Toward a New Confessions Test: Replacing Voluntariness with Power

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TOWARD A NEW CONFESSIONS TEST: REPLACING VOLUNTARINESS WITH POWER

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I. Introduction

Miranda is broken.\textsuperscript{1} It is broken not only because of the problems associated with the now-famous warnings established by the Supreme Court in 1966.\textsuperscript{2} The warning is only the first part in a two-part test for the admissibility of a confession. The second part, as the Court in Dickerson v. United States reiterated, is the voluntariness inquiry.\textsuperscript{3} Once a court has been satisfied that a criminal suspect has been given his Miranda warnings prior to confessing, the court then asks whether he waived his Miranda rights voluntarily, knowingly, and intelligently.\textsuperscript{4} Courts have used different language to describe this step, but the catch-all phrase “voluntariness” captures its spirit. In its essence, it looks to whether the suspect’s confession was a product of a free and deliberate choice rather than intimidation, coercion, or deception.\textsuperscript{5} This part of the Miranda test, too, is broken.\textsuperscript{6}

\textsuperscript{1} See Generally ROGER W. SHUY, THE LANGUAGE OF CONFESSION, INTERROGATION, AND DECEPTION (1998) (in which he discusses numerous linguistic deficiencies in Miranda that render it misunderstood or not understood); Irene Merker Rosenberg & Yale L. Rosenberg, In the Beginning: The Talmudic Rule against Self-Incrimination, 63 N.Y.U.L. REV. 955, 958-59 (1988); “the staccato admonitions pitched at suspects neither effectively inform them of their rights nor have any significant impact on confession or conviction rates”; Marianne Sadowski, “In an Evil Hour”: Confessions, Narrative Framing, and Cultural Complicity in Law and Literature, 34 CONN. L. REV. 695, 715 (2002): Miranda “does not remove the coercive atmosphere from custodian interrogations.”; Claudio Salas, The Case for Excluding the Criminal Confessions of the Mentally Ill, 2004 YALE J.L. & HUMAN. 243, 246 (2004): “some commentators do not think the present constitutional safeguards provide the criminal suspect enough protection.”; Saul M. Kassin, On the Psychology of Confessions: Does Innocence Put Innocents at Risk?, AMERICAN PSYCHOLOGIST, April 2005, at 218: “the [Miranda] requirement may have little effect.”


\textsuperscript{3} Dickerson v. United States, 530 U.S. 428, 444 (2000): “The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry.”


\textsuperscript{5} Id.

\textsuperscript{6} Dickerson, 530 U.S. at 444: “cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.”; Davis v. United States, 512 U.S. 452, 461-62 (1994) (in which the Court held that a suspect must “clearly” request an attorney, and suspect’s statement “[m]aybe I should talk to a lawyer” was not adequate to stop questioning under Miranda); Colorado v. Connelly, 479 U.S. 157, 169-70 (1986) (in which the Court held that “notions of ‘free will’” have no place in constitutional law, in that the Fifth Amendment privilege is not concerned “with moral and psychological pressures to confess emanating from sources other than official coercion.”); Frazier v. Cupp, 394 U.S. 731, 738 (1969) (in which false evidence was used, the interrogator gave the suspect a moral excuse for the crime, and the suspect requested an attorney without cessation of questioning).
It is with the second part of the admissibility test that this article is concerned. Instead of basing this totality-of-the-circumstances test\(^7\) of voluntariness and coercion, I propose that courts examine the relations of power that exist in interrogation settings between the suspect and interrogator(s). This would mean that where there was, for example, false evidence presented to the suspect in an interrogation, we would ask not whether that presentation rendered the suspect’s subsequent confession involuntary, but rather to what extent—if any—the presentation of that false evidence changed the balance of power between suspect and interrogator.

Continuing to employ the multi-factor approach of the voluntariness inquiry,\(^8\) my proposed system would also consider all the factors that influence the relations of power in the interrogation event. The judge, in her discretion, might attach a certain value to each factor, and decide how much and in what direction it affected the relations of power. Another possibility, for those less comfortable with judicial discretion, might be to establish set values for certain factors and provide the judge with a guidelines system, not unlike the grid system of the Federal Sentencing Guidelines that govern federal criminal sentencing in the United States.

Once the prosecution and defense have argued the factors in a pre-trial suppression hearing, and the judge has determined each factor’s impact, she would decide the extent and direction of the imbalance of power between suspect and interrogator. If the imbalance was weighted at all in favor of the suspect, the confession would be admissible. If the interrogator was found to have held a certain amount of power in excess of that held by the suspect, the confession would be suppressed. The judge would have discretion to suppress or render admissible any confession held to be the product of an interrogation in which the relations of power were between evenly balanced and in favor of the interrogator to a certain degree.

With this article, I hope to convince judges and attorneys to view admissibility of confessions in terms of relations of power rather than (or in addition to) voluntariness. However ambitious this project is, it is undertaken in the spirit of Miranda itself, in which the Court acknowledged the need for further reform and creative thinking.\(^9\)

Based on this introduction, a number of questions arise. First, should we tamper with the voluntariness test? Those who answer “no” to this question may think that voluntariness is a good test, and the relations of power test is wildly different and therefore a bad replacement. Other naysayers may think that the voluntariness test is a bad one and the relations of power test simply a voluntariness test in fancy dress. I suggest that the relations of power test preserves the good aspects of the voluntariness test while minimizing or eliminating its bad aspects. A second question is: given the current state of confessions jurisprudence and interrogations, how will the power test address abuses and produce better results more accurately than the voluntariness test? A natural third question concerns the nature of the power test: what is it, how does it

\(^7\) Withrow v. Williams, 507 U.S. 680, 689 (1993): “we examined the totality of the circumstances to determine whether a confession had been ’made freely, voluntarily and without compulsion or inducement of any sort.’”

\(^8\) Id. at 693.

\(^9\) Miranda, 384 U.S. at 467: “Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.”
function, and, most importantly, what concepts inform it? Finally, anyone who has read this far has undoubtedly considered a number of legal and practical problems with the power system. I will address these problems, and show that they are easily surmountable where they are, in fact, actual problems.

With these questions in mind, this article will examine in Part II current confessions jurisprudence as it relates specifically to the voluntariness test. Part III discusses in detail the power test as I envision it. Part IV compares the voluntariness and power tests, and discusses the ways that the power test may be preferable. In Part V, I shall examine the theoretical underpinnings of my power test. I shall examine some works by Jeremy Bentham, Michel Foucault, and Richard Posner, and will discuss Talmudic law on confessions. I will also introduce works by a number of contemporary psychologists and sociologists. Where Parts II–IV are the skeleton and muscles—the practical aspects of my proposal—Part V provides the organs, the part of my proposal that breathes life into and supports my thesis. If you need to be convinced that the power test has any validity, you may wish to glance first at Part V. Part VI concludes my article by addressing a number of apparent legal and systematic problems. Certainly no aspect of my proposal is unassailable. In Miranda’s spirit, however, we can merely acknowledge the problem, offer solutions, and seek, everyday, to make our system more just and more efficient.10

II. Current Confessions Jurisprudence and the Voluntariness Test

In this part, I examine Supreme Court jurisprudence concerning criminal confessions from Bram v. United States in 1897 to Dickerson v. United States in 2000, and focus strongly on Miranda, which came down in 1966. The scope of this article does not allow for a complete treatment of such a long and intricate history; nor is such a treatment necessary, as many other authors have covered that ground. This article merely highlights some of the most prominent cases and suggests that they reveal, respond to, and would be better served by an appreciation of the relations of power approach I advocate. Bram installs the voluntariness test, Miranda acknowledges that more is needed to preserve the suspect’s consent in the interrogation setting and tries and fails to address that need, and Miranda’s progeny gradually shelve away from Miranda the limited protections that it offered.

I then discuss the current test for the admissibility of criminal confessions and other suspect statements. I do this both to provide a base of knowledge for the reader, and to suggest that this test is inadequate, again from the standpoint of relations of power.

a. Bram to Miranda

Throughout American confessions jurisprudence, courts have focused on any of the three theories to limit the admissibility of confessions. These three theories are self-determination (the suspect has the free choice to voluntarily confess or not), reliability (how trustworthy are confessions obtained under duress, coercion, etc.), and deterrence (concern with preventing abusive interrogation techniques).11 Bram v. United States, handed down in 1897, was based on self-determination and ushered in a 69-year period in

10 Id.
which the admissibility of a confession depended on the voluntariness of the suspect’s confession. 12

As we will see, Bram echoes much of today’s voluntariness test. In Bram, the Court announced its new rule:

The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. 13

The Bram decision contained three elements we recognize in the voluntariness test today: the suspect’s voluntariness in confessing, the absence of police coercion that would overpower the suspect’s mind, and, implicitly, an evidentiary hearing to determine the contours of the first two elements. It also held that the voluntariness test would be a subjective one that focused on the mind of the suspect:

the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effects upon the mind… the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the conditions of mind which the causes ordinarily operated to create. 14 (italics mine)

This subjective approach has winded its way into today’s voluntariness test, 15 but was dealt a blow in Colorado v. Connelly. 16

Despite the fact that these strands of Bram continue in force today, it is surprising that Bram was controlling precedent for 69 years. This is so because, if we accept the notion that our actions as individuals are determined in at least some minute way by people and forces external to us, then Bram charted a course for the complete suppression of suspect statements. The Court cited a hornbook on criminal procedure:

a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence... A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influences used, or decide upon its effect upon the mind of the

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12 Id. at 327.
14 Id. at 548.
15 Withrow, 507 U.S. at 693 (in which the Court looked to the totality of circumstances, which includes factors such as the defendant’s maturity, education, physical condition, and mental health).
16 Connely, 479 U.S. at 170: “the Fifth Amendment privilege is not concerned ‘with moral and psychological pressures to confess emanating from sources other than official coercion’. . . . The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”
prisoner, and therefore excludes the declaration if any degree of influence has been exerted.\textsuperscript{17} (italics mine)

Decisions between \textit{Bram} and \textit{Miranda} reinforced this absolute position. The Court in \textit{Haynes v. Washington} in 1963 held to exclude confessions obtained by the slightest degree of external pressure.\textsuperscript{18} The next year the Court made a similar ruling in \textit{Escobedo v. Illinois}, which resulted in a flurry of protest.\textsuperscript{19} At this point, most everyone realized that the Court’s absolutist focus on the self-determination theory would mean the end of police questioning as an instrument in criminal investigations.\textsuperscript{20} Two years later came \textit{Miranda}, which, in the light of its history, can be seen as an attempt to satisfy the needs of law enforcement while maintaining the protections afforded criminal suspects in the \textit{Bram} era.\textsuperscript{21}

\textbf{b. Miranda}

The \textit{Miranda} decision can be boiled down to three main ideas: custodial police interrogations are inherently coercive; this coercion, in the absence of adequate protection, renders all suspect statements involuntary; and the (now famous) warnings established by the Court serve to empower suspects and thereby enable voluntary confessions.\textsuperscript{22} A discussion of these three ideas will suggest that the coercion to which the Court is referring resides in the relations of power between suspect and interrogator, and that the Court knew that its warnings solution was not adequate to protect suspects.

The \textit{Miranda} decision lays the jurisprudential foundation for a relations of power approach. Although it frames its discussion in familiar terms of voluntariness and coercion, it really expounds upon the power relations that undergird the confession, whether voluntary or not. The Court wrote, for example, that the “interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.”\textsuperscript{23} The Court stated also that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”\textsuperscript{24} Words such as “subjugate” and “weakness” are words describing notions of power, not consent. Indeed, the Court selected language that suggests interrogations are more like war than struggles to persuade one to speak voluntarily: it wrote that the essence of interrogation tactics is to undermine the suspect’s “will to resist,”\textsuperscript{25} and that “[t]he entire thrust of police interrogations... was to put the defendant in such an emotional state as to impair his capacity for rational judgment.”\textsuperscript{26}

The Court, in fact, was not interested in the suspect’s free will, because the nature of interrogations vitiates any free will the suspect might have had. Wrote the Court:

\begin{itemize}
\item \textsuperscript{17} \textit{Bram}, 168 U.S. at 542-43.
\item \textsuperscript{18} Penney, \textit{supra} note 11, at 361.
\item \textsuperscript{19} \textit{Id.} at 364-65.
\item \textsuperscript{20} \textit{Id.} at 365.
\item \textsuperscript{21} \textit{Id.} at 366.
\item \textsuperscript{22} \textit{Miranda}, 384 U.S. at 457-58.
\item \textsuperscript{23} \textit{Id.} at 444.
\item \textsuperscript{24} \textit{Id.} at 457.
\item \textsuperscript{25} \textit{Id.} at 455.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 465.
\end{itemize}
[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. 28

To correct the power imbalance, the Court mandated the warnings. In so doing, the Court acknowledged their inadequacy, writing that

[o]ur decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal law. 29

The Bram voluntariness test legally survived Miranda because Miranda merely added a constitutional requirement—it replaced or overruled nothing. In fact, however, Miranda would come to be a bright-line rule. 30 The voluntariness test would be so weakened that the Court in 2000 declared that where the Miranda warnings are correctly administered, suppression of a suspect’s confession on voluntariness grounds will be rare. 31 Justice Clark’s Miranda dissent was thus prescient. In it, Clark keeps the flame of a totality test alive by citing Haynes. In so doing, he also acknowledges the caring attention that must be paid in determining the voluntariness of a confession:

[t]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. 32

Clark went on to suggest criteria that ought to be considered in the totality test, including threats or imminent danger, physical deprivations, repeated or extended interrogations, and individual weakness or incapacities. 33 Although he was speaking, and perhaps thinking, the language of voluntariness, his dissent is an ancestor to my relations of power approach in a number of ways. It recognizes the utter inadequacy of Miranda, acknowledges the complexity of a totality test as well as the care and good faith needed to adequately perform such a test, provides factors that ought to be considered in the test, and would view the suspect’s consent or lack thereof from the subjective point of view of the suspect. If we truly care about the consent of the suspect to any confession he might make, these aspects must be preserved. My relations of power approach does preserve them. A renewed attention to them, moreover, is needed since post-Miranda decisions have weakened each of them, often to the point of extinction.

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28 Id. at 461.
29 Id. at 467.
31 Dickerson, 530 U.S. at 444.
32 Miranda, 384 U.S. at 502.
33 Id. at 508.
c. Miranda's Progeny

Post-Miranda confessions cases have weakened the voluntariness test and have threatened the introduction of any other totality test that might be introduced, including one based on relations of power. They have done so in three ways. First, they make the Miranda warning constitutionally required and enhance its stature as a bright-line dispositive test. Second, they render overly-simple and thus inadequate any totality test that is performed. Third, they often perform the totality test from an objective point of view that disregards the effects of interrogation on individual suspects.

Dickerson in 2000 saved Miranda. In that case, the Court considered the legality of 18 U.S.C. 3501, a federal statute passed in 1968 to override Miranda by mandating that the admissibility of a suspect's statements would turn only on whether or not they were voluntarily made. §3501 sought to return confessions law to the pre-Miranda Bram regime. The issue that would decide the case was whether the Miranda requirements were constitutionally mandated. Miranda itself seemed to answer in the negative, with the majority writing that "our decision in no way creates a constitutional straitjacket."

Subsequent decisions agreed. Justice Rehnquist, writing for the majority in Michigan v. Tucker, suggested that Miranda was not constitutionally required, but was merely prophylactic. Wrote Justice Rehnquist: "a failure to give interrogated suspects full Miranda warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context." The Court seems to have looked to a totality test and included Miranda warnings in its calculation as merely one of many factors.

In Oregon v. Elstad, the Court held that an initial failure to give Miranda warnings, followed by uncoerced statements, and then followed by adequate Miranda warnings, did not taint the voluntariness of statements made after the warnings had been given. Although Justice O'Connor, writing for the majority, asserted the necessity of Miranda warnings, Justice Brennan in dissent wrote that "the Court has engaged of late in a studied campaign to strip the Miranda decision piecemeal and to undermine the rights Miranda sought to secure."

In an abrupt about-face, the Dickerson majority opinion, written by Chief Justice Rehnquist (who wrote the Tucker opinion), read that Miranda was a constitutional decision and therefore could not be superceded by statute. The Court further enconced the warnings requirement by suggesting that it was virtually the only test in town: if

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35 Dickerson, 530 U.S. at 432.
36 Miranda, 384 U.S. at 467.
37 Hellerstein, supra note 34, at 164.
39 Id. at 436 (in which the Court noted that the suspect stated that he understood his rights and that he did not want an attorney).
41 Id. at 307 n.1.
42 Id. at 319.
43 Dickerson, 530 U.S. at 432.
Miranda warnings were given, successful challenges based on the voluntariness test were rare.⁴⁴

The voluntariness test still does survive, however weakened the post-Miranda cases may have rendered it. Prior to 1986, the voluntariness test seemed to be still breathing. The Tucker Court seems to have looked to a number of factors in considering a suspect’s confession, remarking that the police had given the suspect most of the Miranda warnings, they asked him if he wanted an attorney, and he replied that he did not.⁴⁵ The majority in Elstad wrote that “[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made.”⁴⁶ Connelly, however, signaled the death knell for the voluntariness test. One commentator has said that the case “marked a subtle departure from a traditional, multi-factored voluntariness test that gave significant weight to” a number of factors.⁴⁷

The Connelly Court appallingly held that “notions of ‘free will’” have no place in constitutional law.⁴⁸ Based on Connelly, the Court would no longer concern itself with “moral and psychological pressures to confess emanating from sources other than official coercion.”⁴⁹ The Court would, instead, look solely at whether a confession was the result of abuse on the part of police: “[t]he voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”⁵⁰ Connelly, therefore, rendered absurd the voluntariness test. Justice Stevens in dissent expressed at much, writing that the majority decision was based on the notion that “a waiver can be voluntary even if it is not the product of an exercise of the defendant’s ‘free will.’”⁵¹ Lest the majority get away with its jurisprudential legerdemain, Stevens noted that its “incomprehensible” decision was foreclosed by Moran v. Burbine, handed down prior to and in the same term as Connelly, which held that “the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice.”⁵²

Despite Connelly, voluntariness may yet be alive. Seven years after that case, the Court in Withrow v. Williams wrote that the voluntariness totality test is still in force,⁵³ and factors that focus on the mind of the suspect, such as his maturity, education, and physical and mental health, may be considered.⁵⁴

With the line of cases following Miranda, we find ourselves today with a two-step test that asks first about Miranda warnings and second about the voluntariness of a suspect’s confession. However clearly the case law may articulate each step, a question remains as to the extent to which the voluntariness step is applied.
d. The Two-Step Test

In determining the admissibility of a confession, courts perform a two-step test. The first part is approached as a threshold question: were Miranda rights properly given? If they were, courts then move on to the second step. If they were not, then the confession is declared inadmissible. The second step is the totality-of-circumstances test that asks whether a confession was given voluntarily or not. If it was not, then the confession is not admissible. If it was determined to be voluntary (and it has passed step one), then it is admissible.

Although this article concerns itself primarily with the second step, a few remarks on the first step are appropriate. These remarks will show that Miranda is not, in fact, a bright-line threshold question. It is, rather, open to evaluation. Post-Miranda cases, furthermore, have shifted the likely outcome of the evaluation toward admissibility. They have done so by, as Justice Brennan wrote, “strip[ping] the Miranda decision piecemeal and...undermin[ing] the rights Miranda sought to achieve.”

Although the Dickerson Court held that Miranda warnings were constitutionally required, that Court also wrote that Miranda and its progeny govern admissibility of statements made during custodial interrogations. This is problematic because Miranda’s progeny weaken the bright-line test into which Miranda had developed by the time of Dickerson.

In Frazier v. Cupp, for example, the Court heard the case of a defendant who had been given “a somewhat abbreviated description of his constitutional rights.” After receiving these rights, the defendant began talking, but then stopped and said to the interrogator, “I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am now.” Despite the fact that Miranda mandated the recitation to suspects of its warnings and the cessation of questioning once the suspect states that he wants an attorney, the Frazier Court held the confession admissible. The Court held that Miranda did not apply to Frazier because the defendant’s "statement about seeing an attorney was neither as clear nor as unambiguous" as would be required to invoke Miranda. Twenty five years later, this rationale was still in effect. The Court in Davis v. United States held that "law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." The unclear statement the Court rejected was, "[m]aybe I should talk to a lawyer."

New York v. Quarles found the Court reviewing a situation in which police detained a suspect for rape who had been reported to be armed and who, when caught, was wearing an empty shoulder holster. Before reading the suspect his rights, an

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53 Eiland, 470 U.S. at 349 (in the absence of properly-given Miranda warnings, “there is an ‘irrebuttable’ presumption that such confessions are indeed coerced and are therefore inadmissible”)
54 Moran, 475 U.S. at 421.
55 Eiland, 470 U.S. at 319.
56 Dickerson, 530 U.S. at 432.
57 Frazier, 394 U.S. at 737.
58 Id. at 738.
59 Miranda, 384 U.S. at 444.
60 Id. at 474.
61 Frazier, 394 U.S. at 739.
62 Davis, 512 U.S. at 461.
63 Id. at 462.
officer asked him where his gun was. The suspect pointed to some empty crates nearby and said, "the gun is over there." The officer retrieved the gun, placed the suspect under arrest, and read him his rights. The Court, in upholding the admissibility of the suspect's statement about the gun, created a public safety exception to the Miranda rule. In concurrence, Justice O'Connor wrote that "the Court acknowledges that it is departing from prior precedent." Justice Marshall in dissent was more troubled, writing that "the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions."

The Court in Oregon v. Elstad considered whether an initial failure to read a suspect his rights, without more, tainted subsequent admissions made after the suspect had been given and waived his rights. In that case, the suspect began to give uncoerced but unwarned statements, and was then given his rights and continued talking. The Court held that that suspect could successfully waive his rights and continue to make an admissible confession after proper Miranda warnings were given. This case seems to be rightly decided unless one reads on into Justice Brennan's dissent. He noted first that the overwhelming majority of state courts had held that subsequent confessions are presumptively tainted by a first confession taken in violation of Miranda and that Miranda warnings alone cannot dissipate that taint. His rationale is as realist as the majority's is abstract: "[t]he interrogator, far from dismissing a first admission or confession...understand that such revelations frequently lead directly to a full confession." Appreciating the psychological dynamics in an interrogation, Brennan noted that the Court has in general "rejected the simplistic view that abstract notions of 'free will' are alone sufficient to dissipate the challenged taint." He goes on to condemn the majority's ruling:

The Court today shatters this sensitive inquiry and decides that, since individuals possess 'will, perception, memory and volition,' a suspect's 'exercise [of] his own volition in deciding whether or not to make a [subsequent] statement to the authorities must 'ordinarily' be viewed as sufficient to dissipate the coercive influence of a prior confession obtained in violation of Miranda...Thus we have always rejected, until today, the notion that 'individual will' alone presumptively serves to insulate a person's actions from the taint of earlier official illegality.

Connelly was decided on similar absolutist views of individual free will. The concept of free will, in fact, is the main philosophical underpinning of the second-step voluntariness test, and it is what introduces so many of the problems inherent in that test.

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67 Id. at 652.
68 Id.
69 Id. at 651.
70 Id. at 660.
71 Id. at 674.
72 Elstad, 470 U.S. at 300.
73 Id. at 318.
74 Id.
75 Id. at 322-23.
76 Id. at 328.
77 Id. at 335.
78 Id. at 336.
79 Connelly, 479 U.S. at 170.
On one extreme is the libertarian idea that we are islands unto our individual selves, able to be unaffected by forces around us and therefore make decisions as a result of perfect free will. On the other extreme is the hard determinist notion that we are so embedded in the externalities around us that we cannot make decisions that are unaffected by these external forces. We thus have no genuine free will. Obviously, each situation in which a person finds himself falls somewhere in between these two poles, depending on his variable power to assert himself and his environment's variable power to influence his actions. As we shall see, my relations of power approach is based on an appreciation of this continuum. The current voluntariness test, unfortunately, is ill-suited to operate within this continuum.

**e. Voluntariness**

The voluntariness test says that the suspect, for his confession to be admissible, must have confessed "voluntarily, knowingly and intelligently." Justice O'Connor in her [Moran opinion described this test:](#)

The inquiry has two distinct dimensions...First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

There are a few things wrong with this test. First, it assumes a clear divide between "free and deliberate choice" and "intimidation, coercion, or deception." In fact, these ideas are not discrete except at their extremes. They overlap and cloud each other and comprise what two commentators have called "the abstruse and indeterminate 'voluntariness' standard." Second, for a waiver to be valid, it must have been made with "a full awareness of...the nature of the right being abandoned."" Studies have shown that suspects often do not understand the rights that have been read to them. Third, the suspect must have been aware of the consequences he faces as a result of waiving his rights. Widely accepted and utilized police interrogation techniques work to hide the actual consequences of confessing from a suspect and manipulate the consequences that the suspect does perceive. These techniques remain in use and are apparently legal.

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[81] Id.
[83] Guido, supra note 30, at 290; Shyu, supra note 1, at 57; Kassin, supra note 1, at 218.
[84] Fred E. Inbau et al., *Essentials of the Reid Technique: Criminal Interrogations and Confessions* 27 (2005) ("It is psychologically improper to mention any consequences or possible negative effects that a suspect may experience if he decides to tell the truth."); David E. Zulawski & Douglas E. Wicke, *Lander, Practical Aspects of Interview and Interrogation* 361 (2002) (the proper point to ask the suspect for a confession is when "[the interrogator has offered rationalizations that allow the suspect to save face and has focused his attention on the future, rather than on the consequences at hand."
The voluntariness test is inadequate for ensuring a suspect's consent to confession because it fails to appreciate the nuanced relationship between free will and external pressures. In its application, the Court has also declined to find many police actions coercive, even when they impinge upon a suspect's ability to understand his rights or the consequences of giving up those rights. Finally, the application of the two steps I have outlined here, taken together, often result in contradictory results. Under this two-step rule, wrote Justice O'Connor, "patently voluntary statements taken in violation of Miranda must be excluded from the prosecution's case."\(^{85}\) Dickerson, furthermore, suggests that involuntary statements made under properly-given Miranda warnings will be admissible as voluntary.\(^{86}\) The logical fallacies to be drawn from current confessions jurisprudence are these:

If proper Miranda warnings have been given (M), then the suspect's confession is a result of Free Will (FW).
If not M, then not FW.
If FW, then M.
If not FW, then not M.
Miranda, and only Miranda = Free Will.
Free Will, and only Free Will = Miranda.

The relations of power test addresses these problems. It acknowledges the overlap between regions of free will and regions of external pressure; it includes police interrogation techniques such as those outlined above in its analysis; it refocuses the analysis on the suspect's consent to confess, thus avoiding the logical fallacies above; and it attempts to make the analysis less abstruse and indeterminate by looking to power as opposed to voluntariness, which two commentators note "required inquiry into metaphysical states of mind that, by the 1960s, were believed to be inherently unknowable."\(^{87}\)

III. The Relations of Power Test

Having outlined the current voluntariness test and a few of the advantages to replacing that test with one based on relations of power, I now lay out the structure of the relations of power test. In this part, I do not argue in favor of the power test; I leave that to Part IV, where I explore in greater detail why the power test is preferable to the voluntariness test, and Part V, where I justify the power test by exploring the philosophical and psychological underpinnings that inform it.

a. A Continuum

At its center, the power test envisions a continuum. Picture a horizontal line, with a point at both extremes and an intersecting line segment in the middle. This horizontal line represents the field upon which we may depict the relations of power between suspect and interrogator. The point at the leftmost extreme is labeled "island," referring

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\(^{85}\) Elstad, 470 U.S. at 307.

\(^{86}\) Dickerson, 530 U.S. at 444 ("cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.")

\(^{87}\) Frumkin & Garcia, supra note 82.
to the notion of an individual as an "island unto himself." If one finds himself at this point on the continuum, he is said to be completely unaffected by externalities and thus able to make choices that are "free" in the most fundamental—or simplistic—meaning of that term. This extreme clearly does not exist in real life, since we all are always subject to at least a minimal level of external influence.

The point at the rightmost extreme is labeled "network," which refers to the Lacanian theory that power does not flow one way or in a hierarchy, but exists within a network of signifiers. These signifiers are people, ideas, institutions—anything that has power to influence—and each individual exists in this network and is influenced by the other signifiers around him. At the rightmost extreme, therefore, we find people who have succumbed to the power of external signifiers and therefore make no choice of their own volition. This extreme too does not exist in real life, since however submissive a situation renders the individual, the individual always retains some agency, however slight.

The exact middle of the line segment depicting this continuum represents the point at which the suspect and the interrogator each hold equal amounts of power vis-à-vis the other. It is possible that this equilibrium exists in the real world, even if only in passing as the fluid situation of an interrogation shifts the balance of power from one person to the other and back again.

Where a subject is located on the continuum is, indeed, fluid and can change moment to moment as forces impinge upon the interrogation event. Stanley Milgram’s classic study on obedience in the face of scientific authority suggests as much: people who, under normal circumstances, would not acquiesce to commands to harm another person were convinced to do just that. The reason why may be that the event changed the balance of power. The authority figure was a scientist, dressed in a lab coat, and the setting was a laboratory and a scientific experiment. Interrogation manuals, similarly, suggest that interrogators conduct interrogations in settings that do not look like police detention facilities, and that they dress in civilian clothing. Dressing up the scientist’s authority status and dressing down the interrogator’s is a difference, but the goal and the result is the same: to create a physical space that persuades or allows the subject to do what the authority figure wants him to do.

A study of criminal confessions in China has shown also that suspects’ consent to confess or not can be imagined on a continuum that is fluid, and can be altered by legal reforms. Lu and Miethe observed that as economic reforms in 1980s China introduced Western values of individualism and discounted traditional–communitarian values, changes in legal structures along the same lines followed. One result was a decline in criminal confessions. Lu and Miethe suggested four reasons for this change: 1) the decline in the communitarian value system, 2) various changes in the legal structure that benefited defendants, 3) changes in legal ethics emerging, possibly, from a greater appreciation of individual rights, and 4) pragmatic concerns concerning harsh

88 Inbau, supra note 84, at 29.
89 Id. at 41.
91 Id. at 568.
punishments. Of course, we may not wish to make changes to our system that either reduce the number of confessions made or benefit defendants. If we do care about the suspect's consent to confessions that are made, however, and if we accept that the current system is broken, then this study shows us that the island-network continuum is real, is fluid, and can therefore be altered by well-considered legal reforms.

b. Scoring

In the relations of power test, the admissibility of a suspect's confession will be judged by locating him, in the interrogation event, on the continuum. By so locating him, the court will determine the extent of his power (and thus the suspect's ability to consent to the confession) and the extent of the interrogator's power (and thus the interrogator's ability to coerce a confession). If the suspect is located to the left of a certain point on the continuum, he will be judged to have had adequate power to resist the interrogator's power or consent to the confession. He will be a sufficient island unto himself, and his confession will be admissible. If the suspect is located to the right of a certain point on the continuum, he will be found to have had inadequate power to resist that of the interrogator. He will be found to be overly influenced by the network—of which the interrogator is the most powerful signifier—and his confession will be inadmissible. Between these two ranges will be a third range. If the suspect falls within this range, the judge shall have discretion to admit or exclude the confession from evidence.

A way to administer this system with a view to uniformity would be to determine all of the forces surrounding the interrogation event that impinged on either the interrogator's or the suspect's power. Each force would be supplied a numerical value, and the values would be totaled and would be used to determine the suspect's location on the continuum. The continuum itself would be measured by set values. The dead middle of the continuum would be zero, the island extreme +100, and the network extreme -100. Where a force caused an increase in the suspect's power or a decrease in the interrogator's power, a negative value would attach. Where a force caused a decrease in the suspect's power or an increase in the interrogator's power, a positive value would attach. For example, a suspect's prior criminal involvement with the police (giving him more experience and ability in evading interrogation techniques) may give him a -10. The suspect's mental condition, consisting of mental retardation and schizotypal personality disorder, would give him a very high plus value. One can conceive of any number of factors, which will be discussed below.

Since the Miranda court and countless others since then have acknowledged that an interrogation is an inherently coercive event for the suspect, a baseline score of +20 or so should be applied before any valuation of factors is performed. This baseline score

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92 Id. at 568-69.  
would address *Miranda* concerns and protect the suspect from the coercion that the Court has acknowledged.

The power test may be misperceived, depending on one's political bent, as either a criminal's free ride to suppression of his confession or a defendant's much-needed protection against an abusive system that does not truly care about his voluntariness. It should be noted, therefore, that the force of the test lies not in its structure, but in the factors to be evaluated and the ranges selected for admission, judicial discretion, and exclusion. Both of these are variable and their determination will free the guilty, condemn the innocent, or, hopefully, admit confessions made consensually and suppress all others.

c. Factors

Depending on one's political bent, one could select factors that encourage either the admissibility of confessions or the protection of defendants. If one is concerned with honestly evaluating the relations of power and the suspect's consent to his confession, one should seek to include in his evaluation all factors that impinged upon the interrogation event. To a very limited extent, this is what courts do now.\textsuperscript{95}

More needs to be done. That is, more factors need to be considered—whether we are working with a voluntariness test or a power test—if we are to truly evaluate a suspect's consent in his confession. We can start with the techniques that interrogation manuals suggest.

The manual by Inbau, Reid, and Buckley has been around for decades and is the most influential practical manual in existence.\textsuperscript{96} It promotes the use of the Reid method of interrogation, which, by its own admission, "involves active persuasion" and is used to "dominate the conversation."\textsuperscript{96} The *Miranda* Court itself cited the Reid manual in its discussion of the inherent coercion in interrogations.\textsuperscript{97} Commentators have said of the Reid method that it teaches officers "to assume guilt, to manipulate the suspects' emotions and expectations,"\textsuperscript{98} and that it is reducible to three processes of "isolation...confrontation...[and] minimization."\textsuperscript{99} Of interrogation manuals and techniques in general, one commentator wrote that they "are sometimes more highly developed, more psychologically sophisticated, and more effective than those that were used by the Chinese Communists in Korea."\textsuperscript{100} There is little doubt, then, that interrogation methods taught today are philosophically, psychologically, and legally coercive. These methods, therefore, ought to be included as factors, and should ordinarily receive plus values, shifting the suspect toward the network extreme of the continuum.

\textsuperscript{94} Witherow, 507 U.S. at 693 (the Court can look to police coercion, length of interrogation, location of the interrogation, its continuity, the defendant's maturity, education, physical condition, mental condition, and whether Miranda rights were given).

\textsuperscript{95} GUDJONSSON, supra note 30, at 7; Redlich, supra note 93, at 20.

\textsuperscript{96} INBAU, supra note 84, at 5.

\textsuperscript{97} Miranda, 384 U.S. at 440, 452, 454-55.

\textsuperscript{98} Redlich, supra note 93, at 20.

\textsuperscript{99} Kassin, supra note 1, at 221.

Some factors that ought to receive relatively larger plus values are the use of false evidence or witnesses,\(^{101}\) the suggestion that a confession will confer benefits on the suspect,\(^{102}\) the interrogator taking on the role of the suspect’s friend,\(^{103}\) expressing sympathy with the defendant or providing a moral excuse for the crime,\(^{104}\) and misuse of Miranda warnings. On the last, one interrogation manual suggests a Miranda warning that makes the suspect’s arrest seem almost to be a gift.\(^{105}\) Other factors include failure to tell the suspect that he is, in fact, the prime suspect in a case (“the pretense for the interview should be fairly vague”),\(^{106}\) the interrogator’s expressed belief in the suspect’s guilt,\(^{107}\) interrogation when the suspect is tired and worn down,\(^{108}\) and abuse of the suspect’s request for an attorney.\(^{109}\)

The interrogation manuals suggest any number of other factors involving the physical surroundings of the interrogation,\(^{110}\) the use of proper furniture,\(^{111}\) and the role the interrogator takes on.\(^{112}\) Miranda cited many of the factors above, and added to that list the privacy inherent in interrogations,\(^{113}\) the interrogator’s air of confidence in the suspect’s guilt,\(^{114}\) the interrogator blaming the victim for the crime,\(^{115}\) the length of interrogations,\(^{116}\) and the interrogator’s engendering of fear in the suspect.\(^{117}\)

Factors can also emanate from the suspect. These factors include the suspect’s maturity, education, physical condition, and mental health.\(^{118}\) They could also include

\(^{101}\) INBAU, supra note 84, at 123.
\(^{102}\) Id. at 131.
\(^{103}\) Id. at 38.
\(^{104}\) Id. at 141-44.
\(^{105}\) JOHN R. SCHAFFER & JOE NAVARRO, ADVANCED INTERVIEWING TECHNIQUES: PROVEN STRATEGIES FOR LAW ENFORCEMENT, MILITARY AND SECURITY PERSONNEL 56 (2003). The authors recommend the following Miranda warning: “First, I’d like to let you know that you are in control of the interview. I can’t make you do or say anything you don’t want to do or say. You don’t have to talk to me unless you want to. You’re the boss. You have the power to tell the police to pound sand. That’s the kind of power you have right now. If you agree to answer questions, you still have the right not to answer any specific question I ask you. If I ask you a question you don’t want to answer, just tell me you don’t want to answer the question and we’ll move on to the next question. It’s very important that you think very carefully about your answers because nothing is off the record and what you say can be used against you in court, so take your time and think about your answers. Remember, just because you agree to talk to me doesn’t mean you can’t stop the interview at any time and talk to an attorney. If you don’t have any money to pay for an attorney, the court will provide an attorney for you at no cost. I want to make sure that you understand what I just told you, so let’s go over the guidelines again.”
\(^{106}\) INBAU, supra note 84, at 49.
\(^{107}\) Id. at 132 (an interrogator might “[e]xplain that the only unanswered question us why the suspect committed the crime.”).
\(^{108}\) SCHAFFER & NAVARRO, supra note 105, at 7.
\(^{109}\) Id. at 57 (“If the suspect asks the question, ‘Do you think I need a lawyer?’ the investigator should simply state, ‘I think you need to tell the truth.’
\(^{110}\) INBAU, supra note 84, at 6, 27-29, 30.
\(^{111}\) Id. at 30; SCHAFFER & NAVARRO, supra note 105, at 11.
\(^{112}\) SCHAFFER & NAVARRO, supra note 105, at 33 ("The interviewer should take on the psychological role of the 'parent' and relegate the role of the 'child' to the interviewee.").
\(^{113}\) Miranda, 384 U.S. at 449.
\(^{114}\) Id. at 450.
\(^{115}\) Id.
\(^{116}\) Id. at 451.
\(^{117}\) Id. at 452.
\(^{118}\) Withrow, 507 U.S. at 693.
the suspect's previous experience in interrogative settings or in the criminal justice process, his intelligence, his age, and his expressed understanding of his Miranda rights or lack thereof.

The list goes on, and it is not my intent in this article to uncover each and every possible factor. My intent, rather, is to suggest that many factors influence the action that a suspect takes in confessing. We ought to explore these factors and place them in a structure that judges can use to evaluate the admissibility of confessions. The practical application of this structure may appear not unlike the Federal Sentencing Guidelines' factor and grid system. Although I am against mandatory guidelines as they existed prior to United States v. Booker, my proposed power test could avoid the infirmities of the Guidelines system by acknowledging and including the many factors that impinge upon the interrogation event and providing a large range on the continuum in which judicial discretion is allowed. My approach would require mandatory admission and suppression of confessions at the extremes, but in many cases, judges would have discretion to decide the status of a confession based on an approach that I believe is better than the voluntariness test we have today.

d. Ranges

Along with the inclusion or exclusion of factors, setting the extent of the three ranges on the continuum will contribute to making it a more or less pro-defendant or pro-prosecution tool. Again, however, we ought to focus on the better goal of admitting consensual confessions and excluding all others. We can set the three ranges—automatic admission, judicial discretion, and automatic suppression—to help achieve that goal.

When a suspect falls into the leftmost range, which lies from the island extreme to some point to the right, his confession should automatically be admitted. This is so because the power that he holds has been deemed sufficient to counteract the power that the interrogator holds. It is clear, therefore, that the entire left half of the continuum should fall within this first range, since this left half is the portion of the continuum where the suspect's power is greater than that of the interrogator. The middle point, being the point at which the suspect's and the interrogator's power is equal, should also be included in the range of automatic admissibility. This is so because where two equal powers face off against each other, one cannot be said to have coerced the other into doing anything. Since the coercion of the interrogator equals the resistance power of the suspect, it cannot have been the coercion that caused the suspect to confess. The hard question is how far to the right will this first range go? Will it stop at the middle point or will it proceed into the portion of the continuum that represents an interrogator's power exceeding that of the suspect? To define this second range of judicial discretion, we first turn to the contours of the third range.

The third range comprises the portion of the continuum on which confessions will be automatically suppressed because the interrogator's power exceeded that of the suspect to such an extent that admission of a confession, based on notions of consent and coercion, cannot be countenanced. This range proceeds from the network extreme to some point to the left, falling short of entering the first range's field. How far to the left will it go? I think most of us would be uncomfortable requiring suppression of

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119 See generally UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (2005).
confessions for all situations in which the interrogator had even an iota of power more than the suspect. If this were the rule, in any event, Miranda’s acknowledgement of inherent coercion in all interrogation settings would serve to exclude all confessions. Practically, therefore, we must allow for admission of confessions falling some distance to the right of the middle point. The questions are 1) how far to the right of the middle point will we allow admission of confessions, and 2) under which range, that of automatic admission or that of judicial discretion, will we allow such confessions?

To answer these questions, we can look to Posnerian notions of procedural reform. Judge Richard A. Posner suggests that in such reform, we must consider the costs of wrong decisions being made as well as the costs to the judicial system itself. The extent of the automatic admission range ought to be set conservatively to allow for judicial discretion in close cases, but set far enough to the right so that the judge will not have to expend judicial resources deciding cases that clearly are within the automatic admissions range. In theory, the first range ought to extend at least to the middle point. In practice, however, as informed by the Miranda Court’s acknowledgement of inherent coercion in interrogations (here is where I go back on what I suggested just one page ago), perhaps we ought to end the first range at the point to the left of the middle point that represents the value that we give to properly given Miranda warnings. To illustrate: if we determine that Miranda warnings given properly, understood, and waived are worth 20 points toward increasing the suspect’s power, then we ought to provide for judicial discretion on the continuum starting at -20 and proceeding to the right. The Miranda-based theory for this is that interrogation settings carry with them an inherent coercion value of 20—automatically locating the suspect 20 points closer to the network extreme—and since the Court instituted its warnings to counteract this inherent coercion, these warnings ought to be worth 20 points in moving the suspect back toward the island extreme. If we believe that the Miranda Court did not offer its warnings as a completely adequate fix, then we may wish to accord fewer than 20 points to properly given and received Miranda warnings. Conceived differently, Miranda’s notes on inherent coercion may shift our middle point to the right or the left, depending on our reading of that case.

Determining the point at which the third range—automatic suppression—ends is more difficult. The fact that Miranda warnings are constitutionally required does not help us, since that step one test is divorced from the step two totality test we are employing here. Current jurisprudence on voluntariness does provide the “overborne will” guideline. Under this test, the court asks whether the suspect’s will was overborne. This determination has been made over the years with more or less concern for the defendant, the prosecution, and the factors involved in the totality of circumstances. The power test would not solve this vagueness problem, and the border between the judicial discretion and automatic suppression ranges might remain as susceptible to individual judicial interpretation and political pressures as the voluntariness test is today. A number

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121 Miranda, 384 U.S. at 455, 457-58.
123 Miranda, 384 U.S. at 467 ("We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.").
of psychologists and legal scholars, however, have studied, if only implicitly, thisorder. We ought to continue studying it in this interdisciplinary way with a view to
understanding what allows individuals to consent to confess and what compels them to
do so against their will. As we refine our answer to these questions, we will find the
appropriate border between the second and third ranges.

Having hemmed in the middle range, we can conclude that judicial discretion
ought to reside in that area between the point of inherent coercion described in Miranda
and the point at which the relations of power between the suspect and interrogator work
to unambiguously and categorically remove the suspect’s ability to resist external
pressure to confess. This system may seem overly complex and thus require too much
judicial time in administering it. This is not true for two reasons: we already administer
systems like the one I am proposing, and judicial time is already set aside for such
administration.

e. Efficiency and the Evidentiary Hearing

As I have mentioned, the Federal Sentencing Guidelines operate on a factor and
grid system not unlike the power test I am proposing. The Guidelines system is, in fact,
much more complex than the power test, since it consists of a sentencing table of 43
levels and six categories at each level. Furthermore, in addition to the many factors it
considers, it also provides for upward or downward adjustments to the values of some
factors. To my knowledge, no commentator has complained about the judicial time
taken up by calculating a sentence under the Guidelines. Despite the many serious
infirmities of the Federal Sentencing Guidelines, they do suggest that the power test is
not overly complex and that it would not take up too much judicial time.

Nor would the power test increase the amount of time taken in evaluating
confeusions. Judges already engage in evidentiary hearings to determine a confession’s
admissibility. Furthermore, the power test (or the voluntariness test, for that matter)
ought to receive much attention since the confession is the prosecution’s gold. Wrote
Justice Brennan,

[trial]ers of fact accord confessions such heavy weight in their determinations that
the introduction of a confession makes the other aspects of a trial in court
superfluous, and the real trial, for all practical purposes, occurs when the
confession is obtained.

Finally, Justice O’Connor suggested that a power test (or, again, the voluntariness
test) might serve the interests of judicial efficiency. She wrote:

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125 See generally GUDJONSSON, supra note 30 (specifically see his work on suggestibility, the effect of
interrogation on the suspect, and the impact of generally accepted interrogation techniques); See generally
Nadler, supra note 93 (on consent, perceived consent and the psychological of coercion); See generally
Kassin, supra note 1; See generally Redlich, supra note 93 (on the inadequacy of the rational economic
actor model and the impact of unconscious emotions on one’s consent to act).
126 UNITED STATES SENTENCING COMMISSION, supra note 119, at 377.
127 Id. at 318-49.
128 GUDJONSSON, supra note 30, at 284; Peter B. Rutledge, The Standard of Review for the Voluntariness of
129 Connolly, 479 U.S. at 182.
The totality-of-the-circumstances approach...permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulties of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous...It is enough that the habeas court look to the warnings or their absence, along with all other factors, and consider them in deciding what is, after all, the ultimate question: whether the confession was compelled and involuntary or the product of a free and unimpaired will. 130

The question now is why the power test I propose is better than the current voluntariness test.

IV. Voluntariness vs. Power

The main criticism that could be leveled at my proposed power test is that it is just as vague as and therefore subject to all the infirmities of the voluntariness test. Each system thus being equal, we should prefer the system we have as opposed to incurring the costs of installing a new system that will confer no additional benefits. I address this vagueness problem below, and conclude that the power test is a more concrete test than that of voluntariness and that, certainly, the power test can be another tool in the judge's box—along with the voluntariness test—that he uses to evaluate the admissibility of a confession.

Conceding these possible infirmities, I nevertheless see three clear advantages to a power test. First, the voluntariness test, jurisprudence, and interrogation techniques are actually focused on the relations of power. Second, the notion of power is superior to that of voluntariness. In other words, power is a category that contains within it the subcategory of voluntariness. Third, therefore, the power test is able to encompass more factors and engage a more holistic approach than the voluntariness test.

a. What's Really Going On

Starting with Miranda, we can see that the language the Court uses is more about power than it is about voluntariness. The Court notes that "interrogation...trades on the weakness of individuals,"131 and that the "interrogation environment is created...to subjugate the individual to the will of his examiner."132 Interrogations, furthermore, are about depriving the suspect of "every psychological advantage...The atmosphere suggests the invincibility of the forces of the law."133 The interrogator "must dominate his subject and overwhelm him."134 The Miranda Court thus used the language of weakness, subjugation, advantage, invincibility, and domination, all of which suggest the idea of the interrogation as a war in which two forces vie for victory through employment of force and power.

130 Withrow, 507 U.S. at 711-12.
131 Miranda, 384 U.S. at 455.
132 Id. at 457.
133 Id. at 449-50.
134 Id. at 451.
Contemporary interrogation manuals employ similar language. Inbau and Reid note that their interrogation tactics will allow the interrogator to “dominate the conversation.” Step four of the nine-step Reid method involves “overcoming the suspect’s secondary line of defense.” The method is meant to obtain “a psychological advantage [or] gain.” For example, the authors recommend that small, loose objects such as paper clips and pencils not be within reach of the suspect during interrogation. The suspect may play with such objects, and tension-relieving activities of this sort can detract from the effectiveness of an interrogation, especially during the critical phase when a guilty person may be trying desperately to suppress an urge to confess.

If the voluntariness test were really about voluntariness, then courts ought to suppress confessions obtained through the use of techniques that create a stressful interrogation atmosphere that forces a suspect to confess, despite his desperate attempt not to do so. In fact, the voluntariness test suggests something else. Given the language of domination, overcoming defenses, advantage, and gain, Inbau and Reid imply that what is really in play is a warlike relations of power analysis.

Along these lines, Schafer and Navarro recommend an ambush. They note that “late afternoon interviews produce the most confessions because people are physically and mentally fatigued.” Invoking the notion of interrogation as both war and a production of simulacrum (the outcome of which—the confession—may more or less express the reality it purports to document), Schafer and Navarro also note that “[a] police station presents an intimidating environment, clearly placing the interviewer in complete control of the interview theater.” They go on to discuss preparation for operations in this theater:

[careful preparation of the interview setting gives the investigator a psychological edge. It is crucial that the investigator control and dominate the interview setting no matter how adverse the conditions.

Indeed, the authors write that “the interviewer should establish and maintain dominance throughout the interview.” Commentators as well recognize that power is what interrogations really regard. One author writes of interrogations:

the status of participants is unequal...with status comes power, and in conversation, power implies certain conversation rights. The powerful person can more readily introduce the topics, ask the questions, disagree, and give directions; the less powerful person cannot.

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115 INBAU, supra note 84, at 5.
116 Id. at 122.
117 Id. at 128.
118 Id. at 29.
119 Id. at 105, supra note 1.
120 Id.
121 Id. at 11.
122 Id. at 11.
123 SHUY, supra note 1, at 7-8.
Gudjonsson too suggests the relations of power test. He writes that "[c]onfessions are best construed as arising through the existence of a particular relationship between the suspect, the environment and significant others within that environment."\textsuperscript{144} He also sees war and power in the interrogation:

the success of the interrogation depends on the extent to which the interrogator is successful in identifying psychological vulnerabilities, exploiting them to alter the suspect’s belief system and perceptions of the consequences of making self-incriminating admissions and persuading him to accept the interrogator's version of the 'truth'.\textsuperscript{145}

The interrogation becomes a war, a battle, a field upon which two parties contend for victory. Said one officer, "[t]he game is—can you con a con? [Suspects] think they’re the smartest thing going; they think they can slick you."\textsuperscript{146} The question is not, therefore, does the suspect volunteer his confession. The question is who has the power—based in intelligence, knowledge, experience, or whatever—to con the other.

b. Power is Superior to Voluntariness

I say that power is superior to voluntariness, by which I mean that power is a notion that holds within it the notion of voluntariness. Discussions of voluntariness necessarily involve power, but discussions of power do not necessarily involve voluntariness. To illustrate: when we discuss consent to heterosexual sexual activity, we must discuss the notion of gendered power. When, on the other hand, we discuss the imbalance of power between the genders, we do not necessarily have to discuss notions of consent. Power as an issue can stand on its own; voluntariness necessarily invokes power.

Another way to express this idea is that power determines voluntariness, but that voluntariness does not determine power. A parent generally holds great power over his young child, and by this power, can determine what the child consents to do or not do, whether that child consents or not, and whether the child even has a choice to consent or not. Power determines voluntariness. On the other hand, the fact that the child may have some choice in terms of the object of his consent, the outcome of his choice, or the existence of his ability to choose says nothing about the power his parent holds. Voluntariness does not determine power.

c. Power Encompasses More

Because power is superior to voluntariness, the power test can encompass a more complex array of factors and realities about the interrogation event than can the voluntariness test. Information held by the suspect is an area of interrogation that would be most affected by a voluntariness test.

Currently, courts allow the use of false evidence in interrogations.\textsuperscript{147} Interrogation manuals advocate the use of false witnesses, meaning that interrogators can

\textsuperscript{144} GUDJONSSON, supra note 30, at 124.

\textsuperscript{145} Id. at 120.

\textsuperscript{146} CONNIE FLETCHER, WHAT COPS KNOW 77 (1991).

\textsuperscript{147} Frazier, 394 U.S. at 737 (in which the interrogator had told the suspect, falsely, that his cousin had been brought in for questioning and had confessed).
state, falsely, that others involved in the investigation had been brought in, confessed, or agreed to cooperate. They also suggest the use of false evidence, such as an evidence case folder or the simulation of one or file cabinets labeled “evidence recovered at [name of the coconspirator]’s residence.”

The Court in Moran, furthermore, held a confession admissible where the suspect was in custody, his attorney (whom he had not requested and the existence of whom he was not aware) had called the police station, and the suspect was not informed of the call. The Court justified its decision on voluntariness grounds:

In the absence of information, therefore, the Court held that a suspect can still voluntarily confess. This is correct in a Posnerian law and economics sense, and the question the Court answered—would the suspect’s actions have been different had no lawyer called?—concludes with the suspect’s voluntary confession. Under a power analysis, the question is a bit different. Assuming that greater information implies greater power, and withheld information deprives one of power, the question is: had the suspect known his attorney called, would his actions have been different? It is quite possible that if he knew he had legal counsel who was trying to contact and protect him, he would not have confessed.

Since information is power, and the most common reason for confession is that the suspect believes his guilt is known, the power test can and ought to encompass the use of false evidence and withholding of important information in its analysis. The voluntariness test, which operates in an islandist society that overestimates people’s ability to make autonomous decisions, is stuck looking solely to what positively exists in the interrogation event and how that affects the suspect. The test should look to all the factors that influence the suspect’s confession, including both those in positive existence and those that, although absent or invisible, still impinge upon the relations of power in the interrogation event.

d. The Vagaries of Voluntariness

The concepts of voluntariness and its correlate consent are ethereal. If someone has a gun to my head and tells me to sign a contract or he will pull the trigger, I sign the

148 INBAU, supra note 84, at 49.
149 Id. at 123.
150 SCHAPER & NAVARRO, supra note 105, at 16.
151 Moran, 475 U.S. at 417, 429.
152 Id. at 422.
153 ZULAWSKI & WICKLANDER, supra note 84, at 241.
154 Nadler, supra note 93, at 169 (observers “tend to grossly overestimate the voluntariness of others’ actions” because “people are strongly inclined toward explaining another person’s behavior in terms of internal causes (their intentions and dispositions), while ignoring aspects of the situation that could account for the person’s actions.”).
contract. Did I consent? Did I sign voluntarily? The answer depends on how we view other ethereal notions such as human nature, moral responsibility for one’s actions, and the metaphysics of such actions. An individual pondering consent can even easily believe simultaneously that I signed the contract voluntarily and did not have any moral responsibility for doing so. What is to be made of voluntariness?

To complicate matters, I will hazard a stereotype and suggest that Americans believe in an individualism and individual autonomous choice that shun the idea that forces external to us necessarily impinge upon our own choices. We have already seen, however, that observers always overestimate the voluntariness of others’ actions. One reason for this is that these observers are focusing on the subject whose voluntariness is in question. Salience is important in evaluating someone’s voluntariness. In one study, observers viewed video tapes of confessions. Some tapes were from the suspect’s perspective, looking at the interrogator. Other tapes were from the interrogator’s perspective, looking at the suspect. When the camera was focused on the suspect, the observers inferred only a small amount of coercion in the confession that followed, because the suspect and his apparent voluntary act of confessing were salient. When the camera was focused on the interrogator, observers inferred a large degree of coercion because they attributed the act of confessing to the actions of the most salient object, the interrogator. Simply put, voluntariness is difficult to define and more difficult to recognize.

Voluntariness is made more difficult to define and recognize by interrogators’ use of what amounts to trickery, deceit, manipulation, and coercion. Techniques such as using false evidence, pretending sympathy, and playing “good cop” are designed to overcome suspects’ resistance and their will-power not to incriminate themselves, and to manipulate them into confessing when they would otherwise not have done so. In addition to these techniques, interrogation itself “can produce a trance-like state of heightened suggestibility...the interrogator can manipulate uncertainty, interpersonal trust, and expectation to change the suspect’s susceptibility to suggestions.” Couple all of these tactics with the facts that very little pressure is often needed to induce false confessions (and even less pressure, probably, to induce true confessions) and that we often readily “consent involuntarily” in the face of an authority figure, and one wonders whether it is possible to discover genuine and discernable voluntariness in any interaction.

The writings and theories of Jeremy Bentham, Michel Foucault, and Richard Posner—all of which are discussed in more detail below—further suggest the inscrutability of voluntariness. Consider briefly Bentham’s panopticon. He built his prison on the idea that surveillance

159 Id. at 168.
158 Id. at 170.
157 GUDIONSSON, supra note 30, at 36-37.
156 Id. at 37.
155 SHLY, supra note 1, at 122-23.
154 Nadler, supra note 93, at 178.
153 Id. at 173.
would ensure compliance, without the need for coercion. Prisoners would become docile through constant training, as rules became internalized and consent replaced mere obedience.\footnote{Reg Whitaker, The End of Privacy: How Total Surveillance is Becoming a Reality 35 (1999).}

Of course, Bentham’s “compliance” ultimately rested on the threat of coercion.\footnote{Id.} Even Richard Posner, one of Bentham’s celebrants, has written that Bentham “was a pioneer in developing techniques of brainwashing”\footnote{Id. at 41.} and that he left a “legacy to totalitarian regimes.”\footnote{Richard A. Posner, The Economics of Justice 40 (1981).} If Bentham’s panopticon were, as Foucault thought, “a pitiless contraption designed for control and subjugation”\footnote{Janet Sempel, Bentham’s Prison: A Study of the Panopticon Penitentiary 114 (1993).} and the prisoners were thought to consent to their reform, then one wonders where voluntariness can lie in an interrogation that is inherently coercive because of its techniques to control and dominate the suspect.

Can power do any better than voluntariness as a test? I believe it can. First, the power test, as we have seen, encompasses more than the voluntariness test, and so it retains the richness of the voluntariness test’s totality of circumstances inquiry. It improves on the voluntariness test by avoiding terms such as “free will,” “consent,” and “voluntary.” These terms are vague as well as laden with deeply embedded societal values. The combination of these two attributes produces a test about which everyone has an opinion but no one is able to quite define. Power, on the other hand, is more concrete than voluntariness. Where voluntariness requires insight into human decisionmaking and the ability to distinguish between “free will” and “compulsion,”\footnote{Ronald J. Allen, Miranda’s Hollow Core, 100 Nw. U.L. Rev. 71, 76 (2006).} power merely requires that we observe realities and conditions imposing on the interrogation event. Where voluntariness requires that we ask how a long interrogation affected the suspect’s decisionmaking, power only requires that we are aware of and calculate for that long interrogation.

Attempting to discern a suspect’s consent is an honorable quest because it was born out of a concern for protecting that suspect’s rights. Where the operation of this protection rests on measuring something as unknowable as the suspect’s state of mind,\footnote{Frumkin & Garcia, supra note 82.} it is time for a new test. The power test draws us back from the metaphysical inquiry of the voluntariness test into the world of observable and, hopefully, measurable realities and conditions. It is a more workable, and therefore better, test.

\textbf{e. Another Tool in the Box}

At the least, the power test provides a judge with another lens through which to analyze the admissibility of a confession. Judges will likely hesitate to replace a voluntariness test that is entrenched by precedent, practice, and a measure of reliability. There is little to stop them, however, from applying the power test where and when they believe it will suit the situation better than the voluntariness test. They may also wish to apply both tests to produce a more enlightened conclusion regarding the confession’s admissibility. In the marketplace of ideas on the bench, judges will gradually decide which test is better and under what circumstances.
V. The Power Test Informed: Foucault et al.

In this Part, I discuss the philosophical underpinnings of the relations of power test. Although it centers on the theories of Michel Foucault concerning power, knowledge, and coercion/consent, it is also informed by Talmudic law on confessions, Jeremey Bentham’s panopticon, and Richard Posner’s law and economics models. As it happens, the best order in which to approach these topics is chronologically, as they appeared in history. We start with Talmudic law.

a. Talmudic Law

With few exceptions, Talmudic law prohibits the use of criminal confessions at trial, whether voluntary or coerced.\(^{169}\) In short, “nobody, ever, may confess to a criminal act.”\(^{170}\) Talmudic law, therefore, rejects the notion of consent or voluntariness in confessions. Its reasons for this prohibition suggest that any confession that is used cannot of its nature be voluntary. One reason for the prohibition is that confessions go against the basic human will to survive.\(^{171}\) Under this rationale, Talmudic law suggests that confessions are made because of an imbalance of power. Writes one commentator:

[b]ecause confessions are often made where the suspect/defendant is in a position of acquiescence and dependence, confessions are contrary to basic human autonomy and dignity.\(^{172}\)

Roseberg and Rosenberg, the authors of a seminal law review article on Talmudic law and confessions, reinforce this notion of power and coercion. They write:

The refusal to allow such admissions [confessions] can be viewed as a recognition that in any encounter between individual and government, the exercise of free will by the accused is illusory. Thus, the self-incrimination prohibition may have stemmed from an understanding that only an absolute ban can make it certain that the human will has not been overcome in the confession context.\(^{173}\)

Talmudic law thus offers a rationale for its prohibition based on active coercion by the interrogator. It also suggests that the suspect’s condition may be such that he is weakened psychologically in the interrogation event and will thus confess. The law states that confessions are prohibited because anyone who confesses thereby gives “evidence of a sick soul, bent on self-destruction.”\(^{174}\) In other words, those who confess are “confused in mind”\(^{175}\) and presumably open to either the power of the interrogator and/or giving a false confession.


\(^{170}\) Id. at 226.

\(^{171}\) Sadowski, *supra* note 1, at 714.

\(^{172}\) Id.

\(^{173}\) Rosenberg & Rosenberg, *supra* note 1, at 1040-41.

\(^{174}\) Salas, *supra* note 1, at 265.

\(^{175}\) Darrow-Kleinhaus, *supra* note 169, at 217; Rosenberg & Rosenberg, *supra* note 1, at 1033.
Finally, we should note the paradox inherent in Talmudic law: by prohibiting confessions to ensure a suspect's free will in the interrogation event, the law must assert that the only way to ensure free choice is to give no choice at all. The assumption here is that people do not of their nature wish to confess to the crimes they have committed. If we agree with this assumption, then it must logically follow that all confessions are coerced and should be suppressed. We do not suppress all confessions. Thus, either we think that people do wish to confess to their crimes or we are not truly concerned with ensuring suspects' exercise of their free will. Answering that question with any degree of certainty is beyond the scope of this article, but the sections that follow on Bentham, Foucault, and Posner ought to suggest that the answer is, in fact, the latter.

b. Jeremy Bentham and the Panopticon

We move now to late 18th and early 19th century England, which saw Bentham introduce, with grand failure, his idea of the panopticon prison. As we shall see, the panopticon is akin to interrogations in some important ways. For this reason, its effect on the subject's consent and its raison d'être suggest the power inherent in interrogations.

b.i. Panopticon as Interrogation

At the center of the panopticon, literally and figuratively, lies the guard tower. Circling the guard tower a certain radial length away from the center are the cells. Each cell door faces the guard tower, and there is a window on the opposite cell wall, facing away from the tower. The guard tower itself is set up so that the guard can always see every prisoner, but no prisoner can ever see the guard in the tower. These lines of sight are the purpose of this architecture. The guard is at the center, and through the regulation of sight, he becomes "the 'hidden' God." This god, this all-seeing and never-seen entity, "issues all orders" and operates this panopticon, this "new mode of obtaining power of mind over mind." Through this one-way gaze, the prisoner is rendered powerless and, in that state of powerlessness, receptive to reform. In the end, Bentham believed, surveillance would ensure compliance without the need for coercion.

The key elements of the panopticon are thus 1) the use of physical surroundings to the guard's advantage; 2) the all-seeing and all controlling nature of the guard; 3) the no-seeing and uncontroling nature of the prisoner; 4) the use of power; and 5) the attempt to obtain compliance from the prisoner while maintaining the prisoner's consent. Are interrogations really any different?

177 Rosenberg & Rosenberg, supra note 1, at 1041.
178 For a detailed description of the architecture of the panopticon, see JEREMY BENTHAM, THE PANOPTIC
179 Id. at 43.
181 Id. at 109.
182 Id. at 31.
184 WHITAKER, supra note 162, at 35.
Interrogation manuals stress the importance of an interrogation's physical surroundings and the interrogation room's architecture. The Reid method suggests that an interrogation be "conducted in a controlled environment...private and free from distractions."\textsuperscript{184} The surroundings should not contain any police paraphernalia such as handcuffs or badges,\textsuperscript{185} and the less they suggest a police detention facility, the more likely it is that a suspect will confess.\textsuperscript{186} The Reid method also suggests an observation room adjoining the interrogation room, and between the two a one-way mirror.\textsuperscript{187} Through the mirror, the unseen law enforcement officer can see the suspect. The interrogator in the room should also position himself so that he has a clear view of the suspect's entire body.\textsuperscript{188} The architecture of the panopticon survives in the interrogation room. The importance is placed on the physical surroundings, the controlled environment, the privacy, and especially the one-way mirror and the focus on the interrogator and his cohorts seeing the suspect's entire body. Bentham placed windows in the outer walls of the panopticon cells precisely so that the guard could see the entire body of the suspect, see exactly what the suspect was doing at every moment. This fetishistic observation of the human body is no different in the interrogation room, as interrogators are taught to look at even slight and ambiguous bodily movements as evidence of a suspect's guilt.\textsuperscript{189} As the panopticon guard is supposed to be all-seeing and all controlling, so too is the interrogator. It is fundamental that the interrogator express certainty of the suspect's guilt.\textsuperscript{190} To further this fiction of omniscience, the interrogator is taught to tell the suspect that if he lies, his deception will be detected,\textsuperscript{191} just as the prisoner's transgression will be known by the guard. As well, the interrogator should tell the suspect that he already knows the answers to some of the questions he will be asking.\textsuperscript{192} If the interrogator does not have real evidence to back up his claim of seeing and knowing all, he can resort to false evidence in the form of false coconspirator statements,\textsuperscript{193} statements of others involved in the matter,\textsuperscript{194} or physical props such as labeled file cabinets and documents.\textsuperscript{195} Such evidence "gives the illusion that the interrogator(s) know more about the investigation than they really do."\textsuperscript{196} The interrogator ought also to control the interrogation environment. He should immediately take control of the time, space, agenda, and pace of the interrogation.\textsuperscript{197} "It is crucial that the investigator control and dominate the interview setting no matter how adverse the conditions."\textsuperscript{198} Even when the suspect moves to deny involvement in the
crime in question, the interrogator should control such denials, meaning that he should seek to prevent them from being made.

To obtain a confession, it is in the interrogator's best interest to prevent the suspect from seeing and knowing. The suspect should not be told that he is a prime suspect, and the purpose of the interrogation should be kept vague. The suspect should also not be reminded of the consequences of confessing, and the interrogator is recommended to try to obtain a confession when the suspect is least aware of the consequences.

b.ii. Coercion or Consent?

Perhaps the fundamental problem with the panopticon is that it was founded on the idea that one could compel consensual obedience and reform through the mechanisms of power and coercion. If we believe Talmudic thinking that confessions are against human nature or the more mundane thought that people simply do not want to confess to wrongdoing, then contemporary interrogations share panopticon's problem. Interrogation manuals suggest, but do not acknowledge, this dilemma. They note the importance of "active persuasion," implying that it is the interrogator's role to get the suspect to do something he does not want to do. Other tactics, like providing the suspect with a moral excuse, blaming the victim or another person, blaming alcohol or drugs, or simply sympathizing with the suspect recognize that the suspect, on his own, will not confess, and the interrogator must move him to a point where he will confess. One manual suggests going for a confession when the suspect appears to be in a state least indicative of his consent to confess. The best time to try for a confession, they write, is when suspects enter the submissive phase of the interrogation, when they reach the lowest ebb psychologically that they will reach during the course of the interrogation...their eyes might begin to tear up or they might even cry...the suspect withdraws emotionally, eye contact reduces to almost zero. For most suspects, the head drops down, they look toward the left knee...the trunk of the body often tilts forward and the shoulders slump as the tension drains out of the muscles.

b.iii. Panopticon: Exists for Others, not for the Prisoner

If the consent of the suspect is not, in fact, of much importance in the interrogation event, it may be that the interrogation is not meant to benefit the suspect at all. This may seem obvious, but its comparison to the goals of panopticon suggest why we may not care about the suspect's consent. Bentham was a strict utilitarian, and so the importance of panopticon to him was the appearance, rather than the reality, of the suffering of the prisoners. His prison existed for the deterrent value it had on citizens.

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199 ZULAWSKI & WICKLANDER, supra note 84, at 347.
200 INBAU, supra note 84, at 169.
201 Id. at 49.
202 Id. at 27.
203 ZULAWSKI & WICKLANDER, supra note 84, at 361.
204 INBAU, supra note 84, at 5.
205 ZULAWSKI & WICKLANDER, supra note 84, at 361-62.
206 Božović, supra note 179, at 4.
outside the jail looking in. It was a spectacle and a didactic tool for the not-yet-criminal masses. The reformation of the prisoners was of secondary importance.

That interrogations are not meant to benefit the suspect is no surprise, and it is also not particularly disturbing. If interrogations, however, share panopticon's goal of deterrence, we ought to be concerned, since deterrence, as in panopticon, cares not for the consent of the suspect. Deterrence, furthermore, out of the interrogation setting will not be had by the message, "we will question you but you will not confess unless you do so voluntarily." Rather, the deterrence value of interrogations is found in the statement, "Criminals, beware! We will find you, we will know you and your actions, we will force you to speak of your actions, and you will be punished." As Foucault said, one confesses one's crimes, or one is forced to confess them.

c. Michel Foucault

Foucault’s book *Discipline and Punish* is a postmodern primer on power and coercion in the criminal justice system. In it, he speaks mostly of punishment, and analyzes the panopticon in so doing, but he also examines interrogations and confessions. In his book *Power/Knowledge*, Foucault focuses his discussion of power and suggests some compelling arguments about power in the interrogation event. *This is Not a Pipe* finds Foucault questioning the nature, and therefore voluntary nature, of what contemporary American jurisprudence would determine to be admissible confessions. Finally, Foucault’s analysis of the parricide case of Pierre Rivière is a case study of a criminal’s confession misused, which will also impugn the idea of voluntary confessions.

c.i. On Confessions, Interrogations, Coercion, and Power

Foucault defines “confession” as “all those procedures by which the subject is incited to produce a discourse of truth... which is capable of having effects on the subject himself.” He acknowledges a few implications of this definition. He notes that truth was “extorted” to obtain confessions or, in other words, “every possible coercion would be used to obtain” them. These bald accusations of coercion were made against confessions that took place at least two hundred years prior to Foucault’s writing, but he makes the sentiments current. He writes that then, the interrogation was done through torture, on the body, and that since we no longer attack the body, interrogators must attack the soul. Evoking the psychological warfare that interrogation manuals suggest, Foucault wrote that “[t]he expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.” Current interrogation methods of feigning sympathy, implying benefits to confessing, and inducing or removing feelings of guilt act in just the same way. And the goals of interrogations then, as now, are the same. Then, as now, confessions were

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207 Id.
208 WHITAKER, supra note 162, at 33.
210 Id. at 217.
212 Id. at 16.
213 Id.
particularly strong proof and therefore highly valued. Thus, interrogators would do all they could to obtain one.\textsuperscript{214} Then, as now, confessions were “a strict judicial game.”\textsuperscript{215} and operated to see which player could hold out longest.\textsuperscript{216} Then, as now, confessions were imperative in the process of bringing the crime to light and making it public.\textsuperscript{217}

Foucault places power in the center of the interrogation event by posing the question: “whom does discourse serve?”\textsuperscript{218} Here is a door into Foucault’s notion of relations of power, the structure of which is “a more-or-less organized, hierarchical, coordinated cluster of relations.”\textsuperscript{219} Since it is hierarchical, his structure assumes imbalanced relations of power, and since power has the ability to produce knowledge and discourse,\textsuperscript{220} one party in the interrogation event will be able to determine the knowledge and discourse that is produced. What conclusion will be made about the guilt of the suspect depends on who has the power. The suspect may hold the balance of power, in which case anything he say can and will justifiably be used against him. But the suspect is the one making the confession, the one speaking, and for Foucault, discourse serves the listener.\textsuperscript{221} It is the listener who forgives, condemns, or acquits. It is the listener who determines the truth and the discourse that produces that truth.\textsuperscript{222} Once the suspect has begun to confess, the interrogator has begun to listen, and therefore has begun to determine the truth of the confession.

The listener, in fact, is a necessary part of any confession. Without an authority figure present to require, prescribe, and appreciate the confession, the suspect will not confess.\textsuperscript{223} Not only is the interrogator necessary for the confession, but the interrogator’s coercion too is required. It is the interrogator’s gaze, specifically, that induces the effects of power and the means of coercion that cause the suspect to be entirely visible.\textsuperscript{224} The gaze is part of the interrogation, which itself is “a normalizing gaze, a surveillance that makes it possible to qualify, to classify and to punish.”\textsuperscript{225} The interrogation renders the suspect transparent, his guilt known to all through the mechanisms of power. Foucault goes on to suggest the detailed jurisprudence and techniques surrounding interrogations, as well as the “truth” producing qualities of the event:

in all the mechanisms of discipline, the examination is highly ritualized. In it are combined the ceremony of power and the form of the experiment, the deployment of force and the establishment of truth.\textsuperscript{226}

\textsuperscript{214} Id. at 38-39.
\textsuperscript{215} Id. at 40.
\textsuperscript{216} Id. at 40-41.
\textsuperscript{217} Id. at 56.
\textsuperscript{218} FOUGAULT, supra note 209, at 115.
\textsuperscript{219} Id. at 198.
\textsuperscript{220} Id. at 199.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 61-62.
\textsuperscript{224} FOUGAULT, supra note 211, at 171-72.
\textsuperscript{225} Id. at 184.
\textsuperscript{226} Id.
The gaze in the interrogation event literally and figuratively captures and fixes the suspect by placing him "in a field of surveillance [and] a network of writing." For Foucault, then, the interrogation is about the production of truth through the exercise of coercive power, with the end result being the fixing of the suspect as Criminal through a written confession.

c.ii. Power/Knowledge

We have touched on the importance of the relationship between power and knowledge in the coercive production of truth. It is an important aspect of this article, since the confession is a truth-establishing document of knowledge. The confession tells the world that the suspect is a criminal and exactly how and why he is a criminal. The confession, absolutely accurate or not, becomes truth, and is produced by the holder of power. Power, then, is not only repressive; it is also productive. It produces discourse and propagates knowledge, and it clears up confusion. The confession therefore is the solution to an unsolved crime. By fixing the suspect as the criminal, the knowledge of guilt and the crime's source is determined, and all vexing questions are answered. The case is closed, and the police can go home. It is therefore in power's nature to obtain a confession, whether it is reliable or not, coerced or not. The actual goal is not to solve a crime. The actual goal is to produce a knowledge that fixes, that settles unsettled and unsettling questions.

c.iii. This is Not a Pipe: The Confession Is not the Crime

At this point, one ought to be concerned with the possibility that confessions cannot be their nature be given with consent. Foucault's short book This is Not a Pipe raises a question that should further concern the reader. In the book, Foucault deconstructs René Magritte's surrealistic paintings, especially his most famous one, Ceci n'est pas une pipe. The painting is of an image that clearly appears to be a smoking pipe. In script below the image are the words "Ceci n'est pas une pipe," or "This is not a pipe." What, Foucault asks, do these words mean? Are they meant to suggest that the image we see is not supposed to represent a pipe? Or do they tell us that the image we see is not a pipe because, clearly, it is merely paint on a canvas? Perhaps the words are referring to the painting itself, which is not a pipe. Or do the words refer to themselves, as in the author stating, "the words you are currently reading are not the image that you see above the words." The words themselves are not a pipe.

What if the suspect were presented with a pad and pen, wrote the words "I killed my brother," and below those words, wrote "This is not a confession? What if the suspect wrote out the first passage, and below that wrote "This is not a crime"? This

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227 Id. at 189.
228 Id. at 194.
229 FOUCAULT, supra note 209, at 59.
230 FOUCAULT, supra note 221, at 12.
231 FOUCAULT, supra note 211, at 219.
would, obviously, never happen, but what does happen is what Foucault observed about Magritte’s painting: the act is completely divorced from the words used to describe the act. The divorce, furthermore, raises serious problems of representation and the accuracy and reliability of that representation. The confession itself is not the crime, and so it is possible that the suspect, in confessions, consented to the confession, but did not admit to doing the crime.

This is not so far-fetched. This representation problem is what allows suspects to write false confessions. Whenever news of a false confession comes out, the suspect-victim’s statement is the same: “I was tired and wanted to go home. They said I could go home if I just signed the confession.” “I didn’t do it. They said if I signed the confession I wouldn’t be punished.” In the absence of physical or psychological violence, all false confessions are based on consent to the confession, but not consent to admit to the crime. The confession is not the crime, nor, apparently, need it be in fact an admonition of the crime.

Foucault’s axiom that “one confesses to his crime...one confesses, or one is forced to confess” may help us clarify things. In the French, the line is, “on avoue ses crimes...On avoue, ou on est forcé d’avouer.” The French verb “avouer” can be translated as “to avow” or “to confess.” The sense of the word “avow” in English suggests a type of ownership or an acknowledgment that the thing avowed is part of the person doing the avowing. “Confession” can mean the same thing, but in the criminal context, it means that the confessor admits to involvement in an act external to himself. “Avowal” is, for our discussion, a true confession, i.e. an avowal that the crime is part of the suspect. “Confession,” viewed in the light of false confessions and the discussion in this article, implies representational problems as well as the problems with consent I have been developing.

The vagaries of confessions where the suspect actually committed the crime are no less than those of false confessions. One interrogation technique involves asking seemingly small, innocuous questions. By receiving answers, the interrogator is both priming the suspect to answer larger, more damning ones, and is also gathering information to box the suspect in, to force the suspect to admit to the obvious when that final, damning question is posed. The suspect may have consented to answering the small questions and avowed the answers he gave. When it comes to the big question, however, the suspect may not have consented to being boxed in nor to giving the final, unavoidable, damning answer. In giving that answer, he consents to answering the question, but may not avow the crime or the consequences of his answer.

This assumes that the confession is clearly related to the crime at hand. “I killed my brother” is unambiguous. Most confessions are not this clear, however. Like Magritte’s words, they are highly susceptible to interpretation and cause great confusion, because they are pieced together by fragments of questions and answers obtained throughout an interrogation. The final written confession presented to the suspect may read, “I killed my brother,” but the interrogator may have reached that conclusion and presented that confession to the suspect for signature based on an interrogation that produced the absence of an alibi, the suspect’s diffuse anger toward his brother, a motive, and the suspect’s skill in using handguns. Assuming the suspect has power enough to resist this confession, all is well. Assuming, however, that the suspect is under pressure,
it is possible that he confesses to but does not avow the crime. This is not a pipe, just as a confession may not be an avowal.

c.iv Pierre Rivière the Parricide

There is another problem of representation between the confession and the act to which one confesses. The suspect may have done a crime and confessed to it, but he consented to the confession for purposes other than that which the authorities use the confession. Obviously no suspect confesses in order that his confession be used to convict him of a crime. He confesses because of feelings of guilt, a belief that confession is the morally right thing to do, coercion, or because it is simply human nature to want to talk about the important things one has done. At first blush, this does not seem to be a problem: if the suspect confesses voluntarily, he has been warned that it will be used against him and so the law is satisfied and our consciences can rest easy. If we are concerned, however, that the power that lies in authority needs to fix a suspect in a certain role in order to satisfy its own needs, then this ought to raise questions about the pressure that power applies on the suspect, and the possibility that any resulting confession can be consensual.

Pierre Rivière’s case is a good example of the suspect confessing to a crime he committed for one reason, and having that confession used by the powers around him for their own purposes. Foucault and a team of researchers reconstructed and published the case of Pierre Rivière, a French peasant who killed his mother, sister, and brother in 1835.224 Foucault intended his study to be a map “of those combats...confrontations and battles...the interaction of those discourses as weapons of attack and defense in the relations of power and knowledge.”225 His study would provide material for a thorough examination of the way in which a particular kind of knowledge (e.g. medicine, psychiatry, psychology) is formed and acts in relation to institutions and the roles prescribed in them (e.g. the law with respect to the expert, the accused, the criminally insane, and so on).226

Finally, Foucault’s study would give “us a key to the relations of power, domination, and conflict within which discourses emerge and function.”227 What the story of Rivière tells us is that the criminal at the heart of the matter has no voice to establish his own truth. Rather, the forces swirling around him—the police, the court, the king, the doctors, psychiatrists, and the newspapers—seek to fix him into the role that best establishes and enhances their power. And they all used Rivière’s confession to do so.

Rivière was accused of murdering his mother, sister, and brother. He did, in fact, do so, and he willingly and under no apparent coercion wrote a confession avowing these crimes,228 though he did so at the behest of the authorities.229 His purpose in writing

225 Id. at xi.
226 Id.
227 Id.
228 Id. at 54-121.
229 Id. at 121.
this confession was clear: "all I ask if that what I mean shall be understood." He went on to write a confession that takes up 67 pages of text, in which he avowed the crimes and much more. He begins his confession with the history of his mother and father's relationship. According to Rivièrè, his parents got married in order that his father might escape military service. It seems that his mother was not entirely in agreement with this arrangement, and delayed consummating the marriage for an unusually long period of time. His mother was also abusive to his father and others around her. Rivièrè did not recognize it as such, but his confession suggests that his mother suffered from some mental illness that manifested itself in anger toward her husband and others.

Rivièrè goes on to describe himself, his "character and the thoughts I had before this deed." A number of aspects of his character come out. The writing of the confession alone suggests an above average level of intelligence and perception, especially for a French peasant in 1835. Rivièrè himself admits to being very devout when he was 7 or 8. He would even learn sermons and preach before people. A few years later, he reported that he "displayed singularities" that separated him from other boys his age. He often passed the time alone in his imagination, and he "had ideas of glory." He kept reading religious texts as well as histories and newspapers. Reading these texts made him irreligious within three years. By this time, it seems that he, like his mother, was displaying indications of mental illness. Instead of turning angry, however, he became anxious, especially toward women. "Above all I had a horror of incest which caused me to shun approaching the women of my family. When I thought I had come too close to them, I made signs with my hand as if to repair the harm I believed I had done." Rivièrè's confession goes on to indicate that he had a general anxiety toward society.

Rivièrè then began to discuss his motives for murdering his family members. Taking inspiration from the religious texts and the stories of heroes in history, he decided that he would deliver his father from the torment that his mother was causing him. Rivièrè knew that he would be put to death for his acts, but he was ready to sacrifice himself for his father. Just as "our Lord Jesus Christ died on the cross to save mankind,

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240 Id. at 55.
241 Id.
242 Id. at 56.
243 Id. at 57.
244 Id. at 59, 61, 67, 68.
245 Id. at 68; with no reason to believe that Rivièrè's father was unfaithful, his mother told his father "oh yes you would like to rob me, when you have money on hand you keep it, you old villain, you clapped-out old beast, you old whoremaster you would rather support your goodwife, you starve your children to support hers, you sow her land and plow it...all you want is your fun, she is a forward bitch, she has a damn good arse...you ought to be ashamed of yourself, here you have had my children, but you must have your goodwife too."
246 Id. at 100.
247 Id. at 101.
248 Id.
249 Id.
250 Id. at 102.
251 Id.
252 Id. at 103.
253 Id. at 105-06.
Rivière wrote, “I can deliver my father only by dying for him.” Rivière thus decided to kill his mother, as well as his sister, who was in league to make his father suffer. Rivière concluded that he would also have to kill his brother, whom his father loved dearly, both because “he loved my mother and sister, [and] because I feared that if I only killed the other two, my father though greatly horrified by it might yet regret me when he knew that I was dying for him.” Rivière’s brother had to die so that his father would hold Rivière “in such abhorrence that he will rejoice in [Rivière’s] death, and so he will live happier being free from regrets.”

Rivière’s confession is his voice. He comes off as intelligent but disturbed. In his disturbed state, his ordinary religiosity takes on an extraordinary tone, suggesting delusions of grandeur. Rivière was clearly mentally ill, but retained his ability to understand the world around him and recognize right from wrong. He saw the torment his mother caused his father, he resolved to solve it, and once the murder was done, he immediately realized the moral dimensions of it, and was shocked at his own actions. Rivière then fled, evading the authorities for a month. When he was caught, he attempted to escape punishment by claiming that God ordered him to commit the murders. In short, Rivière, however heinous his act, is understandable. He is not a mad genius or an insane idiot. He is religious but not overly so. He is like us, only with thoughts a little skewed and, perhaps, in need of Freudian analysis.

This Rivière did not suit the powers around him. While Rivière was claiming in interrogation that God had ordered him to murder, the interrogator instead wanted to hear that he was mentally ill and hated his mother and family. He wanted to hear that Rivière was violent from his childhood. To his neighbors, he had to be the village idiot, the deranged outcast. At the pre-trial court, the interrogator argued that Rivière was not a religious monomaniac or an idiot. He was, instead, simply a “cruel being” who “followed the promptings of evil” and “did not struggle hard enough to control the propensities of his evil character.” He was just “like all heinous criminals.”

In the decision of the pre-trial court, Rivière became a gifted near-genius. The court wrote that it was most regrettable that Rivière has by an atrocious act rendered henceforth useless to Society the gifts so liberally imparted to him by nature without any assistance whatever from education; a remarkable memory, a great aptitude for the sciences, a lively and strong imagination coupled with an eagerness for instruction and the achievement of glory.
His "character" was "extraordinary," and the fact that his neighbors believed
him to be the village idiot was dismissed as "imperfect recollection and [made because
of] prejudices against him." The scientists weighed in as well. One doctor gave a direct and mundane
psychological explanation:

[endowed with a bilious and melancholic temperament, a frequent witness of his
parents' quarrels, Rivière was deeply affected by his father's
misfortunes...Rivière wanted one thing only, to deliver his father, and in order to
achieve his purpose he had to murder his mother."

Another psychiatrist, who worked in a mental hospital, thought Rivière was
clearly insane. Rivière, he wrote, "was not sane and...the act which the prosecutor
considered to be an atrocious crime was simply the deplorable result of true mental
alienation." After Rivière was convicted and sentenced to death, the king commuted his
sentence to life, and based his commutation on the notion, rejected by all including
Rivière, that Rivière had killed his family as a consequence of "religious
hallucinations."

Where does the real Pierre Rivière reside? Of all the voices weighing in, I believe
the most reliable one is that of Rivière himself, spoken through his confession. But the
right to speak was precisely what Rivière did not have. Power would not allow this
voice. Wrote one of Foucault's team:

[even when it shouts aloud, this voice is heard only as the mutterings of a dying
man. If he had anything to say, the native was the only person who was not taken
at his word. If he was to be heard, he had to be killed."

If the suspect has no voice in the confession process, and if the powers swirling
around him are able to impose their definition of him, then can the suspect's consent to
confess exist?

d. Richard Posner

Judge Richard A. Posner and his law and economics approach rounds out this
discussion for two reasons. First, he cites Jeremy Bentham as the source and inspiration
for much of law and economics today. Second, Judge Posner is considered by many to
be a champion of conservatism and is not associated with protections for suspects. His
views are necessary, therefore, to counter those of the radically leftist and pro-suspect
Foucault. Although Judge Posner may deny the affiliation, a thoughtful exegesis of his
theories reveals a kinship with those of Foucault.

d.1 Bentham and Foucault

265 Id. at 50.
266 Id. at 48.
267 Id. at 123.
268 Id. at 125.
269 Id. at 169.
270 Id. at 181.
271 Id. at 188.
Bentham may be seen as a root from which grew two trunks. One truck is that of Foucault, who took from Bentham his writings on imprisonment and punishment, power, and coercion. The other trunk is that of Judge Posner, who finds in Bentham the source of the idea of the individual as a “rational utility maximizer in all areas of life.” Bentham, writes Posner, was one of the “most illustrious progenitors” of the law and economics movement, and Bentham created the economic analysis of crime and punishment. Finally, Posner believes that Bentham influenced the design of the criminal justice system in the United States.

So there are two shades of Bentham. On the one hand is Bentham’s totalitarian tendencies which gave rise to the panopticon and led to Foucault’s discussion in *Discipline and Punish*. On the other hand are his well-intended efforts at reform through utilitarian-inspired methods of training criminals for reentry into society and self-sustaining, consensual moral behavior. These efforts relied on a primitive notion of costs and benefits that would lead to Posner’s more developed and explicit economic model.

It is interesting that Posner does not mention Foucault in any of his writings, especially since he acknowledges that Bentham’s work also included “developing techniques of brainwashing” and “repressive tendencies” that left a “legacy to totalitarian regimes.” One explanation for this is that Posner’s theories are limited to situations in which all the parties have equal bargaining power. When the competing powers are equal, Foucault becomes irrelevant.

d.ii. Amorality and Assuming Equality

The vitriolic complaints leveled at Posner amount to accusations that he simply does not know what goes on in real life. He is the quintessential white male and cannot fathom that women, racial minorities, or the poor may have less power to bargain than he. If one appreciates Posner’s theories for what they are, however, these accusations lose some of their force.

Economics is about defining a space and analyzing all the powers that impinge upon that space. Like any area laying claim to a scientific method, economics has to limit its scope of inquiry. Posner does just that by announcing the amorality of his theories that are about means, and not ends: “Economics does not answer the question whether the existing distribution of income and wealth is good or bad...Economic reasoning is over means rather than ends.” Since he is amoral, he is able to assume a system in which all the players act voluntarily: “willingness to pay can be confidently determined only by actually observing a voluntary transaction.” To be of any use, his theories must rely on such assumptions. And why not? We do not complain that the laws of gravity are irrelevant because they are accurate only in the non-existent space of a vacuum.

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272 *Posner*, *supra* note 122, at 4.
274 *Id.* at 34.
275 *Id.* at 53.
276 *Posner, supra* note 164, at 40.
277 *Id.* at 41.
278 *Id.*
280 *Id.* at 16.
Posner recognizes this, and in so doing, gives weight to Foucault and my argument in this article. Although his theories rely on the voluntariness of transactions, he writes that "many of the transactions either affected or effected by the legal system are involuntary." In fact, he writes, "truly voluntary" transactions are "few." We live in a world of "coerced exchange[s]" or "legally regulated forced exchanges." The criminal justice system itself constitutes "a system of government coercion" and he suggests that power and coercion may be the fundamental factors in reallocating social wealth. In the end, he posits a very anti-Posnerian rhetorical question: "[w]ould a rational person ever confess to a crime voluntarily?"

**d.iii. Surroundings Shape Behavior**

Posner does not have only that sentiment in common with Talmudic law and Foucault. Despite his clean rational economic actor model, he acknowledges that externalities impinge upon a subject’s decision to act or not. In economic terms, he argues that people respond to incentives, so that if a person’s surroundings change in such a way that a subject could increase his satisfactions by altering his behavior, he will do so. Along those same lines, Posner applies the Law of Demand, which states that as the price of something increases the demand for it will decrease.

Applying these laws to the interrogation context, let us say that the suspect is trying to "purchase" his freedom by not confessing. At the start of the confession, the cost of this freedom is quite low, as the interrogator has yet to introduce evidence, apply psychological pressure, or suggest that the system will go easy on the suspect if he confesses. All the suspect has to do is sit and remain silent, and he will have purchased his freedom.

Let us now say that the interrogator tells the suspect that a witness saw him at the crime scene, and suggests a moral excuse for committing the crime. The cost of the suspect’s freedom has just increased, because instead of sitting and remaining quiet, the suspect must reevaluate his decision to not confess in light of the evidence and the excuse he is being given. As the interrogator successfully applies the techniques he has learned, the cost to the suspect of his freedom increases. In turn, the cost of confessing decreases, since, if he confesses, his moral excuse is much easier than doing so without such an excuse.

A problem arises when we learn that there was, in fact, no eye witness, and the interrogator provided a moral excuse to the suspect with the sole purpose of obtaining a confession—the excuse would not constitute a mitigating factor at any point in the criminal justice process. In contrast, an exchange based on such illusion would constitute misrepresentation and the contract would be rendered voidable. In the Posnerian criminal justice world, however, the confession is not voidable for misrepresentation. Informing this conclusion is Posner’s definition of “rationality,” which is “choosing the best...
available means to the chosen ends.\textsuperscript{289} “To be poorly informed,” moreover, “is not to be irrational.”\textsuperscript{290} Rationality, therefore, lies within the scope of choices available to us, regardless of the abusive manipulation of those choices by external forces.

Posner says as much, writing that

\[ \text{[t]his analysis implies that courts should be more lenient toward the use of misrepresentations and other trickery to extract confessions than they are toward brutality. Although a false promise (‘confess and you won’t be punished!’) could induce a false confession, it does not impose substantial costs on either the interrogated or the interrogators and therefore is more likely to be cost-justified than physical brutality. Or take the common case where, to induce a confession, the police exaggerate the other evidence they have of the suspect’s guilt. By this exaggeration they are trying to persuade him that the cost of confession to him is lower than it actually is. However, this tactic is unlikely to elicit a false confession; and in a case where the police have failed to obtain other evidence of guilt, the benefit of the confession is maximized... So cost-benefit analysis strongly supports permitting police and prosecutors to employ this tactic.}\textsuperscript{291}

The problem with Posner is not that he does not understand that imbalances of power exist in relations. It is, rather, that he fails to recognize the impact these imbalances have on choices made within those relations. If one party holds greater power, that party is going to be able to determine the choices presented to the other party. This is precisely the interrogator’s job—to shape the choices presented to the suspect such that the suspect will recognize only one choice, confession. Since Posner bases his theories on choice, it is easy to conclude that any choice made will be rational. Like gravity in a vacuum, choice in economics fails to see what lies outside of that space: power, and the impact it has on the suspect’s choice.

\section*{VI. Conclusion: Roadblocks}

At first blush, the relations of power test I propose in this article may seem far-fetched to some. Not only does it take its inspiration from Foucault, one of law’s great outsiders, but it also seems simply unnecessary, since it is as ambiguous as the voluntariness test and just as much a totality test. Under either test, judicial discretion is the rule, and if judges had wanted to look to relations of power, they could have already done so. We should not change tests if there is no apparent advantage to doing so.

I think there are a number of advantages. First, power is what we are really talking about when we talk about confessions and voluntariness. Anything we can do to uncover the real mechanisms of judicial decisionmaking can only make our system better.

Second, power as a construct encompasses voluntariness, and so can envision more factors and thus a fuller picture of the interrogation event in determining the admissibility of confessions. If we truly care that a confession is admissible only when it is voluntarily given and not coerced, we should not shy away from tests that offer a more holistic picture.

\begin{footnotesize}
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\item[{\textsuperscript{289}}] Posner, supra note 273, at 252.
\item[{\textsuperscript{290}}] Id. at 255.
\item[{\textsuperscript{291}}] Posner, supra note 122, at 716.
\end{itemize}
\end{footnotesize}
Third, voluntariness leads into notions of consent, free will, and coercion, which are all fundamentally ambiguous and often conflicting. One can be coerced and yet choose freely, just as external coercion can be entirely absent, yet the suspect, because of some internal disorder, confesses involuntarily. In this way, voluntariness requires a certain awareness of human nature, something hard to come by and upon which people rarely agree. Power, in contrast, is a more objective measure that stops its analysis before having to delve into the bog of human nature. It is a test that looks to what is in the open, rather than what lies within the mysterious minds, hearts, and souls of people. Because of the nature of the power test, mistakes will be made in its application. But mistakes are made now under the voluntariness test, and the power test, I believe, would decrease the incidence of mistakes and, at least, provide a more open and clearer test which counsel and appellate judges can better evaluate.

Fourth, the theorists I have discussed—Bentham, Foucault, and Posner—all point to power as an important concept in relationships, especially those between an individual and governmental authority, and especially in interrogation/confession relationships. None of them speak of free will, consent, or voluntariness as concepts concrete enough upon which to hang a legal test. In contrast, each theorist discusses power as a material, concrete, virtually measurable factor, which, I argue, makes power a better basis for a test.

Finally, at the very least, the relations of power test ought to be considered another tool in the judge's box as he goes to evaluate the admissibility of a confession. It provides a new point of view the use of which would not apparently violate any constitutional ruling.

There are, however, three apparent roadblocks that must be addressed, and can be done so quickly.

First, Miranda is still the law of the land. This means that the relations of power test cannot erase the interrogator's constitutionally-mandated requirement to give Miranda warnings. In fact, the relations of power test would not disrupt Miranda, since the Miranda warnings constitute the first part of the two-step test. The power test would only touch the second step, the voluntariness test. If Miranda is ever overturned or—more appropriately—if we ever evolve beyond Miranda, the role and scope of the power test—or the voluntariness test, for that matter—should be revisited.

Second, the power test with its factors, continuum, and continuum ranges seems overly complex and requiring too many judicial resources. In fact, the power test may save the courts' time over the current voluntariness test for two reasons. One, courts already hold pre-trial evidentiary hearings to evaluate factors and perform the voluntariness test. Courts realize that confessions often make the prosecution's case, and so are quite willing to expend valuable court time in their evaluations. Two, the Federal Sentencing Guidelines consist of a much more complex test than the power test. Prior to Booker and into the current day, judges were and are required to complete this test, and they do so quickly and without excessive use of judicial time.

Legal commentators always hope for a wholesale adoption of their proposals, but are usually more realistic. I hope that attorneys, judges, legislators, and others involved in the criminal justice process will read this article and respond with awareness that power impinges greatly on the interrogation event and the voluntariness test has some fundamental flaws. Later, they will take tentative steps in practice: thinking about power
over voluntariness, asking questions that are framed around power over voluntariness, and in legal memoranda and opinions addressing issues from the standpoint of relations of power. They will give voice to the power test in the marketplace of judicial ideas, and in the end, the best test, be it power, voluntariness, or something else, will prevail.