
m ents could be used against him rather than as consideration for benefits
to him; and most importantly, (4) the trial judge expressly stated that his
finding was in view of all the circumstances.\(^8\)

Here then is a case in which the Sixth Circuit found Ohio’s procedure
of placing the burden on the defendant unconstitutional, but at the same
time treated the procedure as adequate by permitting a finding of voluntari-
ness to stand simply because the trial judge recited that it had been made
in view of all the circumstances. Any inclination to use the case to illustrate
Ohio’s lack of sensitivity to due process rights, therefore, must be tempered
by noting the insensitivity demonstrated by the federal court as well in its
review.

\textit{Arrington v. Maxwell} does, however, correctly state that the burden
of proof of voluntariness is on the prosecution. There should have been
no question about this since \textit{Jackson v. Denno} was decided in 1964. If
it was not entirely clear at the time of \textit{Arrington v. Maxwell}, in 1969, it
became so in 1972, when the United States Supreme Court in \textit{Lego v. Twomey},\(^9\) without even considering the possibility of a burden on the
defendant, established that the State had to meet its burden by a preponder-
ance of the evidence.

One month before \textit{Lego} came \textit{State v. Kassow},\(^8\) the second of the
three cases that display the current confusion in Ohio’s treatment of vol-
tariness, a case in which the Ohio Supreme Court upheld a murder
conviction. While the confession in \textit{Kassow} was used solely for impeach-
ment purposes,\(^8\) the opinion does focus considerably on the matter of
burden of proof. It looks back to \textit{Ruler v. State},\(^8\) completely overruled
by \textit{Jackson v. Denno} (which \textit{Kassow} does not mention), for the proposition
that the burden is on the defendant.\(^8\) It also openly applies the reliability
test\(^8\) while purportedly applying \textit{Miranda}. It misconstrues \textit{Miranda} in
attempting to put the burden of proof on the defendant as to the confession
while putting it on the state as to waiver.\(^8\)

The final case, \textit{State v. Edgell},\(^8\) is instructive in several respects. First,
the Court distinguishes this case from *Kassow* but also does not mention *Lego v. Twomey*. The court in *Edgell* explains that in *Kassow* it held that failing to file a pre-trial motion to suppress does not constitute waiver of the defendant's right to object to the state's failure to prove that the defendant waived his right not to make a statement. In *Edgell*, it holds that the defendant does waive his right to object later if he does not object during the trial. The distinction then that the *Kassow* opinion did not make clear is supposedly one between failure to object before trial and failure to do so during trial, not between voluntariness of confession and that of waiver.

The *Edgell* court thus also diverts attention to procedure in order to avoid the substantive question of voluntariness. In this case the defendant's statement was tape-recorded, but there was an interruption in the tape while the *Miranda* rights were being read. The reviewing court acknowledges that it would be a violation of *Miranda* for the prosecution not to prove that it used no coercion during the interruption. The defendant alleged that during the interruption he asked for an attorney but was discouraged by the prosecutor, who told him it would be easier on him if he cooperated. The prosecution testimony at trial did not contradict these allegations. The defendant also alleged that the sheriff had told him that if he did not confess, his fiancee would be sent to reform school. The court concedes *Miranda* error but calls it harmless because other unchallenged evidence against the defendant was so overwhelming that conviction was inevitable. (Here again is the old reliability theory only slightly disguised.)

Thus *Edgell*, the Ohio Supreme Court's most recent case on voluntariness, still reflects heavily weighted use of the reliability theory in addition to unconstitutional allocation of burden of proof. The opinion circumvents *Miranda* while using *Miranda*'s attention to procedure to avoid the substantive question.

Yet even before *Miranda* came the United States Supreme Court's automatic reversal rule, required in *Fahy v. Connecticut* where "there is reasonable possibility that the [erroneously admitted] evidence . . . might have contributed to the conviction." Also, the Court insists in *Chapman v. California* that the *Fahy* rule applies in spite of any contrary state harmless error statute.

It is at least worth noting, however, that Chief Justice O'Neill, after

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87 *Id.* at 106, 283 N.E.2d at 148.
88 *Id.*
89 *Id.* at 109-10, 283 N.E.2d at 150.
91 *Id.* at 86-87.
concurring in the Kassow opinion, dissents at length in Edgell, where, after giving the facts in almost minute detail, he expressly finds the confession involuntary and says that "harmless error can only be predicated upon evidence or testimony which itself is constitutionally admissible." Edgell’s statements were produced by "certain coercive threats" and were, he concludes, involuntary.

Of particular import is that Chief Justice O’Neill finds the sheriff’s threat preceding an oral confession to have affected the written confession five hours later. In other words, a five-hour lapse did not attenuate the effect of the threat. Rather, "the totality of the circumstances surrounding the [initial] interrogation ... were coercive," and rendered the later statement constitutionally impermissible.

Ultimately, then, a defendant whose defense is an involuntary confession can find his only detailed support in Ohio case law in the Chief Justice’s dissent in Edgell and in the Court of Appeals opinion in Utsler. Both are, of course, relatively weak sources of support. They are hardly strong enough to counter the force of: (1) having the burden of proof placed on the defendant, allowed reluctantly by Arrington and boldly by Kassow; (2) having his confession tested by the reliability theory, strongly approved by both Kassow and Edgell; and (3) having Miranda violations dismissed as harmless error, possible in light of Edgell.

Furthermore, since 1973, the Ohio Rules of Criminal Procedure have strengthened the forces against the defendant, so that now he may lose his due process protection if his counsel fails to timely move to suppress his confession according to strict technicalities. A motion to suppress an illegally obtained statement must be raised before trial. Failure to do so constitutes waiver. The state is even allowed an appeal as of right from the granting of a motion to suppress, as long as: (1) the state’s purpose is not delay, and (2) "the granting of the motion has rendered the state’s proof ... so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed." In effect, what this means is that if the only real evidence against the defendant is an involuntary confession, the state can nonetheless overcome suppression simply because that confession is the

93 30 Ohio St. 2d at 112, 283 N.E.2d at 151.
94 Id. at 115, 283 N.E.2d at 153.
95 Id.
96 OHIO R. CRIM. P. 12. Contra, FED. R. CRIM. P. 12, which does not even include a motion to suppress a statement among the motions that must be raised before trial.
97 OHIO R. CRIM. P. 12(B)(3).
98 OHIO R. CRIM. P. 12(G).
99 OHIO R. CRIM. P. 12(J).
only evidence. The rule heavily favors the prosecution, and, in so doing, it adheres substantially to the reliability theory.

Rule 12 serves the defendant in only two ways. It does require the judge to state on the record essential findings on factual issues.\textsuperscript{100} Also, it allows the court to extend the time allowed for making the suppression motion, and to grant relief from the waiver for good cause.\textsuperscript{101} Ultimately then, a defendant without both alert and astute counsel must hope that the trial judge is sensitively attuned to due process requirements and can detect subtle suggestions of involuntariness. Otherwise the defendant's chances of reversal upon review in Ohio are virtually non-existent, precluded both by case law and by the Ohio Rules of Criminal Procedure.

III. VOLUNTARINESS IN THE FEDERAL COURTS

A. Before Miranda

To detail the stumbling blocks obstructing due process protection in Ohio, of course, cannot be to assume that a defendant is afforded any more protection in the federal courts. A review of federal courts' application of the changing concept of voluntariness does in fact reveal inconsistent results, after \textit{Miranda} as well as before, while the Supreme Court was developing its deterrence theory.

Before \textit{Miranda}, a number of confessions were found involuntary in federal courts for predictable reasons. Often the courts made much of the quantifiable factors that marked "inherently coercive" circumstances.\textsuperscript{102} Sometimes it seemed that the giving of any promise at all was enough to render a confession involuntary.\textsuperscript{103}

However, there is no distinguishing feature (except a sketchy record) to mark cases of the same period in which confessions following comparable

\textsuperscript{100} \textit{Ohio R. Crim. P. 12(E)}.
\textsuperscript{101} \textit{Ohio R. Crim. P. 12(G)}.
\textsuperscript{102} \textit{See, e.g., United States ex rel. Johnson v. Yeager, 327 F.2d 311 (3d Cir. 1964) (questioning in relays the entire night until late the following morning yielded an involuntary confession from a "psychically inadequate" defendant); United States ex rel. Williams v. Fay, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915 (1964) (the accused was told he could see his mother and the chaplain if he confessed, which he did after 18 hours of interrogation, producing an involuntary confession).}
\textsuperscript{103} \textit{United States ex rel. Everett v. Murphy, 329 F.2d 68, 70 (2d Cir. 1964) (confession was involuntary in part because it was "induced by police falsely promising assistance on a charge far less serious than the police knew would actually be bought"); Crawford v. United States, 219 F.2d 207 (5th Cir. 1955) (police promised to release defendant's wife if he would confess to a narcotics offense.) In \textit{Crawford}, the court noted that any promise is sufficient to show that a confession is not voluntary. \textit{Id.} at 211 n.6, \textit{citing with approval}, Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924), where the Supreme Court said: "In the federal courts, the requisite of voluntariness is not satisfied by the establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if it was, in fact, voluntarily made."
threats or promises were held voluntary. McHenry v. United States\(^{104}\) illustrates the common situation in which the trial judge found the confession voluntary, the jury accepted that finding, and on appeal the court could not find in the record sufficient ground on which to hold the verdict clearly against the weight of the evidence. Essentially the same sequence of events occurred in Smith v. Heard.\(^{105}\) In these and other cases, the appellate opinions reflect that the defendants alleged threats or promises had been made, but even the appellate opinions do not so much as indicate the precise nature of the allegations.

Even the opinions that do provide a synopsis of the allegations often only assert, without analysis or explanation, that the confession is voluntary.\(^{106}\) One court, in place of analysis, substitutes strong disapproval of the broad application of the old Bram reference to promises “however slight”;\(^{107}\) that language has never been applied with the wooden literalness urged upon us by appellant.\(^{108}\)

B. After Miranda

After Miranda, as predicted by the Supreme Court, most of the cases transferred their attention from the confession to the waiver. However, it was still possible for there to be full compliance with Miranda and yet for a confession to be held involuntary.

[A]n incriminating statement may...be admissible...because not factually shown to have been freely and voluntarily given, even though the requirements of Miranda have been fully met; for an accused may surely be physically or psychologically induced to incriminate himself after he has been fully warned and advised of all his Constitutional rights.\(^{109}\)

This initial skepticism about the effectiveness of formal waiver had been anticipated by the Supreme Court in Haynes v. Washington:\(^{110}\)

\(^{104}\) 308 F.2d 700 (10th Cir. 1962).

\(^{105}\) 315 F.2d 692 (5th Cir. 1963).

\(^{106}\) See United States v. Ferrara, 377 F.2d 16 (2d Cir. 1967), cert. denied, 389 U.S. 908 (1967) (federal agent told experienced criminal that if he cooperated, the agent felt sure he would be released on reduced bail); Fernandez-Delgado v. United States, 368 F.2d 34 (9th Cir. 1966) (a confession was held voluntary even though the defendant had been promised help in obtaining bail and told that any assistance he gave the authorities would be brought to the attention of the prosecuting attorney). In United States ex rel. Johnson v. Yeager, 327 F.2d 311, 317 (3d Cir. 1964), the court acknowledges that a bargain made with another defendant was improper but not sufficiently so to rule his confession involuntary. The confession had been given after the police asked the defendant if he had a gun at home and told him they wanted to check to see if it had been fired, promising not to use it as evidence if it had not been fired.


\(^{108}\) United States v. Ferrara, 377 F.2d 16, 17 (2d Cir. 1967).

\(^{109}\) Coyote v. United States, 380 F.2d 305, 310 (10th Cir. 1967).

Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness. Certainly, we cannot accord any conclusive import to such an admission...111

It is likewise conceded that written waiver might not alone be sufficient in *United States v. Hall.*112

It was in this climate that Congress included in the Omnibus Crime Control and Safe Streets Act of 1968113 sections directly expressing tests of voluntariness. When determining involuntariness, a federal judge is directed to consider “all the circumstances surrounding the giving of the confession.”114

111 Id. at 513.
112 396 F.2d 841 (4th Cir. 1968); Accord, United States v. Barber, 291 F. Supp. 38 (D. Neb. 1968) (holding a waiver not knowing and intelligent where it followed comments from authorities that they were mainly concerned with who had made the counterfeit money that the defendant was accused of passing, and where they discussed the possibility of her being freed at a time when she feared a still free cohort would harm her children).
114 18 U.S.C. §3501(b) (1968). Federal judges had earlier been instructed on the concept of voluntariness in connection with guilty pleas FED. R. CRIM. P. 11 (1966) prohibits a judge's accepting such a plea “without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.” (This language reflects the same concerns as those expressed by the Ohio Court of Appeals in State v. Utsler, 21 Ohio App. 2d 167, 255 N.E.2d 861 (1970), two years later when spelling out the tests to determine the effectiveness of waiver.) Rule 11 specifically prohibits the court's accepting a guilty plea “unless it is satisfied that there is a factual basis for the plea.”

The federal rule is to be contrasted with Ohio R. CRIM. P. 11. The federal rule applies to guilty pleas in both felony and misdemeanor cases, whether or not the defendant is represented by counsel. The Ohio rule reserves only for felony cases in which the defendant is not represented by counsel, the requirements regarding the judge personally addressing the defendant. Ohio's rule is, however, even more detailed as to those requirements. Rule 11(C) (2) provides that the judge shall not accept such plea without first addressing the defendant personally and: (a) determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation. (b) informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgement and sentence. (c) informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

In all this detail what is missing is the federal requirement that there be a finding of factual basis for the plea. In other words, if Ohio's Rule 12 helps the prosecution more than federal Rule 12 does, Ohio's Rule 11 is far more helpful to the defendant than the federal Rule 11 is. The Ohio rule concentrates on the defendant's understanding of consequences; federal Rule 11 concentrates far more on whether he apparently committed the crime. That is, surprisingly for a rule made effective in 1966, the federal rule reflects the reliability theory.

It is acknowledged that the effects of a guilty plea are usually of far more consequence than those of a statement that amounts to a confession. Thus the analogy here is not completely precise. But it is still true that a judge who is used to following a set of rules in one context is at least likely to have them in mind for definitional purposes in another context in which the same concept, voluntariness, is at issue.
The statute indicates that the presence or absence of any one factor should not be conclusive.

However, the history of federal cases since *Miranda* generally shows growing reliance on written waiver as indicative, if not completely conclusive, of voluntariness. United States v. Arcediano is one of the few opinions to include the nature of the defendant's allegations to support his contention of involuntariness. Here an FBI agent told a defendant in state custody "that he would speak to local authorities and would do his best to have the defendant placed in federal custody," where the defendant preferred to be because he believed he would get better medical attention. Regarding these allegations, which the court apparently believed, the court comments that since the defendant conditioned giving information on the agent's giving him assurances, the ensuing statement was clearly voluntary.

United States v. Lewis is an even more unusual opinion insofar as it goes into detail to refute the defendant's allegations. The defendant here claimed that the Assistant Chief of Security at his prison promised that he would be released from maximum security confinement if he confessed. Ruling his allegations false, the court cites evidence that the alleged promisor was merely an investigator who had been at the institution only two weeks, and lacked authority even to suggest such a bargain, and that he would have had little notice that the FBI would be interrogating the prisoner on the day of the confession. The court completely disregards the likelihood that the defendant would have had little knowledge of these facts.

United States v. Walker is far more typical in its briefly expressed holding that a confession was voluntary. Here the defendant claimed his fear of returning to the state penitentiary, and his desire to go to the federal penitentiary instead, made his confession involuntary. The court on appeal simply did not agree. Walker is the most recent in the long series of federal

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115 See United States v. Cox, 487 F.2d 634 (5th Cir. 1973); United States v. Chapman, 448 F.2d 1381 (3d Cir. 1971); Brooks v. United States, 416 F.2d 1044 (5th Cir. 1969); Holbrook v. United States, 406 F.2d 44 (10th Cir. 1969); United States v. Hayes, 383 F.2d 375 (4th Cir. 1967), cert. denied, 390 U.S. 1006 (1968).


117 Id. at 462.

118 The court cites United States v. Frazier, 434 F.2d 994 (5th Cir. 1970), for the proposition that Bram is not to be followed literally. But see Sands v. Rose, 396 F. Supp. 257 (E.D. Tenn. 1975), in which the state trial court had not believed the defendants' allegations that they were given to understand that if they confessed, they would be transferred to a different jail where they would get better medical attention. Although their confessions were found voluntary, the district court acknowledged that such allegations, if believed, would be "reasonably certain" to result in a finding of involuntariness.

119 524 F.2d 991 (5th Cir. 1975) (per curiam).

120 524 F.2d 1125 (10th Cir. 1975).
cases in which the reviewing court finds insufficient evidence in the record to warrant disturbing the earlier finding of voluntariness.

Walker makes a fitting concluding case because it is typical. While the courts still sometimes quote with approval the liberal language of the early Supreme Court cases, when the courts apply the tests, they are inclined to find confessions voluntary unless there is uncontradicted evidence of demonstrable facts amounting to involuntariness as a matter of law. In a swearing contest between defendant and prosecutor, defendant usually loses on appeal as well as at trial.

CONCLUSIONS

The comparison between Ohio courts and federal courts does support the general conclusion that if a defendant's confession has been induced by threats or promises, such as to make it involuntary according to current United States Supreme Court standards, that defendant does stand a better chance of having his confession held involuntary by a federal court than by the courts of Ohio. There are four separate contributing factors.

First, the federal courts are at least somewhat less likely to apply the reliability test. (Ironically, however, this may work to the benefit of a defendant whose trial is in state court. If his trial record clearly shows the reliability test was used, he may later secure a reversal in federal court on habeas corpus. If his trial is in district court, the record is more likely not to reveal any application of the reliability test, which will make it harder for him on appeal.)

Second, the federal courts much more consistently allocate properly to the state the burden of proof of voluntariness of both waivers and confessions.

Third, the federal courts do not tend to regard Miranda violations as harmless error, as Ohio sometimes does.

Fourth, the Federal Rules of Criminal Procedure do not impose the stumbling blocks that the Ohio Rules do. (However, state judges accustomed to testing voluntariness of guilty pleas under Ohio Rule 11, may transfer at least some of the care that rule imposes when they test confessions. Federal Rule 11 does not go into nearly as much detail and does suggest some residual effect of the reliability theory. On the other hand, the 1968 Omnibus Crime Control and Safe Streets Act instructs federal judges carefully also in how to test for voluntariness.)

However, in the wake of Miranda, a defendant in either Ohio or federal court stands far less chance of having his confession held involuntary
as a matter of law. Attention to procedure has made it almost impossible for a record to show inherently coercive circumstances, and the defendant is almost certain to lose a swearing contest with the police as to what went on behind the closed doors of the interrogation room. Ultimately, the defendant whose confession was in fact involuntary may now have his only substantial chance of reversal if he can prove some procedural violation by the authorities—not an easy thing to do since Miranda has also resulted in sophisticated police training to avoid technical error.

Miranda has often been criticized for interfering with effective law enforcement and letting the guilty go free; its less publicized long-term effect may be to focus so completely on procedural matters that traditional voluntariness will cease to be an issue at all.121 If that day comes, it will be defendants, not the police, who will suffer as a result. If a defendant who has made an involuntary confession loses the procedural means by which to have it held involuntary, then Miranda, the landmark due process case, will have fostered a devastating erosion of the right of due process.

121 See Michigan v. Mosley, 423 U.S. 96, 99-100 (1975), where the Supreme Court reiterates that a Miranda violation renders a confession inadmissible even though voluntary. In his discussion of this rule in his dissent, Justice Brennan explains that freedom from Miranda violations is "necessary, though not sufficient, for the admission of a confession," Id. at 113 that is, that voluntariness remains an issue. Yet, Justice Brennan goes on to refer to the "clear, objective standards [provided by Miranda] that might be applied to avoid the vagaries of the traditional voluntariness test." Id.