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*Commenting on why it has taken the United States so long to apply "the privilege against self-incrimination and the right to counsel to the proceedings in the stationhouse as well as to those in the courtroom"—as the Supreme Court did in *Miranda v. Arizona*—this author notes that, "To a large extent this is so because here, as elsewhere, there has been a wide gap between the principles to which we aspire and the practices we actually employ."*

The Citizen on Trial: The New Confession Rules

BY YALE KAMISAR

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FOR THE professional and amateur students of criminal justice in the United States June 13, 1966, was D-Day. On that occasion, the Supreme Court handed down its long-awaited decision in the landmark confession case of *Miranda v. Arizona*,¹ finally applying the privilege against self-incrimination and the right to counsel to the proceedings in the stationhouse as well as to those in the courtroom. The traditional and often elusive "voluntariness" test for the admissibility of confessions was displaced by a set of relatively specific, "automatic" guidelines. Thereafter, for any resulting confession to be used in a criminal prosecution, police interrogators were required to issue a four-fold warning to persons in custody, advising them that: 1) they had a right to remain silent, 2) anything they did say could be used against them, 3) they had a right to have an attorney present during the questioning, and 4) if they could not afford a lawyer one would be provided free.

¹ 384 U.S. 436 (1966). For excerpts from this decision, see *Current History*, June, 1967, p. 359.

² See this author's "On the Tactics of Police-Prosecution Oriented Critics of the Courts," *Cornell Law Quarterly*, Vol. 49 (1964), p. 436; and "When the Cops Were Not 'Handcuffed,'" *The New York Times Magazine*, November 7, 1965, p. 34.

In what may prove to be an extremely important part of the opinion, the High Court warned law enforcement officials that if they continue to question a person without the presence of an attorney and a statement is taken, a "heavy burden" rests on them to demonstrate that the defendant knowingly and intelligently waived his rights; regardless of the police version of how they elicited the incriminating statement, "lengthy interrogation" or "incommunicado incarceration" before a statement is obtained is "strong evidence" that the defendant did not waive his rights.

Miranda soon became one of the most publicized and debated cases of our time. Handed down when we were experiencing a "crime crisis"²—a crisis to which, many suspected, the Supreme Court had contributed heavily—the new confession ruling evoked much anger and spread much sorrow among bench and bar and the general public, to say nothing of the already harassed and embittered police, a goodly number of whom once again announced they "might as well close up shop."

One week later, and almost unnoticed in the hue and cry, the Supreme Court decided another case, one which has not received

anything like the attention it deserves: *Davis v. North Carolina*.³ Since Davis was attacking a 1959 murder conviction by seeking a writ of habeas corpus and since the new confession standards were not to be given "retroactive" effect (the Supreme Court had made it clear that the new test would not be applied to cases whose trials had commenced before the new rules had been promulgated), the admissibility of Davis' confessions was governed by the traditional "voluntariness" test. Thus, the appropriate inquiry was not whether Davis had been adequately advised of his rights before confession but rather whether (taking into account the "totality of the circumstances") his confessions had been made "freely" and "voluntarily" or had been the product of an "overborne will."

DAVIS V. NORTH CAROLINA

That the *Davis* case has been largely overlooked is regrettable, for the history of the case dramatically shows the ineffectiveness and unworkability of the traditional "voluntariness" test—whose passing from the scene four members of the High Court and many lawyers and laymen continue to lament.

As to the particulars of the case, Davis had a third or fourth grade education and a level of intelligence so low that it prompted one of the lower courts, even while affirming his conviction, to raise the moral question whether a person of his mentality should ever be executed. His first contact with the police occurred as a small child when his mother murdered his father and his long criminal record began with a prison sentence at the age of 15. A used-up, impoverished Negro, charged with the rape-murder of a white woman while a fugitive from a state prison camp, Davis' predicament was as unenviable as his sorry background. Having lost most of life's battles, he figured to lose life itself.

Nevertheless, Davis was more fortunate than most alleged victims of impermissible police interrogation tactics. At least he could point to a specific notation on the arrest sheet which read: "Do not allow anyone to

see Davis. Or allow him to use the telephone." Rarely, if ever, do police officials make a written declaration, as they did in this case, of a design to hold a suspect *incommunicado*. Moreover, Davis could also point to the uncontested fact that no one other than the police had seen or spoken to him during the *sixteen days* of detention and interrogation in an "overnight jail" which preceded his confessions.

Helpful though these "objective facts" were, however, they did not suffice to invalidate the confessions in the trial and appellate courts of North Carolina in the years 1959 and 1960. Nor did these facts, a year later, impress the federal district judge, who first denied Davis a hearing on his "coerced confession" claim, and then, when reversed on this point and forced to conduct a hearing on the issue, found Davis' confessions to have been "voluntary." Nor, in the year 1964, were these facts quite enough for the United States Fourth Circuit Court of Appeals, which upheld denial of habeas corpus, albeit by a 3-2 vote.

The readiness with which the state and lower federal courts accepted dubious police claims, and the looseness with which they stated (or, more accurately, failed to state) "the facts," is hardly calculated to inspire confidence in the workability and effectiveness of the test—at least from the defendant's point of view. In affirming Davis' conviction, a unanimous Supreme Court of North Carolina observed:

[T]he prisoner was advised he need not make a statement; that if he did it might be used against him. . . . The prisoner asked to see his sister, whom the officers searched for, after some difficulty found, and delivered the prisoner's message. She appeared at the jail and Captain McCall admitted her to a private conference with the prisoner.

As it happened, the prisoner's sister *was* admitted to a private conference with him, but not, the state court neglected to point out, until he had already confessed, after having been interrogated "forty-five minutes or an hour or maybe a little more" (according to one of the officers) each day for 16 days.

³ 384 U.S. 505 (1966).

Similarly, the state court failed to note that there was no indication in the record that the prisoner was advised of his rights until the sixteenth day—*after* he had confessed orally but just before he had signed the written confession.

After holding its 1963 habeas corpus hearing, the federal district court had little difficulty concluding "from the totality of circumstances in this case that the confession was the product of a rational intellect and a free will." How did it deal with the tell-tale notation on the police blotter directing that Davis be held *incommunicado*? *It made no reference whatever* to this incongruous item in its five-page opinion, four of which were devoted to the "historical facts."

"The notation on the arrest record creates suspicions," conceded the 3-2 majority of the Fourth Circuit in its 1964 opinion:

but such suspicions cannot overcome the positive evidence that the notation had no practical effect or influence upon what was done and that help rather than hindrance was offered to [Davis] in his one effort to contact someone outside the prison walls.

This, of course, was the police version. The Fourth Circuit opinion pointed out elsewhere that Davis' sister had testified at the habeas corpus hearing that "she twice went to see her brother in the Charlotte City Jail, but each time was turned away." The district court, however, "did not believe her, finding, as the officers testified, that neither she nor anyone else was turned away."

What, if anything, does the foregoing discussion prove? True, seven years after his conviction, the United States Supreme Court did finally invalidate the confessions by a 7-2 vote (Justices Tom C. Clark and John Marshall Harlan dissenting). But it should not be forgotten that in the 30 years since *Brown v. Mississippi*,⁴ the first fourteenth amendment due-process confession case decided by the highest court of the land, the

Supreme Court has taken an average of only one state confession case every year. How fared the many defendants over these years who did not have the benefit of a powerful and coherent dissenting opinion? How fared the many defendants whose cases did not receive the meticulous attention each Supreme Court justice gives "death penalty" cases marked in red, as was Davis' case and *two-thirds* of the confession cases the Court has chosen to review these past 30 years?

RIGHTS AND THE COURTS

Analyzing a recent Supreme Court term, E. Barrett Prettyman, Jr., a Washington, D.C., attorney who is a careful student of the High Court's work, reported that the Court was asked to review over 2,000 cases, of which 42 involved the death penalty. Although "all of the allegations in these capital cases were so serious that the Supreme Court might have felt compelled to decide each and every one of them" only one condemned man out of four received a hearing, and only one out of eight obtained a reversal.⁵ How many garden-variety criminal defendants who cried "coerced confession" but lost the "swearing contest" below could survive the difficult winnowing process above? As Justice Hugo Black put it in the *Miranda* oral arguments, "if you are going to determine it [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."⁶

Whether or not it is more than the judges in the "front lines" are capable of doing, it seems to be more than very many of them were ready and willing to do. The defendant who was in fact beaten, threatened, tricked or cajoled into confessing faced such enormous, almost insurmountable, problems of proof that the safeguards provided by the old "totality of circumstances-voluntariness" test were largely illusory. When, as was almost invariably the case, the police and the defendant presented sharply conflicting versions of what happened behind the closed doors and when there were no means of independently verifying either version, trial

⁴ 297 U.S. 278 (1936).

⁵ See E. Barrett Prettyman, Jr., *Death and the Supreme Court* (New York: Harcourt, Brace & World, 1961), pp. 297-98.

⁶ From an unofficial transcript of oral argument in *Miranda* and companion cases, p. 91, on file in the University of Michigan Law Library.

judges were under heavy pressure to accept the police account.

As police interrogators abandoned physical violence and made greater use of "psychological" techniques over the years, the problems of proof became increasingly arduous. Disputes over whether physical violence occurred are not always easy to resolve, but evidence of "mental" or "psychological" coercion is especially elusive. Not infrequently, the defendant is quite inarticulate, which aggravates the difficulties of recreating the tenor and atmosphere of the police questioning.

A short week after Justice Harlan manifested a sanguine attitude about the "workability" and "effectiveness" of the traditional "voluntariness" test (in his dissenting opinion in *Miranda*) he and Justice Clark would have applied the old test to sustain Davis' confessions. "The sporadic interrogation of Davis," as they saw it,

can hardly be denominated as sustained or overbearing pressure. From the record it appears that he was simply questioned for about an hour each day [for sixteen days] by a couple of detectives.

"Disagreement," said Justice Harlan of the "voluntariness" test in his *Miranda* dissent, "is usually confined to that borderland of close cases where it matters least." After three decades and 30-odd "coerced" confession cases which saw the overall gauge steadily changing, usually in the direction of restricting police interrogation methods, was *Davis* still a "close case?" If so, was the need to scrap the "voluntariness" test still a close question?

The question has been asked in many quarters: If the privilege against self-incrimination and the right to counsel really mean as much as the Supreme Court now says they

do, why did they mean so little all these years?

For many decades, the "legal mind"—unhappily displaying a "trained incapacity" (to use Thorstein Veblen's phrase) to see the problem in the round—was equal to the task of seeming to reconcile the grim proceedings in the stationhouse with the lofty principles in the Constitution: police interrogation—indeed, the "third degree"—did not violate the Constitution because the questioning did not involve any kind of judicial process for the taking of testimony. The argument ran that, because police officers have no legal authority to compel statements of any kind, there is no legal obligation to answer to which the privilege against self-incrimination can apply; hence, the police can elicit statements from suspects who are *likely to assume or be led to believe* that there *are* legal (or extra-legal) sanctions for stubbornness.⁷

Of course the view that police interrogation was neither limited nor affected by the privilege against self-incrimination or the right to counsel had a great deal more to commend it than merely the inherent force of its "logic" or the self-restraint and tenderness of the exempted class of interrogators. It must have had, in order for it to have been taken seriously for so long.

SOCIETY'S ROLE

Among the forces at work was one of society's most effective analgesics—"necessity," real or apparent. Its influence may be seen in numerous opinions. Although Justice Robert H. Jackson recognized, in his much-quoted concurring opinion in the 1949 *Watts* case,⁸ that "if the State may . . . interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty," he was willing to let this "negation" occur, for otherwise

the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested.

Again, the first axiom of Justice Felix Frankfurter's dissertation on police interrogation and confessions in the 1961 *Culombe* case⁹ is: "Questioning suspects is indispensable in law

⁷ See the discussion and authorities collected in Yale Kamisar, Fred E. Inbau and Thurman Arnold, *Criminal Justice in Our Time* (Charlottesville: University Press of Virginia, 1965), pp. 21-25, 31-33.

⁸ *Watts v. Indiana*, 338 U.S. 49 (1949), at 59-62.

⁹ *Culombe v. Connecticut*, 367 U.S. 568 (1961), at 578.

enforcement." "Questioning," as Justice Frankfurter and many others used the term, is a euphemistic "shorthand" for questioning *without* advising the suspect of his rights or permitting defense counsel, friends or relatives to be present.

As Justice Arthur J. Goldberg observed in the *Escobedo* case,¹⁰ the police interrogation practices which have prevailed in this country until very recently were based in large measure on

the fear that if an accused is permitted to consult with a lawyer, he will become aware of and exercise, these rights.

* * *

If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement [Justice Goldberg commented further], then there is something very wrong with that system.

The lack of confidence in and impatience with the principles we profess—when the chips are really down—was noted by Justice Frankfurter in another context, that of "trial by newspaper—and TV." Dissenting from the Court's opinion sustaining a conviction for the sexual molestation-murder of a little girl, despite sensational pretrial press coverage of the event, Justice Frankfurter protested:

Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the orderly course of justice. To allow such use of the press by the prosecution as the California court [and the United States Supreme Court] here left undisciplined, implies either that the ascertainment of guilt can-

¹⁰ 378 U.S. 478 (1964), at 490.

¹¹ *Stroble v. California*, 343 U.S. 181 (1952), at 201-02.

¹² Office of the District Attorney of Los Angeles County, *Results of Survey Regarding the Effects of the Dorado and Miranda Decisions Upon the Prosecution of Felony Cases* (August 4, 1966), p. 4, copy on file in the University of Michigan Law Library.

¹³ Thurman Arnold, *The Symbols of Government* (Harbinger ed.; New York: Harcourt, Brace & World, 1962), p. 142.

¹⁴ Herbert Packer, "Two Models of the Criminal Process," *University of Pennsylvania Law Review*, Vol. 113 (1964), p. 64.

¹⁵ Colin MacInnes, "The Criminal Society," in *The Police and the Public* (London: William Heinemann Ltd., 1962), p. 101.

not be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive, popular revulsion against horrible crime but do vindicate the sober second thoughts of a community.¹¹

It now appears that the "necessity" for interrogating suspects without advising them of their rights was considerably exaggerated. For example, after surveying more than 1,000 post-*Miranda* cases, in fully half of which the defendant had made an incriminating statement, Evelle Younger, Los Angeles district attorney, concluded:

Large or small, . . . conscience usually or at least often, drives a guilty person to confess. If an individual wants to confess, a warning from a police officer, acting as required by recent decisions, is not likely to discourage him.¹²

Other significant factors operating over many decades to freeze the status quo were the invisibility of the stationhouse proceedings—no other case comes to mind in which an administrative official is permitted the same broad discretionary power assumed by the police interrogators, together with the power to prevent objective recordation of the facts—and *the failure* of influential groups to identify with those segments of our society which furnish most of the raw material for the criminal process. As Thurman Arnold, a former federal judge and a former United States assistant attorney general, once pointed out, too many people are roused by any "violation of the symbol of a ceremonial trial," but "left unmoved by an ordinary nonceremonial injustice."¹³ And as Professor Herbert Packer of the Stanford Law School recently observed:

One of the most powerful features of the Due Process Model is that it thrives on visibility. People are willing to be complacent about what goes on in the criminal process as long as they are not too often or too explicitly reminded of the gory details.¹⁴

Society, one might add, does not *want* to be reminded, does not "want to know about criminals, but it does want them put away, and it is incurious how this can be done provided it is done."¹⁵ It stings now to say it,

for we are too close to it, but in the first two-thirds of the twentieth century too many people, good people, viewed the typical police suspect and his interrogator as garbage and garbage collector, respectively. (This is every bit as unfortunate for the officer as it is for the suspect.)

Moreover, with the inadvertent exception of those who wrote the interrogation manuals—each manual very likely equal to a dozen law review articles in its impact on the Court (the majority opinion in *Miranda* devotes six full pages to extracts from various police manuals and texts spelling out techniques for depriving the suspect of every psychological advantage, keeping him “off balance,” exploiting his fear and insecurity, and tricking or cajoling him out of exercising his rights)—most law enforcement agency members and their spokesmen did their best to *keep* society comfortable and blissfully ignorant. Not too surprisingly, they were much more interested in “sanitizing” the proceedings in the interrogation room than in disseminating the life-size details. As long ago as 1910 (when, everybody *now* agrees, things were in a terrible state), the president of the International Association of Chiefs of Police assured us:¹⁶

Volunteer confessions and admissions made after a prisoner has been cautioned that what he states may be used against him, are all there is to the so-called “Third Degree.”

As recently as July, 1966, the veteran special agent of the Kansas Bureau of Investigation, Alvin A. Dewey, of *In Cold Blood*¹⁷ fame, testified before the Senate subcommittee on constitutional amendments:¹⁸

¹⁶ Major Richard Sylvester's comments are reported in John Larson, “Present Police and Legal Methods for the Determination of the Innocence or Guilt of the Suspect,” *Journal of Criminal Law and Criminology*, Vol. 16 (1925), pp. 222-25.

¹⁷ See Truman Capote, *In Cold Blood* (New York: Random House, 1966).

¹⁸ Statement of Alvin A. Dewey before the subcommittee on constitutional amendments of the Senate Committee on the Judiciary, July 21, 1966, p. 2 (mimeographed), on file in the University of Michigan Law Library.

¹⁹ National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (Washington: U.S. Government Printing Office, 1931), generally referred to as the *Wickersham Report*.

What is wrong with an officer exercising persistence or showing confidence? Isn't that what any good salesman demonstrates in selling insurance or a car? And a law enforcement officer should be a good salesman in selling a suspect on telling the truth, proving his innocence or guilt. But a salesman cannot do his job if a competitor is standing by, and that is the situation for the law enforcement officer with the presence of an attorney while interrogating a suspect.

* * *

As to the description of an interrogation room, I wish to define it as a room where people can talk in privacy which is nothing more than an attorney desires in talking to his client or a doctor in talking to his patient. . . . [These rooms] bear no resemblance to torture chambers as some may wish to think, and in fact some are equipped with air conditioning, carpeting, and upholstered furniture.

PERSISTENT ROOTS

What I have suggested so far does not fully account for the persistence of the de facto inquisitorial system. In the late 1920's and early 1930's, complacency about the system was shaken—at least for a while—by several notorious cases, and by the shocking disclosures of the Wickersham Commission's report on “lawlessness in law enforcement.”¹⁹ Still the system survived. Why? Probably because, in addition to the factors already mentioned, the practice had become so widespread and entrenched that even most of its critics despaired of completely uprooting it in the foreseeable future. A broad, fundamental attack on the system might well have failed completely; elimination of the more aggra-

(Continued on page 114)

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CITIZEN ON TRIAL

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vated forms of coercion commanded a high priority and alone appeared feasible. In this regard, the pessimistic views, some 36 years ago, of Harvard Law School's Zechariah Chafee, coauthor of the famous report to the Wickersham Commission on "the third degree,"²⁰ are instructive:

It is hard enough to prevent policemen from using physical violence on suspects; it would be far harder to prevent them from asking a few questions. We had better get rid of the rubber hose and twenty-four hour grillings before we undertake to compel or persuade the police to give up questioning altogether.²¹

New advances in constitutional-criminal procedure have rarely suffered from a short-

²⁰ *Ibid.*, p. 26.

²¹ Zechariah Chafee, "Remedies for the Third Degree," *The Atlantic Monthly*, November, 1931, pp. 621, 630.

age of absolutely thunderstruck commentators. *Miranda* is no exception. To a large extent this is so because here, as elsewhere, there has been a wide gap between the principles to which we aspire and the practices we actually employ. The officially prescribed norms—what Professor Packer calls the Due Process Model—view the criminal process as limited by and subordinate to the maintenance of the dignity and autonomy of the individual. But the real-world criminal process, what Packer calls the “assembly line” Crime Control model, sees the “efficient” disposition of criminal suspects as the central value to be served and tends to be far more administrative and managerial than it does adversary and judicial.²²

PRIZE FOR INGENUITY

In theory or principle, there is nothing really startling or inventive about the new confession ruling. The prize for ingenuity, I think it may fairly be said, goes not to the Supreme Court for finally applying the privilege against self-incrimination and the right to counsel to the police station but rather to those who managed to devise rationales for excluding these rights from the stationhouse all these many years.²³

It may be that we cannot really do in this area of the law what we have done with respect to school segregation and legislative malapportionment, namely take our ideals down from the walls where we have kept them framed “to be pointed at with pride on ceremonial occasions,” and instead “put flesh and blood” on them.²⁴ But this task must be left to *Miranda's* hope for a more enlightened posterity.

²² See Packer, *op. cit.*, pp. 1-68, and the same writer's “The Courts, the Police and the Rest of Us,” *Journal of Criminal Law, Criminology and Police Science*, Vol. 57 (1966), p. 239.

²³ The point is elaborated in this author's “A Dissent from the *Miranda* Dissents: Some Comments on the ‘New’ Fifth Amendment and the Old ‘Voluntariness’ Test,” *Michigan Law Review*, Vol. 65, (1966), pp. 64-76.

²⁴ The quoted language is taken from the remarks of Justice Walter Schaefer of the Illinois Supreme Court, in “Symposium on Poverty, Equality and the Administration of Criminal Justice,” *Kentucky Law Journal*, Vol. 54 (1966), pp. 521, 524.