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Confessions and the Court

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POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY. By *Yale Kamisar*. Ann Arbor: University of Michigan Press. 1980. Pp. xx, 323. $17.50.

Collected in this volume are seven essays and law review articles, spanning sixteen eventful years of evolution, revolution, retrenchment, and just plain chaos in the jurisprudence of police interrogation. Presented with scarcely any updating of text or references,[1] and with no overview of trends or themes, the book provides an easy target for the kinds of criticism that can be leveled at any collection of this sort. If anything, this collection is more vulnerable than most, because only two or three of the articles can be said to take a general problem in confessions as their starting point.[2] Three of the others are commentaries on individual cases, with meticulous attention to particularities of the record or to opinions filed in concurrence and dissent;[3] two articles are tributes to the work of colleagues;[4] and one article still bears the marks of its origins in the lowly book review

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1. Kamisar deleted the portions of one pre-*Miranda* article that discussed the implications of *Escobedo*, and made additions to eight out of well over a thousand end notes and footnotes. *See* Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS viii, xii (1980) [hereinafter cited as KAMISAR ESSAYS without cross-reference].

2. *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure* (originally published in CRIMINAL JUSTICE IN OUR TIME 11 (A. Howard ed. 1965)), in KAMISAR ESSAYS at 27, addresses the fundamentals directly and with a breadth of vision matched by few articles in the field. *What is an 'Involuntary' Confession?* (originally published at 17 RUTGERS L. REV. 728 (1963)), in KAMISAR ESSAYS at 1, provocatively explores the title question against the background of the law enforcement manual, F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962). The article began as a book review, p. xi, and much of it is devoted to a close critique of Inbau and Reid's tendentious statement of the law. *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?* [hereinafter cited as *What is Interrogation?*] (originally published at 67 GEO. L.J. 1 (1978)), in KAMISAR ESSAYS at 139, is heavily rooted in the facts and opinions in *Williams*, though it proceeds well beyond them.

3. *A Dissent from the Miranda Dissents* (originally published at 65 MICH. L. REV. 55 (1966)), in KAMISAR ESSAYS at 41; *Brewer v. Williams — A Hard Look at a Discomfiting Record* (originally published at 66 GEO. L.J. 209 (1977)), in KAMISAR ESSAYS at 113; *What is Interrogation?*, *supra* note 2, in KAMISAR ESSAYS at 139.

4. *Kauper's "Judicial Examination of the Accused" Forty Years Later* (originally published at 73 MICH. L. REV. 15 (1974)), in KAMISAR ESSAYS at 77; *Fred E. Inbau: "The Importance of Being Guilty"* (originally published at 68 J. CRIM. & CRIMINOLOGY 182 (1977)), in KAMISAR ESSAYS at 95.

genre.[5]

This unlikely mixture of ingredients nonetheless makes for a bubbling and thoroughly captivating brew. Each topic, however tied to events of the moment, triggers an explosion of questions, hypotheticals, analyses, and insights. Forgotten dissenting opinions and never-noticed details of trial testimony lead to larger problems that are anything but dated or obscure. The discussion constantly probes not just for "policy arguments" but for the *facts*, the raw facts underlying the polite abstractions. The articles survey the pros and cons but then let you know where the author stands, usually in no uncertain terms, and often in language that glows white hot with an indignation made more compelling by Kamisar's obvious awareness of countervailing arguments and his graciousness (usually) to the individuals who advance them. Along the way we find countless refreshing sidelights and anecdotes, a mini-history of the academic debates over police interrogation, and in effect, the intellectual autobiography of the person who, despite his generous praise for the contributions of others,[6] was himself a leading force in the *Miranda* "revolution" of the 1960s.

A book so rich, so full of life, will not easily bear a summary, seriatim, of its constituent parts. It provides a mine of information, stimulation, and insight that will have countless different uses for students and teachers, lawyers and judges, reformers and scholars. For me it prompted many questions about how and why the various confessions doctrines have developed to their present point, how well those doctrines satisfy the diverse demands that are properly imposed upon them, and how the constraints of the judicial function have affected and should affect the evolving content of the overall package of doctrinal principles. What follows are some thoughts on these matters suggested by Kamisar's immensely stimulating work.

I. The Constitutional Limitations on Police Interrogation

Three independent constitutional doctrines have played a role in limiting police interrogation and related prosecution efforts to obtain incriminating information from suspects: the due process clause

5. *What is an "Involuntary" Confession?*, in Kamisar Essays at 1; *see* note 2 *supra*.

6. Kamisar lauds Bernard Weisberg for drawing attention to the interrogation manuals that proved so influential in *Escobedo* and *Miranda*, pp. 62 n.19, 109-10; he credits Claude Sowle with inspiring his own truly inspired *Gatehouses and Mansions* article, pp. 106-07, 256 n.62; and attributes much of *Miranda*'s conceptual foundation to the "magnificent" American Civil Liberties Union brief authored by Anthony Amsterdam and Paul Mishkin, pp. 49 n.11, 109, 163 n.30.

(with its associated requirement of "voluntariness"); the fifth amendment privilege against compulsory self-incrimination (with its associated *Miranda* safeguards); and the sixth amendment right to the assistance of counsel.[7] I will consider these in turn.

A. *The Due Process "Voluntariness" Test*

In a series of cases beginning in 1936,[8] the Supreme Court held that the admission in a state criminal trial of an "involuntary" confession violates due process. The early cases required exclusion of such confessions primarily (and perhaps exclusively) because of their unreliability, but as the course of adjudication proceeded, it became clear that confessions would be held "involuntary" and hence inadmissible, even when their reliability was clearly established. Indeed in 1961, in *Rogers v. Richmond*,[9] the Supreme Court held that a court assessing a voluntariness claim could not even *consider* the fact that the police tactics would not tend to produce a false confession.[10] The Court did not, however, get very far in its efforts to articulate precisely what factors *did* render a confession involuntary or what policies supported the exclusion of involuntary confessions. The opinions condemned "overbearing the will," as revealed by "the totality of the circumstances." They justified the condemnation as a response to "fundamental unfairness"[11] or because "ours is . . . not an inquisitorial system."[12] There was virtually nothing more to go on. In 1961, Justice Frankfurter, in an ambitious attempt to lay bare the fundamentals, identified two competing policies: first, that "questioning suspects is indispensable to law enforcement" and thus "whatever reasonable means are needed to make the questioning effective must be conceded to the police";[13] but second, that "the terri-

7. One other doctrine, the fourth amendment protection against unreasonable searches and seizures, has lurked in the background of cases involving the use of secret agents and surreptitious recording to obtain information. United States v. White, 401 U.S. 745 (1971), does not entirely settle the constitutionality of such tactics, because the plurality opinion in *White*, in holding justified the imposition of a risk of betrayal, relies heavily on the possibility that if a defendant "sufficiently doubts [a companion's] trustworthiness, the association will very probably end or never materialize." 401 U.S. at 752. It seems far from clear whether this reasoning can fairly be extended to custodial situations in which a secret agent is posing as a defendant's cell mate. *Cf.* United States v. Hearst, 563 F.2d 1331, 1346 (9th Cir. 1977) (upholding eavesdropping, without consent of either party, but only under circumstances reasonably necessary for maintaining prison security), *cert. denied*, 435 U.S. 1000 (1978). Fourth amendment problems related to confessions are not addressed by Kamisar and will not be pursued here.

8. Brown v. Mississippi, 297 U.S. 278 (1936).

9. 365 U.S. 534 (1961).

10. 365 U.S. at 543-44.

11. Lisenba v. California, 314 U.S. 219, 236 (1941).

12. Rogers v. Richmond, 365 U.S. 534, 541 (1961).

13. Culombe v. Connecticut, 367 U.S. 568, 578-79 (1961) (plurality opinion).

ble engine of the criminal law is not to be used to overreach individuals who stand helpless against it . . . . [M]en are not to be exploited for the information necessary to condemn them . . . ."[14] He described the voluntariness test as an effort to strike a balance between these two opposite "poles."[15]

Kamisar's first interrogation article, *What Is an Involuntary Confession?*, exposes the contradictions underlying Frankfurter's approach and calls for a new departure. Drawing on police interrogation manuals. Kamisar sketches a vivid picture of the interrogation techniques recommended by responsible police educators and of the sophisticated theories of psychological manipulation underlying those techniques. He makes clear that "reasonable means . . . to make the questioning effective" and "overreach[ing] individuals who stand helpless" are not opposite poles but more often "intersecting circles":

> If the police may tear suspects from their homes, friends and neighbors, put them in an "interrogation room" without informing them of their right to keep silent, and shut out the "outside," they *can* "exploit" suspects for information "necessary to condemn them," can they not? . . . Evidently an uncounselled, uninformed suspect all alone in an interrogation room is not deemed "helpless" . . . . At what point *is* he rendered "helpless" or "exploitable?" [Pp. 13-14.]

Using a brilliant four-part hypothetical (pp. 15-20), Kamisar shows that the old voluntariness terminology, with its focus on "breaking the will," was not only unhelpful but misleading. He demonstrates that neither of the two critical concerns — the offensiveness of the police behavior and the tendency of the interrogation methods to produce a false confession — had focused or should focus primarily on the subjective mental condition of the particular defendant. The essay does not attempt to sketch all the answers but instead ends with a call for discarding the obfuscating language of voluntariness and starting to address the underlying concerns more directly.

Events quickly overtook efforts to sharpen the old due process test, and when Kamisar returned to the subject in later essays his objective was not so much to explicate the due process test as to show its elusiveness and its inherent unworkability. In a scathing attack on the opinions filed by the dissenters in *Miranda* (pp. 41-76), Kamisar invites us to ponder their claim that the voluntariness standard represented "a workable and effective means of dealing with

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14. 367 U.S. at 581.

15. 367 U.S. at 578, 581.

confessions in a judicial manner."[16] His review of cases decided under that standard before *Miranda*, his selection of the dissenters' own earlier characterizations of the standard ("elusive, measureless,"[17] "uncertain" and "unpredictable,"[18] "we do not shape the conduct of local police one whit"[19]), and his telling statistics about the realities of Supreme Court review (very few confessions issues won Supreme Court consideration in noncapital cases, and even in capital cases only one out of four petitioners was granted a hearing (p. 75), serve to expose the central premise of the dissenters' argument as altogether unconvincing if not mildly ridiculous.

Adding up the diverse strands of criticism developed by Kamisar and others, one finds roughly six defects in the due process voluntariness test:

1. *The standard left police without needed guidance*. Because of its vagueness and its insistence on assessing "the totality of the circumstances," the voluntariness standard gave no guidance to police officers seeking to ascertain what questioning tactics they could use. Indeed, at the critical point when the police sensed that a suspect was about to "crack," they were enjoined to be on guard against both "overbearing the will" and losing their chance by lessening the tension or pressure; in many common situations the message of the due process test was not just vague but inherently contradictory. Under these circumstances, moreover, exclusion of improperly obtained confessions was an unsatisfactory remedy: the defendant's physical or psychological injury was not redressed, the exclusion did virtually nothing to deter similar police abuses in the future, and society lost the benefit of a statement that might have been obtained anyway had the police been forewarned to avoid the tactics eventually ruled improper.[20]

2. *The standard impaired the effectiveness and the legitimacy of judicial review.* The vagueness of the voluntariness test spawned several interrelated difficulties for the courts. Not only were conscientious trial judges left without guidance for resolving confession

16. Miranda v. Arizona, 384 U.S. 436, 506 (1966) (Harlan, J., dissenting). *See also* 384 U.S. at 503 (Clark, J., concurring and dissenting) (advocating a "totality of the circumstances" test of voluntariness).

17. Reck v. Pate, 367 U.S. 433, 455 (1961) (Clark, J., dissenting).

18. Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring).

19. 347 U.S. at 139 (Clark, J., concurring).

20. *But see* Stroble v. California, 343 U.S. 181 (1952), where a confession obtained after police kicked and threatened a suspect was held admissible on the ground that the police conduct was not a causal factor triggering the confession. *Cf.* Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975) (severe coercion did not taint a subsequent confession), *cert. denied*, 425 U.S. 969 (1976). *See* note 52 *infra*.

claims but they were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing. Judges unsympathetic to constitutional values, or concerned about the release of a dangerous offender, might not adhere to the evolving constitutional standard. Appellate courts theoretically could correct erroneous trial court judgments, but similar attitudes inclined many appellate judges to permit interrogation tactics that should have been condemned under applicable Supreme Court precedent. There was ample evidence that such disregard of established principles was serious and pervasive.[21] Effective appellate control therefore required either active Supreme Court review — an impossibility in our judicial system — or active intervention by federal courts granting habeas corpus — a technique that was inhibited to a degree by the same subjective attitudes and that was unhealthy for the federal system when it worked.[22]

In any event, inadequate judicial sensitivity to constitutional rights was not the most fundamental part of the problem. The ambiguity of the due process test and its subtle mixture of factual and legal elements discouraged active review even by the most conscientious appellate judges. Moreover, when higher courts did attempt to address confessions questions, they found themselves so wholly at sea that the appearance of principled judicial decision-making inevitably suffered, whether or not they chose to hold the confession inadmissible. The Supreme Court, which has special reasons to guard the objectivity and perceived legitimacy of its processes, was particularly vulnerable to institutional damage on this ground.[23] The damage simply could not be contained by Justice Frankfurter's eloquent insistence that the ad hoc due process approach was nothing but a "disinterested inquiry pursued in the spirit of science."[24] Had the Court been willing to hear more confessions cases, the threat to its legitimacy and prestige probably would have been aggravated by the very actions that were at the same time necessary to exert more effective control over the lower courts.

3. *Application of the standard was fatally dependent upon resolution of "the swearing contest."* Even if the content of the voluntari-

21. *See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 806-08 (1970).

22. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 351 n.5 (1963) (Harlan, J., concurring) (noting that state courts are charged with front-line responsibility for enforcing constitutional rights).

23. *See* Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319 (1957).

24. Rochin v. California, 342 U.S. 165, 172 (1952).

ness test had been more precise, its application would remain dependent on fact-finding about events that inevitably occurred in secret, with the suspect isolated and often disoriented, distraught, or confused. At trial, there was little to prevent police from describing the interrogation in terms consciously or unconsciously slanted to favor admissibility of the confession. The defendant could do little more than present his version, leaving it to the judge or jury to decide the relative credibility of the two sides to this "swearing contest." And there was next to nothing to prevent judges and juries from systematically resolving credibility isssues in favor of the police. Indeed, it was likely that *any* fact-finder, no matter how skeptical of police testimony, would tend to credit that testimony over the claims of a suspect whose perceptions probably were not acute, whose incentive to fabricate was even stronger than that of the police, and whose ability to supply corroborating facts was usually nil. Under these circumstances no one could know whether the "facts" evaluated in court corresponded to the events that actually had occurred in the interrogation room.[25]

4. *Considerable interrogation pressure was allowed.* Although the amount of pressure to confess tolerated by the courts seemed to be steadily diminishing, the voluntariness test clearly did authorize considerable pressure. Indeed, the conception of voluntariness indirectly *encouraged* police to pressure suspects because it viewed police efforts to persuade a reticent suspect to talk as legitimate and highly desirable.[26] Of course, defenders of the voluntariness test did not regard this particular feature as a defect. But for those who supported the principle of the fifth amendment privilege against compulsory self-incrimination, and who failed to see why "compulsion" within the meaning of the privilege should be narrowly defined as a formal, legal obligation to speak, the allowance of substantial police pressure under the voluntariness test was anomalous and wrong.[27]

5. *The weak were manipulated.* The voluntariness test ostensibly took account of special weaknesses of the person interrogated, but because it did permit the use of substantial pressures, suspects who were ignorant of their rights, unsophisticated about police prac-

25. Of course, all judicial fact-finding is to some extent vulnerable to the vagaries of a swearing contest. But once the courts affirmed police authority to exclude any potential observer from the interrogation setting, the one-sidedness of the swearing contest in confession cases could no longer be seen as fortuitous or inevitable.

26. *See* Miranda v. Arizona, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting); Culombe v. Connecticut, 367 U.S. 568, 578-80 (1961) (plurality opinion).

27. The argument is forcefully developed in Kamisar's *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*. P. 27.

tices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation. Indeed even in theory, the voluntariness test favored the more sophisticated suspect because it probably did not permit *greater*-than-average pressure against the stronger-than-average defendant.[28] The appearance of advantage for the more sophisticated took on overtones of discrimination against racial minorities or the poor. This discomfort with the voluntariness test was sometimes mislabelled and too readily dismissed as an "equal protection" claim,[29] but the objection was not based on equal protection doctrine. Rather, the point was simply that we do (and should) find it unseemly for government officials systematically to seek out and take advantage of the psychological vulnerabilities of a citizen.[30] Whether or not one considers such tactics necessary for effective law enforcement, they convey a feeling of manipulation and exploitation of the weak by the powerful that many would tolerate with at best considerable reluctance.

6. *Physical brutality was not adequately checked.* Of course, the voluntariness test prohibited physical violence and other extreme forms of abuse. But by permitting the use of "some" pressure, this approach encouraged the questioning process itself. Indeed, while courts occasionally mentioned a preference for evidence produced "by the independent labor of [police] officers,"[31] the voluntariness test reinforced the idea that an effective police officer is one who succeeds (by "fair" means) in obtaining a confession from the suspect. Unfortunately, after several hours of questioning, "slowing mounting fatigue does . . . play its part"[32] in weakening *the officer. His* will — to comply with the law — may be "overborne" by impatience, frustration, or the persistence of a stubborn suspect who refuses to "come clean." It should not have been surprising that sincere, dedicated investigators, intent on solving brutal crimes, occasionally lost their tempers.[33]

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28. *See* pp. 23-24.

29. *See Developments in the Law, Confessions*, 79 HARV. L. REV. 938, 1018 (1966).

30. *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("Even without employing brutality . . . or the specific strategems described above, the very fact of custodial interrogation . . . trades on the weaknesses of individuals.").

31. Culombe v. Connecticut, 367 U.S. 568, 582 (1961) (plurality opinion).

32. Spano v. New York, 360 U.S. 315, 322 (1959).

33. *Cf.* 8 J. WIGMORE, EVIDENCE 309 (3d ed. 1940) ("The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physicial force and torture.").

The shortcomings of the voluntariness standard are of more than merely historical interest for two reasons. First, that standard remains the principal basis for adjudication in various confessions situations not governed by *Miranda*.[34] Second, and perhaps more important, law enforcement authorities continue to press vigorously for the overruling of *Miranda*;[35] though a majority of the present Court seems unprepared to take that step yet, the Justices' perceptions of the usefulness of the due process test undoubtedly condition their willingness incrementally to expand the domain of that test by very restrictive interpretations of *Miranda*.

The re-publication of Kamisar's early articles on the voluntariness test is therefore timely, and his work on that subject can usefully be compared to the new crop of due process proposals generated by the Court's evident discomfort with *Miranda*. Professor Joseph Grano, in a particularly thorough study, has probed the difficult conceptual foundations of voluntariness discourse and has identified several elements that courts should highlight in a sensitive due process analysis.[36] Such studies are extremely useful, but insofar as they propose a return to exclusive reliance on the voluntariness test, conceived primarily as an individualized balancing of competing interests, they fail, in my judgment, to come to grips with the central defects of that approach. Such proposals largely ignore the importance, for effective law enforcement as well as for the accused, of providing clear guidance to the police. They bypass the difficulties of "the swearing contest," downplay the manipulation of the weak,[37] and overlook the dangers of encouraging actual physical abuse of suspects.

Professor Grano's study does argue directly for the use of significant interrogation pressures and for the feasibility of judicial review. But even his comprehensive analysis seems to leave a great deal unsaid concerning these problems. To assess the permissible degree of pressure, for example, Grano develops a test cast in terms of whether a person of ordinary firmness would yield to the pressures deployed,

34. *See* text accompanying notes 53-56 *infra*.

35. *Cf.* Brewer v. Williams, 430 U.S. 387, 438 (1977) (Blackmun, J., dissenting) (noting that petitioner and 21 states and others, as *amici curiae*, had urged overruling of *Miranda*).

36. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

37. Grano, for example, recognizes that some personal characteristics of suspects must be considered, but also emphasizes that since the objective of interrogation is to overcome unwillingness to speak, not every weakness can be taken into account. *Id.* at 901. He concludes that physical or mental illness and extreme youth or old age should be considered, but that "social adversity, peculiar personality traits, abnormal temperament, or low intelligence" should not be considered: "We expect an individual to overcome these conditions or characteristics." *Id.* at 904.

and proposes that cases be judged in terms of what "[o]ur common experience tells us"[38] about the effect of interrogation pressures on the average person.[39] Unfortunately, Grano's standard of "ordinary firmness," though imaginatively patterned on the law of duress and not transposed without caveats,[40] seems much more misleading than helpful in the confessions context.[41] And the "common experience" of most judges, lawyers, and law professors will seldom give them a feel for the impact of persistent questioning in a custodial environment. A balancing analysis structured in this way cannot provide a principled means to gauge the pressures deployed or to evaluate on a case-by-case basis how much pressure should be constitutionally acceptable.

Sanguine predictions for the reliability of judicial review under the new voluntariness proposals suffer similar shortcomings. They are not buttressed by live examples from recent litigation, and they simply do not square with the sad lessons of actual experience with the ostensibly objective analysis of the pre-*Miranda* standard. Even in close confessions cases where a conscientious court legitimately could rule either way, the voluntariness standard impaired sound judicial administration: it prevented appropriate appellate control of the trier of fact, and at best left an appearance of inconsistent, un-

38. *Id.* at 898.

39. *See id.* at 896-99.

40. *See id.* at 899, 906-07.

41. Reference to the "ordinary firmness" standard in the law of duress conceivably might suggest either: (1) a benchmark against which to judge the allowable quantum of pressure; (2) a framework for structuring moral discourse about the pressures one can be expected to resist; or (3) a source of evidence that such a standard is not too elusive for satisfactory administration. Grano explicitly disclaims the first suggestion, *id.* at 899, and rightly so: in substantive criminal law, even threats of substantial bodily harm may be insufficient to establish a duress defense, particularly when the charge is homicide. The third suggestion is untenable because the open-ended duress standard is intended for application by juries on an ad hoc, intuitive basis; Jackson v. Denno, 378 U.S. 368 (1964), forecloses that method of adjudication for confessions claims.

The second suggestion is the most plausible, but it is nonetheless flawed. In the substantive law of duress the standard of "ordinary firmness" prescribes a moral norm: one *ought* to resist certain pressures because the failure to do so causes harm to other people. As a result, the analysis of what one ought to do, though informed by perceptions about average capacities, can be rooted in comparisons of relative harms and available alternatives. This kind of moral discourse is wholly out of place in a voluntariness analysis. To speak of "the effort and resistance that reasonably can be expected of suspects in custody," Grano, *supra* note 36, at 907, overlooks the absence of any moral notion that one *ought* to resist, in the interests of society, or that one who fails to resist should be condemned for an antisocial act. From a social viewpoint the suspect *should* confess; he is not expected but rather *entitled* to resist, and ordinarily he does resist at the outset. We do not have a coherent moral notion of what it would mean to say that the suspect was "unreasonable" when he ceased his resistance and confessed. (From his own point of view, of course, a suspect's decision to confess to the police is *always* unreasonable.)

principled decision-making.[42] Moreover, the problems of effective judicial control were by no means confined to the close cases, as numerous truly shocking decisions attest. Lengthy confinement incommunicado, for example, is mentioned by Professor Grano as a factor that would strongly suggest involuntariness under his analysis. He cites *Davis v. North Carolina*[43] and several earlier cases as confirming examples.[44] But Kamisar provides a careful review of the litigation history of *Davis*, showing that before the Supreme Court reversed Davis's conviction, the North Carolina courts, the federal district court on *habeas*, and the United States Court of Appeals for the Fourth Circuit all had held that the confession in this capital case was *not* involuntary (pp. 43-44, 73-76). And *Davis* was far from an isolated example. To choose just one other, let me avoid the South and pick on my own home state, where in the *Kern* case a Pennsylvania appellate court held voluntary a confession obtained after interrogators forced the suspect to strip naked.[45] Grano points to this factor as one that also would strongly suggest involuntariness under his approach.[46] Indeed, as early as 1945 the Supreme Court had roundly condemned the tactic in *Malinski v. New York*.[47] Nevertheless, the Pennsylvania court never referred to *Malinski*, and the opinion explained the voluntariness finding only in a brief passage so mind-boggling[48] that the reader can scarcely believe it was written only eighteen months before the Supreme Court's decision in *Escobedo v. Illinois*.[49] Unlike *Davis*, *Kern* was not a death penalty case (the robbery conviction merely yielded Kern a sentence of not less than seventeen years nor more than thirty-seven years), and both the Pennsylvania and United States Supreme Courts denied review.

Conceivably, such miscarriages of justice would be less likely to-

42. *See* text following note 22 *supra*.

43. 384 U.S. 737 (1966).

44. Grano, *supra* note 36, at 908.

45. Commonwealth *ex rel.* Kern v. Banmiller, 187 A.2d 185 (Pa. Super. Ct. 1962), *cert. denied*, 374 U.S. 852 (1963).

46. Grano, *supra* note 36, at 908.

47. 324 U.S. 401, 407 (1945).

48. It is true that the F.B.I. officers stripped Kern of his clothes in making a search of him immediately after being taken to the police station. This was testified to be standard practice and the reasons given therefor. It is not denied that after this took place, Kern was permitted to put on his underwear, and it was in this condition that the statement was obtained. Counsel for Kern now contends that this was psychological coercion. Amazingly, Kern himself never referred to this as being a cause for giving or signing any alleged confession. The officers testified that there was no beating and abuse . . . .
Commonwealth *ex rel.* Kern v. Banmiller, 187 A.2d 185, 190 (Pa. Super. Ct. 1962), *cert. denied*, 374 U.S. 852 (1963).

49. 378 U.S. 478 (1964).

day. The Supreme Court now believes that, at least in search-and-seizure cases, judicial insensitivity to constitutional rights is largely a thing of the past.[50] In confessions cases it is much harder to say whether such attitudes have changed, because *Miranda* has displaced the voluntariness analysis in the most frequently litigated situations. Several important differences between search-and-seizure litigation and confessions cases suggest the need for caution before concluding that state courts would apply an open-ended voluntariness test in the appropriate spirit.[51] Indeed, among the relatively few voluntariness cases still litigated, there are enough contemporary horribles to suggest that the problems of effective appellate review remain acute.[52] The claim that a due process approach can provide

50. *See* Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976). For discussion of the applicability of *Stone* to *Miranda* claims, see text at notes 102-20 *infra*.

51. Among the many possible areas of difference, two particularly worth exploring are judicial attitudes toward the underlying right and the clarity of operative legal principles. On the first point, freedom from unreasonable search and seizure has been recognized in principle at least since Wolf v. Colorado, 338 U.S. 25 (1949); *see also* Weeks v. United States, 232 U.S. 383 (1914) (first applying the exclusionary rule in the federal courts). In contrast, a suspect's right to terminate a custodial interrogation was not recognized even in theory until Miranda v. Arizona, 384 U.S. 436 (1966), and understanding of the nature and importance of this right may not yet have penetrated the judiciary to the same extent as understanding of the fourth amendment.

The second point is much less speculative. Fourth amendment jurisprudence has long since diverged from weighing the totality of the facts to determine whether a search was "unreasonable." *Cf.* Spinelli v. United States, 393 U.S. 410, 432-35 (1969) (Black, J., dissenting) (criticizing the Court's refusal to follow the lower court's use of the totality of the circumstances test). Because the governing rules usually leave appellate courts free to render judgment *de novo*, the doctrines permit effective control over the trial bench, where concern about the crime and corresponding insensitivity to constitutional rights are likely to be greatest. The voluntariness test, in contrast, is much more closely tied to a factual assessment. The trial court's finding on the ultimate issue plainly is reviewable, but when an evaluation of the particular defendant's subjective state of mind is central to the mixed issue of fact and law, the reviewing court will (and ordinarily should) defer heavily to the trier of fact. The ensuing difficulties for a conscientious reviewing court are vividly illustrated by Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975), *cert. denied*, 425 U.S. 959 (1976). *See* note 52 *infra*. In practice, inadequate sensitivity to constitutional rights at the trial court level is much more difficult to identify and to remedy in voluntariness cases than it is in search and seizure cases.

52. State v. Taylor, 112 Ariz. 68, 537 P.2d 938 (1975), *cert. denied*, 424 U.S. 921 (1976), involved a sixteen-year-old suspect who apparently had not gone beyond the eighth grade and whose intelligence was described as "borderline." In connection with an investigation of a hotel fire in which 28 persons died, Taylor was arrested at about 2:30 a.m., given his *Miranda* warnings, and then questioned continuously for seven hours by a team of nine interrogators. He made a series of confused and inconsistent statements which were later introduced against him, leading to conviction on 28 counts of first-degree murder. The Arizona Supreme Court held the statements voluntary, explaining that "we are impressed by the fact that despite this alleged overwhelming atmosphere, the appellant never confessed to anything. He continued through an ever changing pattern of fabrications to protest his innocence . . . ." 112 Ariz. at 81, 537 P.2d at 951.

Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975), *cert. denied*, 425 U.S. 959 (1976), involved a murder suspect who was kidnapped by four relatives and friends of the victim, driven to a secluded hunting cabin and severely beaten. Beginning at 6:00 a.m. the next morning, he was interrogated continuously for over six hours and was repeatedly

"a workable and effective means of dealing with confessions in a judicial manner"[53] is no more plausible today than when Kamisar wrote his caustic "dissent" from the *Miranda* dissents fifteen years ago.

Kamisar's attack on the emptiness of the due process test no doubt diverted his interest from the questions raised in his first article about how that test ideally should be interpreted. His failure to return to that problem is nonetheless unfortunate, because even while *Miranda* survives, its safeguards are simply inapplicable in many important situations. These situations include police questioning of suspects not in custody[54] and questioning by private parties even when suspects are in a custody-like situation.[55] A *Miranda* claim is also unavailable in certain significant procedural contexts, even when the evidence involved is concededly the fruit of custodial police interrogation.[56] In all these situations, the primary criterion of admissibility under *current* law is the "old" due process voluntariness test.

Because the due process test is still very much with us, Kamisar's convincing demolition of it works one regrettable and undoubtedly unintended disservice. *Police Interrogation and Confessions* may tend to reinforce impressions often conveyed elsewhere that *Miranda* marked the death of the due process test and that, at least for the

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threatened with death. Finally he admitted killing the victim and agreed to lead his captors to her body. The trial judge found that the statements made in the cabin were inadmissible but held that subsequent statements and actions leading to discovery of the body later the same afternoon were voluntary because once the defendant had admitted his involvement, "a spirit of relative friendliness supplanted the former hostile, strained relationships between the defendant and his captors." 368 Mass. at 672, 335 N.E.2d at 667. The Massachusetts Supreme Judicial Court affirmed, relying heavily on its duty to abide by the trial judge's findings of fact; although the defendant had testified that he made the afternoon statements unwillingly, the trial judge chose not to believe this testimony. In one dissent, Justice Kaplan argued that the trial judge's "finding" that by afternoon the defendant was "completely free from fear" was "merely [a] reformulation in other words of the judge's conclusion. . . ." 368 Mass. at 706 n.2, 335 N.E.2d at 686 n.2 (Kaplan, J., dissenting). However, another dissenter, Justice Hennessey, viewed Justice Kaplan's approach as intruding on the trial court's prerogatives to appraise witness credibility and attempted instead to argue for reversal on a burden of proof theory. *See* 368 Mass. at 727-28, 335 N.E.2d at 697-98 (Hennessey, J., dissenting).

See also State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977), *revd. sub nom.* Mincey v. Arizona, 437 U.S. 385 (1978).

53. Miranda v. Arizona, 384 U.S. 436, 506 (1966) (Harlan, J., dissenting).

54. *See* Oregon v. Mathiason, 429 U.S. 492 (1977).

55. *E.g.*, Commonwealth v. Mahnke, 368 Mass. 662, 335 N.E.2d 660 (1975), *cert. denied*, 425 U.S. 959 (1976), discussed in note 52 *supra*. The "private party" exception is sometimes extended to private security guards who act in a semi-official law enforcement capacity. *E.g.*, Schaumberg v. State, 83 Nev. 372, 432 P.2d 500 (1967).

56. *E.g.*, Harris v. New York, 401 U.S. 222 (1971) (statement elicited in violation of *Miranda* may be used to impeach the defendant's trial testimony).

time being, it remains buried.[57] Careful attention to the voluntariness issue remains an imperative, though sometimes overlooked, obligation of court and counsel,[58] and careful scholarly attention to the voluntariness case law that has developed since 1966 is long overdue.[59]

B. *The Fifth Amendment*

The crux of *Miranda* was not so much the now-famous warnings but rather the Court's holding that:[60]

> all the principles embodied in the [Fifth Amendment] privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak . . . .[61]

From this premise the *Miranda* Court proceeded to articulate the safeguards necessary (at least in the absence of equally effective legislative remedies[62]) to dispel the inherently compelling pressures of custodial interrogation and to assure respect for the suspect's fifth amendment privilege. Before any questioning, the *Miranda* Court held, suspects must be warned about their rights to remain silent and to consult counsel. If a suspect indicates a desire to remain silent

57. *See, e.g.*, Grano, *supra* note 36, at 863. The leading casebook discusses the content of the voluntariness test only as part of the historical background of *Miranda* and does not present any judicial opinions applying the test. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 543-665 (5th ed. 1980).

58. A recent example is United States v. Mesa, 638 F.2d 582 (3d Cir. 1980). The defendant had barricaded himself in a motel room and threatened that he would not surrender peaceably. While 25 to 30 officers surrounded the motel, an F.B.I. crisis negotiator attempted to persuade the defendant to surrender and in the process obtained incriminating statements. A *Miranda* claim was rejected because one judge found no "custody" and a second found no "interrogation." Both views are based on particularities of *Miranda*'s rationale and would by no means preclude a voluntariness claim. Yet the defense never argued, and so the court never considered, whether the statements made by this psychologically distraught suspect, on the verge of suicide, in the course of a three-and-one-half hour conversation under highly charged circumstances, were admissible under the due process test.

59. Aspects of the post-*Miranda* voluntariness problem have been explored in White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979), and in Dix, *Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275.

60. Miranda v. Arizona, 384 U.S. 436, 461 (1966).

61. With this step the Court made a definitive break with the doctrinal and conceptual premises of the due process approach. Although the fifth amendment language of compulsion is not obviously different from the due process conception of "overbearing" the will, the reliance on the fifth amendment implied that the need for effective ways of obtaining statements and the need to avoid overreaching the suspect could no longer be seen as equally important concerns. Instead, by viewing the problem in fifth amendment terms, the Court made clear (at least in principle) that protection against compulsory self-incrimination was not to be balanced against other legitimate social interests.

62. 384 U.S. at 444, 467.

("in any manner, at any time"[63]) then all questioning must cease. If a suspect chooses to speak, the state bears a "heavy burden" of proving that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[64]

Miranda was, of course, sharply condemned by law enforcement officials. The civil liberties community, by and large, welcomed the decision as a major victory.[65] Kamisar's first response noted that some aspects of the decision would have to be clarified (p. 42), suggested that the Court had perhaps gone too far in one respect,[66] and concentrated its fire on exposing (with great force and effectiveness) the many inadequacies in the dissenting opinions. But how much had *Miranda* actually accomplished? To what extent had it solved the specific problems that made the voluntariness approach so unsatisfactory? It is of course much easier to answer these questions now than it was in 1966, but some serious shortcomings should have been apparent from the outset.

On the plus side, *Miranda* certainly provided plenty of guidance for the police. There was some potential ambiguity at the fringes of "custody" and "interrogation," but the Court had taken a big step toward clarifying the ground rules of permissible interrogation. *Miranda*'s guidance also largely eliminated factors that, under the voluntariness approach, produced situations conducive to actual brutality.[67] Moreover, *Miranda* eliminated, at least in principle, the due process test's built-in conflict between the police officer's duty to obtain a statement and his duty to respect the suspect's constitutional rights: the Court emphatically commanded the police to cease all questioning at the first sign of any desire to remain silent. The conflict, of course, persists below the surface because the officer will *want* to obtain a statement, but at least the Court tried to tell the police what, in theory, was expected of them.

It is more difficult to find virtue in *Miranda*'s response to the problems of appellate review under the voluntariness test. Of

63. 384 U.S. at 473-74.

64. 384 U.S. at 475.

65. Several ACLU lawyers objected that *Miranda* had not gone far enough, because it did not mandate the presence of counsel. *See* pp. 47-49 n.11.

66. *See* pp. 42-43 n.2 (questioning the Court's failure to differentiate between stationhouse interrogation and "custodial" questioning in the field or in the squad car).

67. Of course, neither *Miranda* nor any other approach can render defiance of the law impossible. The most elaborate rules, even if complemented by thorough recording procedures, probably cannot prevent use of the rubber hose "off camera." But *Miranda* outlawed the interrogation dynamics that easily lead to brutality; the voluntariness approach did not.

course, the new questions about whether "custodial interrogation" had occurred and whether proper warnings had been given were much more focused than the voluntariness inquiry and did not invite a balancing of subjective attitudes about the need for vigorous law enforcement. But the issue that normally arises next — whether a proper waiver had been obtained — was destined from the beginning to be at the heart of the system of safeguards, and here the Court simply reintroduced, in slightly modified form, the inquiry into "voluntariness." The Court provided a few pointers,[68] but the issue was defined primarily in terms of an unfocused assessment of the suspect's subjective state of mind under all the circumstances. As a result the Court not only left itself at the mercy of lower courts unsympathetic to constitutional safeguards, but more important, it failed to provide the many conscientious appellate judges with the framework for principled adjudication that had been lacking under the due process approach.[69]

How did *Miranda* contribute to reducing the amount of permissible interrogation pressures? In theory the opinion promised a great deal. *Any* custodial interrogation, no matter how brief or polite, was held to involve excessive pressure unless the suspect had received the *Miranda* warnings and had knowingly waived his right to remain silent. Moreover, the Court's safeguards (or any legislatively designed substitutes) were to be "adequate . . . to dispel the compulsion inherent in custodial surroundings."[70] Given the premise — essential to the Court's holding and, in my view, convincingly documented — that extremely strong pressures are inherent in the custodial atmosphere, the remedial medicine obviously would have to be potent. Was the Court's prescription adequate to the purpose? By proclaiming that the suspect has rights that will be respected, the *Miranda* warnings probably do reduce in some measure the intimidating tone of the interrogation proceedings. Yet when the suspect, though hopefully not yet "subjected to the techniques of persuasion," remains "swept from familiar surroundings . . . , surrounded

68. The Court stated that evidence of threats, trickery, lengthy interrogation, or incommunicado incarceration would suggest that a waiver was illegally obtained. *See* 384 U.S. at 476.

69. The Court did offer one point of departure for the waiver analysis by referring to the standard for "knowing and intelligent" waiver of the right to counsel under Johnson v. Zerbst, 304 U.S. 458 (1938). *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966). But the analogy quickly broke down, and it may have been inevitably destined to do so because of critical differences between the rights being waived. The Court itself insisted, for example, that "[v]olunteered statements of any kind are . . . not affected by our holding. . . ." 384 U.S. at 478. As a result, the "right to remain silent" quite clearly could be lost inadvertently or unintelligently, and the right to counsel analogy was rendered inapplicable.

70. 384 U.S. at 458.

by antagonistic forces,"[71] and particularly when the all-important warnings are delivered by those same "antagonistic forces," it is hard to see how the intimidation can be reduced very much. Indeed, the *Miranda* Court at one point seems to recognize as much, for in explaining the defendant's need for counsel the Court notes:[72]

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators . . . . Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. . . . Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo v. Illinois*, 378 U.S. 478, 485, n.5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Yet the Court implements this insight by merely requiring another once-stated warning — concerning the right to counsel. The entire passage just quoted collapses with the last five words, which condition the presence of counsel on the defendant's choice and assume that this choice can remain "unfettered" even when it must be made by an isolated defendant and then communicated to the very forces whose hostility has created the need for the protection in the first place.[73] The Court could have done much better by insisting on the presence of an attorney during interrogation,[74] or by requiring initial consultation with an attorney or friend, or even by mandating that warnings and waivers take place in the presence of a neutral magistrate who could break the wall of isolation and hostility surrounding the suspect.[75] The Court did not even mention these alternatives.

Miranda's promise for the weak and unsophisticated is closely linked to its prospects for dispelling the pressures of interrogation. By requiring that police inform all suspects of their rights, and by making clear that indigents too were entitled to the assistance of counsel (if they so desired), the Court went far toward correcting the appearance that the poor and the unsophisticated were particularly

71. 384 U.S. at 461.

72. 384 U.S. at 469-70.

73. *See* pp. 92-93.

74. This was the position of the ACLU. *See* pp. 47-49 n.11. The argument was developed in detail in the *amicus* brief filed by the ACLU in *Miranda*.

75. Under this last alternative the Court also would have had to bar any questioning of the suspect before he receives the warnings in the magistrate's presence.

vulnerable to police exploitation. The manner in which police could deliver warnings and obtain waivers nevertheless promised that beneath the appearances, manipulation of the weak and vulnerable might continue.

The subject of the "swearing contest" is saddest of all because this problem was *the* central obstacle to effective judicial control of the interrogation process. In *Miranda* itself the Court referred in several places to the problem of secrecy in police interrogation.[76] The Court even purported to explain the suspect's right to counsel by claiming that, among other things, an attorney's presence during questioning would help provide a reliable picture of what had occurred during the interrogation.[77] Yet *Miranda* does nothing whatsoever to mitigate the pitfalls of the swearing contest. The heralded warnings need not be given by a disinterested person, and the Court required no objective proof to corroborate claims that they were given in proper form by the police. The defendant's decision to waive his right to silence need not be made before a disinterested party or recorded in any fashion. Even the right to counsel, vaunted by the Court as a safeguard against police fabrication, can be "waived" by the suspect when he is isolated, in the privacy of the interrogation room, with only the police as observers. The most that can be said is that by requiring the prosecution to bear a "heavy burden" of proving waiver, and by dropping a strong hint about the State's ability to furnish objective corroboration,[78] the Court was perhaps laying the groundwork for tackling the swearing contest in the future if police proved unwilling to take the hint. One has to wonder, however, whether in seeking a truly effective package of prophylactic rules, the Court should have started where *Miranda* starts and postponed what *Miranda* postponed.

Kamisar probably would be the last person to deny these shortcomings. Yet his "Dissent from the *Miranda* Dissents" seems astonishingly circumspect about these matters. He relegates to a three-page footnote the complaints by a few civil liberties advocates that *Miranda* did not go far enough and the early reports about the ease with which police were obtaining waivers (pp. 47-49 n.11). His own view was that "[t]he *Miranda* Court required enough things 'at one gulp,' for me at any rate."[79] In his later writings, criticism of *Mi-*

76. 384 U.S. at 445, 448.

77. 384 U.S. at 470.

78. 384 U.S. at 475.

79. P. 49 n.11, quoting Miranda v. Arizona, 384 U.S. 436, 502 (1966) (Clark, J., concurring and dissenting). Perhaps Kamisar wondered about the tactical consequences of a forthright

randa becomes more explicit. Indeed the lion's share of two full articles is devoted to the all-important swearing contest.[80] Kamisar vividly exposes both the obvious and the more subtle problems here and shows how the difficulties could be avoided, without significantly impairing any legitimate countervailing interest.[81] Yet even now Kamisar tends to be somewhat indirect in discussing *Miranda*'s other weak points,[82] while he chooses instead to stress the basic conceptual soundness of the *Miranda* approach. The most recent and most substantial of all his confessions pieces, covering more than one third of the book, is an extended criticism of the Court's choice of a sixth amendment focus in *Brewer v. Williams*,[83] and a plea for remembering *Miranda*, which "[w]hatever its shortcomings, . . . tried to take the 'police interrogation'-'confession' problem by the throat" (p. 223).

I am not so sure. *Miranda* undoubtedly serves important symbolic functions. It also affords certain concrete advantages over the due process test, in terms of its guidance to the police, its partially effective safeguards for the suspect, and its somewhat more focused framework for judicial review. *Miranda* does not, any more than the due process test, come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self-in-

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attack on the essential conservatism of *Miranda*. A demonstration that the Court really had not changed very much might have deflated the foolish, but politically consequential, 1968 outcry over "handcuffing" the police. But then, a forceful showing that *Miranda*'s logic called for much more than the Court had required conceivably could have heightened fears that worse things were to come and thus strengthened the forces of political reaction. Perhaps Kamisar worried too about the responsibilities of the scholar (the *committed* scholar) under these circumstances. Most of us will be thankful that we did not face these dilemmas ourselves.

80. *See* Brewer v. Williams — *A Hard Look at a Discomfiting Record*, *supra* note 3; *Kauper's "Judicial Examination of the Accused" Forty Years Later*, *supra* note 4.

81. Ironically, however, a requirement that all interrogation sessions be recorded (or even that all "proceedings" be recorded, *see* p. 135) may be of little or no help in resolving the particular issue presented in Brewer v. Williams, 430 U.S. 387 (1977), the very case Kamisar uses to develop his point. The police probably cannot be expected to have tapes rolling at (and before) the moment when a suspect unexpectedly "volunteers" information. If, as in *Williams*, they contend that the statements were made in that fashion, they will for the same reason have no tapes to produce; the question whether their failure to record was improper will turn on the same unverifiable testimony as the question whether there was "interrogation" in the first place. To make matters worse, the police may even point proudly to their failure to record as evidence that no interrogation was intended. Of course, these ironies in no way detract from Kamisar's basic point that when the police *do* intend to interrogate, the failure to make a complete recording is indefensible.

82. Some problems arising out of *Miranda*'s approach to waiver are mentioned, pp. 223, 303 n.472, with primary emphasis again on "swearing contest" problems. Kamisar directly and forcefully addresses *Miranda's* failure to mitigate the pressures of custodial interrogation in connection with the discussion of the Kauper proposal for formal interrogation by a magistrate. Pp. 92-93.

83. 430 U.S. 387 (1977).

crimination and to a law enforcement system in which police interrogation is perceived as a necessity. If anything, *Miranda*'s technique for denying this dilemma, for insuring that we can have our cake and eat it, is infinitely less candid than the due process balancing analysis that Kamisar has justifiably attacked. Seen as a compromise, *Miranda* is well worth retaining. Whether *Miranda* represents the best possible compromise, and indeed whether compromise is required at all, remain open questions.[84]

C. *The Sixth Amendment*

In *Massiah v. United States*,[85] decided two years before *Miranda*, the Court held inadmissible certain incriminating statements obtained from an indicted defendant by an undercover informant. The defendant was not in custody when the statements were made, he was not even aware that he was talking to a government agent, and he faced virtually no significant pressure to speak under the circumstances. Neither due process nor fifth amendment concerns could justify exclusion of the statements. Yet six members of the Court, in an opinion by Justice Stewart (who would soon dissent in *Miranda*), held exclusion required by the different set of concerns underlying the sixth amendment. The Court reasoned that after the initiation of formal judicial proceedings (in this case by indictment), defendants are entitled to a lawyer's help at every stage of those proceedings. Because the government "deliberately elicited" incriminating information from the suspect in the absence of his attorney, it had defeated this right to assistance.

Massiah was soon overshadowed by the controversial *Escobedo* and *Miranda* decisions and its potential was, as Kamisar puts it, "lost in the shuffle" (p. 160). Recently, however, the Court returned to *Massiah* in *Brewer v. Williams*.[86] *Williams* involved a direct conversation between the police and a murder suspect who had explicitly and repeatedly invoked his rights to silence and to counsel. Williams was arrested on murder and kidnapping charges, formally arraigned, and then driven across Iowa in police custody. During the ride Williams made incriminating admissions after a now-notori-

84. In a piece written four years before his plea for reinvigorating *Miranda*, Kamisar offered intriguing suggestions for modifying present fifth amendment restrictions on formal testimonial compulsion and for replacing the *Miranda* safeguards with a system of official interrogation by a magistrate in the presence of counsel. Pp. 77-94. This approach, and particularly its capacity to satisfy the perceived "need" for confessions, seems well worth further exploration.

85. 377 U.S. 201 (1964).

86. 430 U.S. 387 (1977).

ous "Christian Burial Speech," in which a police captain pointed out the prospect of a heavy snowfall and stressed the danger that the young victim's body might never be found and properly buried without prompt help from Williams. Because the captain had not asked Williams any direct question (in fact he told Williams, "I do not want you to answer me . . . . Just think about it. . . ."),[87] the lower courts had focused on the questions whether the speech constituted "interrogation" and whether Williams had waived his *Miranda* rights. The Supreme Court bypassed *Miranda* and held the statements inadmissible under the sixth amendment *Massiah* doctrine.

Why did the Court ignore *Miranda* and choose the *Massiah* route instead? This question, which both perplexed and troubled Kamisar, prompted the last and by far the longest of the pieces in this book.[88] In a penetrating examination of both *Miranda* and *Massiah*, Kamisar provides invaluable insight into the contrasting foundations and distinct limits of the fifth and sixth amendment doctrines. Once more making brilliant use of numerous arresting hypotheticals, Kamisar identifies two ways in which *Massiah* afforded an easier route to reversal than *Miranda*: (1) *Massiah* bars efforts to "deliberately elicit" information by *any* strategem and does not require "interrogation"; and (2) its basis in the sixth amendment suggests that any "waiver" of the right to counsel should be tested by an especially stringent standard. Yet the Court made no reference to either of these advantages in *Williams*. Instead, it characterized the "Christian Burial Speech" as "tantamount to interrogation"[89] and discussed the waiver problem in terms that would have been equally suited to analysis of fifth amendment rights. Given the Court's treatment of the facts, reversal should have been a foregone conclusion under *Miranda*. In light of other indications of the Court's lack of enthusiasm for *Miranda*,[90] its avoidance of *Miranda* in the *Williams* situation was "at least puzzling and at worst (for supporters of *Miranda*, at any rate) downright ominous" (p. 202).

Kamisar proceeds to show that anyone concerned about the potential evils of police interrogation could take scant comfort from the revived status of *Massiah*. Although that doctrine is potentially broader than *Miranda* with respect to the "interrogation" and "waiver" problems, it is narrower in one crucial respect. *Massiah* rights come into play only after the onset of adversary judicial pro-

87. 430 U.S. at 393.

88. *What is Interrogation?*, *supra* note 2.

89. 430 U.S. at 400.

90. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

ceedings. The Court has indicated that this does not occur merely upon arrest; rather, some formal litigation event, such as indictment, preliminary hearing, or arraignment seems to be required.[91] Kamisar offers a telling critique of this requirement[92] and suggests several less arbitrary ways in which an appropriate line could be drawn, but concludes that the Court is committed to a relatively formalistic conception. As a result, law enforcement authorities may be free to manipulate the events that trigger *Massiah* rights. And in any event, the doctrine is simply unrelated to concerns about the fairness of an interrogation or the potential for coercion which it may involve.[93] The *Miranda* safeguards therefore remain essential to assure adequate protection for constitutional rights during police interrogation.

We now know that fear of the imminent demise of *Miranda* was premature. Without great enthusiasm, to be sure, the Court has explicitly reaffirmed *Miranda*,[94] and if the Justices still seem unlikely to embark on vigorous expansion of fifth amendment requirements, the Court probably will at least continue to tolerate *Miranda*'s substance as it stands.[95] This is not to say that Kamisar's fears were exaggerated. On the contrary, there is at least some evidence that the Court's subsequent decisions reaffirming *Miranda* may in some measure be ascribed to the simultaneously balanced and impassioned argument developed so convincingly in Kamisar's article on

91. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion).

92. Pp. 210-24. Arguments in support of the formal line drawn by the Court are developed in Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 25-31 (1979).

93. Even after adversary judicial proceedings have begun, *Massiah* may afford a less satisfactory standard of judgment than *Miranda*. Because *Massiah* applies when the government "deliberately elicits" information, it has the advantage of making irrelevant the existence of "interrogation" pressures or the suspect's perception of an official demand to speak. On the other hand, the "deliberately elicit" test appears to make the governmental *purpose* critical; since the defendant himself has no direct knowledge of this, the "swearing contest" may not even be a contest. The *Massiah* standard may or may not be extended to situations in which the governmental purpose is equivocal or impossible to prove, *see* United States v. Henry, 447 U.S. 264, 271 n.9 (1980); 447 U.S. at 277 n.* (Powell, J., concurring), but in any event the subjective elements of the test aggravate problems of proof that are already considerable. In contrast, the test of interrogation for *Miranda* purposes is essentially objective, *see* Rhode Island v. Innis, 446 U.S. 291, 298-302 (1980). In practice the standard should prove somewhat less vulnerable to the difficulties of the swearing contest. For a discussion of the *Innis* and *Henry* decisions, see White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209 (1980).

94. *See* Tague v. Louisiana, 444 U.S. 469, 471 (1980) (per curiam). *See generally* Rhode Island v. Innis, 446 U.S. 291 (1980).

95. *See* 446 U.S. at 304 (Burger, C.J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.").

Williams.[96]

There remains, however, one plausible (and potentially "ominous") reason, not mentioned by Kamisar, for the Court's preference for the *Massiah* route in *Williams*. *Massiah* afforded one advantage over *Miranda*, even on the Court's view of the facts, because *Williams* reached the Court in the context of a habeas corpus proceeding. That procedural point assumes importance in light of *Stone v. Powell*,[97] decided eight months before *Williams*. In *Stone*, the Court had ruled that fourth amendment search and seizure claims may not be raised on federal habeas corpus if the state has provided an opportunity for full and fair litigation of the claim. *Stone* raised serious questions about what other kinds of constitutional claims similarly might be held unavailable on habeas. In *Williams*, two Justices mentioned the *Stone* problem, one in concurrence and one in dissent,[98] and it must be said that neither Justice suggested any reason for treating *Massiah* claims differently from *Miranda* claims in the habeas context. Nevertheless, the status of *Miranda* claims on habeas seems far more precarious under the reasoning of *Stone*.[99]

The majority opinion in *Williams* omits any mention of *Stone*, presumably because the parties had not fully briefed the issue,[100] but it seems reasonable to speculate that at least some members of the Court would have had difficulty ignoring *Stone's* implications, if reliance had been placed on *Miranda*.[101] The Court's decision in *Williams* to avoid that route thus could be read as darkening the shadow cast by *Stone* over the continued availability of *Miranda* claims on habeas. In any event *Stone*'s independent implications are sufficiently serious to warrant separate consideration of the role of the habeas remedy in an appropriate judicial response to the problems of confessions litigation.

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96. *See* 446 U.S. at 300 n.4.

97. 428 U.S. 465 (1976).

98. Justice Powell, in concurrence, argued that the issue had not been adequately raised. *See* Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring). Chief Justice Burger, in dissent, disputed this and, reaching the merits of the issue, concluded that both *Massiah* and *Miranda* claims should be barred on habeas. *See* 430 U.S. at 422-28 (Burger, C.J., dissenting).

99. *See* text at notes 109-19 *infra*.

100. *See* note 98 *supra*.

101. *Cf.* Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (the Court indicated that if necessary to the disposition of the case, it might have considered extending *Stone* to *Miranda* claims, even though the prosecutor had not even raised the point).

II. Confessions in Federal Habeas Corpus Litigation

Stone v. Powell[102] bears witness to the Court's desire to promote more effective judicial administration by reshaping the machinery available for the resolution of constitutional claims. In sharply restricting the availability of fourth amendment claims on habeas, the Court proceeded from the premise that these claims, unlike many other constitutional claims, "do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations . . . .' "[103] The question therefore was whether the potential for habeas relief in the federal courts would add measurably to the deterrent effect of exclusion at trial or on direct review, and if so, whether any such added deterrence would justify the costs incurred in achieving it. In *Stone* the Court found "no reason to believe . . . that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review . . . ."[104] Moreover, the Court stressed that the costs of exclusion were substantial, not only because of the impact of the exclusionary rule on accurate fact-finding whenever it is invoked, but also because of "societal costs [that] persist with special force"[105] in the habeas context:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[106]

The Court's search for manageable tools for adjudicating confessions claims inevitably will proceed beyond reexamination of interrogation doctrine to similar questions about the proper scope of the habeas remedy in such cases. Yet, neither a due process claim nor a sixth amendment *Massiah* claim could plausibly be excluded from habeas under the reasoning of *Stone*. A due-process claim, unlike a fourth amendment claim, ordinarily does involve a direct "challenge

102. 428 U.S. 465 (1976).

103. 428 U.S. at 479 (quoting Kaufman v. United States, 394 U.S. 217, 224 (1969)).

104. 428 U.S. at 493.

105. 428 U.S. at 495.

106. 428 U.S. at 491 n.31 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

[to] evidence as inherently unreliable." Moreover, the Court had held that use of an involuntary confession at trial impermissibly impairs the integrity of the judicial proceedings even if the confession can be shown to be trustworthy. Thus in *Mincey v. Arizona*,[107] the Court held that a reliable but involuntary confession (unlike reliable search and seizure evidence) may not be introduced even for the limited purpose of impeachment. In light of decisions like *Mincey* there is little doubt that the Court would (and should) regard a voluntariness claim as so central to the integrity of the judicial process that habeas relief must remain open even after full and fair litigation in the state courts.[108]

A sixth amendment *Massiah* claim is only slightly more vulnerable under the reasoning of *Stone*. Admittedly, a *Massiah* violation will typically cast no doubt on the trustworthiness of the defendant's statements. Chief Justice Burger stressed this point in arguing in his *Williams* dissent that habeas relief should have been denied whether or not the *Massiah* claim was well-founded on the merits.[109] But the *Massiah* "exclusionary rule" is not merely a prophylactic device; it is not designed to reduce the *risk* of actual constitutional violations and is not intended to deter any pretrial behavior whatsoever. Rather, *Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used "as evidence against *him* at his trial."[110] The failure to exclude evidence, therefore, cannot be considered *collateral* to some more fundamental violation. Instead it is the admission at trial that in itself denies the constitutional right. When the government has made an "end run" around counsel, or effected pretrial discovery in

107. 437 U.S. 385 (1978).

108. To the same effect is Rose v. Mitchell, 443 U.S. 545 (1979), where the Court refused to extend *Stone* to a claim of grand jury discrimination. Such a claim casts no doubt upon factual guilt but still challenges the integrity of the proceedings in a fundamental way. *Rose* is not completely dispositive, however, because a grand jury claim is by nature much less likely to receive a sympathetic hearing in the state courts. *See* 443 U.S. at 563. *See also* Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (implying that *Stone* could not arguably be extended to a voluntariness claim). A decision to the contrary would require overruling Brown v. Allen, 344 U.S. 443 (1953).

109. Brewer v. Williams, 430 U.S. 387, 425-26 (1977) (Burger, C.J., dissenting).

110. Massiah v. United States, 377 U.S. 201, 207 (1964). Although the *Massiah* rule does not condemn post-indictment investigation as such, the decision does not necessarily authorize post-indictment efforts to elicit information in all cases. Rather, the *Massiah* Court explicitly limited its holding to the "circumstances here disclosed." 377 U.S. at 207. Since the defendant was "part of a large and well-organized ring" of drug smugglers under "continuing investigation" by federal agents, 377 U.S. at 206, a particularized need for further information had been shown. The Court in *Massiah* did not address the scope of permissible post-indictment investigation in the case of a defendant charged with a completed crime in which he apparently had acted alone.

disregard of the norms of legitimate adversary procedure, it is wholly beside the point to claim that the evidence obtained by such tactics was reliable. Use of the evidence taints the judicial proceedings in a fundamental way,[111] and relief on habeas must remain open.

Miranda claims seem much closer to search and seizure claims for purposes of applying *Stone* and denying habeas review. Of course, it could be argued that a *Miranda* violation poses a possibility of actual but unprovable involuntariness, and thus that *Miranda* violations involve an unacceptable risk of untrustworthiness.[112] But the Court has repeatedly rejected this view, holding in several different contexts that a *Miranda* violation does not, in itself, impair the fact-finding process or in any other way impugn the integrity of judicial proceedings.[113] For example, a confession obtained in violation of *Miranda* can, like search and seizure evidence, be used for impeachment purposes if its reliability is established.[114] Moreover, the Court has repeatedly characterized *Miranda* as a set of prophylactic rules designed to deter unacceptable police behavior and to reduce the risk of actual constitutional violations.[115] Given the Court's assumption in *Stone* that habeas relief is not useful in furthering such deterrence goals, the Court may consider the value of habeas relief in *Miranda* cases to be similarly outweighed by its costs.

One major difference between *Miranda* claims and fourth amendment claims nevertheless should lead the Court to reject this analogy and to reaffirm the availability of *Miranda* claims in habeas cases. In search and seizure cases, the only plausible constitutional objection to the police behavior ordinarily must be based on the fourth amendment.[116] By foreclosing such claims on habeas, *Stone* makes a major contribution to the finality of litigation, helps conserve judicial resources, and reduces friction between state and fed-

111. Weatherford v. Bursey, 429 U.S. 545, 556-57 (1977) (police undercover agent's participation in pretrial discussions between defendant and his attorney did not deprive defendant of a fair trial, as long as no information obtained by the agent was communicated to the prosecutors).

112. *See* Note, *The Supreme Court 1965 Term*, 80 HARV. L. REV. 91, 138-39 (1966).

113. *E.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966) (nonretroactivity of *Miranda*).

114. Harris v. New York, 401 U.S. 222 (1971).

115. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 443-44, 446-47 (1974).

116. A due process claim is extraordinarily difficult to establish in the search and seizure context. *Compare* Rochin v. California, 342 U.S. 164 (1952), *with* Irvine v. California, 347 U.S. 128 (1954). Such claims presumably remain open after *Stone*, although in delineating its holding, the Court (perhaps inadvertently) stated that after an opportunity for full and fair state litigation of a fourth amendment claim, federal habeas relief on grounds of "unconstitutional search or seizure" is precluded. Stone v. Powell, 428 U.S. 465, 482, 494 (1976). *Compare* 428 U.S. at 495 n.37 ("we hold only that a federal court need not apply the exclusionary rule on habeas review of a *Fourth Amendment* claim . . . .") (emphasis added).

eral courts.[117] Extending *Stone* to *Miranda* claims will produce none of these advantages, because a due process voluntariness claim necessarily will remain open to the habeas petitioner. Such an extension of *Stone* would only shift primary attention at the habeas stage from *Miranda* to the open-ended due process standard. Whether defendants or prosecutors would more often profit from this situation is unclear, but principled decision-making and effective appellate administration undoubtedly would suffer. Indeed, the usual difficulties of the due process approach probably would be compounded by an extension of *Stone*. The shift of focus at the habeas stage from *Miranda* to due process would tend to impede reliance on findings of fact in the prior state proceedings.[118] The voluntariness standard also would require more frequent resort to relatively subjective, ad hoc decision-making that would only enhance friction between the state and federal courts. Ironically, the extension of *Stone* to *Miranda* claims would not even remove the *Miranda* issue from the case, except in a purely theoretical sense: the habeas court still would have to determine whether the interrogated suspect had been warned of his rights, because such warnings are recognized as an important factor in due process analysis of the totality of the circumstances.[119]

Thus the extension of *Stone* would provide no added measure of finality to state criminal cases and would in the end complicate rather than simplify the habeas litigation that would necessarily continue. An extension of *Stone* to *Miranda* claims therefore seems unwise even if the deterrent effect of habeas review is considered slight. In habeas corpus as well as on direct review, *Miranda* remains useful as a tool for manageably adjudicating constitutional claims in confessions cases.

III. Confessions and the Judicial Function

Kamisar opened his first article on confessions with the observation that "[t]o discuss police questioning without knowing what such questioning is really like . . . is playing Hamlet without the

117. *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

118. *See, e.g.*, Taylor v. Cardwell, 579 F.2d 1380, 1382 (9th Cir. 1978).

119. *See* Haynes v. Washington, 373 U.S. 503, 516-17 (1963); *Developments in the Law, Confessions*, *supra* note 29, at 981. Moreover, if warnings were not given, or given and not respected, a habeas court applying a voluntariness analysis normally would even have to decide whether there was "custody" and "interrogation" *within the meaning of Miranda*, because the failure of police to respect legal requirements is again recognized as an important factor in the totality of the circumstances. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 510 n.7 (1963); Spano v. New York, 360 U.S. 315, 320-21 (1959).

ghost."[120] Few people have done as much as Yale Kamisar has to bring us face to face with that reality. While Kamisar illuminates the analytical complexities of confessions doctrine with far more subtlety than most of the "legal minds" he loves to poke fun at,[121] he also constantly communicates a vivid sense of the human drama behind the abstractions.

Nevertheless, after nearly two decades of rapid, ostensibly "revolutionary" legal development, the judicial doctrines relating to confessions still seem far stronger on form than on substance. Kamisar justifiably lambastes *Massiah* as little more than a symbol,[122] but much the same must be said of *Miranda*; neither one delivers even a fraction of what it seems to promise.

What should one properly expect of the Court? One can fairly question whether *anything* the Court might do in this area would change the underlying social and political realities very much. But a firm judicial determination to restrict interrogation severely or to prohibit it altogether probably could be enforced. Would this really be desirable? I am inclined to think that, given suitable alternatives to police interrogation,[123] such a step could be worth its potential costs, but it is easy to understand why fair-minded Justices might not feel sufficiently certain about the consequences. The best of them must feel sorely tempted to adopt a strong but largely symbolic stance, without seeking to intrude very much upon the hard worlds where investigators and high-volume penal administrators continue to attempt their impossible missions.

If many of the Court's "reforms" are destined to be essentially symbolic, we will need to develop a much better understanding of how judicial reform functions on the symbolic level and how, if at all, its impact ultimately is felt. For similar reasons, the significance of judicial "retreat" may need to be assessed primarily from a symbolic perspective. Indeed, anxious hand-wringing over each new technical loophole engrafted on *Miranda* by the Burger Court is, in terms of *Miranda*'s practical effectiveness, supremely beside the point. Apart from their immediate consequences, however, such retreats convey a symbolic message of their own. The finer points of respect for individual rights are necessarily disparaged, the distinction between the desirable and the constitutionally permissible is in-

120. P. 1 (quoting Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 153, 155 (C. Sowle ed. 1962)).

121. *See* pp. 32, 56, 104.

122. *See* pp. 212, 223-24.

123. *See* note 84 *supra*.

evitably missed, and a certain amount of clear overreaching by police and prosecutors is, in the nature of things, encouraged.

On the symbolic level, therefore, the Court has every reason to continue operating on the "high ground" of concern for those individual liberties threatened by increasingly complex and powerful social institutions. The Court's symbolic steps, however piecemeal or imperfect, may prompt the kind of comprehensive legislative response that, given the contemporary politics of crime control, is most unlikely to emerge without prodding from the judiciary. In the long run, the Court's efforts conceivably can help educate the thousands of front-line officials upon whose voluntary and comprehending compliance the constitutional order ultimately depends.[124] What the Court needs to carry out its educative mission is the continued support of those clear voices that articulate the best aspirations of a free society, that relentlessly expose the everyday world where those aspirations have yet to penetrate, and that constantly call upon us to narrow the loopholes and exceptions that keep us distant from our goals. Kamisar's voice is among the best of that essential breed.

124. *Cf.* Stone v. Powell, 428 U.S. 465, 492 (1976) ("[O]ver the long term, [the] demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.") (footnote omitted). Of course, that process of reshaping values is exceedingly complicated, at best. *See, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).