Fifth Amendment Miranda Waiver and Fourteenth Amendment Voluntariness Doctrine in Cases of Mentally Retarded and Mentally Ill Criminal Defendants

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FIFTH AMENDMENT MIRANDA WAIVER AND FOURTEENTH AMENDMENT VOLUNTARINESS DOCTRINE IN CASES OF MENTALLY RETARDED AND MENTALLY ILL CRIMINAL DEFENDANTS

I. INTRODUCTION

In the United States, all citizens are afforded protection against compulsory self-incrimination under the Fifth Amendment of the United States Constitution and under the Voluntariness Doctrine of the Fourteenth Amendment. In situations of custodial interrogation suspects must be given Miranda warnings before questioning begins. Following the warnings, a suspect may choose to waive his rights and proceed with the interrogation. The state has the burden of showing that the individual knowingly and intelligently waived his rights. If

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1 U.S. Const. amend. X. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"; U.S. Const. amend. XIV. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"; see also Miranda v. Arizona, 384 U.S. 436, 439 (1966) (concluding persons in situations of custodial interrogation are afforded protections under the Fifth Amendment).

2 See Miranda, 384 U.S. at 439 (recognizing that procedural safeguards must be in place to secure the privilege); see also Rhode Island v. Innis, 446 U.S. 291, 300 (1980). "Interrogation," as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. Interrogation as defined by the Miranda opinion includes not only the express words used by the police but also any actions that the police knows will encourage an incriminating response from the suspect. Id. at 301.

3 Miranda, 384 U.S. at 444; see also Oregon v. Bradshaw, 462 U.S. 1039, 1043-44 (1983). When an accused has invoked his right to counsel a subsequent waiver is effective only if the accused initiates conversation with the police. Id. Evidence that the suspect answered subsequent police-initiated questions does not amount to a valid waiver. Id. With regard to subsequent interrogations, the burden is on the prosecution to show that the defendant made a valid waiver of his right to counsel. Id. at 1044.

4 Miranda, 384 U.S. at 444-45.
this burden is not met, any statements made by the individual will be excluded from the court proceedings.\(^5\)

Where the circumstances are not inherently coercive, citizens are protected under the Voluntariness Doctrine of the Fourteenth Amendment.\(^6\) In this case, statements will be admissible only if the state can prove that the statements were made free from police coercion and that the suspect's will was not overborne.\(^7\) Some of the factors to consider in making this determination are the duration of the interrogation, police conduct, and the defendant's state of mind.\(^8\)

Assessing the nature and effect of an interrogation is further complicated in cases involving individuals who are mentally retarded

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\(^5\) *Id.*; see also Edwards v. Arizona, 451 U.S. 477, 482 (1981) (*quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). "Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.*

\(^6\) U.S. CONST. amend. XIV.

\(^7\) Haynes v. State of Washington, 373 U.S. 503, 513 (1963). A confession obtained through the use of threats violates due process. *Id.* The question is whether the defendant's will was overborne at the time of his confession. *Id.* "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." *Id.* (*quoting* Wilson v. United States, 162 U.S. 613, 623 (1896)); see Commonwealth v. Garcia, 379 Mass. 422, 428, 399 N.E.2d 460, 465 (1980) (holding voluntariness is determined by an examination of the totality of circumstances).

\(^8\) See Withrow v. Williams, 507 U.S. 680, 689 (1993) (reiterating that totality of circumstances analysis is used to decide whether confession violates due process); Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (*quoting* Stein v. People of State of New York, 346 U.S. 156, 185 (1953)). "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." *Id.*
or mentally ill. In order to ensure that all citizens are afforded the same protection, courts must consider and determine whether such individuals are able to make truly voluntary statements and whether they are able to understand Miranda warnings to the extent that they can make a valid waiver. Since all cases will inevitably involve different circumstances this analysis must be done on a case by case basis.

The underlying premise for admissibility of statements, whether made in a custodial setting or under any other circumstances, is that the defendant understands his constitutional rights and the ramifications of waiving those rights in favor of making an admission. These steps require a certain level of cognitive sophistication. In most circumstances, an adult's ability to perform these mental tasks is taken for granted. In cases involving mentally retarded or mentally ill defendants, however, one cannot assume that the defendant knowingly waived his rights. Although it would be prejudicial to assume that these deficiencies automatically preclude the defendant's ability to make voluntary statements, a standard practice must be in place to provide guidance on how to proceed with an interrogation of such a defendant.

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9 See Commonwealth v. Williams, 388 Mass. 846, 852, 448 N.E.2d 1114, 1119 (1983) (acknowledging that special considerations should be afforded to mentally retarded defendants).

10 Id.

11 Id. at 856.

12 See generally Miranda v. Arizona, 384 U.S. 436 (1966) (warning that safeguards must be in place to assure that defendant's rights are preserved).

13 See id. at 469 (recognizing that intelligence is relevant to issue of whether defendant understands his rights).

14 Commonwealth v. Vazquez, 387 Mass. 96, 100, 438 N.E.2d 856, 859 (1982) (quoting Gibbs v. Warden of the Ga. State Penitentiary, 450 F.Supp. 242, 244 (Ga. 1978)). "[T]here is no per se rule holding inadmissible [statements] given by individuals suffering severe psychotic conditions. Rather, a [statement] is inadmissible if it would not have been obtained but for the effects of the confessor's psychosis." Id.
This article examines the protections afforded all citizens under the Fifth and Fourteenth Amendments, and then examines how these protections can be extended to criminal defendants who are either mentally retarded or mentally ill. Recognizing that such afflictions do not, per se, prevent a defendant from making a voluntary and admissible confession, this article cautions that safeguards should be in place to ensure that no one's constitutionally protected rights are compromised.

Focusing on Massachusetts law, this paper considers the role of the Humane Practice Doctrine in the protection of defendants' due process rights. This two step process requires the judge to make an initial determination of voluntariness and then instruct the jury to do the same. By adopting this procedure, courts in Massachusetts have demonstrated an appreciation for the seriousness of this issue in the judicial process.

II. FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCrimination

The Fifth Amendment to the United States Constitution reads, in relevant part, that, "[n]o person...shall be compelled in any criminal case to be a witness against himself" and that, "the accused shall...have the assistance of counsel." In Miranda v. Arizona, the United States Supreme Court articulated a standard procedure for law enforcement officers to follow before interrogating a suspect in custody. Recognizing the fundamental right against self incrimina-

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16 U.S. CONST. amend. V.
18 Id. at 467-68. The Court held that informing a defendant of his right to remain silent is a prerequisite to interrogation whether or not a defendant is already familiar with that right. Id. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation." Id. at 468-69.
tion, the Court held that any statements made by a defendant pursuant to a custodial interrogation, whether inculpatory or exculpatory, are not admissible unless the prosecution can show that steps were taken to protect the defendant’s Fifth Amendment privilege. The Court in *Miranda* distinguished custodial interrogations from other forms of questioning and investigation because it recognized the inherently coercive nature of such situations. In attempting to define the scope of its holding, the Court defined custodial interrogations as, “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”

In formulating a standard that law enforcement officers must follow before initiating questioning, the Court enumerated warnings that must be given to ensure that the privilege against self incrimination is protected. Specifically, the Court held that a suspect must be warned of his right to remain silent, that any statement he makes may be used against him, and that he has the right to the presence of counsel. If the suspect cannot afford to hire his own attorney one will be appointed for him.

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19 See *id.* at 444 (concluding statements of defendant during incommunicado interrogation without warning of constitutional rights violates Fifth Amendment privilege); see also Noel Moran, *Confessions Compelled by Mental Illness: What’s an Insane Person to do?* Colorado v. Connelly, 56 U. CIN. L. REV. 1049, 1064-65 (1988) (stating *Miranda* draws bright line rule regarding admissibility of statements).

20 See *Miranda*, 384 U.S. at 446-48; see also Moran v. Burbine, 475 U.S. 412, 426 (1986). The Court confirmed that custodial interrogations are inherently coercive and that, as a result, there is a substantial risk that law enforcement will abuse its authority to conduct a criminal investigation by infringing upon a suspect’s constitutional right. *Id.*

21 *Miranda*, 384 U.S. at 444.

22 *Id.*

23 *Id.; see Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (emphasizing that no adverse inference can be drawn from exercise of right to remain silent).

24 *Miranda*, 384 U.S. at 444.
Furthermore, these warnings must be given in a clear manner and are an absolute prerequisite to interrogation in all cases.\(^{25}\) It is irrelevant whether the suspect was already aware of his rights or whether the officer knew that the suspect was familiar with his rights.\(^{26}\) Any statements made by the defendant without the proper *Miranda* warnings will be inadmissible in subsequent court proceedings.\(^{27}\)

In limiting the scope of the decision in *Miranda*, the United States Supreme Court has held that while statements made in violation of *Miranda* may not be used in the prosecutor’s case-in-chief, such statements are admissible for purposes of impeachment.\(^{28}\) The only prerequisite for admissibility for this purpose is that the statement is trustworthy.\(^{29}\)

Once the investigator properly administers *Miranda* warnings, the defendant may waive his rights and proceed to make a valid and admissible statement.\(^{30}\) Given the nature of the custodial interrogation, however, the prosecution has the heavy burden of showing, beyond a reasonable doubt, that the waiver was in fact valid.\(^{31}\) A defendant

\(^{25}\) Id. at 467-68.

\(^{26}\) Id. at 468.

\(^{27}\) Id. at 444.

\(^{28}\) Harris v. New York, 401 U.S. 222, 224 (1972). “It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.” Id.; see also Mincey v. Arizona, 437 U.S. 385, 397-98(1978) (stating that statements in violation of *Miranda* are admissible for impeachment if trustworthy).

\(^{29}\) See Oregon v. Hass, 420 U.S. 714, 720-24 (1975) (holding that *Miranda* violative statements are admissible for impeachment as long as they are trustworthy).

\(^{30}\) See *Miranda*, 384 U.S. at 444 (holding that defendant may waive rights after proper warnings have been given).

\(^{31}\) Id. at 475. Inherent to custodial interrogations is an atmosphere of secrecy susceptible to unrestrained coercive police tactics that must be controlled. Id. at 448. The Court has recognized that the suspect in these situations is subject to psychological influences not easily detectable. Id. For this reason, the Court stresses the importance of procedural safeguards in protecting
must knowingly, voluntarily, and intelligently waive his rights.\textsuperscript{32} An explicit statement of waiver is certainly a clear indication of the defendant's intent, but such precise language is not required.\textsuperscript{33} It is sufficient to show that the defendant voluntarily relinquished his rights based on the totality of the circumstances.\textsuperscript{34}

A waiver cannot be made until the proper warnings have been given.\textsuperscript{35} The arresting officer must give the warnings even if the suspect attempts to waive his rights prior to hearing the warnings.\textsuperscript{36} An example of a valid waiver is an express statement made by the defendant indicating his wish to waive his rights coupled with an expression of understanding those rights.\textsuperscript{37} Silence does not constitute a valid


\textsuperscript{32} \textit{Edwards}, 420 Mass. at 670; \textit{see Moran v. Burbine}, 475 U.S. 412, 421 (1986). A valid waiver has two distinct parts: it must be voluntary and free from coercion, and the waiver must be made with a full awareness of both the nature of the rights and the consequences attached to the act of waiving those rights. \textit{Id.; see also} Commonwealth v. Cameron, 385 Mass. 660, 664, 433 N.E.2d 878, 882 (1982) (stating that confessions are valid "only if the suspect actually understands the impact of each \textit{Miranda} warning"); Commonwealth v. Dustin, 373 Mass. 612, 616, 368 N.E.2d 1388, 1391 (1980) (holding that statements not in compliance with \textit{Miranda} must be excluded even if voluntary and reliable).

\textsuperscript{33} \textit{See North Carolina v. Butler}, 441 U.S. 369, 373 (1979). The issue of a valid waiver is not one of form but rather an inquiry into whether the defendant in fact knowingly and voluntarily waived his \textit{Miranda} rights. \textit{Id.}

\textsuperscript{34} \textit{Id.; see also} \textit{Edwards}, 420 Mass. at 677-73, 651 N.E.2d at 402 (looking at totality of circumstances to assess whether defendant exercised his free will and rational intellect).

\textsuperscript{35} \textit{See Miranda v. Arizona}, 384 U.S. 436, 467 (1966) (stating that warnings are essential to ensure defendant understands privilege against self-incrimination).

\textsuperscript{36} \textit{See id. at} 475-76 (holding that if a defendant makes statements prior to warnings this is not evidence of valid waiver).

\textsuperscript{37} \textit{See Moran}, 475 U.S. at 422-23. The Court concluded that once the prosecution establishes that the suspect waived his rights voluntarily, was aware
waiver, nor does the mere fact that a statement was ultimately obtained. Once the suspect makes a valid waiver he can choose to reinstate his rights at any time. For example, after initially answering some questions, a defendant may decide to invoke his right to remain silent. The law enforcement officer must then cease questioning immediately. Failure to do so will result in suppression of any subsequent statements.

III. THE FOURTEENTH AMENDMENT VOLUNTARINESS DOCTRINE

Confessions offered into evidence that were not elicited under circumstances of custodial interrogation are protected by the Four-
teenth Amendment Voluntariness Doctrine. As we have seen, the Fifth Amendment and *Miranda* warnings are relevant only in cases of custodial interrogation. This distinction is made primarily because the Court has recognized the inherently coercive nature of interrogations conducted while the suspect is in custody. Nonetheless, the Fourteenth Amendment requires the protection of due process rights even under less formal circumstances.

In *Brown v. Mississippi*, the United States Supreme Court held for the first time that the Due Process Clause of the Fourteenth Amendment prohibited states from using coerced confessions in an effort to obtain a conviction. In this case, three men were convicted of murder and sentenced to death based solely on their confessions. There was no other independent corroborating evidence to connect the three defendants to the crime. On the night of the murder, po-

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43 See Commonwealth v. Tavares, 385 Mass. 140, 145, 430 N.E.2d 1198, 1202 (1982) (citing Coyote v. United States, 380 F.2d 305, 309-10 (1967)) (emphasizing that *Miranda* requirements can be satisfied but confession not admissible because it was not voluntarily obtained).

44 See *Miranda*, 384 U.S. at 445 (recognizing that custodial interrogations put suspect at disadvantage due to police dominated environment).

45 See Commonwealth v. Garcia, 379 Mass 422, 428, 399 N.E.2d 460, 465 (stating that whether there was a waiver and whether it was voluntary are separate but related issues). Waiver relates to whether a defendant was given the appropriate *Miranda* warnings and whether he made a voluntary, knowing, and intelligent waiver. Id. Voluntariness relates to whether a defendant’s statements were made freely and voluntarily when considered in light of the totality of the circumstances. Id. Commonwealth v. Valcourt, 333 Mass. 706, 711, 133 N.E.2d 217, 221 (1956). Although *Miranda* warnings in a non-custodial interrogation are not necessary, it is a relevant inquiry and in fact may prove to be important evidence to show that a confession was voluntarily made. Id. Commonwealth v. Edwards, 420 Mass 666, 673, 651 N.E.2d 398, 403 (1995). Although waiver and voluntariness are separate issues both are determined in light of the totality of the circumstances and they share many relevant factors. Id.

46 297 U.S. 278 (1936).

47 Id.

48 Id. at 279-80.

49 Id.
lice officials went to the homes of the defendants, brought them to the crime scene and in front of a crowd of people hung them by their necks and beat them until they confessed to the killing.  

On a grant of certiorari, the Supreme Court rejected the state’s argument of immunity from compulsory protection against self-incrimination by pointing out that, while the state is free to operate according to its own policies and laws, such privileges are clearly limited. Specifically, the Court held that the freedom of states to follow their own dictates is limited by the requirement of due process of law. In this case, it was clear from the undisputed evidence that the defendants had been denied their right to due process. The Court warned that in cases involving a miscarriage of justice such as was evident here there would be no hesitation to overrule the state’s judgment.

The decision in Brown made the due process requirement of the Fourteenth Amendment applicable to the states. Recognizing the inherent injustice in coerced confessions, the Court clearly stated that

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50 Id. at 281.
52 Id. “It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.” Id. at 286.
53 Id.
54 Id. at 287.
55 Id. at 278; Malloy v. Hogan, 378 U.S. 1, 7 (1964). The Court held that, [T]he constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was ‘free and voluntary; that is, [it] 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 influences.’ Id.; Id. at 7 (citing Lisenba v. California, 314 U.S. 219, 241(1942)) (marking shift to federal standard in state cases by focusing on defendant’s free choice to admit, deny, or refuse to answer).
such practices would not be tolerated.\textsuperscript{56} Almost three decades later the Court in \textit{Malloy v. Hogan}\textsuperscript{57} articulated a standard for determining admissibility of confessions in criminal cases.\textsuperscript{58} Returning to the standard set forth in \textit{Bram v. United States},\textsuperscript{59} the Court reiterated the need to assess whether the confession was made freely and voluntarily.\textsuperscript{60} In other words, in order for a confession to be admissible it must have been obtained free from threats, violence, or other improper influences.\textsuperscript{61} The Court stressed that "the right of a person to remain silent unless he chooses to speak is the unfettered exercise of

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\textsuperscript{56} \textit{Brown}, 297 U.S. at 287 (\textit{quoting} Fisher v. State, 145 Miss. 116, 134, 110 So. 361, 365 (1926)). "The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and whenever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective." \textit{Id.}

\textsuperscript{57} 378 U.S. 1 (1964). After pleading guilty to gambling charges, petitioner was ordered to testify in connection with an investigation into gambling activity within the county. \textit{Id.} at 3. Petitioner refused to testify claiming his Fifth Amendment privilege. \textit{Id.} The court denied petitioner's writ of habeas corpus stating that the Fifth Amendment was not available in a state proceeding. \textit{Id.} On a writ of certiorari, the United States Supreme Court reversed the state court's ruling. \textit{Id.} at 4.

\textsuperscript{58} See \textit{id.} at 11 (holding that the same standard applies at both state and federal levels).

\textsuperscript{59} 168 U.S. 532 (1897). This case arose out of a murder committed on the American ship Herbert Fuller on a journey from Boston to South America. \textit{Id.} at 534. The first officer was accused and convicted of murdering the Captain of the ship during the voyage. \textit{Id.} The defendant appealed arguing that his confession was coerced. \textit{Id.} The Circuit Court for the District of Massachusetts reversed the judgment and set aside the verdict. \textit{Id.} at 569.

\textsuperscript{60} \textit{Malloy}, 378 U.S. at 7; see also \textit{Bram}, 168 U.S. at 549. The standard set forth in \textit{Bram} to determine the admissibility of statements focuses on whether the suspect would have remained silent but for the improper influences exerted on him by law enforcement. \textit{Id.}

\textsuperscript{61} \textit{Bram}, 168 U.S. at 549; \textit{Commonwealth v. Williams}, 388 Mass. 846, 856, 448 N.E.2d 1114, 1121 (1983). While there is no bright line rule for assessing voluntariness, the totality of the circumstances should be considered to ensure that the confession is not the product of inquisitorial activity that overwhelmed the defendant's free will. \textit{Id.}
his own free will, and [he should] suffer no penalty...for such silence."\(^{62}\)

The Voluntariness Doctrine was designed to maintain the integrity of our system of jurisprudence by refusing to tolerate coercion of any kind, whether physical or psychological.\(^{63}\) The government must prove a man’s guilt through independent evidence properly obtained, not through the manipulation of the defendant’s will.\(^{64}\) It is irrelevant to the principles of the Doctrine whether statements made freely are more or less likely to be true than statements made under duress.\(^{65}\) Rather, the focus must be on whether the prosecution has properly obtained evidence sufficient to prove guilt beyond a reasonable doubt.\(^{66}\)

In *Colorado v. Connelly*\(^ {67}\), the Court was faced with a case involving a defendant who attempted to suppress his confession not because of police misconduct but because of his own mental condition at the time of his confession.\(^ {68}\) The defendant in this case returned to Colorado from Boston to confess to the murder of a young girl.\(^ {69}\) Although the defendant admitted to a history of psychiatric hospitalizations, he appeared coherent and alert to the police investigators.\(^ {70}\) After giving a detailed description of the crime, he then accompanied police to the crime scene.\(^ {71}\) By his own admission, there were no issues at anytime of police coercion or misconduct.\(^ {72}\)

\(^{62}\) *Malloy*, 378 U.S. at 8.

\(^{63}\) Rogers *v. Richmond*, 365 U.S. 534, 535-36 (1961). Suspect in a murder investigation confessed to the crime after six hours of interrogation, and after police threatened to take his ailing wife into custody for questioning. *Id.*

\(^{64}\) *Id.* at 540-41.

\(^{65}\) *Id.*

\(^{66}\) *Id.*

\(^{67}\) 479 U.S. 157 (1986).

\(^{68}\) *Id.*

\(^{69}\) *Id.* at 160.

\(^{70}\) *Id.*

\(^{71}\) *Id.*

Relying on the standard set forth in *Malloy v. Hogan*, the United States Supreme Court concluded that the defendant's statements were made based on his own free will and, therefore, reversed the judgment of the Colorado Supreme Court excluding the statements.\(^73\) In defending its holding, the United States Supreme Court ruled that police misconduct is a necessary ingredient to the finding of an involuntary confession.\(^74\) Addressing the issue of a defendant's state of mind, the Court acknowledged that it is a relevant factor but that, standing alone, it will never warrant a finding of due process violation.\(^75\) Since the purpose of the Due Process Clause is to prevent the unfair use of evidence rather than to safeguard against admissibility of false evidence, the Court concluded that inquiries into a defendant's state of mind are beyond the scope of the United States Constitution and are better left to the judgment of state law makers.\(^76\)

IV. THE HUMANE PRACTICE DOCTRINE

Understanding the complexity and fundamental importance of the Voluntariness Doctrine, courts in Massachusetts have established a two step process to ensure that defendant's due process rights are duly protected.\(^77\) Under the Humane Practice Doctrine, when the

\(^73\) *Id.* at 170.
\(^74\) *Id.* at 164; *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

*Id.*

\(^75\) Connelly, 479 U.S. at 164.
\(^76\) *Id.* at 167; see *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (warning that even if extrinsic evidence shows confessions are true they will be inadmissible if obtained involuntarily).

prosecution attempts to admit a confession into evidence the presiding justice must make an initial determination of voluntariness in the absence of the jury.\textsuperscript{78}

If the judge rules the statements were voluntarily made they will be properly admitted into evidence.\textsuperscript{79} The judge, however, must instruct the jury that it is up to them to independently consider the issue of voluntariness.\textsuperscript{80} The jury must not be told of the judge's preliminary determination of voluntariness.\textsuperscript{81} If, in light of all the evidence, the jury finds that the statements were a product of coercion or undue influence, the jury must disregard the statements in reaching a verdict.\textsuperscript{82}

\textsuperscript{78} Id. at 432. In Garcia, defendant admitted killing the victim but claimed self-defense. \textit{Id.} at 424. He appealed his conviction, arguing, among other things, that the judge erroneously instructed the jury on the burden of proof regarding voluntariness. \textit{Id.} The Supreme Judicial Court of Massachusetts affirmed the conviction. \textit{Id.}

\textsuperscript{79} See Sims v. Georgia, 385 U.S. 538, 544 (1967) (warning that judge's preliminary determination of voluntariness "must appear from the record with unmistakable clarity").

\textsuperscript{80} Commonwealth v. Chung, 378 Mass. 451, 457, 392 N.E.2d 1015, 1019 (1979). "Should the judge admit the confession, and if credible evidence of insanity at the time of the confession is presented to the jury, our practice requires jury reconsideration as to the question of the defendant's rationality, likewise 'as part of the issue of voluntariness.'" \textit{Id.;} Commonwealth v. Tavares, 385 Mass. 140, 152, 430 N.E.2d 1198, 1206 (1982). The court held that when voluntariness is a live issue the judge must instruct the jury that the Commonwealth has the burden of proving beyond a reasonable doubt that the statement was made voluntarily. \textit{Id.} If the Commonwealth does not meet its burden of proof, the jury must disregard the statement. \textit{Id.}

\textsuperscript{81} Tavares, 385 Mass. at 149-53, 430 N.E.2d at 1204-06.

\textsuperscript{82} Chung, 378 Mass. at 458, 392 N.E.2d at 1020; Commonwealth v. Johnson, 373 Mass. 21, 24, 364 N.E.2d 1211, 1213-14 (1977). "[U]nder our practice the voluntariness of a confession is to be determined by the judge in the first instance. If he rules that a confession is voluntary, he submits the same question to the jury, instructing them not to consider the confession if they find it
It is important to note that although the judicial finding is required under federal law, the subsequent jury instruction is not. In Massachusetts, however, this two step process known as the Humane Practice Doctrine is well established. Whenever the issue of voluntariness is a live issue in the case the judge is bound to instruct the jury of their duty to assess the voluntariness of the defendant’s statements. The courts in Massachusetts go on to say that, while the Humane Practice Doctrine is only mandatory in cases involving police interrogation, the preferred practice is to follow the same standard in cases involving statements made to private citizens.

V. ISSUES CONCERNING MENTALLY RETARDED AND MENTALLY ILL DEFENDANTS

The protections against self incrimination and involuntary confessions afforded by the Fifth and Fourteenth Amendments focus primarily on the role and actions of the interrogator. The Constitution has addressed the issue of protection from police coercion but little to be involuntary.” *Id.*; *Commonwealth v. Vazquez*, 387 Mass. 96, 99, 438 N.E.2d 856, 858 (1982) (holding that before statements made by defendant are admitted to jury, judge must find beyond reasonable doubt that statements were voluntary).

83 *Chung*, 378 Mass. at 456, 392 N.E.2d at 1019.
84 *Johnston*, 373 Mass. at 24, 364 N.E.2d at 1214.
attention has been given to the characteristics of the accused.\textsuperscript{87} Although courts acknowledge that these issues must be decided on a case by case basis focusing on the totality of the circumstances, almost no focus has been placed on the mental and intellectual capacity of the particular defendant at issue.\textsuperscript{88} This raises concerns because so much of what goes into deciding whether a valid waiver has been made or whether a confession is voluntary rests on the premise that the defendant understood his rights and the consequences of relinquishing those rights.\textsuperscript{89}

Before discussing what special considerations, if any, should be extended to people with mental retardation or mental illness, it is important to distinguish between these two conditions and consider the possible impact that such afflictions may have on the person's ability to interact with the criminal justice system.\textsuperscript{90}

The American Association of Mental Deficiency defines mental retardation as a significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior.\textsuperscript{91} One of the most objective ways of measuring mental retardation is by looking at the person's intelligence quotient, commonly known as the IQ score.\textsuperscript{92} With an average score of one hundred, the high end of mental retardation is set at seventy or two standard deviations from

\textsuperscript{87} See James W. Ellis, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414 (1985) (acknowledging that issues involving mentally retarded defendants have received little attention from courts).

\textsuperscript{88} Id. at 414-15.

\textsuperscript{89} Moran, supra note 19, at 1067 (recognizing that "a rational intellect inquiry requires examining the mental state of the defendant, and is, therefore, often difficult for courts to determine").

\textsuperscript{90} See Ellis, supra note 87, at 415 (recognizing that courts frequently ignore the difference between mental retardation and mental illness).

\textsuperscript{91} Ellis, supra note 87, at 445. "American courts have long recognized that confessions by mentally retarded persons are somewhat suspect, although they have not always been successful in articulating the reasons for their skepticism." Id.

\textsuperscript{92} Id. at 422.
the norm.\textsuperscript{93} There are four categories of mental retardation: mild, moderate, severe and profound.\textsuperscript{94} Eighty nine percent of all people categorized as mentally retarded fall into the mild category with an IQ score between fifty and seventy.\textsuperscript{95}

Some of the most common characteristics of people with mental retardation include limited communication skills, impaired memory, poor impulse control, and delayed moral development.\textsuperscript{96} In terms of their interaction with the criminal justice system there are some characteristics that seem especially relevant and worthy of consideration.\textsuperscript{97} Mentally retarded people often try to hide their cognitive limitations and have a strong desire to please authority figures.\textsuperscript{98} This may manifest itself by a reluctance to admit not knowing an answer when asked or offering an answer that will please or satisfy the interrogator.\textsuperscript{99}

The primary difference between mental retardation and mental illness is that mental retardation is a permanent condition that typically manifests itself by the time the person has turned eighteen.\textsuperscript{100} In addition, mental retardation is more easily quantified through tests such as the IQ score.\textsuperscript{101} Mental illness, however, is a complex psychological condition that is difficult to measure and is always changing in intensity.\textsuperscript{102}

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\textsuperscript{93} Id.
\textsuperscript{94} Id. at 423.
\textsuperscript{95} Id. at 428-29.
\textsuperscript{96} Ellis, \textit{supra} note 18, at 428-29.
\textsuperscript{97} See Suzanne Lustig, \textit{Searching for Equal Justice: Criminal Defendants with Mental Retardation}, \textit{New Jersey Lawyer}, July 1995, at 32. Defendants with mental retardation tend to display poor judgment because they do not understand the consequences of their actions. \textit{Id.} They also tend to be more prone to suggestibility and to mask their disability making it difficult to detect their limitations in some cases. \textit{Id.}
\textsuperscript{98} Ellis, \textit{supra} note 87, at 430-31.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 423.
\textsuperscript{101} Id. at 424.
\textsuperscript{102} Id.}
In recent years, courts have struggled with the issue of how to measure whether or not a defendant has the mental capacity to understand his rights and make voluntary statements. The courts have recognized that an analysis of the totality of the circumstances must include not only a review of the interrogation techniques used, but also the mental characteristics of the defendant. In fact, courts have acknowledged that special consideration must be extended in cases involving defendants with subnormal intelligence or mental capacity.

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If intelligent knowledge in the Miranda context means anything, it means the ability to understand the very words used in the warnings. It need not mean the ability to understand far-reaching legal and strategic effects of waiving one’s rights, or to appreciate how widely or deeply an interrogation may probe, or to withstand the influence of stress or fancy; but to waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail.

Id.

105 Cameron, 385 Mass. at 664, 433 N.E.2d at 882; see also Moran, supra note 19, at 1069 (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)). “Surely in the present state of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane.” Id.; Commonwealth v. Williams, 388 Mass.
The focus in cases involving mentally ill or mentally retarded defendants should not only be on whether the individual has the ability to understand what is being said to him, but also on his heightened vulnerability to otherwise acceptable police tactics.\textsuperscript{106} This is especially so in cases involving custodial interrogation where defendants might succumb to the pressure and intimidation inherent in the situation and offer a confession, not because they are guilty but because they wish to please their interrogators by giving what they perceive to be the "right" answer.\textsuperscript{107}

On the other hand, it is important to balance the analysis with an appreciation of the fact that mentally retarded or mentally ill suspects are not per se incapable of making a valid \textit{Miranda} waiver.\textsuperscript{108} In fact, courts have been quick to point out that mental impediments do not automatically render waivers invalid.\textsuperscript{109} Courts in Massachusetts have

846, 852, 448 N.E.2d 1114, 1119 (1983) (recognizing that techniques of custodial interrogation acceptable for adults of normal intelligence not appropriate for minors or people with mental impairments); Hourihan, \textit{supra} note 103, at 1503 (concluding that courts should take defendant's adaptive functioning into account rather than simply looking at IQ score).

\textsuperscript{106} United States v. Hull, 441 F.2d 308, 312 (1971) (finding that 34 year old man with mental age of eight or nine years was ill-equipped to handle pressures of police interrogation).

\textsuperscript{107} \textit{See id.} at 312 (noting the vulnerability of disabled persons in the pressured environment of custodial interrogations). \textit{See generally} Ellis, \textit{supra} note 87; Lustig, \textit{supra} note 97.


\textit{Id.}

pointed out that there is no *per se* rule disallowing statements solely because the speaker suffers from a mental condition. Such statements are inadmissible only if they would not have been made but for the defendant's impairment, or if the defendant is unable to understand the ramifications of his statement or the need for self-protection. However, under these circumstances, the prosecution bears the heavy burden of proving the voluntariness of the defendant's waiver.

The analysis for determining the voluntariness of a statement made by a mentally retarded defendant is similar to the *Miranda* waiver analysis. Again, since the issue of voluntariness has to do primarily with the ability to reason and understand consequences, courts have held that judges must take into consideration the defendant's mental condition. If the defendant introduces evidence indicating mental impairment at the time the statement was made the judge must consider whether the statement was the product of a rational intellect.

capable of effectively waiving rights and rendering knowing and voluntary confession).

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111 See Vazquez, 387 Mass. at 100, 438 N.E.2d at 859.

112 See Paszko, 391 Mass. at 175-76, 461 N.E.2d at 230.

113 See Commonwealth v. Edwards, 420 Mass. 666, 667, 651 N.E.2d 398, 401 (1995) (stating that test is essentially the same under both Fifth and Fourteenth Amendments although they are two separate and distinct inquiries).

114 See Vazquez, 387 Mass. at 99, 438 N.E.2d at 858; United States v. Hull, 441 F.2d 308, 312 (1971) "Mental or emotional instability, low intelligence and immaturity have been recognized as important factors in determining the voluntariness of confessions." *Id.*

115 Vazquez, 387 Mass. at 99, 438 N.E.2d at 859. The court determined that the defendant's statement was a product of his free will by relying on the
In 1986, the United States Supreme Court recognized that police conduct was not the sole variable for determining the voluntariness of a statement. Just as external conditions may have an impact on the analysis so too does the defendant's emotional state of mind. Although the Court focused primarily on cases of severe mental illness, the door was at least opened to the possibility that one's mental status was a legitimate concern for purposes of assessing voluntariness.

The appreciation for the impact of a defendant's mental condition on the ability to make a voluntary statement raises the question of how to determine whether the defendant does, in fact, suffer from any mental impediment. After all, before any thought may be given to what standard of practice is appropriate to ensure that rights are protected, one must first establish that cognitive functions are, in fact, limited.

Courts in Massachusetts have attempted to address this issue by holding that police officers can base their opinion on the defendant's external characteristics. Most importantly, police may consider whether the defendant made an express statement indicating his understanding of his rights, the fact that he has waived those rights, and his willingness to engage in conversation. This approach offers a

expert testimony of two psychiatrists. Id. Specifically, the court considered the fact that the defendant's statements followed chronological order, were coherent, and exculpatory. Id.


Id. at 162.

Id. at 165. The Court stated that, "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the defendant's mind can never conclude the due process inquiry." Id.

See Blackburn v. Alabama, 361 U.S. 199, 208 (1960) (recognizing that "facts such as youth and lack of education are more easily ascertained than the imbalance of a human mind").


Id.
concrete method of solving what is, in fact, a much more complex psychological and cognitive issue.

VI. CONCLUSION

A delicate balance must be struck between protecting all citizens from involuntarily making self incriminating statements while at the same time not allowing mental illness to serve as a shield against the consequences of a truly voluntary confession. In *Miranda*, the Court articulated a standard to ensure proper admissibility of confessions. The problem that the Court did not foresee, however, is that the standard is not easily applied in cases involving mentally deficient defendants. The ability to make a knowing and intelligent waiver of warnings such as the right to remain silent and the right to the presence of counsel presupposes a certain level of cognitive sophistication that is not always present.  

Courts are moving in the right direction in terms of acknowledging the importance of considering the defendant’s mental condition as part of the analysis for determining the voluntariness of a statement. Law enforcement officers should continue to follow the dictates of *Miranda* in cases of custodial interrogation with all defendants. If a defendant acknowledges his rights and expresses, either directly or indirectly, his wish to waive those rights, officers should be free to proceed with the interrogation. It is unreasonable to expect law enforcement officers to assess the psychological condition of the defendant beyond obvious signs and indicators.

Therefore, in cases where police coercion is not present, the burden should be on the defendant to raise the issue of mental incapacity in an effort to suppress incriminating statements. Furthermore, since we have seen that courts will not exclude statements simply because there is a showing of mental illness, the defendant must prove that his

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122 See Ellis, *supra* note 87, at 447 (stating the three main elements of a valid waiver are capacity, information, and voluntariness, each of which present particular problems when dealing with a mentally retarded defendant).
illness had a direct and significant impact on his ability to make a voluntary statement.  

Mental illness, unlike mental retardation, is a variable condition that changes in intensity and effect on one’s ability to function. Factors such as medication and counseling may also effect the acuteness of the condition. Therefore, when assessing the impact of the illness on the ability to make a voluntary confession the focus should be on the defendant’s state of mind at the time the statement was made. Because it may be difficult for an expert witness, unfamiliar with the defendant prior to trial, to make such an assessment based on subsequent evaluations extrinsic evidence would be very useful to show the circumstances at the time the confession was made. For instance, the court could examine whether the defendant was employed at the time, whether he lived independently, or any other factors which would shed light on the defendant’s overall ability to function in the community.

Clearly, law enforcement practices play a central role in the evaluation of whether a statement was made voluntarily by a mentally retarded defendant. The officer conducting the interrogation should pay careful attention to the extrinsic cues that the defendant is demonstrating in assessing whether he is capable of understanding Miranda warnings. Although it would be unrealistic to expect a law enforcement officer to make a clinical assessment about the suspect’s mental and cognitive abilities, if there is a suspicion of diminished capacities added care should be extended to ensure that the defendant’s rights are presented as clearly and concretely as possible.

Alisia St. Florian

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123 Moran, supra note 19, at 1070. "[O]nly those mental illnesses demonstrating a high probability that the confessor lacked the faculties necessary to make a reliable statement should result in suppression of the evidence." Id.

124 See id. at 1072-73 (stating that extrinsic evidence could provide independent reliability for the inherent untrustworthiness of an insane person’s confession).