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Constitutional Law - Self-Incrimination - Use of Confessions for Impeachment Purposes

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CONSTITUTIONAL LAW—SELF-INCRIMINATION—USE OF CONFESSIONS FOR IMPEACHMENT PURPOSES—The United States Supreme Court has held that the voluntary confessions of a criminally accused, made in the absence of full Miranda warnings, may be used to impeach his credibility.

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

Harris was indicted on two counts for selling narcotics to an undercover agent, and he was convicted on one count. During his trial, Harris took the stand to state that he had put only baking powder, not heroin, into the envelopes he sold to the police agent. On cross-examination, the prosecutor attempted to impeach his credibility by referring to his prior in-custody statement, made soon after his arrest, when he had not been warned of his right to counsel. Two portions of his inconsistent statement were read, involving his confession that he had acted as an agent for the undercover officer in order to purchase narcotics and that he had purchased narcotics from an unknown person.

Harris appealed, and the Appellate Division of the New York Supreme Court,[1] in affirming his conviction, considered whether in-custody statements of the accused could be used for impeaching purposes when obtained in absence of the warnings outlined in *Miranda v. Arizona*.[2] The latter court adhered to a New York Court of Appeals' pre-Miranda ruling,[3] which stated that a confession could be used for impeachment purposes, although it could not be used for a prosecutor's case in chief. When Harris appealed further, the New York Court of Appeals held that the *Miranda* case had no effect on the use of confessions for impeachment.[4]

The United States Supreme Court granted certiorari[5] to consider whether a confession made in the absence of full *Miranda* warnings could be used to impeach the defendant's credibility.

Chief Justice Burger, speaking for the majority, stated that the admissibility of a confession into evidence for impeachment purposes was not to be decided on the basis of the *Miranda* criteria, but on the long accepted judicial standard of voluntariness. The Court said that *Miranda* specifically excluded a "tainted" confession from a pros-

1. People v. Harris, 31 App. Div. 2d 828, 298 N.Y.S.2d 245 (1969).
2. 384 U.S. 436 (1966).
3. 31 App. Div. 2d at 830, 298 N.Y.S.2d at 249, *citing* People v. Kulis, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966).
4. People v. Harris, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349 (1969).
5. 398 U.S. 937 (1970).

ecutor's case in chief;[6] *Miranda's* assumed effect of eliminating police misconduct in questioning a suspect was thereby fully satisfied.[7] According to Chief Justice Burger, however, a secondary and saving use of the "tainted," voluntary confession should be allowed. He reasoned that impeaching the defendant's credibility on cross-examination would counter his temptation to commit perjury on the witness stand.[8]

The dissenting opinion, written by Justice Brennan, joined by Justice Douglas and Justice Marshall, had no argument against the voluntary test for confessions, that had been joined with the due process clause of the fourteenth amendment,[9] but said that the *Miranda* case presented a new constitutional reason for total exclusion of a defendant's confession. The dissent stated that the *Miranda* criteria for excluding a confession were based upon the fifth amendment rights against self-incrimination and that the *Miranda* criteria had to be fulfilled so the defendant could freely choose to take the witness stand.[10]

The majority and the dissent disagreed also on the application of *Walder v. United States.*[11] In that case, the Court permitted impeachment use of "tainted" evidence excluded from a prosecutor's case in chief. Chief Justice Burger admitted that *Walder* established collateral impeachment of a defendant through evidence that was unrelated to his instant trial; however, the Chief Justice saw no problem in establishing impeachment through direct evidence, since the jury would be aided in weighing the defendant's credibility.[12] Quite the contrary, Justice Brennan narrowly interpreted *Walder* as a sanction for collateral impeachment and a guaranty that the defendant could freely take the witness stand to deny all " 'the elements of the case' "[13] against him.

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6. Harris v. New York, 401 U.S. 222, 224 (1971).
7. *Id.* at 225.
8. *Id.* at 225-226.
9. Brown v. Mississippi, 297 U.S. 278 (1936).
10. 401 U.S. at 229-230.
11. 347 U.S. 62 (1954). This case was a conflict between fourth amendment rights and perjury. The defendant had been convicted on a federal drug violation. During his trial he took the stand to testify that never in his life had he possessed or dealt with narcotics. Several years earlier, however, heroin had been found in his possession through an illegal search and seizure. This evidence was offered by the prosecutor to impeach his credibility. The case held that a defendant could be impeached with collateral evidence if he took the witness stand and "of his own accord . . . went beyond a mere denial of complicity in the crimes of which he was charged and made a sweeping claim." *Id.* at 65. *Walder* has never been extended to allow impeachment use of direct evidence from an illegal search and seizure. *See* Cannito v. Sigler, 321 F. Supp. 798 (D. Neb. 1971), where the attempted use of such evidence was unsuccessful.
12. 401 U.S. at 225.
13. *Id.* at 229.

The significance of the Supreme Court decision in *Harris* is twofold. First, the Court continued the rather dubious practice of letting a "tainted" in-custody statement be heard by the jury as an attack on the defendant's credibility. Second, the Court changed the impeachment test for use of "tainted" confessions from the narrow exculpatory test to the broad and nebulous voluntary one.

In the history of excluding confessions from a prosecutor's case in chief, the saving use of impeachment is a fairly recent innovation developed by Chief Justice Burger in 1959 when he was a member of the Court of Appeals for the District of Columbia.[14] At the time, Chief Justice Burger was confronted with voluntary confessions excluded because of delays in arraignment. He established a test that would permit impeachment use, and at the same time, not infringe upon the defendant's rights. Exculpatory[15] sections of a defendant's voluntary statements were available for impeachment purposes. To administer the test, the trial judge was to compare the defendant's in-custody confession with his trial testimony and "to receive into evidence only that part of the written statement which does not go to the admission of acts which constitute elements of the crime itself."[16] This exculpatory test for impeachment was adopted by other federal and state courts.[17] After 1966, the exculpatory test was discontinued by most courts[18] because of a reference in *Miranda* to the invalidity of distinguishing exculpatory segments from inculpatory segments in a defendant's confession for impeachment purposes. *Miranda* said all of a defendant's in-custody statements were incriminating.[19]

This oblique reference to impeachment with exculpatory statements did not, however, state that voluntary confessions could never again be used for impeachment purposes, as they had in the past. The pos-

14. Chief Justice Burger expounded his impeachment idea in the dissenting opinion of Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959), and the majority opinion in Tate v. United States, 283 F.2d 377 (D.C. Cir. 1960).

15. A defendant's in-custody statements used to be placed in three categories: statements involving facts that were subordinate to the crime; exculpatory statements that were explanations of innocence; and confessions, the only one of the three considered incriminating. The modern view rejects this classification and focuses upon the rights of the accused. 3 WIGMORE, EVIDENCE § 821 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

16. 270 F.2d at 920-921.

17. *See* United States v. Curry, 358 F.2d 905 (2d Cir. 1966); People v. Kulis, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966).

18. 401 U.S. at 231.

19. 384 U.S. at 476-477.

sibility was brought up academically before *Harris*.[20] Along with the dissent in *Harris*, the theorists believed the whole spectrum of a defendant's trial rights argued strongly against an impeachment use of confessions when the *Miranda* criteria for interrogation had not been met.

The majority opinion in *Harris* did not recognize a close relationship between impeachment use and conviction use. In fact, Chief Justice Burger expressed some doubt that the *Miranda* safeguards were needed to curb police misconduct.[21]

Since *Miranda* ended the exculpatory test for admitting confessions into evidence for impeachment, Chief Justice Burger in the majority opinion in *Harris* needed a new test. His choice of the voluntary test seems to have been both obvious and natural because of its long use in excluding confessions from the courtroom and because of *Miranda's* acknowledgment of its continued validity as a test.[22]

No one really knows what a voluntary confession[23] is; a definition would have to include two historic developments. First, in common law a voluntary confession was a trustworthy statement that had not been induced by physical coercion.[24] Second, the United States Supreme Court recognized the additional untrustworthiness of a confession produced by psychological coercion.[25] The second development ended the clarity of the voluntary test. Finally, the Supreme Court admitted that only a case by case determination could be used to gauge a voluntary confession, based upon the "totality of circumstances"[26] of the interrogation process.[27] Concurrent with the last development the Court focused more and more upon the defendant's rights and stopped worrying whether a confession was trustworthy or

20. *See* Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177 (1967); Comment, *The Collateral Use Doctrine: From Walder to Miranda*, 62 NW. U.L. REV. 912 (1968); Comment, *The Impeachment Exception to the Exclusionary Rules*, 34 U. CHI. L. REV. 939 (1967).

21. 401 U.S. at 225.

22. "Voluntary statements of any kind are not barred by the Fifth Amendment. . . ." 384 U.S. at 478.

23. *See* Culombe v. Connecticut, 367 U.S. 568 (1961), where Justice Frankfurter offered this criterion: "Is the confession the product of an essentially free and unconstrained choice of its maker?" *Id.* at 602.

24. WIGMORE, § 817.

25. *See* Miller and Kessel, *The Confession Confusion*, 49 MARQ. L. REV. 715, 717 (1966).

26. Culombe v. Connecticut, 367 U.S. 568, 606 (1961).

27. The Wigmore test for the admissibility of confessions lists voluntariness as just one factor, and all the factors are given equal importance. WIGMORE, §§ 824-826. If a confession were inadmissible to a prosecutor's case in chief because of its failure to meet any one of the factors, Wigmore believed that no impeachment use could take place. *Id.* § 821.

not.[28] The voluntary test for confessions exists, but it is not really clear whether Chief Justice Burger adopted a test or a justification for admitting confessions into evidence for impeachment.

Whether as a test, justification, or both, the Court's choice of the voluntary standard for admitting a confession into evidence for impeachment purposes has three practical effects. The first effect is that the fifth amendment protection for the accused under police interrogation is made less important than the protection of the due process clause of the fourteenth amendment. The fourteenth amendment had long been associated with the voluntary test for confessions, and an involuntary confession had been excluded from both convicting and impeaching use by the Court. The new criteria for confessions, supplied by *Miranda,* were associated with the fifth amendment rights against self-incrimination.[29] Perhaps the fact that *Harris* permitted the impeachment use of voluntary confessions, taken in violation of the fifth amendment, points to the essential confusion in language and purpose in the *Miranda* opinion.

A second practical effect of the *Harris* opinion is upon the conduct of police officers. Any error they might make in fulfilling the procedural safeguards to a defendant could produce a confession, which would be valuable evidence for a prosecutor. The confession, offered as an attack upon the defendant's credibility, would be very believable to a jury. A jury could not help being aware that the confession was made closer in time to the criminal charge than the trial, and made without the intervention of an attorney. In questioning a suspect, police officers no longer have an incentive to live up to higher standards than not using coercion, when the United States Supreme Court has told them a voluntary confession is trustworthy evidence even if they violate the *Miranda* procedures. No one would say police officers would deliberately ignore or disobey the *Miranda* procedures; they might if the suspect being questioned was particularly offensive.

The third and most critical effect of the *Harris* decision is upon the defendant himself. Any suspect, ignorant or educated, is unequal

28. United States v. Spano, 360 U.S. 315 (1959), where the Court said: "The abhorrence of society to the use of involuntary confessions does not turn alone to their inherrent untrustworthiness. It also turns on the deep rooted feeling that the police must obey the law while enforcing the law. . . ." *Id.* at 320.

29. The oral arguments before the Court and the comments of the judges showed this confusion over whether the fourteenth amendment, the fifth amendment, or the sixth amendment was involved in *Miranda. See* MEDALIE, FROM ESCOBEDO TO MIRANDA; THE ANATOMY OF A SUPREME COURT DECISION (1966).

to the experience of police officers in the interrogation process.[30] The *Miranda* safeguards were not a solution to that psychological effect of weakness produced by official questioning.[31] Studies have shown the warnings have not been understood,[32] or if understood, were not heeded by suspects who unwittingly incriminated themselves.[33] Nonetheless, the procedural safeguards were a beginning. The impeachment use of confessions obtained in violation of the *Miranda* procedures harms that beginning step.

Two concepts emerge from the effects of *Harris* on the implementation of the *Miranda* procedures. Police officers need to use the interrogating technique, but in using it, justice should not be sacrificed. A bridge between these two concepts could be the fifth amendment. Other constitutional rights are available, and other remedies have been suggested for aiding the suspect under questioning. The other remedies are far in the future when education might catch up to the suspect and the police officer. Meanwhile, the fifth amendment has begun to have some relevance to ensuring fair treatment for the accused. That relevance could be strengthened if the fifth amendment could guarantee that no police interrogation could take place unless an attorney were present. Further confusing rules for excluding or including confessions won't help.

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30. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

31. The majority opinion in *Miranda* did succeed in identifying the nature of the intimidation involved in police interrogation by quoting extensively from authorities in the field: 384 U.S. at 449-452, 454-455, *citing* INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953).

32. Medalie, Zeitz, and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

33. See note 30.