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James E. Krier
Michigan School of Law, jkrier@umich.edu

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POLICE INTERROGATION AND CONFESSIONS

In the police interrogation room, where, until the second third of the century, police practices were unscrutinized and virtually unregulated, constitutional ideals collide with the grim realities of law enforcement. It is not easy to talk about the defendant's right to silence and his RIGHT TO COUNSEL when the defendant has confessed to a heinous crime—for example, the rape and murder of a small child as in BREWER V. WILLIAMS (1977) or the kidnapping, robbery, and murder of a cab driver, by a shotgun blast to the back of the head, as in RHODE ISLAND V. INNIS (1980)—and the confession seems quite credible. Thus, for many years few matters have split the Supreme Court, troubled the legal profession, and agitated the public as much as the confession cases.

Not surprisingly, the most famous confession case of all, MIRANDA V. ARIZONA (1966), is regarded as the high-water mark of the WARREN COURT's "DUE PROCESS revolution." Nor is it surprising that the decision became the prime target of those who attributed an increase of crime to the softness of judges. *Miranda*, which finally applied the RIGHT AGAINST SELF-INCRIMINATION to the informal proceedings in the interrogation room, emerged only after a long struggle, and increasing dissatisfaction, with the test for admitting confessions that preceded it—the "voluntariness" test based on the "totality of circumstances." *Miranda* can be understood only in light of the Court's prior efforts to deal with the intractable confession problem.

Until well into the eighteenth century, doctrines concerning confessions did not affect the admissibility of extrajudicial narrative statements of guilt offered as EVIDENCE, but dealt only with the conditions under which immediate conviction followed a confession as a plea of guilty. It was not until *The King v. Warickshall* (1783) that an English court clearly expressed the notion that confessions might be unworthy of credit because of the circumstances under which they were obtained. In that case the judges declared: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."

Because a separate rule against coerced confessions emerged in eighteenth-century English cases nearly a century after the right against self-incrimination had become established, JOHN H. WIGMORE, the great master of the law of evidence, concluded that the two rules had no connection. But Leonard W. Levy, the leading student of the origins of the right against self-incrimination, strongly disagrees. He maintains that "[t]he relationship between torture, *compulsory* self-incrimination, and *coerced* confessions was an historical fact as well as a physical and psychological one" and that "in the 16th and 17th centuries, the argument against the three, resulting in the rules that Wigmore said had no connection, overlapped" (Levy 1968, pp. 265, 288–289 n.102).

Levy points out that Baron Geoffrey Gilbert, in his *Law*

of Evidence, "written before 1726 though not published until thirty years later, stated that though the best evidence of guilt was a confession, 'this confession must be voluntary and without compulsion; for our Law in this differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation . . .' " (Levy 1968, p. 327). Baron Gilbert's phrasing, "our Law . . . will not force any Man to accuse himself," Levy says, "expressed the traditional English formulation of the right against self-incrimination, or rather against *compulsory* self-incrimination. The element of compulsion or involuntariness was always an essential ingredient of the right and, before the right existed, of protests against incriminating interrogations" (ibid., pp. 327–328).

Although Levy insists that this was a historical blunder, both in the United States and in England the confession rules and the right against self-incrimination were divorced and, with the one notable exception of *Bram v. United States* (1897), went their separate ways—until the two rules were intertwined in MALLOY V. HOGAN (1964) and fused in the famous *Miranda* case (1966). Moreover, for most of its life the voluntariness test was essentially an alternative statement of the rule that a confession was entitled to credit so long as it was free of influence that made it untrustworthy or "probably untrue." Wigmore reflected the law prevailing at the time when in 1940 he pointed out that a confession was not inadmissible because of "any *breach of confidence*" or "any *illegality* in the method of obtaining it," or "because of any connection with the *privilege against self-incrimination.*"

In *Bram v. United States* (1897) the Supreme Court did rely explicitly on the self-incrimination clause of the Fifth Amendment in holding a confession inadmissible. But the Court soon abandoned the *Bram* approach, perhaps stung by the criticism of Wigmore and others that it had misread history, and until the mid-1960s *Bram* amounted only to an early excursion from the prevailing due process-voluntariness test.

The right against self-incrimination was not deemed applicable to the states until 1964, and by that time the Supreme Court had decided more than thirty state confession cases. Moreover, even if the Fifth Amendment right against self-incrimination had been deemed applicable to the states much earlier, the law pertaining to "coerced" or "involuntary" confessions still would have developed without it. For until *Miranda* (1966), the prevailing view was that the suspect in the police interrogation room was not being compelled to be a witness against himself within the meaning of the privilege; he was threatened neither with perjury for testifying falsely nor contempt for refusing to testify at all. Because the police have no legal authority to compel statements, there is no legal obligation to answer, ran the argument, to which a privilege can apply.

So long as police interrogators were not required to advise suspects of their rights nor to permit them to consult with lawyers who would do so, there could be little doubt that many a suspect would assume that the police had a legal right to an answer. Still worse, there could be little doubt that many a suspect would assume, or be led to believe, that there were *extralegal* sanctions for refusing to cooperate. Small wonder that commentators decried the legal reasoning that excluded the privilege against self-incrimination from the stationhouse for so many years as "casuistic," "a quibble," and a triumph of logic over life.

Wigmore long condemned the statement of the confession rule in terms of voluntariness for the reason that "the fundamental question for confessions is whether there is any danger that they may be untrue . . . and that there is nothing in the mere circumstance of compulsion to speak in general . . . which creates any risk of untruth." But only two years after the Supreme Court handed down its first FOURTEENTH AMENDMENT due process cases, BROWN V. MISSISSIPPI (1936), Charles McCormick defended the voluntariness terminology on the ground that it might reflect a recognition that the confession rule not only protects against the danger of untrustworthiness but also protects an interest closely akin to that protected by the right against compulsory self-incrimination. Three decades later, the *Miranda* Court would agree. McCormick also suggested that the entire course of decisions in the confessions field could best be understood as "an application to confessions both of a privilege against evidence illegally obtained . . . and of an overlapping rule of incompetency which excludes the confessions when untrustworthy" (1954, p. 157). In the advanced stages of the voluntariness test, the Court would again make plain its agreement with McCormick.

Thus, in *Spano v. New York* (1959) the Court, speaking through Chief Justice EARL WARREN, pointed out that the ban against involuntary confessions turns not only on their unreliability but also on the notion 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." And the following year, in *Blackburn v. Alabama* (1960), the Court, again speaking through Chief Justice Warren, recognized that "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary."

The "untrustworthiness" rationale, the view that the

rules governing the admissibility of confessions were merely a system of safeguards against false confessions, could explain the exclusion of the confession in *Brown v. Mississippi* (1936), where the deputy sheriff who had presided over the beatings of the defendants conceded that one had been whipped, "but not too much for a Negro." And the untrustworthiness rationale was also adequate to explain the exclusion of confessions in the cases that immediately followed the *Brown* case such as CHAMBERS V. FLORIDA (1940), *Canty v. Alabama* (1940), *White v. Texas* (1940), and *Ward v. Texas* (1942), for they, too, involved actual or threatened physical violence.

As the crude practices of the early cases became outmoded and cases involving more subtle pressures began to appear, however, it became more difficult to assume that the resulting confessions were untrustworthy. In *Ashcraft v. Tennessee* (1944), for example, although the confession was obtained after some thirty-six hours of almost continuous interrogation, there was good reason to think that the defendant had indeed been involved in the murder. The man whom the defendant named as his wife's killer readily admitted his involvement and accused the defendant of hiring him to do the job. Moreover, after the interrogation had ceased and the defendant had been examined by his family physician, he made what the doctor described as an "entirely voluntary" confession, in the course of which he explained why he wanted his wife killed. Nevertheless, calling the extended questioning "inherently coercive," a 6–3 majority, speaking through Justice HUGO L. BLACK, held that Ashcraft's confession should not have been allowed into evidence. Under the circumstances, the *Ashcraft* case seemed to reflect less concern with the reliability of the confession than disapproval of police methods which appeared to the Court to be dangerous and subject to serious abuse.

Although he dissented in *Ashcraft*, Justice FELIX FRANKFURTER soon became the leading exponent of the "police misconduct" or "police methods" rationale for barring the use of confessions. According to this rationale, in order to condemn and deter abusive, offensive, or otherwise objectionable police interrogation methods, it was necessary to exclude confessions produced by such methods regardless of how relevant and credible they might be, a point underscored in ROGERS V. RICHMOND (1961). After more conventional methods had failed to produce any incriminating statements, a police chief pretended to order petitioner's ailing wife brought down to headquarters for questioning. Petitioner promptly confessed to the murder for which he was later convicted. The trial judge found that the police chief's pretense had "no tendency to produce a confession that was not in accord with the truth" and in his charge to the jury he indicated that the admissibility of the confession should turn on its probable reliability. But the Court, speaking through Justice Frankfurter, held that convictions based on involuntary confessions must fall

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system. . . . Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. . . . The attention of the trial judge should have been focused, for purpose of the Federal Constitution, on the question whether the [police behavior] was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.

The "voluntariness" test seemed to be at once too wide and too narrow. In the sense of wanting to confess, or doing so in a completely spontaneous manner, as one might confess to rid one's soul of guilt, no confession reviewed by the Court under the "voluntariness" test had been voluntary. On the other hand, in the sense that the situation always presented a choice between two alternatives, all confessions examined by the Court had been voluntary.

As the voluntariness test evolved, it became increasingly clear that terms such as "voluntariness" and "coercion" were not being used as tools of analysis, but as mere conclusions. When a court concluded that the police had resorted to unacceptable interrogation techniques, it called the resulting confession "involuntary" and talked of "overbearing the will." When, on the other hand, a court concluded that the methods the police had employed were permissible, it called the resulting confession "voluntary" and talked of "self-determination." Moreover, such terms as "voluntariness," "coercion," and "overbearing the will" focused directly on neither of the two underlying reasons that led the courts to bar the use of confessions—the offensiveness of police interrogation methods or the risk that these methods had produced an untrue confession.

Another problem with the due process "totality of the circumstances"—voluntariness test was that it was amorphous, elusive, and largely unmanageable. Almost everything was relevant—for example, whether the suspect was advised of his rights; whether he was held incommunicado; the suspect's age, intelligence, education, and prior criminal record; the conditions and duration of his deten-

tion—but almost nothing was decisive. Except for direct physical coercion no single factor or combination of them guaranteed exclusion of a confession as involuntary. Because there were so many variables in the voluntariness equation that one determination seldom served as a useful precedent for another, the test offered police interrogators and trial courts little guidance. Trial courts were encouraged to indulge their subjective preferences, and appellate courts were discouraged from active review.

In the thirty years between *Brown* (1936) and *Miranda* (1966) the Court had reviewed about one state confession case per year and two-thirds of these had been death penalty cases. Indeed, the Court's workload had been so great that it had even denied a hearing in most death penalty cases. Not surprisingly, Justice Black remarked in the course of the oral argument in *Miranda:* "If you are going to determine [the admissibility of the confession] each time on the circumstances, [if] this Court will take them one by one, [it] is more than we are capable of doing."

The Supreme Court's dissatisfaction with the elusive "voluntariness" test and its quest for a more concrete and manageable standard led to the decisions in MASSIAH V. UNITED STATES (1964) and ESCOBEDO V. ILLINOIS (1964) and culminated in the 1966 *Miranda* decision.

Massiah grew out of the following facts: After he had been indicted for various federal narcotics violations and retained a lawyer, and while he was out on bail, Massiah was invited by his codefendant, Colson, to discuss the pending case in Colson's car. Massiah assumed that he was talking to a partner in crime, but Colson had become a secret government agent. A radio transmitter had been concealed in Colson's car to enable a nearby federal agent to overhear the Massiah-Colson conversation. As expected, Massiah made incriminating statements.

Despite the fact that Massiah was neither in "custody" nor subjected to "police interrogation," as that term is normally used, the Supreme Court held that his damaging admissions should have been excluded from evidence. The decisive feature of the case was that after adversary criminal proceedings had been initiated against him—and Massiah's RIGHT TO COUNSEL had "attached"—government agents had deliberately elicited statements from him in the absence of counsel.

Massiah was soon overshadowed by *Escobedo*, decided a short five weeks later. When Danny Escobedo had been arrested for murder he had repeatedly but unsuccessfully asked to speak to his lawyer. Instead, the police induced Escobedo to implicate himself in the murder. Although Escobedo had incriminated himself before he had been indicted or adversary criminal proceedings had otherwise commenced against him, a 5–4 majority held that under the circumstances "it would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment." At the time the police had questioned him, Escobedo "had become the accused and the purpose of the investigation was to "get him' to confess his guilt despite his constitutional right not to do so."

Until *Miranda* moved the case off center-stage two years later, the meaning and scope of *Escobedo* was a matter of widespread disagreement. In large part this was due to the accordion-like quality of Justice ARTHUR J. GOLDBERG's majority opinion. At some places the opinion suggested that a suspect's right to counsel was triggered once the investigation ceased to be a general inquiry into an unsolved crime and began to "focus" on him, regardless of whether he was in "custody" or asked for a lawyer. Elsewhere, however, the opinion seemed to limit the holding to its special facts (Escobedo had specifically requested and been denied an opportunity to seek his lawyer's advice, the police had failed to warn him of his right to remain silent, and he was in police custody).

The *Escobedo* dissenters read the majority opinion broadly: "The right to counsel now not only entitles the accused the counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused has become suspect. From that very moment apparently his right to counsel attaches." The dissenters expressed a preference for a self-incrimination approach, rather than a right to counsel approach. The right against self-incrimination, after all, proscribed only compelled statements. "It is incongruous to assume," they argued, "that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States." Two years later, in *Miranda*, the Court would focus on the Fifth Amendment, but it would define "compulsion" within the meaning of the privilege in a way that displeased the four *Escobedo* dissenters (all of whom also dissented in *Miranda*).

Dissenting in *Ashcraft* in 1944, Justice ROBERT H. JACKSON agreed that custody and questioning of a suspect for thirty-six hours is "inherently coercive," but quickly added: "And so is custody and examination for one hour. Arrest itself is inherently coercive and so is detention. . . . But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive'?" Both Jackson and Justice Black, who wrote the majority opinion in *Ashcraft*, knew that in 1944 the Court was not ready for an affirmative answer to Jackson's question. But by 1966 the Court had grown ready.

Ernesto Miranda had been arrested for rape and kidnapping, taken to a police station, and placed in an "interrogation room," where he was questioned about the crimes. Two hours later the police emerged from the room

with a signed confession. In the 1940s or 1950s Miranda's confession unquestionably would have been admissible under the voluntariness test; his questioning had been mild compared to the objectionable police methods that had rendered a resulting confession involuntary in past cases.

The Supreme Court, however, had become increasingly dissatisfied with the voluntariness test. Miranda's interrogators admitted that neither before nor during the questioning had they advised him of his right to remain silent or his right to consult with an attorney before answering questions or his right to have an attorney present during the interrogation. These failures were to prove fatal for the prosecution.

In *Miranda* a 5–4 majority, speaking through Chief Justice Warren, concluded at last that "all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." Observed the Court:

> An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the persuasions [described in various interrogation manuals, from which the Court quoted at length] cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. . . . Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

The adequate protective devices necessary to neutralize the compulsion inherent in the interrogation environment are the now familiar "*Miranda* warnings." Although *Miranda* is grounded primarily in the right against self-incrimination, it also has a right to counsel component designed to protect and to reinforce the right to remain silent. Thus, prior to any questioning a person taken into custody or otherwise deprived of his freedom of action in any significant way must not only be warned that he has a right to remain silent and that "anything said can and will be used against [him]," but must also be told of his right to counsel, either retained or appointed. "[T]he need for counsel to protect the Fifth Amendment privilege," stated the Court, "comprehends not merely a right to consult with counsel prior to any questioning but also to have counsel present during any questioning if the defendant so desires."

A suspect, of course, may waive his rights, provided he does so voluntarily, knowingly, and intelligently. But no valid WAIVER OF CONSTITUTIONAL RIGHTS can be recognized unless specifically made after the warnings have been given. Moreover, "[t]he mere fact that [a person] may have answered some questions or volunteered some statements . . . does not deprive him of the right to refrain from answering any further inquiries until he had consulted with an attorney and thereafter consents to be questioned."

Although a great hue and cry greeted the case, *Miranda* may fairly be viewed as a compromise between the old voluntariness test (a standard so elusive and unmanageable that its safeguards were largely illusory) and extreme proposals (based on an expansive reading of *Escobedo*) that threatened to "kill" confessions.

Miranda allows the police to conduct general on-the-scene questioning even though the person arrested is both uninformed and unaware of his rights. It allows the police to question a person in his home or office, provided they do not restrict the person's freedom to terminate the meeting. (Indeed, the opinion seems to recommend that the police question a suspect in his home or place of business.) Moreover, "custody" alone does not call for the *Miranda* warnings. The Court might have held that the inherent pressures and anxieties produced by arrest and detention are substantial enough to require neutralizing warnings. But it did not. Thus, so long as the police do not question one who has been brought to the station house, *Miranda* leaves them free to hear and act upon volunteered statements, even though the volunteer neither knows nor is advised of his rights. (This point was recognized by dissenting Justice BYRON R. WHITE in *Miranda.*)

Surprisingly, *Miranda* does not strip police interrogation of its characteristic secrecy. To the extent that any lawyer worth his salt will tell a suspect to remain silent it is no less clear that any officer worth his salt will be sorely tempted to get the suspect to do just the opposite. But no stenographic transcript (let alone an electronic recording) of the waiver transaction, or the questioning that follows a waiver, need be made; no disinterested observer (let alone a judicial officer) need be present. There is language in *Miranda* suggesting that the police must make an objective record of the waiver transaction but this language has been largely overlooked or disregarded by the lower courts. And nowhere in the *Miranda* opinion does the court explicitly require the police to make either tape or verbatim stenographic recordings of the crucial events.

On the eve of *Miranda*, there were doubts that law enforcement could survive if the Court were to project defense counsel into the police station. But the *Miranda* Court did so only in a quite limited way. It never took the final step (and, as a practical matter, the most significant one) of requiring that the suspect first consult with a lawyer, or actually have a lawyer present, in order for his waiver of constitutional rights to be considered valid.

Whether suspects are continuing to confess because

they do not fully grasp the meaning of the *Miranda* warnings or because the police are mumbling, hedging, or undermining the warnings, or whether the promptings of conscience and the desire "to get it over with" are indeed overriding the impact of the warnings, or whether admissions of guilt are quid pro quos for reduced charges or lighter sentences, it is plain that in-custody suspects are continuing to confess with great frequency. This result would hardly have ensued if *Miranda* had fully projected counsel into the interrogation process, requiring the advice or presence of counsel before a suspect could waive his rights.

Because *Miranda* was the centerpiece of the Warren Court's revolution in CRIMINAL PROCEDURE, and one of the leading issues of the 1968 presidential campaign, almost everyone expected the BURGER COURT to treat *Miranda* unkindly. And it did, but only for a decade.

The first blow was struck in HARRIS V. NEW YORK (1971), which held that statements preceded by defective *Miranda* warnings, and thus inadmissible to establish the prosecution's initial case, could nevertheless be used to impeach the defendant's credibility if he took the stand. The Court noted, but seemed untroubled, that some comments in the landmark opinion seemed to bar the use of statements obtained in violation of *Miranda* for any purpose.

A second impeachment case, *Oregon v. Hass* (1975), seemed to inflict a deeper wound. In *Hass*, the police advised the suspect of his rights and he asserted them. Nevertheless, the police refused to honor the suspect's request for a lawyer and continued to question him. That such a flagrant violation of *Miranda* should produce evidence that may be used for impeachment purposes is especially troublesome; under these circumstances, unlike those in *Harris*, it is fair to assume that no hope of obtaining evidence usable for the government's case-in-chief operates to induce the police to comply with *Miranda*. *Hass*, then, was a more harmful blow to *Miranda* that was *Harris*.

Even more disturbing than the impeachment cases is their recent extension to permit the use of a defendant's prior silence to impeach his credibility if he chooses to testify at his trial. In JENKINS V. ANDERSON (1980) the Court held that a murder defendant's testimony that he had acted in self-defense could be impeached by showing that he did not go to the authorities and report his involvement in the stabbing. In *Fletcher v. Weir* (1982) the Court held that even a defendant's post-arrest silence—so long as he was not given and need not have been given the *Miranda* warnings—could be used to impeach him if he decided to testify at trial.

Still other blows were struck by *Michigan v. Mosley* (1975) and *Oregon v. Mathiason* (1977). Although language in *Miranda* can be read as establishing a per se rule against any further questioning of one who had asserted his right to silence, *Mosley* held that under certain circumstances, which the case left unclear, if the police cease questioning on the spot, they may try again and succeed at a later interrogation session. *Mathiason*, a formalistic, crabbed reading of *Miranda*, demonstrates that even police station interrogation is not necessarily "custodial." (The suspect had agreed to meet a police officer in the state patrol office and had come to the office alone.)

For supporters of *Miranda*, the most ominous note of all was struck by Justice WILLIAM H. REHNQUIST, speaking for the Court in *Michigan v. Tucker* (1974). The *Tucker* Court viewed the *Miranda* warnings as "not themselves rights protected by the Constitution" but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement" for the right against self-incrimination. And it seemed to equate "compulsion" within the meaning of that right with "coercion" or "involuntariness" under the pre-*Miranda* due process test. It seemed to miss the point that much greater pressures were necessary to render a confession "involuntary" under the old test than are needed to make a statement "compelled" under the new. That was one of the principal reasons the old test was abandoned in favor of *Miranda*.

A lumping together of self-incrimination "compulsion" and pre-*Miranda* "involuntariness," which appears to be what the Court did in *Tucker*, seemed to approach a rejection of the central premises of *Miranda*. Moreover, the Supreme Court has no supervisory power over state criminal justice. By stripping *Miranda* of its most apparent constitutional basis without explaining what other bases for it there might be, the Court in the *Tucker* opinion seemed to be preparing the way for the eventual overruling of *Miranda*.

A decade later, in NEW YORK V. QUARLES (1984) and in OREGON V. ELSTAD (1985), a majority of the Court, relying heavily on language in the *Tucker* opinion, again drew a distinction between statements that are actually "coerced" or "compelled" and those that are obtained merely in violation of *Miranda*'s "procedural safeguards" or "prophylactic rules." *Quarles* admitted a statement a handcuffed rape suspect had made when questioned by police about the whereabouts of a gun he had earlier been reported to be carrying. The Court, speaking through Justice Rehnquist, "conclude[d] that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting [the] privilege against self-incrimination." *Elstad* held that the failure to give *Miranda* warnings to a suspect who made an incriminating statement when subjected to custodial interrogation in his own home did not bar the use of a subsequent station house confession by the suspect when the second confession was immediately preceded by *Miranda*

warnings. The court, speaking through Justice SANDRA DAY O'CONNOR, rejected the argument that a *Miranda* violation "necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as "fruit of the poisonous tree." Although *Quarles* and *Elstad* can be read very narrowly, and *Tucker*, too, can be limited to its special facts, the Court's language in these cases—language that "deconstitutionalizes" *Miranda*—may prove to be far more significant than the cases' specific holdings.

In light of the *Tucker* majority's undermining of the basis for *Miranda* and against the background of such cases as *Harris*, *Hass*, and *Mathiason*, a 1980 confession case, *Rhode Island v. Innis*, posed grave dangers for *Miranda*. The defendant had been convicted of heinous crimes: kidnapping, robbery, and murder. He had made incriminating statements while being driven to a nearby police station, only a few minutes after being placed in the police vehicle. Any interrogation that might have occurred in the vehicle was brief and mild—much more so than the direct, persistent police station interrogation in *Miranda* and its companion cases. Two police officers conversing with one another in the front of the car, but in Innis's presence, had expressed concern that because the murder occurred in the vicinity of a school for handicapped children, one of the children might find the missing shotgun and injure himself. At this point, Innis had interrupted the officers and offered to lead them where the shotgun was hidden.

The Court might have taken an approach suggested by earlier dissents and limited *Miranda* to custodial station house interrogation or its equivalent (for example, a five-hour trip in a police vehicle). It did not do so. The Court might have taken a mechanical approach to interrogation and limited it, as some lower courts had, to situations where the police directly address a suspect. Again, it did not do so. It might have limited interrogation to situations where the record establishes (as it did not in *Innis*) that the police intended to elicit an incriminating response, an obviously difficult test to administer. It did not do this either.

Instead, the Court, speaking through Justice POTTER STEWART (one of the *Miranda* dissenters), held that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." The term "interrogation" includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit as incriminating response from the suspect." Although the *Innis* case involved police "speech," the Court's definition embraces police tactics that do not. Thus, the Court seems to have repudiated the position taken by a number of lower courts that confronting a suspect with physical evidence or with an accomplice who has already confessed is not interrogation because it does entail verbal conduct on the part of the police.

One may quarrel, as the three dissenters did, with the Court's application of its definition of "interrogation" to the *Innis* facts (the Court concluded that the defendant had not been interrogated). But *Innis* ia a harder case than most because there was "a basis for concluding that the officer's remarks were for some purpose *other* than that of obtaining evidence from the suspect. An objective listener could plausibly conclude that the policeman's remarks . . . were made solely to express their genuine concern about the danger posed by the hidden shotgun" and thus not view their conversation "as a demand for information" (White 1980, pp. 1234–1235).

In any event, considering the various ways in which the *Innis* Court might have given *Miranda* a grudging interpretation, its generous definition of "interrogation" seems much more significant than its questionable application of the definition to the particular facts of the case. In *Innis* the process of qualifying, limiting, and shrinking *Miranda* came to a halt. Indeed, it seems fair to say that in *Miranda*'s hour of peril the *Innis* Court rose to its defense.

If *Innis* encouraged *Miranda*'s defenders, EDWARDS V. ARIZONA (1981) gladdened them even more. For *Edwards* was the first clear-cut victory for *Miranda* in the Burger Court. Sharply distinguishing the *Mosley* case, which had dealt with a suspect's assertion of his right to remain silent, the *Edwards* Court, speaking through Justice White (another of the *Miranda* dissenters), held that when a suspect invokes his right to counsel the police cannot try again. Under these circumstances, a valid waiver of the right to counsel cannot be established by showing "only that [the suspect] responded further to police-initiated custodial interrogation," even though he was again advised of his rights at a second interrogation session. He cannot be questioned anew "until counsel has been made available to him, unless [he] himself initiates further communication, exchanges or conversation with the police." Thus, *Edwards* reinvigorates *Miranda* in an important respect. (But a more recent case, *Oregon v. Bradshaw* (1983), interprets "initiation of further communication" so broadly that it seems to sap *Edwards* of much of its vitality.)

Although *Miranda* maintained the momentum generated by *Escobedo*, it represented a significantly different approach to the confession problem. Although the *Miranda* Court understandably tried to preserve some continuity with the loose, groping *Escobedo* opinion, it has become increasingly clear that, by shifting from a right to counsel base to a self-incrimination base, *Miranda* actually marked a fresh start in describing the circumstances under which Fifth and Sixth Amendment protections attach. *Escobedo* assigned primary significance to the amount of

guilt available to the police at the time of questioning; the opinion therefore contains much talk about "focal point" and the "accusatory stage." But *Miranda* attaches primary significance to the conditions surrounding or inherent in the interrogation setting; thus the opinion contains much discussion of the "interrogation environment" or the "police-dominated" atmosphere that "carries its own badge of intimidation."

If the requisite inherent pressures exist, *Miranda* applies whether or not the individual being questioned is a "prime suspect" or has become "the accused." On the other hand, if these pressures are not operating, an individual is not entitled to the *Miranda* warnings—no matter how sharply the police have focused on him or how much they consider him the "prime suspect" or "the accused." In short, *Miranda* did not enlarge *Escobedo* so much as displace it.

The same, however, cannot be said for *Massiah*. Although *Miranda* has dominated the confessions scene ever since it was handed down, *Massiah* has emerged as the other major Warren Court confession doctrine. As strengthened by two Burger Court decisions, *Brewer v. William* (1977) (often called "the Christian burial speech" case) and *United States v. Henry* (1980), the *Massiah* doctrine holds that once "adversary" or "judicial" proceedings have commenced against an individual (by way of INFORMATION, or initial appearance before a magistrate), deliberate government efforts to elicit incriminating statements from him, whether done openly by uniformed police officers (as in *Williams*) or surreptitiously by secret government agents (as in *Massiah* and *Henry*) violate the individual's right to counsel.

Williams revivified *Massiah*. Indeed, one might even say that *Williams* disinterred it. For until the decision in *Williams* there was good reason to think that *Massiah* had only been a steppingstone to *Escobedo* and that both cases had been largely displaced by *Miranda*.

But *Massiah* is alive and well. And the policies underlying the *Massiah* doctrine are quite distinct from those underlying *Miranda*. The *Massiah* doctrine represents a pure right to counsel approach. It comes into play regardless of whether a person is in custody or is being subjected to interrogation in the *Miranda* sense. There need not be any compelling influences at work, inherent, informal, or otherwise.

The most recent *Massiah* case, *United States v. Henry* (1980), applied *Massiah* to a situation where the Federal Bureau of Investigation (FBI) had instructed its secret agent, ostensibly a fellow prisoner, not to question the defendant about the crime and there was no showing that he had. Nevertheless, the defendant's incriminating statements were held inadmissible. It sufficed that the government had "intentionally create[d] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." The FBI created such a situation when it instructed its secret agent to be alert to any statements made by the defendant, who was housed in the same cellblock. Even if the agent's claim were accepted that he did not intend to take affirmative steps to obtain incriminating statements, the agent "must have known that such propinquity likely would lead to that result." *Henry* not only reaffirmed the *Massiah* doctrine but significantly expanded it. Thus, the *Massiah* doctrine has emerged as a much more potent force than it ever had been during the Warren Court era.

The Burger Court's generous reading of *Miranda* in *Innis* and *Edwards* and its even more generous reading of *Massiah* in the *Henry* case have reaffirmed the Court's commitment to control police efforts to obtain confessions by constitutional rules that transcend "untrustworthiness' and "voluntariness."

Regardless of its shortcomings and the hopes it never fulfilled (or the fears about the case that proved unfounded), *Miranda* was an understandable and long-overdue effort—and the Court's most ambitious effort ever—to solve the police interrogation-confession problem. At the very least it formally recognized an interrogated suspect's self-incrimination privilege, and a right to counsel for rich and poor alike designed to protect and effectuate that privilege; generated a much greater general awareness of procedural rights; and emphatically reminded the police that they neither create the rules of interrogation nor act free of JUDICIAL REVIEW.

Miranda was an attempt to do in the confessions area what the Warren Court had done elsewhere—take the nation's ideals down from the walls, where they had been kept framed to be pointed at with pride on ceremonial occasions, and live up to them. The degree to which *Miranda* actually succeeded is debatable, but the symbolic quality of the decision extends far beyond its actual impact upon police interrogation methods.

YALE KAMISAR
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