Detention for the Purpose of Interrogation as Modern "Torture"

Rinat Kitai-Sangero*

ABSTRACT

Although the Court in Miranda stated that custodial interrogation is designed to undermine the will of the interogee, it has not prohibited the admission of confession given under such circumstances. It rather assumed that it is possible to dispel the pressures of a custodial interrogation by means of proper safeguards. The article claims that there is no plausible way to dispel the coercive atmosphere engendered by a custodial interrogation. Custody today constitutes a refined version of torture used in the past in order to extract confessions. Consequently, the confession of a suspect under circumstances of custodial interrogation is involuntary and should not be admitted at trial. Treating a custodial confession in this manner is justified by the two main rationales underlying the requirement of voluntariness: 1) ensuring the reliability of the confession, and 2) protecting the right of the suspect to reach an autonomous decision.

Table of Contents

I. Introduction

Despite the fact that the Bail Reform Act of 1984 does not recognize the need to conduct an interrogation as grounds for detention,[1] custodial interrogation is a common practice.[2] The leading judgment in *Miranda* extensively discussed the issue of custodial interrogation.[3] In effect, taking the statement of a suspect after questioning him about his involvement in a criminal offense is a central means for

*LL.B. (1992), Ph. D. (2001), Hebrew University of Jerusalem. Lecturer, Ramat Gan Law School, Israel. My thanks are due to Boaz Sangero and Neil Zwail for their helpful comments.

[1] The Bail Reform Act of 1984, 18 U.S.C. 3142(e) permits detention only if "after a hearing…the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community".

[2] Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1421-22 (1985).

[3] Miranda v. Arizona, 384 U.S. 436, 440, 482 (1966).

investigating crime.[4] The police interrogation is primarily directed at obtaining an admission of guilt from a suspect who the police believe committed the offense that is attributed to him.[5] Indeed, many suspects make incriminating statements as the result of an interrogation.[6] A suspect's admission of guilt during a police interrogation plays a major role in the criminal process.[7] Such a confession constitutes decisive evidence at trial leading, in the overwhelmingly majority of cases, to a conviction.[8] Detention is a major investigative tool for the purpose of eliciting confessions from suspects.[9]

The Supreme Court has recognized that "[i]n the United States, 'interrogation' has become a police technique, and detention for purposes of interrogation a common, although generally unlawful, practice."[10] In contrast to the grounds of endangering public safety or obstruction of justice, detention for the purposes of interrogation does not attribute a future improper act to the suspect. Detention on these grounds is primarily designed to ensure the convenience and effectiveness of the investigation.

---

[4] HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 69 (1996); Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 126 (1986).

[5] Seth Goldberg, Missouri v. Seibert*: The Multifactor Test Should be Replaced With a Bright-Line Warning Rule to Strengthen* Miranda*'s Clarity*, 79 ST. JOHN'S L. REV. 1287, 1292 (2005); Raymond J. Toney, *English Criminal Procedure Under Article 6 of the European Convention on Human Rights: Implications for Custodial Interrogation Practices*, 24 HOUS. J. INT'L L 411, 426 (2002); Boaz Sangero, Miranda *is Not Enough: A New Justification for Demanding 'Strong Corroboration' to a Confession*, CARDOZO L. REV. (forthcoming, 2007).

[6] Toney, *supra* note 5, at 426-27. Thus, according to a study conducted by Cassell and Hayman, a third of all suspects admit to having committed the offense attributed to them: Paul G. Cassell & Bret S. Hayman, *Dialogue on* Miranda*: Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. 839, 842 (1996). In England suspects confess in approximately 60 percent of all cases: GISLI H. GUDJONSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 156 (2003).

[7] Toney, *supra* note 5, at 426.

[8] Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983-84 (1997); Sangero, *supra* note 5.

[9] Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J. L. REFORM 1, 24 (1990); VAUGHAN BEVAN & KEN LIDSTONE, A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT 1984, § 5.03 (1985) ("…the police frequently arrest a presumptively guilty person at a very early stage in the investigation with little or no evidence of the person's guilt and set out to prove that guilt by custodial questioning.").

[10] Culombe v. Connecticut, 367 U.S. 568, 572 (1971).

Detention serves two main purposes for police interrogators. The first is to act as a means of pressure designed to induce the suspect to cooperate with the interrogators. As the Court stated in *Miranda*, "… such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[11] The second objective of detention is to enable investigative measures or ruses that must be conducted within the confines of the detention facility. These include planting an undercover agent in the suspect's cell, in order to get him to make an incriminating statement, and eavesdropping on the conversation of several persons suspected of having being involved in the commission of an offense, who have been brought together for this purpose.

Undoubtedly, an interrogation in a custodial setting is easier and more effective for investigators than one conducted while the suspect is free.[12] Detention itself operates to undermine the suspect's will to resist.[13] It isolates the suspect and deprives him of contact with his family and friends, who could provide him with moral support that enables him to cope with the interrogation.[14] It disrupts the suspect's daily routine and activities, such as: regular employment, normal dietary habits, sleeping in a comfortable bed and taking a bath.[15] The disruption of his daily routine and the removal of the suspect from his normal environment create a sense of isolation and anxiety, causing him to become dependent on his interrogators.[16] The suspect loses control over his life and it is the interrogators who determine the timing and length of the interrogation, as well as the degree of pressure exerted.[17] When he is in this state of alienation and helplessness, it is easier for interrogators to exert psychological pressure on the suspect in order to induce his cooperation, primarily by

[11] Miranda v. Arizona, 384 U.S. 436, 457, 465 (1966).

[12] MARTIN L. FRIEDLAND, DETENTION BEFORE TRIAL 40 (1965).

[13] *Miranda*, 384 U.S. at 455.

[14] *Miranda*, 384 U.S. at 449-50, 455; Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 110 (1989); Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 928 (1997); Ofshe & Leo, *supra* note 8, at 997.

[15] Magid, *supra* note 14, at 929.

[16] Hagit Lernau, *A Research Evaluation of the Israeli New Pretrial Detention Act*, 35 ISR. L. REV. 266, 267 (2001).

[17] Ofshe & Leo, *supra* note 8, at 997.

confessing.[18] The harsh conditions of detention also operate to undermine the suspect's will to resist.[19] It is no wonder, therefore, that custodial interrogations yield many more confessions from suspects than interrogations conducted while suspects are free.[20]

Certain investigative measures, such as planting an undercover agent as a cellmate, are not physically possible when the suspect is free. Moreover, when the suspect is in custody, it is much easier to obtain samples for the purposes of DNA testing, such as secretions found on a used handkerchief or a saliva sample left on an eating utensil, or to obtain physical evidence, such as an excreted bag of drugs.[21]

In Part II of this article, I will discuss the arguments supporting the use of detention for the purpose of interrogation as an effective tool for inducing the suspect to cooperate during the course of the investigation. Furthermore, in this part of the article, I will discuss the main argument against this ground for detention, which relates to the danger that the will of the interrogee will be broken. The assumption that custodial interrogation acts to undermine the interrogee's will to resist was the central assumption underlying the *Miranda* ruling. This article will examine whether or not this assumption is correct; and, by discussing the opposing arguments, it will conclude that the very fact that many suspects act against their own best interests, confessing at the police station to the offenses attributed to them, indeed demonstrates that their will to resist has been undermined. Nonetheless, the *Miranda* ruling assumed that, with the help of proper safeguards (which primarily consist of informing the suspect of his right to remain silent and his right to consult with a defense attorney, retained or appointed), it is possible to dispel the coercive atmosphere engendered by a custodial interrogation. I will attempt to show that this assumption is naïve and that, in fact, it is impossible to invent a rule that would completely dispel the coercive aspect of a custodial interrogation.

Part III of the article will discuss the proper attitude that should be taken regarding the confession of a suspect who is being held in custody. Since a suspect usually admits his guilt to the police because his will to resist has been broken, a

[18] Berger, *supra* note 9, at 24.

[19] Lernau, *supra* note 16, at 267.

[20] For the figures, see Cassell & Hayman, *supra* note 6, at 872, 884.

[21] For a clear example of seizing samples, during detention, for the purposes of testing, see R. v. Stillman, [1997] 1 S.C.R. 607, sections 58-60.

custodial confession should be treated as inadmissible. Such an attitude is dictated by the two main rationales underlying the voluntariness requirement: ensuring the reliability of the confession and protecting the right of the suspect to form an autonomous decision.

Part IV of the article will examine the possibility to detain a suspect in order to employ investigative tactics that can only be carried out in a detention facility, such as planting an undercover agent as a cellmate. Although the argument regarding the improper application of pressure is weaker when it is necessary to detain a person in order to use techniques that can be physically employed only in a custodial setting, and not just for the sake of exerting pressure, even such detention – which is not designed to prevent a danger posed by the suspect – is a greater violation of the presumption of innocence than is necessary.

This article will conclude that detention for the purpose of interrogation is unlawful. Detention currently replaces the torture used in the past as a means for breaking the willpower of the interrogee. However, a confession obtained in this manner cannot be trusted and should not be relied on.

II. Examining the Legitimacy of Detention for the Purpose of Exerting Pressure

Detention for the purpose of advancing the investigation is accepted in many countries, including France,[22] England,[23] Sweden,[24] Hong Kong,[25] India,[26] South Africa,[27] China,[28] Austria,[29] and Israel.[30] In contrast, this ground for detention is not

[22] JOHN HATCHARD, BARBARA HUBER & RICHARD VOGLER EDS., COMPARATIVE CRIMINAL PROCEDURE 80 (1996).

[23] Section 37(2) of the Police and Criminal Evidence Act 1984 permits the detention of a suspect without charges if this "is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him."

[24] Hanns von Hofer, *Sweden*, in FRIEDER DÜNKEL & JOHN VAGG EDS., UNTERSUCHUNGSHAFT UND UNTERSUCHUNGSHAFTVOLLZUG / WAITING FOR TRIAL 576 (1994).

[25] John Vagg, *Hongkong*, in DÜNKEL & VAGG, *id.* at 281.

[26] Bhuvan B. Pande, *India,* in DÜNKEL & VAGG, *id.* at 303.

[27] Dirk Van Zyl Smit, *South Africa*, in DÜNKEL & VAGG, *id.* at 675.

considered proper in Germany.[31] In England, some judges in the nineteenth and early twentieth century believed that the police had no authority at all whatsoever to interrogate suspects in custody.[32] Nowadays, arresting a suspect for the purpose of conducting an interrogation is, as already indicated, a statutory ground for detention. Furthermore, the House of Lords has held it to be a proper purpose.[33] Apart from the fact that this ground for detention is officially recognized, it often constitutes a latent cause of arrest.[34]

The legitimacy of detaining a suspect for the purpose of exerting pressure in order to induce him to cooperate with his interrogators is disputed. An examination of the arguments both supporting and opposing this ground for detention helps to illustrate the tension between the crime control approach and the due process approach.[35]

A. Arguments Supporting Detention for the Purpose of Exerting Pressure

The fact that an investigation is actually being conducted unavoidably entails a violation of the rights of the individual. Even if a person is innocent, he pays a price for the fact that there is incriminating evidence against him giving rise to probable cause that he committed a crime. Just as it is possible, under these circumstances, to

---

[28] Edward J. Epstein, Andrew C. Byrnes & Felice D. Gaer, The People's Republic of China, in DÜNKEL & VAGG, *id.* at 796

[29] Roland Miklau, Inge Morawetz & Wolfgang Stangl, *Pre-trial Detention in Austria*, in STANISLAW FRANKOWSKI & DINAH SHELTON, PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE 140 (1992) (noting that, in practice, detention is used in Austria as a means for eliciting confessions).

[30] Criminal Procedure Law (Powers of Enforcement – Detention), 1996, section 13(a)(3).

[31] Justus Krümpelmann, *Probleme der Untersuchungshaft im deutschen und ausländischen Recht*, ZStW 1052, 1066, 1070 (1970).

[32] K. W. Lidstone & T.L. Early, *Questioning Freedom: Detention for Questioning in France, Scotland and England*, 31 INT'L & COMP. L.Q. 488, 501-02 (1982).

[33] *Mohammed-Holgate v. Duke* [1984] Q.B. 209, 216.

[34] Toyoji Saito, *Preventive Detention in Japan*, in FRANKOWSKI & SHELTON, *supra* note 29, at 182.

[35] For a description of these two models see HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).

conduct a search of his home or to eavesdrop on his conversations, it is also possible to detain him for the purpose of interrogation.[36] The presumption of innocence cannot shield a person from the very attempt to refute it and it does not prevent the implementation of measures designed to clarify the suspicion against a person.[37]

Adherents of detention for the purpose of advancing the investigation view it as a legitimate investigative measure. Detention is an effective tool for examining the suspicion against a person, since, without it, the chances for cooperation on the part of the suspect, and certainly the chances for a confession, are significantly diminished.[38] In the overwhelming majority of cases, the suspect is the best source of information.[39] Without the suspect's cooperation, many crimes would go unsolved.[40] Perpetrators do not usually come to the police station on their own initiative in order to confess; in order to obtain a confession, the police must take some sort of active step of investigation and detention.[41] A suspect must be detained in order to provide the police with a reasonable opportunity to conduct an incommunicado interrogation before he concocts a story or decides not to cooperate with his interrogators.[42] Every interrogation necessarily entails a certain degree of inherent pressure that could be particularly acute for a suspect who has committed the offense attributed to him. However, this pressure should only trouble a legal system that views a suspect's choice to cooperate with the police as something undesirable.[43] The belief that it is possible to successfully interrogate a suspect without detaining him is unrealistic. When a person arrives to an interrogation after resting at home and receiving the

[36] Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1210 (2001) (relating to deceptive interrogation techniques).

[37] For a discussion of the significance of the presumption of innocence, see Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 289 (2002).

[38] *Mohammed-Holgate v. Duke* [1984] Q.B. 209, 216 (detaining a suspect for the purpose of exploiting the elements of stress and pressure entailed by the deprivation of liberty, in order to obtain a statement, is a proper purpose).

[39] PACKER, *supra* note 35, at 187.

[40] Kenneth P. Jones, McNeil v. Wisconsin*: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding Does Not Constitute Invocation of* Miranda *Right to Counsel for Unrelated Charge*, 26 GA. L. REV. 1049, 1067 (1992).

[41] Van Kessel,, *supra* note 4, at 144.

[42] PACKER, *supra* note 35, at 187.

[43] JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 45 (1993).

moral support of his family and friends, the chances of getting useful information out of him for the purposes of the investigation are very slim.[44] The burden to prove a person's guilt cannot be imposed on law enforcement authorities without equipping them with the tools necessary for this purpose. Officials should therefore be given a reasonable period of time to conduct an unhampered investigation.[45] The confession is a valuable tool for ascertaining the truth, enforcing the law, and protecting public safety.[46] Moreover, the confession is not just significant as incriminating evidence for the purposes of a conviction. A guilty suspect is often the only person who can shed light on the details of the crime and describe, for instance, what happened to a deceased victim in his final moments. This information has vast importance for the public, in general, and for the family and friends of the deceased, in particular.

Indeed, the stupidity of a suspect who gives a confession that goes against his own best interests is often what helps in ascertaining the truth and enforcing the law; however, "[t]here is no privilege against inadvertent self-incrimination or even stupid self-incrimination, but only against compelled self-incrimination."[47] Undoubtedly, a weak, unsophisticated suspect would be more inclined to confess to the commission of a crime than a strong, clever suspect, but this assumption should not be troubling. On the contrary, it should be comforting to know that at least some offenders are convicted with the help of their own confessions.[48]

---

[44] Cited in PACKER, *supra* note 35, at 188 (any type of outside interference diminishes the chance of cooperation on the part of the suspect during the course of the interrogation and, therefore, he should be isolated from his family, as well as from an attorney).

[45] And *see* Stewart Field & Andrew West, *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, 6 CRIM. L.F. 473, 486 (1995) (presenting the prevailing approach in France, which reflects "… the historic compromise under which the police enjoy an initial period of investigation that is virtually untrammeled by defense rights.").

[46] Moran v. Burbine, 475 U.S. 412, 426 (1986); McNeil v. Wisconsin, 501 U.S. 171 (1991); Miranda v. Arizona, 384 U.S. 436, 517 (Harlan, J., dissenting, stating that "peaceful interrogation is not one of the dark moments of the law."); Kimberly A. Roemer, *The Maryland Survey 2001-2002: Recent Decisions: The Court of Appeals of Maryland: IV. Criminal Law and Procedure*, 62 MD. L. REV. 722 (2003).

[47] Ciriago v. State, 57 Md. App. 563, 574, 471 A.2d 320, 325 (1984); Roemer, *supra* note 46, at 746.

[48] Magid, *supra* note 36, at 1181; Minnick v. Mississippi, 498 U.S. 146, 166-67 (1990) (Rehnquist, C.J., Scalia, J., dissenting).

Reinforcing the arguments of those who support detention for the purpose of advancing the investigation, it may be added that such detention does not necessarily start from an assumption of guilt, but rather, its function is to assist in clarifying the question of the suspect's guilt or innocence. And, indeed, some countries grant a power of detention as a means of exerting pressure not only on suspects but also on witnesses – who are not suspected of having committed a crime – in order to extract information that they possess.[49]

B. Arguments against Detention for the Purpose of Exerting Pressure – the Danger that the Will of the Interrogee will be Undermined

The due process approach is incompatible with the detention of a suspect for the purpose of advancing the investigation.[50] The main reason for this derives from the danger of undermining the will of the interrogee.

As important as his statement is for the purpose of solving the crime, a suspect has the right to remain silent. Custodial interrogation is incompatible with the right of silence granted to the suspect.[51] In fact, just the opposite is true, for the police use detention in order to ensure that, in practice, the suspect does not exercise his right to remain silent.[52] Since detention could break down the resistance of certain suspects, inducing them to cooperate with their interrogators, it violates the suspect's right to silence. It also undermines his desire not to assist the investigation being conducted against him and turns him into a vehicle for gathering incriminating evidence.[53] Detention is essentially a coercive measure designed to force the suspect into cooperating, similar to the imprisonment of a witness for contempt of court. Some scholars believe that there is no contradiction between custodial interrogation and the

[49] In France, a power of detention exists for a limited period of time: Field & West, *supra* note 45, at 482. In Australia, the security services may detain a person who is not a suspect for twenty-four hours at a time, up to seven days, if there are grounds to assume that he has information related to terrorist offenses: Christopher Michaelsen, *International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11*, 25 SYDNEY L. REV. 275, 282-83 (2003).

[50] PACKER, *supra* note 35, at 190.

[51] Donald A. Dripps, *Foreword: Against Police Interrogation – And the Privilege Against Self-Incrimination,* 78 J. CRIM. L. & CRIMINOLOGY 699, 734 (1988).

[52] Lidstone & Early, *supra* note 32, at 508.

[53] Martin Dockray, *Notes of Cases: Arrest for Questioning?*, 47 MOD. L. REV. 727, 729-30 (1984).

right to remain silent, since the right to silence is a weak right and only means that a person cannot be compelled to answer questions.[54] This view assumes that custodial interrogation, in and of itself, is not the equivalent of forcing someone to answer questions.

And, indeed, the belief that a custodial interrogation undermines the will of the interrogee is the basis for the claim that detention for the purpose of exerting pressure is unlawful. It is commonly assumed that a confession obtained by means of brutal violence is the classic example of an involuntary confession.[55] However, the courts have expanded the definition of an involuntary confession to include situations other than those in which the confession results from the application of inordinate physical pressure during an interrogation.[56] The voluntariness requirement has been criticized with the argument that its vagueness is an insufficient guide for police interrogators.[57] The courts have indeed tried to differentiate between acceptable and unacceptable police behavior.[58] However, if it is acknowledged that a certain degree of pressure during an interrogation is legitimate, then it is difficult to determine when the applied pressure crosses the boundary of the permissible.[59]

The *Miranda* Court went far beyond the traditional test of voluntariness when it decisively ruled that a custodial interrogation is inherently coercive.[60] The atmosphere of a custodial interrogation is designed to subjugate the will of the detainee to that of the interrogator and could lead him to make an involuntary confession.[61] Notwithstanding this conclusion, the *Miranda* Court attempted to preserve the autonomy of the individual in a manner that would allow the police to

---

[54] GRANO, *supra* note 43, at 44.

[55] The classic example of such a confession is found in Brown v. Mississippi, 297 U.S. 278 (1936).

[56] William J. Stuntz, Miranda*'s Irrelevance:* Miranda*'s Mistake,* 99 MICH. L. REV. 975, 980 (2001).

[57] Rosenberg & Rosenberg, *supra* note 14, at 102; Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 348, 355, 361 (1998); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1833 (1987); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 451 (1987).

[58] Amanda L. Prebble, *Manipulated by* Miranda*: A Critical Analysis of Bright Lines and Voluntary Confessions Under* United States v. Dickerson, 68 U. CIN. L. REV. 555, 561 (2000).

[59] Stuntz, *supra* note 56, at 980.

[60] Miranda v. Arizona, 384 U.S. 436, 458 (1966).

[61] *Id.* at 457.

continue conducting custodial interrogations.[62] Accordingly, the *Miranda* ruling did not prohibit custodial interrogations, but rather, it required interrogators to inform a suspect undergoing such an interrogation of his right to remain silent and to consult with a defense attorney (retained or appointed), and to allow him to avail himself of these rights, as well as to make it clear to him that his statements are liable to be used as evidence against him.[63] In the absence of these safeguards, an irrebuttable presumption arises whereby it is deemed that the confession was coerced and is therefore involuntary.[64]

1. Is the *Miranda* Assumption Regarding the Involuntariness of the Confession Correct?

What exactly constitutes an involuntary confession is a question containing both philosophical and empirical aspects. It is very difficult to define the term "will" or the concept of coercion.[65] Aristotle believed that an involuntary action is one performed under circumstances of coercion or due to ignorance.[66] He distinguished between a voluntary physical action (throwing goods overboard during a storm, in order to save human life) and the abstract sense of the action – which is involuntary, since no person would choose to get into a situation where such an action is necessary.[67] In the abstract sense, it is obvious that the will of the suspect is to open the door of the interrogation room and go home; however, this option is unavailable to him.[68] Under the circumstances of custodial interrogation (obviously, a situation that is intrinsically involuntary), does a suspect's admission of guilt truly reflect his will?

---

[62] Rosenberg & Rosenberg, *supra* note 14, at 102; Penney, *supra* note 57, at 366.

[63] *Miranda*, 384 U.S. at 444.

[64] *Id*. at 468-69.

[65] Laurie Magid, *The* Miranda *Debate: Questions Past, Present and Future: A Review of the* Miranda *Debate: Law, Justice, and Policing, Edited by Richard A. Leo and George C. Thomas III*, 36 HOUS. L. REV. 1251, 1260 (1999).

[66] ARISTOTLE, NICOMACHEAN ETHICS, Book III, *Voluntary Action and Responsibility,* reprinted in W.T. JONES ET AL. EDS., APPROACHES TO ETHICS 61 (1977).

[67] *Id.* at 61.

[68] George C. Thomas III, *Book Review:* Miranda*'s Illusion: Telling Stories in the Police Interrogation Room. Reviewing* Miranda*'s Waning Protections, By Welsh S. White*, 81 TEX. L. REV. 1091, 1095 (2003)

We frequently act in response to external pressure. Most people work in order to make a living, even though they would prefer to spend their time otherwise. Some people study law in order to please their parents. Are such decisions involuntary? Conventional wisdom states that a person does not normally lose his ability to choose except in extraordinary circumstances that interfere with his free choice. Is a custodial interrogation that does not entail improper measures – such as violence or sleep deprivation – an inherent factor that could undermine the will of the interrogee?

Some scholars believe that it is a matter of which aspect we focus on: the volitional aspect of the decision, in which case we would say that the confession is voluntary, or the external circumstances surrounding the decision, in which case we would conclude that the confession was coerced.[69] To a large extent, this is a normative choice.[70] And, indeed, the Supreme Court has recognized that a suspect's confession to the police is not voluntary in the same way as a spontaneous confession to a clergyman, an attorney, or a psychiatrist; but, according to the Court, in this sense, no admission of guilt is voluntary.[71]

However, even regarding the external circumstances surrounding the decision, some scholars reject the contention that custodial interrogation inherently operates to undermine the will of the individual. The *Miranda* ruling envisions a weak-willed suspect, even though this is a person who has allegedly committed offenses that seem to demand a strong character.[72] And, indeed, there are those who reject the assumption that custodial interrogation entails inherent coercion.[73] Thus, Cassell and Hayman argue that approximately half of all confessions are made during the first fifteen minutes of the interrogation, and some confessions are even given during the first five minutes or less.[74] A speedy admission of guilt could perhaps indicate that improper pressure was not exerted on the interrogee. However, findings regarding the speedy confessions of some interrogees do not contradict the sense of desperation and helplessness engendered by the very fact that the suspect is being held under arrest in

[69] Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 724 (1992).

[70] *Id.*

[71] Stein v. New York, 346 U.S. 156, 186 (1953).

[72] Caplan, *supra* note 2, at 1447.

[73] Cited in Penney, *supra* note 57, at 311.

[74] *Supra* note 6, at 920.

a hostile environment.[75] A suspect usually expects that his interrogation will be lengthy and that it will be prolonged until he provides his interrogators with answers that satisfy them.[76] If that is the case, then, when a suspect believes that the interrogation will not cease until he gives his interrogators the answers that they want to hear, why not act preemptively in order to avoid unnecessary suffering? In these circumstances, the actual length of the interrogation is irrelevant in negating a claim of coercion.[77] At any rate, many interrogations are stressful and unpleasant, and, while they are being conducted, interrogators give the interrogee the feeling that his conviction is a certainty, with or without his confession.[78] Even manuals for police interrogators assume that the suspect is not easily inclined to confess and that his resistance must be broken.[79]

Indeed, it is difficult to seriously argue that the pressures of a normal custodial interrogation are impossible to withstand. In fact, there are people whose will to resist is not even broken by torture. A good example of this is the heroic struggle of John Lilburne, in England, in 1637, who refused to answer the questions of the Star Chamber regarding the accusations against him, despite the fact that he was flogged and placed in the pillory.[80] However, we are not concerned here with suspects who do not admit guilt, but rather, with interrogees who do admit guilt during a custodial interrogation.

Custodial interrogation inherently violates the autonomy of the individual.[81] As already indicated, the suspect is interrogated under circumstances in which he lacks power, control and dignity.[82] The separation from family and friends; the disruption of daily routine; the confinement in a cell, in isolation or with others, some of whom may be hardened criminals, in conditions constantly reminding the detainee

[75] Regarding the sense of helplessness engendered by the very status of being detained, see Miranda v. Arizona, 384 U.S. 436, 455-57, 461 (1966).

[76] Berkemer v. McCarty, 468 U.S. 420, 438 (1984).

[77] Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 144 (1997).

[78] Ofshe & Leo, *supra* note 8.

[79] GUDJONSON, *supra* note 5, at 17.

[80] John H. Wigmore, *The Privilege Against Self Incrimination: Its History*, 15 HARV. L. REV. 610, 624-26 (1902).

[81] Rosenberg & Rosenberg, *supra* note 14, at 102; Penney, *supra* note 57, at 313, 359.

[82] See notes 11-19 and accompanying text.

of his pitiful state – all of this is most certainly capable of undermining the suspect's will. Under such circumstances, a waiver of rights cannot truly be considered voluntary.[83]

The proof that detention undermines the will of the interrogee is in the very fact that he has made a confession. A rational suspect, who has not been put under pressure, would seldom choose to confess.[84] This seems obvious. For, under normal circumstances, a confession goes against the best interests of the suspect.[85] Of course, there are also rational reasons for making a confession: a desire to cleanse one's conscience;[86] or the suspect's feeling that "the game is over" and that the police have already ascertained the fact that he committed the crime, whereas denying it is pointless and a confession could work to his benefit.[87] Some offenders are even proud of having committed the crime that they are accused of, particularly when it was committed for ideological reasons. And some psychologists believe that people have an impulse to confess, which interrogative tactics bring to the fore.[88] Notwithstanding these explanations, it is hard to deny the fact that a person is not normally inclined to act against his own best interests. However, when interrogated in custodial surroundings, many suspects feel pressured to speak.[89] And, indeed, even Cassell and Hayman, who do not believe that custodial interrogation inherently undermines the suspect's will, have found that custodial interrogations yield many more admissions of guilt than interrogations conducted while the interrogee is not being held in custody.[90] The necessary conclusion is that a suspect's admission of guilt is normally the result of his will having been undermined and not his "will to confess."

2. Is It Possible to Dispel the Coercive Atmosphere Engendered by a Custodial Interrogation?

[83] Rosenberg & Rosenberg, *supra* note 14, at 110.

[84] Stuntz, *supra* note 56, at 978; Dripps, *supra* note 51, at 700.

[85] Magid, *supra* note 36, at 1198.

[86] Roemer, *supra* note 46, at 747; Stuntz, *supra* note 56, at 987.

[87] See, for example, the depiction of an interrogation, cited in Mitch Reid, *Note:* United States v. Dickerson*: Uncovering* Miranda*'s Once Hidden and Esoteric Constitutionality*, 38 HOUS. L. REV. 1343, 1345-46 (2001). *See, also,* White, *supra* note 77, at 121.

[88] Cited in Lidstone & Early, *supra* note 32, at 510.

[89] Magid, *supra* note 65, at 1260.

[90] *Supra* note 6.

The *Miranda* Court assumed that it was possible to dispel the pressures of a custodial interrogation by means of proper safeguards, which, if maintained, would ensure that a suspect's confession was a reflection of his true will.[91] And, indeed, even when a suspect is actually aware of his rights, the very fact that interrogators have given him a *Miranda* warning makes it clear to the suspect that the interrogators are also aware that they are subject to rules of civilized behavior, and that they cannot wantonly abuse him.[92] In fact, the safeguards established by the Supreme Court in *Miranda* were designed to allow the police to continue making use of custodial interrogation, and that is the result that they have had.[93] If we accept the assumption that these safeguards are capable of dispelling the coercion that exists during a custodial interrogation, then there is seemingly no reason to oppose detention for the purpose of interrogation due to a fear that the privilege against self-incrimination will be violated. The problem is that this assumption appears to be naïve. In practice, most interrogees waive both their right to remain silent and their right to the presence of a defense attorney during the interrogation and are willing to cooperate with their interrogators.[94] This fact alone puts into question the effectiveness of the *Miranda* rule in protecting the suspect from the coercion entailed by a custodial interrogation.[95] And, indeed, when a suspect waives his rights, he is left defenseless against coercive interrogation tactics employed in an attempt to persuade him to admit guilt.[96] In fact, nearly all interrogations involve deception in one form or another.[97] Thus, for example, an interrogator may deliberately show sympathy towards a person suspected of a despicable crime in order to give him the feeling that the victim was to blame for what happened.[98] An interrogator may exaggerate the weight of the evidence against

[91] Miranda v. Arizona, 384 U.S. 436, 444, 467-68, 479 (1966).

[92] Seidman, *supra* note 69, at 743.

[93] Schulhofer, *supra* note 57, at 454.

[94] Prebble, *supra* note 58, at 578-79; Mandy DeFilippo, *You Have The Right to Better Safeguards: Looking Beyond* Miranda *In The New Millennium*, 34 J. MARSHALL L. REV. 637, 639-40 (2001).

[95] DeFilippo, *supra* note 94.

[96] Stuntz, *supra* note 56, at 976, 988-89; Magid, *supra* note 36, at 1169; White, *supra* note 77, at 114. However, the Court has held that the *Miranda* ruling only prohibits coercion and not the use of artifice, such as planting an undercover agent in the suspect's cell: Illinois v. Perkins, 496 U.S. 292, 297 (1990).

[97] Magid, *supra* note 36, at 1168.

[98] *Id.*

the suspect or lie to him regarding the supposed existence of evidence, such as the confession of an accomplice, a fingerprint, or the identification of an eyewitness.[99] Some scholars, in fact, propose that interrogators be forbidden from using various types of artifice, such as a promise of leniency in exchange for cooperation or presenting the evidence against the suspect in a misleading manner.[100] Other scholars reject such proposals, arguing that trickery is essential for proving guilt and that there is no reason to prohibit artifice during an interrogation or other types of investigative stratagems, such as eavesdropping.[101] In the view of police interrogators, the very nature of the interrogation makes the use of artifice necessary, since one party – the police – is interested in ascertaining the truth from the other party – the suspect – who, if guilty, is naturally interested in concealing it.[102] In effect, if such a prohibition were to encompass all methods by which the police are able to obtain a confession from a suspect, such as deception or taking advantage of the suspect's emotional vulnerability, then the result would be equivalent to a ban on interrogation itself.[103] Essentially, there is no way to devise a rule, apart from a total ban on custodial interrogation, which would truly dispel the coercion that exists under these circumstances.[104]

Thus, even taping the interrogation on video would not dispel the coercive atmosphere that exists in the interrogation room. Video documentation could prove that interrogators did not employ improper measures (at least not during taping), but it cannot accurately reflect the suspect's fears and innermost feelings.[105]

Not even replacing the police interrogation with a method of judicial interrogation[106] would solve the problem of coercion. A suspect is still in custody when he comes before a judge.[107] For a suspect, standing before a judge might be

[99] *Id.* at 1174; Toney, *supra* note 5, at 430; GUDJONSON, *supra* note 5, at 8-9.

[100] DeFilippo, *supra* note 94, at 705; White, *supra* note 77, at 147-53.

[101] Magid, *supra* note 36, at 1186, 1197-98.

[102] GRANO, *supra* note 43, at 33-34; ROTHWAX, *supra* note 4, at 81.

[103] Stuntz, *supra* note 56, at 978.

[104] GUDJONSON, *supra* note 5, at 25-26; DeFilippo, *supra* note 94, at 710 (arguing, nevertheless, that this proposal is both excessive and undesirable).

[105] Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel – The Ambivalence of Israeli Law Against the Background of American Law,* 19 B.Y.U. J. PUB'L. L. 205, 216-17 (2004).

[106] For this proposal, see Dripps, *supra* note 51, at 730.

[107] Rosenberg & Rosenberg, *supra* note 14, at 105.

even more intimidating that a conversation with a police interrogator at the stationhouse, due to the difference in status between the judge and the suspect or because of the formal atmosphere of the judicial institution.[108] There is also no reason to rule out the possibility that the interrogative tactics of a judge convinced of the suspect's guilt – like those of a police interrogator – would send a message to the suspect that his guilt has already been determined, inducing him to confess out of desperation.

Some scholars believe that in order to dispel the coercive atmosphere the suspect must be given a true opportunity, which cannot be waived, to consult with a defense attorney prior to the interrogation.[109] As Justice White asked in *Miranda*: "if the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?"[110] Indeed, Justice White asked this question in his dissenting opinion, arguing against the logic of the *Miranda* ruling. However, it demonstrates that the same pressures inducing a person to speak to his interrogators could also cause him to waive his rights.[111] Criticism has been leveled at the proposal that the admissibility of a police confession should be made contingent on prior consultation with a defense attorney. It has been argued that such a rule would make it virtually impossible for police to obtain confession evidence.[112] Its implementation would be overly costly and even impractical given the shortage of competent public defenders, and would cause delays in the interrogation that would be harmful to the suspect himself.[113] This proposal would even lead to an expansion of the boundaries of non-custodial interrogation.[114] However, even if enough competent public defenders were to be found, prior consultation with an attorney (in

[108] DeFilippo, *supra* note 94, at 700.

[109] Note, *Supreme Court Review: Fifth Amendment: The Constitutionality of Custodial Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 878, 891, 898-900 (1992); Penney, *supra* note 57, at 370; Ogletree, *supra* note 57, at 1830, 1842.

[110] Miranda v. Arizona, 384 U.S. 436, 536 (1966).

[111] Dripps, *supra* note 51, at 726-27; Seidman, *supra* note 69, at 740.

[112] DeFilippo, *supra* note 94, at 695; Stuntz, *supra* note 56, at 979.

[113] DeFilippo, *supra* note 94, at 695-96.

[114] *Id.* at 697.

itself, very desirable) does not guarantee that the confession would be the product of the suspect's free will, since the pressurized atmosphere of a police station could cause an attorney to give his client misleading advice.[115] The assumption that a competent defense attorney would advise his client to remain silent[116] is not empirically correct, and such advice is not necessarily in the client's best interests under all circumstances. When the suspect has a reasonable explanation that could clear him of all suspicion, an attorney might advise him to provide a version because his silence at the police station could be detrimental to him. In certain countries (although not in the United States), an adverse inference in support of the prosecution's evidence may be drawn from a detainee's silence at the police station.[117] In the view of police interrogators, the suspect's silence increases the suspicion against him.[118] Moreover, the fact that the suspect has not provided his version at the first opportunity available to him could weaken the credibility of a later version provided in court. When the police have not revealed the evidentiary material that they possess to the suspect prior to the filing of an indictment, a defense attorney is forced to advise his client to either remain silent or answer questions in a state of uncertainty, and this advice could naturally turn out to be erroneous.[119] Furthermore, there are even defense attorneys who fail to take an adversarial posture, cooperating with the police in exerting pressure on the suspect to admit guilt, and others who acquiesce in the face of a hostile and aggressive interrogation, leaving the suspect to his own devices.[120]

In short, these types of proposals, which go even further than *Miranda*, provide only a partial solution to the problem of coercion. Insofar as it is directed at extracting a confession from a suspect, a police interrogation is inherently coercive, since it is designed to persuade the suspect to make "free" statements, instead of

[115] Prebble, *supra* note 58, at 584; Rosenberg & Rosenberg, *supra* note 14, at 105.

[116] Seidman, *supra* note 69, at 734-35.

[117] Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 431, 490 (2000).

[118] *Id.* at 492.

[119] Toney, *supra* note 5, at 432. This situation is especially problematic in a legal system that recognizes the possibility to draw adverse inferences from the very exercise of the right to remain silent, for example, in England: *id.* at 431.

[120] *Id.* at 459 (regarding England).

"selling" them afterwards within the context of plea bargaining negotiations with the prosecution.[121]

III. The Consequences of a Custodial Confession

Even if there are suspects whose will is not undermined and who cooperate voluntarily, given the coercive atmosphere engendered by detention itself, it is impossible to differentiate between a voluntary and an involuntary confession.[122] Therefore, the confession of a suspect at the police station, obtained while he is in custody, should be treated as involuntary and, consequently, as inadmissible in court.[123] Treating a custodial confession in this manner is justified by the two main rationales underlying the requirement of voluntariness: 1) ensuring the reliability of the confession, and 2) protecting the right of the suspect to reach an autonomous decision.[124]

A. Ensuring the Reliability of the Confession

Although various rationales underlie the voluntariness requirement, some scholars argue that its main justification is the fear concerning the reliability of an involuntary confession.[125] And, indeed, in American courts during the nineteenth century, the

[121] Stuntz, *supra* note 56, at 978.

[122] Rosenberg & Rosenberg, *supra* note 14, at 111.

[123] Irene M. Rosenberg , *Wolchover and Heaton-Armstrong On Confession Evidence*, 20 HOUS. J. INT'L L 247, 260 (1997); Rosenberg & Rosenberg, *supra* note 14, at 106, 109-10, 113; Dripps, *supra* note 51, at 701-02 (proposing that the police be allowed to conduct custodial interrogations, but that the suspect's statements to the police be deemed inadmissible). In Malaysia (when it was still united with Singapore), up until 1960, a suspect's confession to the police was inadmissible: B.L. Chua, "Malaysia," in J.A. COUTTS ED., THE ACCUSED: A COMPARATIVE STUDY 156, 157 (1966). Amar & Lettow argue that the version that the suspect provides to the police should not be admissible at trial unless it was given in the presence of a defense attorney or the defendant consents to its admissibility as evidence at trial: Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 909 (1995).

[124] Concerning these rationales, see Penney, *supra* note 57, at 313.

[125] Magid, *supra* note 36, at 1174; Amar & Lettow, *supra* note 123, at 859.

basis for the rule excluding an involuntary confession was not the privilege against self-incrimination, but rather the desire to reduce the possibility of an erroneous conviction based on a questionable confession.[126] Therefore, some scholars argue that the primary inquiry should focus on the question of whether the procedure employed to obtain a confession engenders an unreasonable risk that an innocent person would falsely confess.[127] According to this approach, there is no real reason to place constraints on an interrogation that are unnecessary for the purpose of ensuring the reliability of the confession.[128] In contrast to those scholars who argue that false confessions are a serious problem for the criminal justice system and constitute a widespread phenomenon,[129] others argue that these claims have never been proven empirically and that the research on this subject is mostly anecdotal.[130] According to this view, there is no basis for the belief that an innocent person would confess, and we should be glad that at least the "weak" offenders do confess.[131] Moreover, the factors leading to false confessions should be examined. Thus, if it is proven that false confessions are unrelated to the manner in which the interrogation is conducted – for instance, when a suspect confesses due to his desire to cover up for another person – then there is no reason to place limits on interrogative practices in order to prevent such confessions.[132] An empirical study of this sort regarding the extent of the phenomenon of false confessions is not a simple matter, since positive innocence can be proven in relatively few cases, for example, when a DNA test proves that the suspect did not commit the crime to which he has confessed.[133]

In order to disqualify an interrogation method, it must be shown that it tends to yield unreliable confessions.[134] According to Grano, those who speak of the danger of false confessions express a willingness to sacrifice numerous reliable confessions in order to prevent unreliable ones that are given in an attempt to cover up for another

[126] Penney, *supra* note 57, at 322; White, *supra* note 77, at 111-12.

[127] Magid, *supra* note 36, at 1178, 1187.

[128] Magid, *supra* note 14, at 914-15.

[129] Ofshe & Leo, *supra* note 8, at 983; White, *supra* note 77, at 108.

[130] Magid, *supra* note 36, at 1190.

[131] Caplan, *supra* note 2, at 1457.

[132] Magid, *supra* note 36, at 1191.

[133] *Id.* at 1195-96.

[134] GRANO, *supra* note 43, at 30-31.

person or due to the weakness of the suspect.[135] In Grano's opinion, a position supporting the inadmissibility of confessions cannot be defended unless it demonstrates a tangible danger that the innocent will falsely confess.[136] Grano posits that there is no significant danger that an innocent person will be convicted on the basis of a confession.[137] If we exclude custodial confessions due to their unreliability, the same logic should also lead to the exclusion of eyewitness testimony because of the danger of an error in identification.[138] However, Grano argues that the innocent should not be protected against conviction at all costs.[139]

Although it seems counterintuitive to think that an innocent person would confess to a crime that he did not commit,[140] empirically, it is impossible to deny that innocent persons do confess, even if the dimensions of this phenomenon are disputed.[141] However, apart from the question of to what extent it is possible to empirically prove the danger of false confessions, it can be logically proven. And this is the case even if we accept Grano's assumptions (which seem to me to be correct) that a custodial interrogation does not engender the same type of coercion as that which allows a defendant to avail himself of a defense of duress[142] and that, even if it is unpleasant, such an interrogation is not cruel and inhumane.[143] Grano argues that, although it is hard to deny a causal relation between the pressure of detention and the confession, in the sense of "but for causation," this does not mean that custodial interrogation is improper.[144] However, if it is the coercive atmosphere of detention that yields the confession, then, from the confession itself, it is impossible to distinguish between guilty and innocent suspects.

---

[135] *Id.* at 54.

[136] *Id.* at 55.

[137] *Id.* at 54-55.

[138] *Id.*

[139] *Id.* at 55.

[140] White, *supra* note 77, at 108.

[141] GUDJONSON, *supra* note 5, at 36-37; Sangero, *supra* note 5.

[142] GRANO, *supra* note 43, at 67-70.

[143] *Id.* at 55.

[144] *Id.* at 74-75.

In the absence of corroborating evidence, there is no true possibility to distinguish between the guilty and the innocent.[145] Interrogators could view the suspect's distress as evidence of his guilt.[146] The tension and anxiety felt by an innocent person in a custodial setting, and from the interrogation itself, could be interpreted as the attempt of a guilty person to fool the interrogators.[147] The internal resistance of an innocent person against confessing to a crime that he did not commit is not necessarily stronger than the survival instinct of a guilty person who is trying to conceal his guilt.

Mark Godsey has expressed the view that the proper test for excluding a confession pursuant to the Fifth Amendment of the U.S. Constitution, both from a textual perspective, as well the historical development of legislation and the privilege against self-incrimination, should be based on a standard of compulsion rather than voluntariness.[148] According to this view, the Court has confused two distinct doctrines: the privilege against self-incrimination (*Nemo tenetur*), which developed in response to harsh interrogation tactics, and the doctrine of voluntariness, which was a rule of evidence designed to exclude unreliable confessions, regardless of the interrogation practices employed to extract them.[149] Thus, for example, the promise of a reward, such as leniency in punishment, raises a significant concern for the reliability of the confession, although it does not violate any notion of basic human dignity.[150] Even if we accept this analysis, there is nothing to prevent us from reaching the same conclusion as the *Miranda* Court, whereby the very conduct of a custodial interrogation engenders coercion[151] and that, coercion, by its very nature, raises a concern for the reliability of the confession.

Grano assumes that, as a rule, suspects are guilty. In his words, "[p]utting aside the interrogation of mere witnesses, police interrogation is generally intended to

[145] Sangero, *supra* note 5; Ofshe & Leo, *supra* note 8, at 991; Amar & Lettow, *supra* note 123, at 858-59, 922.

[146] Ofshe & Leo, *supra* note 8, at 1014.

[147] Danny Ciraco, *Reverse Engineering*, 11 W.R.L.S.I. 41, 51-52 (2001); GUDJONSON, *supra* note 5, at 26.

[148] Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination,* 93 CALIF. L. REV. 465, 471-72 (2005).

[149] *Id.* at 478.

[150] *Id.* at 484.

[151] Miranda v. Arizona, 384 U.S. 436, 535-36 (1966).

obtain from guilty suspects self-incriminating statements and clues to additional evidence or other suspects."[152] This conception of guilt, which does not conform to the fact that most suspects are not even charged with a crime,[153] is dangerous. When interrogators assume guilt and believe that the suspect is concealing the truth from them, they might focus their efforts on undermining the suspect's will, instead of on gathering evidence that could establish or diminish the suspicion against him.

It is undisputed that, with a certain degree of coercion, an innocent person would be just as willing to admit guilt as an offender.[154] Detention constitutes an improper application of pressure that, to some extent, is the equivalent of torture.[155] The decisive factor in excluding a custodial confession is that detention, by its very nature, does not serve to advance the investigation, but rather, the advancement of the investigation is facilitated by undermining the suspect's will. This is what distinguishes between detention and other investigative techniques, such as eavesdropping or bodily searches, which are implemented in order to ascertain the truth. Detention for the purpose of exerting pressure cannot serve as a reliable tool for screening out the innocent from among the guilty. It tests a person's ability to endure suffering and not the reliability of the statements made by detained suspects. It is liable to undermine the resistance of the weak, whereas it fails to break the willpower of stronger individuals.

Some scholars indeed warn that a sweeping prohibition against the admissibility of police confessions would actually lead to increased pressure being exerted on suspects, for when interrogators have nothing to lose – from an evidentiary perspective – they would employ improper measures in order to uncover other evidence through the suspect, such as witness testimony and physical evidence.[156] And, indeed, in Germany, during the Middle Ages, interrogators also used torture in

---

[152] GRANO, *supra* note 43, at 82.

[153] Regarding statistics for the United States see *Equal Justice in American Criminal Procedure*, in YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 36 (1980).

[154] JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 156-57 (1974); GUDJONSON, *supra* note 5, at 34.

[155] Stanislaw Frankowski & Henry Luepke, *Pre-trial Detention in the U.S.*, in FRANKOWSKI & SHELTON, *supra* note 29, at 110 (comparing harsh conditions of detention to torture).

[156] George Thomas III, *The End of The Road for* Miranda v. Arizona*? On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 38 (2000).

order to obtain physical evidence that was essential for meeting the heavy burden to prove the guilt of the suspect.[157] Nevertheless, this concern may be overcome by means of an exclusionary rule. At any rate, it cannot serve as an independent argument against the inadmissibility of a custodial confession.

B. Protecting the Autonomy of the Individual

The Supreme Court has held that the reliability and voluntariness of the confession are two separate issues.[158] In several judgments – *Escobedo*[159] and *Miranda* are the most famous – the Court has drawn a link between the voluntariness doctrine and the privilege against self-incrimination.[160] According to this rationale, the voluntariness requirement is designed to protect the suspect's right to reach an autonomous decision.[161] It is founded on an independent right to silence that operates regardless of abusive treatment or a fear concerning the unreliability of the confession.[162] The right to remain silent places a severe constraint on the state's ability to exert its power over the individual and protects the individual from an invasion of his privacy during the investigation. The individual, as an entity separate from the state, has the right to maintain his own personal, independent space.[163] The right of silence respects the autonomy of the suspect, who is entitled to decide to what extent he wishes to cooperate with his accusers and what is the best way to defend himself as a party to a criminal proceeding.[164]

Some scholars claim that on its own – independent of concerns for the reliability of confessions and the need to restrict unfair investigative practices – the rationale of protecting the autonomy of the individual does not justify the privilege

[157] LANGBEIN, *supra* note 154.

[158] Jackson v. Denno, 378 U.S. 368, 384-86 (1964).

[159] Escobedo v. Illinois, 378 U.S. 478 (1964).

[160] Penney, *supra* note 57, at 330.

[161] *Id.*

[162] *Id.* At 331; Godsey, *supra* note 148, at 501; Schulhofer, *supra* note 57, at 444-45.

[163] Leonard G. Ratner, *Consequences of Exercising the Privilege Against Self Incrimination*, 24 U.CHI. L. REV. 472, 488-89 (1957).

[164] Gregory W. O'Reilly, *England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice*, 55 J. CRIM. L. & CRIMINOLOGY 402, 422 (1994).

against self-incrimination or an exclusionary confessions rule.[165] However, there are sound arguments for preserving the individual's autonomy not to answer questions against his will.

The right to remain silent is designed to ensure humane treatment, which is reflected by the belief that suspects, both the innocent and the guilty alike, should not be exposed to intimidating, intensive, and invasive interrogations.[166] Thus, for example, the right to silence enables a suspect to terminate the interrogation after an hour of patiently explaining to interrogators that he is innocent. Without a right to silence, a suspect would be forced to submit to a continuous interrogation lasting hours and even days.[167] Abolition of the right to remain silent would leave a suspect, who must answer all questions posed to him during the interrogation, helpless against the power of the state.[168] The awareness of the suspect that he is not required to answer the questions of his interrogators and that he is guaranteed an impenetrable, autonomous personal space, preserves his dignity as a human being and his sense of self-worth, and slightly moderates the humiliation naturally associated with being interrogated as a suspect. It helps to prevent the authorities from acting oppressively, something that could stem from a sense of unlimited power. The right to remain silent makes it clear to law enforcement officials that their ability to exercise authority over the interrogee and to probe his thoughts is limited. This knowledge carries great significance, since, despite the fact that the individual enjoys a normative presumption of innocence at trial, in practice, no similar presumption exists in the interrogation room.[169] In fact, just the opposite is the case – police interrogators often treat the suspect as if he is guilty, rejecting as worthless any explanation of innocence that he offers.[170] However, the knowledge that a suspect may refuse to cooperate, causes interrogators to view him as a person with a will of his own, which must be respected, and not as an instrument under their control. Such a view helps to deter interrogators from acting improperly. Therefore, the right to silence serves to restrain the police,

[165] Penney, *supra* note 57, at 313, 374.

[166] SUSAN EASTON, THE RIGHT TO SILENCE 105 (1991).

[167] Thomas, *supra* note 68, at 1111.

[168] MARK BERGER, TAKING THE FIFTH, 40-41 (1980).

[169] Thomas, *supra* note 156, at 23.

[170] White, *supra* note 77, at 119-20.

preventing them from resorting to improper and unlawful measures.[171] Historical experience warns of the danger embodied in giving too much power to law enforcement officials. This danger also exists in modern times.[172]

IV. Detention for the Purpose of Applying Investigative Measures in a Custodial Setting

As already indicated, detention for the purpose of interrogation is not only necessary as a means for exerting pressure on the suspect to cooperate with his interrogators in the investigation of the offense attributed to him. The police sometimes need to detain a suspect in order to apply investigative measures that can only be conducted in a custodial setting. The main investigative measure of this type is to plant an undercover agent in the suspect's cell posing as a fellow detainee. There are those who believe that taking advantage of the detention facility in order to operate an undercover agent in this way is a legitimate investigative ploy that does not violate the suspect's privilege against self-incrimination.[173] A person has the right to remain silent, but this does not prevent the police from trying to obtain the suspect's confession through indirect means. The Supreme Court has maintained that the underlying rationale of the *Miranda* ruling is to prevent "…government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained manner."[174] However, the element of coercion that exists in a normal interrogation is absent when the suspect talks to a cellmate.[175] Ploys designed to lull the suspect into a false sense of security do not contradict the desire to dispel the coercive atmosphere of the interrogation room.[176] After all, even when a person

[171] Re Gault, 387 U.S. 1, 47 (1967) (stating that one of the purposes of the privilege against self incrimination "is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.").

[172] *See id.*

[173] Illinois v. Perkins, 496 U.S. 292, 296 (1990).

[174] Arizona v. Mauro, 481 U.S. 520, 529-30 (1987).

[175] *Perkins*, 496 U.S. at 296.

[176] *Id.* at 297.

tells his story to a fellow prisoner – who is not an undercover agent – this same prisoner could reveal his secret to the authorities in exchange for a reward.[177] There is no need to inform the suspect of his rights when he is unaware that he is speaking to law enforcement agent.[178] In fact, it is obvious that an undercover agent cannot inform the suspect of his rights, for this would reveal his identity and defeat the entire purpose of the covert operation.[179] On the other hand, detention provides the police with control over the suspect's environment.[180] A detainee does not choose his cellmates. He is unable to leave and he cannot ask them to leave the cell.[181] A coercive atmosphere, although of a different nature, also exists when a detainee speaks with an undercover agent. The anxiety engendered by the custodial setting often leads the suspect to seek comfort and relief by speaking to those nearby.[182] In contrast to a real detainee, an undercover agent trained in psychological techniques could manipulate the suspect into confessing.[183] Such techniques could, for example, lead the suspect to invent a criminal past in order to meet the expectations of his cellmate.[184] An investigative ruse that exploits the shaky emotional state of the suspect for the purpose of getting him to confess to his acts is both unfair and unreliable.

Nevertheless, the argument that custodial interrogation constitutes an improper pressure is less convincing when confinement is necessary for the purpose of investigative measures that can only be conducted in a custodial setting, and not merely for the sake of applying pressure. However, since such measures may be employed for any type of offense, regardless of its severity, circumstances, or the degree of public interest in its detection, this could lead to a "slippery slope," turning

---

[177] As indeed was the case in *Perkins*, 496 U.S. 292.

[178] *Id.* at 294.

[179] Kathryn Young-sook Kim, Note, *Self-Incrimination, Compulsion and the Undercover Agent* – Illinois v. Perkins*, 110 S. Ct. 2394 (1990)*, 66 WASH. L. REV. 605, 620-21 (1991).

[180] *Id.* at 615; Lisa P. Taylor, Illinois v. Perkins*: Balancing the Need for Effective Law Enforcement Against a Suspect's Constitutional Rights,* 1991 WIS. L. REV. 989, 1033 (1991).

[181] Kim, *supra* note 179, at 614.

[182] *Id.* at 615; *Perkins*, 496 U.S. at 308 (Marshall J., dissenting); Taylor, *supra* note 180, at 1033.

[183] Kim, *supra* note 179, at 616.

[184] *Id.* at 619. Thus, for instance, on the facts of *Perkins*, it can be said that the police exploited the suspect's desire to escape and his fear of being excluded from the escape plan if he were to change the story of murder that he had previously told to his cellmate: Taylor, *supra* note 180, at 1018.

pretrial detention into a norm that takes on the outward appearance of punishment. Furthermore, detention for the purpose of exerting pressure in a custodial setting should still be rejected in principle, considering the role of detention and the procedural safeguards that a suspect should enjoy at the pretrial hearing where the state asks the court to deprive him of his liberty. In the criminal process, a person is usually put behind bars only as a result of a criminal conviction and a sentence of imprisonment. Therefore, detention is incompatible with the duty to treat a defendant as innocent until proven guilty.[185] Indeed, it may be acknowledged that, under certain circumstances, it is legitimate to jail someone prior to a conviction; for instance, when the suspect poses a clear danger to public safety or to the normal course of investigative and trial proceedings. However, detention for the purpose of interrogation is not intended to prevent an improper future act by the suspect. Such confinement violates the presumption of innocence to an unnecessary extent. Given the considerable harm caused to an individual by detention, it is necessary to exhaust other investigative methods that do not entail a deprivation of freedom and do not create an outward appearance of punishment.

Moreover, when the state requests detention for the purpose of advancing the investigation, the suspect has no control over the decision to detain him by proposing alternatives that would dispel the prima facie risk that he poses, as he does when it is argued that his detention is necessary in order to prevent an obstruction of justice or the commission of dangerous offenses in the future.[186] In effect, the suspect is unable to present an effective argument against these grounds for detention. Consequently, it is impossible to ensure minimal due process when the state wishes to detain the suspect for the purpose of advancing the investigation.

As already indicated, detention for the purpose of interrogation could also enable the seizure of physical findings in the detention facility for the purpose of running a DNA test or uncovering evidence. In some cases (such as when there is a reasonable fear that the suspect has ingested narcotics), a person may be detained on the ground of obstruction of justice. In other cases, statutory provisions must be

[185] Daniel Kiselbach, *Pre-Trial Criminal Procedure: Preventive Detention and the Presumption of Innocence*, 31 CRIM. L.Q. 168, 178 (1989).

*LL.B. (1992), Ph. D. (2001), Hebrew University of Jerusalem. Lecturer, Ramat Gan Law School, Israel. My thanks are due to Boaz Sangero and Neil Zwail for their helpful comments.

[186] See the procedural safeguards that are provided by The Bail Reform Act of 1984, 18 U.S.C. 3142(f).

enacted granting the power to compel a suspect to provide a DNA sample or to allow an invasive body search. When a suspect unlawfully objects to a search or an examination, only a brief confinement is necessary for this purpose, provided that the law permits the search or examination to be conducted through the exercise of reasonable force.

V. Conclusion

An unavoidable tension exists between the desire to protect the autonomy of the individual and the desire to advance the investigation by obtaining evidence through the interrogation of a suspect.[187]

Detention is not a legitimate investigative measure.[188] It increases the danger that false confessions will be elicited from suspects who wish to be released, thus harming innocent persons. It also increases the danger that involuntary confessions will be obtained from guilty persons who are forced to waive their right to defend themselves against the charges. Detaining a suspect merely for the purpose of advancing the investigation cannot be justified if there is no genuine, substantiated fear that he will obstruct justice or endanger public safety. However, officials should not be forbidden from taking the statement of a suspect who has been justifiably detained, notwithstanding the need to protect his rights. A suspect who wishes to tell his story should be given the opportunity to do so and clear himself of suspicion. Under such circumstances, the physical coercion that might undermine the suspect's will is not the objective but only a consequence of detention. Nevertheless, since a suspect usually confesses to the police only after his instinct for survival has collapsed, in these circumstances – from the confession itself – it is impossible to differentiate between a false and a reliable confession.

The *Miranda* Court vacillated on this matter: it assumed that a custodial interrogation is designed to undermine the will of the suspect and that this is improper. This assumption seemingly requires the conclusion that custodial interrogation is improper and that, unfortunately, when it is unavoidable (such as

[187] Dripps, *supra* note 51, at 700-01.

[188] Van Kessel,, *supra* note 4, at 85.

when there are grounds for detaining the suspect), it should not be given any weight. However, the *Miranda* Court upheld the possibility to conduct custodial interrogations by establishing safeguards that supposedly dispel the inherent coercion that it entails. As I have tried to show, there is no true possibility to dispel the pressure of a custodial interrogation and, consequently, to eliminate the danger that the will of the suspect will be undermined.

In the past, it was assumed that a confession could not be obtained from a suspect without the use of torture.[189] Today, it is assumed that, without detention, it is impossible to induce a suspect to cooperate with his interrogators and to provide a version (preferably one that would confirm the suspicions of the interrogator). Nowadays, detention replaces the torture that was employed in the past as a means to obtain a confession. However, the road to the truth is not traveled by breaking the interrogee's will. Nor should it be.

[189] Thus, up until the eighteenth century, torture was an accepted means in many countries for obtaining a confession: LANGBEIN, *supra* note 154, at 167.