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DePaul Law Review

Volume 18
Issue 2 *Issue 2 & 3 Summer 1969*

Article 24

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CONFESSIONS AND THE STATION HOUSE SYNDROME

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INTRODUCTION

ONE OF the most persistent myths in the area of criminal justice, widely held by the public and nurtured by the communications media, is that confessions should be taken at face value; that if a man admits complicity, it must be so.[1] Prosecutors and the police who pause to consider the epidemic of false confessions which follow in the wake of highly publicized crimes are familiar with one notable exception to the popular assumption,[2] and courts which have had to pass upon the voluntary or involuntary character of a particular confession, have some inkling that many, if not most, extra-judicial confessions are untrustworthy.[3] The Supreme Court, with greater sophistication, has fashioned rules in an attempt to guarantee that confessions are neither coerced nor unfairly elicited.[4] Perhaps intuitively, the Court

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[1] The Pueblo incident, however, should give the public pause, for false confessions were extracted from high government officials who thereafter disavowed them.

[2] *See* WIGMORE, 3 EVIDENCE § 822 (3d ed. 1940); SARGENT, BATTLE FOR THE MIND 185-218 (1957). *See also* Sadoff, *Psychiatric Involvement in the Search for Truth*, 52 A.B.A.J. 251 (1966).

[3] Especially relevant are juvenile court cases barring extra-judicial confessions from the fact finding stage. *See* In the Matter of Four Youths, 89 Wash. L. Rptr. 639 (D.C. Juv. Ct. 1961); Olivera v. State, 354 P.2d 792 (Okla. 1960); Felder v. State, 17 Ala. App. 458, 85 So. 868 (1920); State v. Shaw, 93 Ariz. 40, 378 P.2d 487 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962). *Compare* N.Y. FAM. CT. ACT § 735 (1963) *with* In re Castro, 243 Cal. App. 2d 402, 52 Cal. Rptr. 469 (1966). *See also* Jackson v. Denno, 378 U.S. 368 (1964) (holding that the trial judge rather than the jury must make initial determination of "voluntariness").

[4] *See, e.g.*, Rogers v. Richmond, 365 U.S. 534 (1961). The earliest cases establishing "voluntariness" as the test for admissibility of confessions were *Hopt v. Utah*, 110 U.S. 574 (1884), and *Pierce v. Utah*, 160 U.S. 355 (1896). *See also* Chambers v. Florida, 309 U.S. 227 (1940).

is gravitating towards the conclusions to be offered below, and it is our contention that not only are *Escobedo*[5] and *Miranda*[6] supported by psychiatric and behavioristic knowledge, but that scientific as well as humanitarian considerations require that *all* confessions be held inadmissible as evidence.

In advancing the thesis that for scientific reasons all confessions should be excluded from evidence, reliance is placed upon psychiatric literature[7] and chiefly upon the experience and observations of Dr. Herbert Spiegel of Columbia University, one of the foremost authorities in the country on the subject of hypnosis and suggestibility.[8] For several years Dr. Spiegel has collaborated in presenting this subject to a Law and Psychiatry seminar, and those present have been intrigued by the relationship between hypnosis and suggestibility and confessions of criminal guilt.[9] I first will briefly discuss the phenomena of hypnosis and suggestion, then the law of confessions, before venturing certain conclusions. Although for the sake of clarity I will refer to suggestibility apart from hypnosis, it should be noted that hypnosis is merely a technique to induce a trance or trance-like state and that other techniques may achieve the same result.

THE PHENOMENA OF HYPNOSIS AND SUGGESTIBILITY

According to Dr. Spiegel:

Hypnosis is an altered state of intense and sensitive interpersonal relatedness characterized by nonrational (in the sense that it does not involve the usual 'every day rationality'—not irrational) submission, and by relative abandonment of ex-

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

[6] Miranda v. Arizona, 384 U.S. 436 (1966). Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 44 (1968), concludes with reference to *Miranda* that "the Court's findings of inherent coercion even in ethical interrogations seems completely justified by the literature of social psychology. Whether the *Miranda* warnings or any other practical safeguards can right the imbalance and dispel the coercion is a more difficult question, and cannot be answered unless the mechanism and extent of the coercion is examined in detail."

[7] *See* MEARES, A SYSTEM OF MEDICAL HYPNOSIS (1960); REITER, ANTI-SOCIAL OR CRIMINAL ACTS AND HYPNOSIS (1968); BRYAN, LEGAL ASPECTS OF HYPNOSIS (1962); MOSS, HYPNOSIS IN PERSPECTIVE (1965). *See also* Driver, *supra* note 6 and authorities cited therein.

[8] Dr. Spiegel, a professor of psychiatry at the College of Physicians and Surgeons of Columbia University, is a leading specialist in hypnosis who is engaged in both research and instruction of doctors and dentists in the technique of hypnosis.

[9] Our joint interest in the subject pre-dates both *Escobedo* and *Miranda*.

ecutive control into a more or less regressed dissociated state. It is actively instigated and knowingly enhanced by the hypnotist and structured for goal achievement.[10]

In the alternative, hypnosis may be described as being:

In response to a signal from another, a capacity for a shift of awareness is activated in the patient (subject) which permits a more intensive concentration upon a designated goal direction. This shift of attention is constantly sensitive to and responsive to clues from the Hypnotist.[11]

Contrary to popular belief, the hypnotic trance is almost the direct opposite of sleep.[12] It involves a concentrated awareness and a cutting down of the number of sensory input stimuli. The subject is led to focus on communications from the hypnotist and to ignore peripheral material. It is a special form of intense concentration by an individual evoked through the use of his own unconscious cooperation with the hypnotist. The trance is the most intense and dramatic example of focal awareness, but there are other hypnotic-like phenomena which occur whether identified as such or not. For example, sleep walking, the fugue state, brainwashing, daydreaming, intense concentration such as "boning up" for exams, people in love who withdraw from the outside world, miracle cures, and the placebo effect in medicine, all may involve hypnotic-like phenomena and a contraction of general awareness.[13] In the case of hypnosis, and the cited examples, there is submission or a willingness to accept signals and simultaneously a decrease in critical judgment, accompanying the focal awareness or intense concentration. The unconscious rather than the concious self is the deciding factor in such submission. If the unconscious wills the individual to do so, a person may go into a trance even against the stated word of his conscious self, and hypnosis can take place without the conscious knowledge of either subject or hypnotist.

This is not to say, however, that hypnosis, suggestibility, and the cited examples are one and the same phenomenon. They are comparable phenomena. They lie on a spectrum or continuum, with the hypnotic trance at one end and suggestibility at the other, with border

[10] Spiegel, *The Spectrum of Hypnotic and Nonhypnotic Phenomena*, 6 AMER. J. OF HYPNOSIS 1, 5 (1963).

[11] *Id.*

[12] Spiegel, *Hypnosis and Invasion of Privacy*, in HOW TO DEFEND A CRIMINAL CASE 355 (Lawyer and George eds. 1967).

[13] *Supra* note 10, at 2-3.

states in between. Moreover, people differ radically as to their susceptibility to induction into hypnotic trances and as to their suggestibility. Dr. Spiegel contends that about one-fifth of the population are highly hypnotizable and easily enter into a deep trance, another one-fifth are virtually impervious to hypnosis, and the other three-fifths fall somewhere in between the two extremes.[14] The same percentages hold true for susceptibility. It must be remembered that hypnosis is a technique and that submission to control or a trancelike state may be created by other techniques.

The immediate situation, personality, stress, and various pressures may increase or decrease susceptibility to both hypnosis and suggestibility.[15] In moments of panic or great stress, a person among the twenty per cent who ordinarily are not hypnotizable may be induced into a trance. Typical examples of this would include cases where a mother in panic lifts the rear end of an automobile to free her daughter who has been run over;[16] invalids in a burning building fleeing from the conflagration;[17] widespread panics such as that following Orson Welles' broadcast of an invasion from Mars; and the mesmerization of audiences by Hitler. In the case of suggestibility, personality and the presence of an authority figure, aligned for or against the subject, affects the degree of susceptibility.[18] Depending upon the strength of the stimuli, perhaps ninety per cent of the population may become susceptible, in varying degrees, to the loss of critical judgment which accompanies such phenomena. Anyone who has been caught up in a mob spirit may recall the suspension of critical judgment. Anyone who has been involved in intense concentration may remember how peripheral awareness diminished or disappeared. Such experiences are common to mankind. Witness the proverbial absent-minded professor!

It also follows that the twenty per cent who are highly hypnotizable

[14] *Supra* note 12, at 364.

[15] *Supra* note 12. Driver, *supra* note 6, at 45 states: "If the physical characteristics of an encounter are controlled and manipulated by one participant, the responses of the other can be significantly influenced."

[16] In one such case related by Dr. Spiegel, a slender young mother extricated her daughter from under the wheels of an auto, rode with her in the ambulance to the hospital, and after learning that the daughter's condition was not serious, collapsed. It was found that she had broken a vertebra in her back when lifting the car.

[17] Psychiatrists usually account for such cases by terming them instances of hysterical paralysis.

[18] *See* MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 61-62 (1966), for results of experiment as to the effect of status figures on memory and recall.

may be induced to enter a trance state by simple signals for induction. Stage hypnotists rely upon this propensity for their performances. The first subject may be accepted at random, and whether or not he is readily induced into a trance, the performer will spot others in the audience who respond to his signals and go into a trance, and thereafter bring them to the stage and use them as subjects. Again, under circumstances of excitement or tension, most people will become susceptible in varying degrees to hypnosis and suggestibility; but those capable of deep trances may readily do so if the person they choose to give the signal for induction does not interfere with the process. Dr. Spiegel has devised a simple test that is easy, inexpensive, and not time consuming, by which he can determine the degree of hypnotizability and suggestibility of a given person.[19]

This does not mean, however, that once there is submission all subjects attain the same degree of submissiveness. "The hypnotic state varies greatly in degrees, on a continuum from one polarity of total awareness and responsibility for action to another polarity of limited awareness and questionable responsibility for action."[20] A subject in a light trance retains awareness of himself and knows what he is doing at any time during the experience, says Dr. Spiegel, and will obey only those signals that are not contrary to his conscience or value system; but a person in a deep trance has a limited sense of awareness, is highly tractable, and responds uncritically to signals and demands even though they tend to be against his best interests. The latter in effect abandons much of his control over himself to the hypnotist, and if the hypnotist desires, the subject will have no memory of orders given during the trance. Those in the middle range between a light and deep trance to some extent lose ordinary critical judgment and perform unimportant acts upon request, although they remain still capable of censoring and refusing to respond to signals to do anything that violates deep personal conviction.

It is not easy to answer the Svengali-Trilby type of question of whether or not a person in a trance may be persuaded to do an immoral act. The reason for this is that it is the unconscious rather than the

[19] Note that if the current test as to the voluntariness of confessions is retained, Dr. Spiegel's test might be used in conjunction with the factors or criteria in order to determine whether the particular person is highly suggestible, in the middle category, or virtually immune to the induction of a trance-like state.

[20] *Supra* note 12, at 357.

conscious self that is the deciding factor. Dr. Spiegel gives the real life example of a stage hypnotist who hypnotized three women and told them to give a strip tease. Two merely went through moderate gyrations or motions, but the third threw herself into the act and had to be rushed from the stage. Presumably, the latter, consciously or unconsciously, had been awaiting such an opportunity to show off her charms. Dr. Martin Orne, another well-known expert on hypnosis, has been quoted as refusing to answer "yes" or "no" to the question of whether or not a person in a trance could be forced to act against his normal inclinations. Dr. Orne pointed out that a person's "normality" is subject to many conditions and circumstances and must be understood in that light, and that "there is no laboratory evidence to date, at all, to show that subjects will or will not do what they do not want to do," because the subject either may know that the signalled dangerous or immoral act is make-believe, or may have implicit confidence in the hypnotist.[21]

Most of what has been said about the hypnotic trance also applies, but to a lesser degree, to ordinary persuasion and influence. Modern advertising in large measure rests upon the assumption that the general public or a particular market may be reached and influenced by repetitive stimuli, even if the particular ad is offensive to taste.[22] The utilization of authority figures or persons with prestige for endorsement of products is a familiar example of commercial persuasion. Although it is apparent that modern advertising deliberately tries to trigger off uncritical and automatic consumer responses, we do not equate that influence with the phenomena of hypnosis and suggestibility under discussion.

If we apply the psychological principles under discussion to police interrogation, it cannot be disputed that optimal conditions exist for

[21] *See* The Harvard Law School Record, Feb. 16, 1961, p.5. Driver, *supra* note 6, at 46, points out that, "The suspect is likely to resist changing his own ideas if, upon entering the interrogation room, he defines the situation as illegitimate or coercive, or feels a strong dislike or distrust of the interrogator. During the interrogation, resistance is likely if the interrogator is perceived as communicating an arbitrary, personal demand and if the defendant feels that his acquiescence would constitute a personal defeat."

[22] For an interesting article on movies and hypnosis, *see* Dr. Hans Sutermeister, *Screen Hypnosis*, 7 BRIT. J. OF MED. HYPNOSIS 150 (1955), where it is said that in addition to the effect movies have on the conscious mind, there are a number of hypnotic techniques which affect the subconscious, and that even brain waves may be altered while watching dramatic scenes, and that the picture may facilitate the phenomenon of identification and suggestion as in hypnosis. *See also* discussion of sublimation in KATZ, GOLDSTEIN, & DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 267-86 (1967).

submission to hypnosis or suggestion and the abandonment of ordinary critical faculties. For most, if not all of us, the policeman and prosecutor are authority figures, and the situation of being subjected to their questioning triggers off emotions varying from apprehension to panic.[23] The physical setup of a station house in itself is intimidating. In the absence of counsel or some friend or relative to lend a supportive role, most suspects will talk, although the experienced or professional criminal may preserve his silence.[24] If interrogation is protracted, done in relays, and fatigue sets in, suspects may confess to almost anything. The third degree, or more sophisticated or subtle forms of psychological coercion, also produce confessions. It is quite common for the confession to become the lesser of two evils for a beleaguered suspect. The truth of this is obvious and the subject of judicial knowledge.[25]

What is not so well appreciated is that in the absence of strong corroborative evidence there can be no assurance that a voluntary or involuntary confession is true or spurious. According to Dr. Harold Rosen of Baltimore: "The hypnotized subject doesn't always tell the truth. He may lie, or, in relating the truth as he sees it at this abnormal time he may disrupt the truth. He also may describe what he thinks happened, but didn't."[26] Dr. Rosen goes on to explain that under hypnosis a subject may confess to a crime he has committed only in fantasy, or he may confess because he is trying to please his hypnotist. In accord with this view is Dr. Jack Tracktir of Baylor University, who is quoted as saying that hypnotism "is no guaranty of truth. . . . A person can lie just as well under hypnotism as he can under normal conditions."[27] The same conclusion applies to the phenomenon of suggestibility.

The most dramatic example of the unreliability of statements made by a hypnotized subject is an experiment conducted by Dr. Spiegel in

[23] *See* MENNINGER, THE CRIME OF PUNISHMENT ch. 3 (1968).

[24] *See* Gallegos v. Colorado, 370 U.S. 969 (1962). As has been pointed out, "any lawyer worth his salt" will advise his client to maintain silence. However, suspects seem to have a psychological compulsion to confess, often whether guilty or not. For a discussion in detail of recommended techniques for police interrogation, *see* INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 25-93 (2d ed. 1967). *See also* Note, *Interrogations in New Haven: Impact of Miranda,* 76 YALE L.J. 1519 (1967).

[25] WIGMORE, *supra* note 2. The leading New York case is Austin v. Barker, 110 App. Div. 510, 96 N.Y.S. 814 (1906). The leading Supreme Court decision is Leyra v. Denno, 347 U.S. 556 (1954).

[26] *See* Long Island Press, April 26, 1967, at 22A, col. 2-3.

[27] *Id.* at col. 5.

cooperation with the National Broadcasting System. Originally filmed to be a part of the N.B.C. television documentary on District Attorney Jim Garrison, the following was recorded on audio-video film: Dr. Spiegel selected a subject he knew to be susceptible to a deep trance, and on camera quickly induced a trance state, telling the subject that there was a communist plot to take over the television industry and that when he emerged from the trance he would be shown a list and would be able to identify some of the conspirators. Nothing further was said. The subject was brought out of the trance and Dr. Spiegel and the broadcaster from N.B.C. began to interview him. Suddenly, on cue, the subject commenced to talk about the plot, giving details and embellishments not mentioned by the hypnotist during the trance. He fabricated a story of a detailed plot. The television reporter handed him a blank sheet of paper, shown to be such by the camera, and the subject read off some names, identified them, and said they were conspirators. Again, no such details had been given by the hypnotist. Moreover, the subject was politically a liberal and deeply opposed to communist witch hunts. Later, when shown the complete film, he found it difficult to believe that he would go against his liberal convictions and charge wholly innocent persons with a communist plot.

In short, information elicited from an individual under hypnosis is not necessarily more accurate than statements made when he is not hypnotized, and if falsity is implanted by the hypnotist during the trance, the subject will believe it to be true and even expand upon it. The same phenomenon may occur in the case of suggestibility and the legal rule should be the same, namely the exclusion of statements made by a person while under the control of another.[28]

Police interrogation under many, if not most, circumstances can produce a trance-like state or heightened suggestibility in the suspect, and the resulting confession may or may not be true. In and of itself, a confession is no guaranty of the truth of the matters related. Under sufficient pressure, most people will confess, even to crimes they did not commit, and although the law has long recognized that under certain circumstances this is true, the findings of behavioral science show that the inherent unreliability of extra-judicial confessions is so great

[28] *Supra* note 12. "Social-psychological data suggest that a suspect—even an innocent suspect—while isolated physically and socially from the groups which usually validate his ideas may well change his stated beliefs in the face of contradictory assertions of 'fact,' emotional inducements, and the possibility of gaining social acceptance." Driver, *supra* note 6, at 51.

that none should be admitted at trial and that a reasonable concern for truth requires proof of guilt by more cogent evidence.

The British psychiatrist William Sargent has written about the psychology and behavioral aspect of religious conversion, brain washing, psychotherapy and other processes employed to change men's beliefs.[29] He notes that police interrogation techniques need not be based on terror or torture to result in erroneous confessions of guilt. Fatigue, the anxiety aroused by accusation, the tension inherent in the questioning itself, and the personal instability of the suspect may all contribute to a state of abnormal brain activity and unusually great suggestibility on the part of the suspect. Moreover, the police because they are suspicious or convinced of guilt may inadvertently by the form and line of questioning suggest the nature of the offense. Truth and falsehood become hopelessly confused in the suspect's mind, and when he later gives back what originally was suggested or implied by the interrogators, it may be with entire good faith. Erroneous confessions are much more likely when the examiner starts out with strong beliefs, which are then conveyed back to him in subsequent confessions. It is psychologically interesting that signed confessions usually are in the official jargon of the police rather than in the idiom of the ordinary citizen. The rule which forbids leading the witness on direct examination indicates that the law, in another situation, recognizes the danger of putting words in the mouth of a subject.

Thus, according to Dr. Sargent, despite warnings as to the privilege to remain silent and the right to counsel, despite an absence of threats or punishments, despite the observance of fair play on the part of police, the confession of the person interrogated may well be a distortion of the truth or wholly erroneous. It is our contention that the likelihood of falsity and distortion is so great that confessions should be automatically excluded.

Confessions in court, when the accused has legal counsel, stand on a somewhat different footing because the support of defense counsel and a presumably neutral judge offset the intimidating influence of police and prosecutor. Even here, however, corroborating evidence must be required before there is substantial assurance that a confession is genuine. There are many examples of defendants "copping a plea" to face a lesser charge and sentence when, although innocent, they fear

[29] SARGENT, *supra* note 2.

conviction. It is well known by the grapevine that courts often impose much stiffer sentences when defendants are convicted after a not guilty plea than those meted out in plea bargaining.[30] Unfortunately, a substantial number of so-called criminal lawyers pressure clients into "copping a plea" despite their protestations of innocence. And in back of the whole procedure often lies the cynicism that even if the defendant did not commit the particular crime alleged, he must have committed others which have not been found out and that he comes from a social or ethnic group which deserves harsh treatment. The adage that "where there's smoke there's fire" often prevails over the theoretical presumption of innocence when justice is dispensed wholesale, and it is not uncommon for police and those on the front line of criminal justice to feel that constitutional rights and due process are the prerogatives of "good guys" and that it is "coddling" criminals to extend due process to the "bad guys." Because of the realities of the administration of criminal justice in our metropolitan courts, even confessions in court have no rational warranty of being fit for judicial consumption.

Confessions or admissions in open court do have the advantage, however, of eliminating the problem of perjury by the accused or the police regarding the circumstances surrounding the confession. The inducements to claims by the defendant of "police brutality," the third degree, and duress are obvious. Less apparent to outsiders is the fact that the police themselves have strong inducements to cover up, lie, and conceal the truth as to circumstances surrounding a confession or alleged waiver of the right to counsel. A recent study of police operations in New York City reports:

> There can be no doubt that police lying is the most pervasive of all abuses. In most of the cases . . . there was a lie whenever there was a criminal trial. . . . In the police canon of ethics the lie is justified in the same way as the arrest: as a vindication of police authority, by proving that defiance of the police is a crime in fact if not in law. . . . Besides, the police dislike such people so much that they consider them unworthy of the protection of the law. By lying, the police enforce these folkways of their own, while preserving the shell of due process of law.[31]

Although there has been little reliable research into police lying, it is clear that the police objective is conviction and if necessary many if not most officers will shade the truth or lie to attain that objective.

30 *See* Levy, Heftler, Meiers, & Edwards, *Criminal Procedure*, in 1966 ANNUAL SURVEY AMERICAN LAW 529, 537-41 (1967) for a discussion on "plea bargaining," which on the basis of court data proves the grapevine theory to be correct.

31 CHEVIGNY, POLICE POWER 141-42 (1969).

Moreover, the morale of the force is such that inevitably police cover up for one another. It is exceedingly difficult, if not impossible, for a court to accurately determine where the truth is when it is claimed that a confession was involuntary. The whole system invites perjury from both sides and could be eliminated by excluding extra-judicial confessions.

THE ADMISSIBILITY OF CONFESSIONS

It is not my purpose to relate in detail the law of confessions. Rather, an attempt will be made to outline its evolutionary development and to examine it in the light of the behavioristic theory previously discussed.

The common law's aversion to coerced confessions was a relatively recent development. Essentially, the antecedents to our fifth amendment privilege against self-incrimination started with Sir Edward Coke and the leveller pamphleteer, John Lilburne, who based their claims to privilege against *mea culpa* on Magna Charta and Holy Scripture.[32] The Puritan Revolution in seventeenth century England thus produced a basis for the claim of privilege against self-incrimination, but it was the American Constitution which gave it meaning and implementation. And the latter meaning and implementation came to fruition only in the past two decades.

Dean Wigmore pointed out that distrust of confessions arises from judicial experience, although there had been no carefully documented confirmation in that regard. However, he concluded that there was sufficient evidence to fortify the ordinary observation:

> . . . that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises whenever the innocent person is placed in such a situation that the untrue acknowledgement of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that there may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.[33]

The empirical observation and judicial intuition relied upon by Dean Wigmore are amply supported today by scientific documentation and,

[32] *See* Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213 (1952).

[33] WIGMORE, *supra* note 2.

as we have seen, there is justification for extending our distrust of confessions into a general rule of inadmissibility.

In legal theory, this distrust of confessions rests upon two grounds, the danger of falsity pointed out by Wigmore, and our aversion to coercive police tactics including the "third degree." Despite the popularity of appeals for "law and order," it should be remembered that the function of a criminal trial is two-fold: to get at the truth and to administer justice by a fair and civilized procedure. Police state measures may or may not be more effective in achieving the former, but one indicium of a democratic society, as opposed to an authoritarian regime, is the fair procedure provided for the administration of criminal justice. Tragically, all too often those most deeply involved in the accusatory process—the police, prosecutors, and trial judges—forget this two-fold purpose of criminal justice and assume that almost any means justify the end of conviction, guilt being assumed.

Of course, from the sociological point of view, the criminal process has been institutionalized by custom and practice, and there is a gap between constitutional theory and actual practice, in much the same way as there is a gap between the law of divorce and what actually happens in uncontested cases. The traditional legal justification for detention and arrest is to bring the accused before a magistrate forthwith, but police and prosecutors, ignoring the reason for such power, have seized upon arrest and detention as an opportunity for interrogation. They were permitted to indulge in this abuse of process for so many years that many now resent judicial interference with the illegal or extra-legal use of their power of arrest. The prevalent abuse of the power to set bail is another example of institutionalization, and there are many others.[34] Such perversions or corruptions (or institutionalizations) of legal processes, without regard to their true purpose, are sought to be justified by a war-on-crime psychology, without regard to the constitutional theory that the rule of law means that officials as well as citizens are subject to law. The psychological difficulty is that too many law enforcement people, instead of regarding themselves *under* law, assume that they are *the* law in this power hungry world.

The test that developed for the admissibility or exclusion of confessions was that of whether or not the particular confession was "voluntary." In applying that test, the cases turned on the two factors of the

[34] For a recent discussion of the horrors of our criminal procedure, *see* MENNINGER, *supra* note 23.

nature of the defendant and his circumstances, and the character of the police methods employed. If the confession was deemed to be "voluntary," it was admissible into evidence, but if "involuntary" it was excluded. It is now established that the judge must make the initial determination of "voluntariness."

The first significant Supreme Court decision to apply the above test was *Brown v. Mississippi*,[35] decided in 1935, which reversed a conviction based upon a confession obtained by lynch mob justice. Since that decision, it has been clear that violent or third degree methods (where proved) render a confession involuntary. Subsequent cases held that other police abuses such as excessively prolonged interrogation,[36] or forcing the prisoner to strip nude before questioning,[37] violated the fourth and fifth amendments and that confessions exacted by such methods were inadmissible at the criminal trial.

Other cases stressed the personality, age, intelligence, experience, education, and background of the confessor, and weighed and balanced such factors against the legitimate needs of law enforcement. In *Crooker v. California*,[38] the intelligence and college education of the defendant, including a year in law school, led to the conclusion that his confession was voluntary. But in *Mallory v. United States*,[39] where a nineteen-year-old defendant of limited intelligence was subjected to a prolonged interrogation, and in *Spano v. New York*,[40] where a foreign-born defendant, age twenty-five, who had no prior criminal record, was subjected to fatigue and long questioning, it was held that the confessions were involuntary.

Perhaps the leading case of the series that applied a weighing and balancing process to assess the defendant's rights and the needs of law enforcement was *Watts v. Indiana*.[41] In his concurring opinion, Mr. Justice Jackson conceded that there had been an extensive interroga-

[35] 297 U.S. 278 (1936). The proposal that all extra-judicial confessions be held inadmissible is not new. In *Brown v. Walker*, 161 U.S. 591, 597 (1896), the Supreme Court commented that the inquisitorial character of an interrogation with its temptation to push the accused into a fatal contradiction "made the system so odious as to give rise to a demand for its total abolition."

[36] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[37] Malinski v. New York, 324 U.S. 401 (1945).

[38] 357 U.S. 433 (1958).

[39] 354 U.S. 449 (1957).

[40] 360 U.S. 315 (1959).

[41] 338 U.S. 49 (1949).

tion of the defendant, without presence of friends or counsel or any support, but concluded that the only way police could perform their task was to sacrifice rights of the defendant where police methods were not patently raw. Unfortunately, he concentrated on the character of police methods and gave insufficient consideration to the nature of the defendant and the extreme risk of falsity of the confession.

In 1961, there were two important decisions dealing with the problem of involuntary confessions. In *Culombe v. Connecticut*, the Court declared that:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne and his capacity . . . impaired, the use of his confession offends due process. The line of distinction is that at which governing self-direction is lost and compulsion of whatever nature or however infused propels or helps to propel the confession.[42]

Although the test is couched in terms reminiscent of the M'Naughten test of legal insanity, it is clear that police methods other than violence or the threat of violence may make a confession "involuntary." Moreover, if, as claimed herein, all police interrogation is per se intimidating, and more often than not, "self-direction" is lost and "compulsion propels the confession," under *Culombe* all confessions are at least prima facie involuntary.

The other 1961 decision in point was *Rogers v. Richmond*, where the Court said that involuntary confessions were inadmissible "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law:"

> that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth . . . . [There is] the deep-rooted feeling that the police must obey the law while enforcing the law: that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.[43]

Thus, the rights to be free from coercive treatment by police and to have involuntary confessions excluded were anchored into the fourth

[42] 367 U.S. 568, 602 (1961).

[43] 365 U.S. 534, 540-41 (1961).

and fifth amendments, and the stage was set for the next step in the evolution of the involuntary confessions rule.

Gideon v. Wainwight,[44] in 1963, held that an indigent accused had a right to assigned counsel at every "critical stage" of a criminal proceeding. Obviously, from defense counsel's point of view, interrogation at the station house is a most "critical stage." The following year, in *Escobedo v. Illinois*,[45] the Court agreed that the right to counsel included a right to have counsel present at police interrogation, especially where the lawyer was at the station clamoring to get in, and the police refused him access to the accused while they continued to grill the accused and to extract a confession. The Court also then proceeded to lay down a set of rules governing police interrogation. Although there was confusion and controversy as to the proper interpretation of *Escobedo*, problems were substantially clarified in 1966 in *Miranda v. Arizona*, which held that when a person is "taken into custody or otherwise deprived of his freedom of action in any significant way," he must be advised, prior to interrogation, that "he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge."[46]

Thus, the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel were construed so that they synthesized with prior fourth and fifth amendment decisions relating to the voluntariness of confessions. Due to *Miranda*, the prosecution cannot use statements stemming from custodial interrogation of the defendant unless it can prove that procedural safeguards effective to secure the privilege against self-incrimination were used. However, if the *Miranda* warning is given and effectively waived, there remains a question as to the voluntariness of any confession exacted and its admissibility into evidence. Implicit in *Miranda* is the recognition that a police station is a hostile atmosphere for an accused, that he is under stress and needs the support of a lawyer, no matter what his circumstances. To this extent, the decision goes beyond the weighing and balancing process in such cases as *Culombe*, with its focus upon voluntari-

[44] 372 U.S. 335 (1963).

[45] 378 U.S. 478 (1964).

[46] 384 U.S. 436, 478, 479 (1966).

ness of a confession, for violation of the procedural rules of *Miranda* requires the exclusion of even a "voluntary" confession.

The practical considerations lying behind the *Miranda* rule, moreover, apply with equal force to what may be the next step in the evolution of the test of the admissibility of confessions. If the danger of police over-zealousness justifies the *Miranda* rule, *a fortiori* it justifies the exclusion of *all* extra-judicial confessions, except, perhaps, those elicited when counsel was present. To say that after an effective waiver following the *Miranda* warning confessions will be deemed to be voluntary is to reject the reasoning in support of *Miranda*. Even though brutality is absent, and there are no threats or promises of reward, the police station remains a hostile atmosphere, and not only does an accused need a lawyer, he also is in danger of falling into a false confession. The former cases stressing the age, intelligence, education, and background of the confessor sense the danger but do not see the risk. The risk is the inherent untrustworthiness of all extra-judicial confessions, not merely those extracted from callow youth, or after prolonged questioning while being held incommunicado, or from a moron, or from a frightened accused.

Moreover, the Court's decision in *Leyra v. Denno* invites the next step. There, in an intuitive opinion by Mr. Justice Black, a confession was voided because the police by trickery had a psychiatrist versed in hypnosis placed in the cell with the accused, and the psychiatrist, "by subtle and suggestive questioning, threats and promises,"[47] obtained a confession. The accused later that same evening also made further confessions to police officers. The Court held both confessions inadmissible, the latter on the ground that it was a continuation or hang-over from the "brainwashing" process used by the psychiatrist posing as friend and doctor. Mr. Justice Black's common sense judgment is supported by students of suggestibility and hypnosis, including his conclusion as to the untrustworthy character of the later confession, due to its continuing relation to the first. But it is not necessary to have a hypnotist nor a trance-like state to do what was done to the defendant's will in *Leyra*. The same result may be achieved by less subtle means, in the case of most people. For example, police achieve great success with the "bad-good cop" technique in the case of suspects who

[47] *Supra* note 25, at 559. *See also* Stein v. New York, 346 U.S. 156 (1953), and Annot., 99 A.L.R.2d 772 (1965).

are not hardened criminals, the suspect frequently confessing to the "good cop" after mistreatment by the "bad cop."

CONCLUSION

Legal knowledge and concern about hypnosis has been quite limited in the past. Statutes in some states license and control stage hypnosis,[48] or regulate its use in medicine and dentistry to those specially qualified.[49] Courts also have held that statements made by an accused while under hypnosis should be excluded on the same grounds applied in the "truth serum" cases.[50] At the same time, courts have been aware of the phenomenon of suggestibility in the development of the law pertaining to the exclusion of involuntary confessions, as has been true in some civil cases where the issue is undue influence. The burden of these remarks is that the law has not gone far enough to achieve its goal of assuring the trustworthiness of confessions, and the only guaranty is the rule of exclusion.

Hypnosis or suggestion can be used to practice deception. In a trance, or trance-like state, an individual's perception can be altered. For example, hallucinations can be induced, round objects may be made to appear square, red may look like blue, and in short, normal critical appraisal of surroundings and circumstances can be diminished. The subject, according to Dr. Spiegel, in a sense "is off guard, in a position of relative helplessness, and placing his trust in the hypnotist, anyone in a deep trance is more vulnerable to intimidation, threat and coercion than he otherwise would be."[51]

[48] *See* Brennan, *Statutory Regulation of Hypnosis*, 14 CLEV.-MAR. L. REV. 112 (1965).

[49] Virginia enacted such a law in 1950, and in Texas the use of hypnosis, under some circumstances, has been regarded as the unauthorized practice of medicine.

[50] *See* Sadoff, *supra* note 2; State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897). Cases are collected in 34 A.L.R. 147 (1925); 86 A.L.R. 616 (1933); 119 A.L.R. 1200 (1939); 139 A.L.R. 1174 (1942); 23 A.L.R.2d 1306 (1952). *See also* Inbau, *The Lie Detector*, 26 B.U.L. REV. 264 (1946); Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. CHI. L. REV. 601 (1947); Comment, *Deception-Tests and the Law of Evidence*, 15 CAL. L. REV. 484 (1927). *Cf.* People v. Sims, 395 Ill. 69, 69 N.E.2d 336 (1946) (statements procured during lie detector test administered without consent held inadmissible). *See also* report of reversal of *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969) and the subsequent altering of Department of Justice standards restricting use of hypnotism. N.Y. Times, March 16, 1969, at 94, col. 4.

[51] *Supra* note 12.

By "hypnotist" Dr. Spiegel does not mean a psychiatrist, a stage hypnotist, or a professional. Police, or anyone else, including the subject himself, can learn to induce hypnotic-like trances. And under police station conditions, whether we call it a hypnotic trance or submission to suggestion, suspects may be manipulated by authority figures. In order to maintain conditions which allow an individual to exercise critical control and his best judgment, there must be alertness, time for reflection, and the support of counsel or friend. Otherwise, the hostile atmosphere of police station interrogation will overwhelm most suspects unfamiliar with police methods, and there can be no assurance that a confession is genuine.

Judge Orman Ketchum, in his discussion of the inadmissibility of the confessions of juveniles, clearly recognized the danger of out-of-court confessions and the fact that *Miranda*-like warnings were inadequate. He said:

> Thus, despite warnings concerning the use to which his incriminating statement may be put, despite the observance of fair play on the part of the police at all times, the confession of the person interrogated may well be a distortion of truth or wholly erroneous. . . . For a suggestible youth, the authoritarian atmosphere of a police station is, in itself, accusatory and full of tensions and pressures not conducive to a frank, open and unvarnished expression of opinion. These statements, made to the police under such circumstances could well have been motivated by many things besides a desire to tell the truth. Hence, none of the youth's oral statements were considered trustworthy enough to admit them as evidence.[52]

In the law of confessions we have a matter which lies at the heart of the problem of reconciling human freedom and security.[53] Before *Miranda*, and possibly even afterwards, the test on voluntariness required an examination of the nature of the defendant and the character of police methods, and perhaps a weighing and balancing of such factors with the needs of law enforcement. It is scientifically sound to exclude all extra-judicial confessions on the ground of inherent unreliability, and it is submitted that it is socially desirable, as long as we have an accusatorial system, to require police and prosecutors to abandon their frequent reliance upon confessions and to arrest, prosecute

[52] In the Matter of Four Youths, *supra* note 3, at 641.

[53] *See* Foster, *The Relation and Correlation of Freedom and Security*, 58 W. VA. L. REV. 325 (1956). In New York, partial abolition of the death penalty and faith in the validity of confessions were affected by the denouement of the *Whitmore* case. For a fascinating account, *see* Shapiro, *Annals of Jurisprudence—The Whitmore Case*, THE NEW YORKER, Feb. 8, 1968, at 39, Feb. 15, 1968, at 44, Feb. 22, 1968, at 42.

and convict malefactors on the basis of cogent proof. Confessions should not be presumed to be voluntary, for behavioristic science points to the opposite premise. If we want to abandon the accusatorial system for the inquisitorial one, that is another issue and problem.

Admittedly, the above doctrine is not in accord with the current cry for law and order. But in this area we need more reason and less hysteria. Such reliable evidence as we have indicates that *Miranda* has been no deterrent to competent law enforcement.[54] Those who accuse the Supreme Court of "coddling criminals" are not realistic and many of the cases they point to are those where guilt is presumed solely because a confession occurred. We have seen how untenable such an assumption is and that the premise is not justified. It undoubtedly is true that most law violators escape punishment,[55] but responsibility for that state of affairs should be placed at the doorsteps of an apathetic public and unprofessional police forces. Moreover, to the extent that we have a "crime of punishment,"[56] the situation is exacerbated by traditional reliance upon confessions to prove guilt. For millions of our citizens we will become less of a police state and more of a democracy the sooner we implement the rule of law and bring the police under its rubric. The "police station syndrome" is a reality, and there is no rational basis for assuming the verity of voluntary or involuntary confessions.

[54] *See* A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 101-49 (Study Draft No. 1, 1968), which summarizes studies on the impact of Miranda. Of special interest are Seeburger & Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); and Note, *Interrogations in New Haven: Impact of Miranda*, 76 YALE L.J. 1519 (1967).

[55] *See* Ennis, *Crime Victims, and the Police*, TRANS-ACTION, June 1967, at 39-40 who concludes on the basis of the President's Crime Commission Report that of 2,000 known crimes the police are notified in about fifty per cent of the cases; when notified they come to the scene about three-fourths of the time; and in four out of five cases no arrest is made. Of the twenty per cent of offenders who are arrested, more than one half are dismissed without a trial; of the forty per cent who are tried, about one-half are convicted, and only some of these serve sentence.

[56] *Supra* note 23.

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