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After tracing the development of the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel, Professor Warden makes a careful analysis of the pre-arraignment interrogation rules laid down by the United States Supreme Court in the recent case of Miranda v. Arizona. He raises some questions concerning the foundations of these rules, and postulates some ethical problems which may face the defense counselor as he tries to work with them. Professor Warden concludes that only time will tell whether Miranda marks the beginning of a new revolution in the development of criminal procedure or merely the climax of an old one.

I. Introduction

"It is far 'pleasanter to sit comfortable in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.'"

I Stephen, History of Criminal Law of England 442 n.1

At this writing *Miranda v. Arizona*[1] is less than four months old. Although its place in the annals of leading constitutional decisions is assured, its meaning for, and influence upon, the criminal law process in the United States is not at all certain. It will require years of data accumulation and analysis to determine how profound an effect it will have and to evaluate that effect in terms of social impact.[2] It is too soon to know whether the *Miranda* case has started a new revolution in the administration of criminal justice or has merely ended an old one. Is this the first loud cry of an ascent period of activism by the Supreme Court in the field of criminal law, or is it the *chant du cygne* of the old active phase? At the present time, only two things are clear. First, the old imaginary lines that sometimes separated confessions, and inculpatory and exculpatory statements have been erased; in their place stands a highly visible requirement that courts make inquiry into the import and effect of the enviroument in which an accused's statements were made. Second, the right to counsel under the sixth amendment and the privilege against self-incrimination under

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1. 384 U.S. 436 (1966).

2. The gloomy truth is that very little effort has been made in this country to gather objective data on the impact of Supreme Court decisions on criminal law enforcement.

the fifth amendment are not isolated from each other, but rather are integral and integrated parts of the complex of fundamental rights secured to citizens accused of crime. The scope of this interrelationship is no more susceptible of being accurately measured at this time than is the *Miranda* case capable of being forced into narrow and well-delineated configurations. We must settle for thinner stuff. We can only ask questions and make tenative observations for we are but participant-observers in a new exploration through the jungles of crime and criminal law.

II. THE MIRANDA CASES

Four cases from different sections of the country were decided under the style of *Miranda v. Arizona.*

First, in the *Miranda* case itself,[3] the accused was arrested in Phoenix for kidnapping and rape and taken to a local police station. He was placed in an interrogation room where, after two hours, he confessed. There is nothing in the Supreme Court's opinion to indicate that any form of physical abuse was used. At the top of his written confession was a typed paragraph stating that the confession was voluntary, made without threats or promises, made after the accused had been told it could be used against him, and made "with full knowledge of my legal rights . . . ."[4] When the confession was introduced at the trial, the police officers admitted that Miranda had not been advised that he had a right to have an attorney present at the interrogation.[5] Unlike Danny Escobedo,[6] Ernesto Miranda had not requested an attorney during his interrogation.

Second, in *Vignera v. New York,*[7] Vignera, a robbery suspect, was picked up by the police and questioned. During the questioning he orally admitted his part in the robbery. At the conclusion of the testimony the trial judge instructed the jury:

> The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what I said, I am telling you what the law of the State of New York is.[8]

In this case, as in *Miranda,* there was no evidence of physical brutality.

Third, in *Westover v. United States,*[9] Westover was arrested and charged with robbery by the Kansas City police. He was interrogated, off and on, for two days, and there was no evidence that the city police

3. 98 Ariz. 18, 401 P.2d 716 (1965).
4. 384 U.S. at 492.
5. *Ibid.*
6. Escobedo v. Illinois, 378 U.S. 478 (1963).
7. 15 N.Y.2d 970, 207 N.E. 2d 527, 259 N.Y.2d 857 (1965).
8. 384 U.S. at 493-94.
9. 342 F.2d 684 (9th Cir. 1965).

ever warned him of his rights. After Westover had been in custody for approximately fourteen hours, he was handed over to the F.B.I. The F.B.I. did not remove Westover from the Kansas City police headquarters. They did inform him of his rights before they commenced the interrogation. The incriminating statements growing out of this latter interrogation were introduced at Westover's trial. As in the two earlier cases, there was no evidence of physical abuse or of unduly prolonged and physically exhausting interrogation.

Fourth, in *California v. Stewart*,[10] Stewart was charged with kidnapping to commit robbery, rape, and murder. He was interrogated in isolation by the Los Angeles police over a period of five days before he confessed. Since the record of the trial court did not show whether Stewart was advised of his constitutional rights, the California Supreme Court reversed, holding that under the *Escobedo* doctrine he should have been advised of his rights and that such advice would not be presumed from a silent record. Again, nothing in the Supreme Court indicates any physical brutality; the five-day interrogation cannot be understood to have been continuous, *i.e.*, without opportunity to eat or sleep.

The remarkable thing about these four cases is that they are unremarkable. Their facts, viewed singly or in the aggregate, do not smell of the stuff of constitutional decisions. They are typical examples of the daily result of the most mundane police precinct investigations. The likelihood of any of them reaching the United States Supreme Court was remote for the "blood of the accused" did not stain their transcripts. In none do we find the traditional indicia of the coerced confession. Yet, it is precisely because of their unremarkable character that they were selected to illustrate the Plimsoll mark of pre-arraignment interrogation procedure. To understand this one must look briefly at the evolution of the interrogation process in the United States Supreme Court.[11]

III. Some History

A. *The Fifth Amendment—Due Process Cases*

The *Miranda* decision was written to clarify and further amplify the Court's decision in *Escobedo v. Illinois*.[12] *Escobedo*, decided in 1963, brought together two separate lines of cases: the fifth amendment—

10. 43 Cal. Rptr. 201, 400 P.2d 97 (1965).

11. The use of confessions by the organized society against one subject to its power must be as old as organized society itself. The special role of confession in a criminal trial has taproots deep in the history of the common law. Holdsworth states "The privilege against self-incrimination was wholly unknown to the common law of this period. It is not until after the Restoration that this privilege was recognized." 5 Holdsworth, History of English Law 193-94 (1924).

12. *Supra* note 6.

due process confession cases and the sixth amendment right to counsel cases. To place the *Miranda* decision in proper perspective, it is necessary to first look at each of these lines of cases. The traditional starting point for an examination of the Supreme Court's interest in confessions is *Bram v. United States*,[13] a federal case decided in 1897. There the accused was taken from the jail to a detective's private office, stripped of his clothing, and interrogated; the resulting conversation was offered as a confession at his trial. The Court concluded that the nature of the defendant's situation and of the detective's questions disspelled any notions that the defendant's responses were the product of voluntary mental action. Then it said:

> Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be compelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes. . . . As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of the mind which the causes ordinarily operated to create.[14]

The first state case which was reversed by the Supreme Court because of the use of an involuntary confession was the 1936 case of *Brown v. Mississippi*.[15] There the defendants were whipped until they gave complete assent to a confession already prepared by the police. The Court reversed the conviction on due process grounds because the facts revolted its sense of justice. The question of the relationship of the fifth amendment prohibition against self-incrimination to the states was not raised or answered. As Chief Justice Traynor has since observed:

> For many years . . . the United States Supreme Court consistently refrained from extending the privilege [against self-incrimination] to the states under the due process clause of the Fourteenth Amendment, but there were portents in the cases that there would be such an evolution. It materialized in *Malloy v. Hogan* in 1964. The evolution was fostered, as Mr. Justice Brennan noted in his opinion for the Court, by the gradual shift in the basis for the exclusion of coerced confessions from the purported untrustworthiness of such testimony to grounds of due process that in time became virtually indistinguishable from the privilege against self-incrimination. Once the privilege was clearly recognized as operative to inhibit state police inter-

13. 168 U.S. 532 (1897).
14. *Id.* at 547-48.
15. 297 U.S. 278 (1936).

rogations, it was *a fortiori* applicable to inhibit interrogations in state judicial proceedings.[16]

The long series of cases following *Brown*[17] make it clear that when there was substantial evidence that a confession introduced at the trial was the product of coercion, the resultant conviction would not be allowed to stand. The meaning of coercion was then expanded to encompass more than actual physical beatings or unduly protracted periods of interrogation without ample opportunity to eat or rest. The best summary of this new attitude of the court toward the confession cases was given by Mr. Chief Justice Warren in *Blackburn v. Alabama*:

> As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus, in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar.
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> But neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, 'The abhorrence of society to the use of involuntary confessions . . . also turns on 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 legal methods used to convict those thought to be criminals as from the actual criminals themselves.' *Spano v. New York*, . . . 360 U.S. 315, 320-321]. Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.[18]

B. *The Sixth Amendment—Right to Counsel Cases*

At the same time that the coerced confession cases were being decided under the fifth amendment, another seemingly separate line

16. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 21 RECORD OF N.Y.C.B.A. 357, 365-66 (1966).

17. Chambers v. Florida, 309 U.S. 227 (1940); Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Lisenba v. California, 314 U.S. 219 (1941); Ward v. Texas, 316 U.S. 547 (1942); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Malinski v. New York, 324 U.S. 401 (1945); Leyra v. Denno, 347 U.S. 556 (1954).

18. Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960). This "complex of values" referred to by Mr. Chief Justice Warren was broad enough to encompass the accused who was denied the right to telephone his wife and speak to his lawyer until he made a statement, Hayes v. Washington, 373 U.S. 503 (1963), and the confession of a fourteen-year-old boy who did not have a lawyer, Gallegos v. Colorado, 370 U.S. 49 (1962). The method adopted by the states to determine "voluntariness" might also be inadequate or improper. Jackson v. Denno, 378 U.S. 368 (1964).

of cases involving the right of an accused to have access to an attorney evolved under the sixth amendment. Between the 1932 case of *Powell v. Alabama*[19] and the 1963 case of *Escobedo v. Illinois*,[20] over fifty right-to-counsel cases were decided by the Court. Unlike the slow reception given the more esoteric ideas involved in the fifth amendment coerced confession cases, the bench, bar and public were inclined to accept readily the sixth amendment right to counsel cases as a legitimate part of our basic "rights." The rationale for ignoring a reliable confession from a "guilty" man is, perhaps, more difficult to appreciate than are the reasons for allowing an accused man to have a lawyer represent him. Nevertheless, both lines of cases eventually converged in the *Escobedo* case.

C. *The Escobedo Case*

The *Escobedo* decision was couched in sixth amendment language, yet it dealt with a traditional fifth amendment problem. Danny Escobedo had asked to see his lawyer and his lawyer had repeatedly asked to see him. The police refused all such requests and managed to obtain a series of incriminating statements from Escobedo. These statements were offered at the trial and Escobedo was convicted. The Supreme Court reversed, and in so doing merged sixth amendment and fifth amendment rights to produce a total constitutional doctrine, applicable to the states under the fourteenth amendment, which should have largely crystallized the pre-arraignment rights of an accused. Mr. Justice Goldberg, speaking for the Court, wrote these now famous words:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright* 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[21]

Because the circumstances in *Escobedo* were unique, however, many state and lower federal courts focused on the peculiar factual situation rather than on the broad principles spelled out in the opinion.

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19. 287 U.S. 45 (1932).
20. *Supra* note 6.
21. *Id.* at 490-91.

D. *Miranda*

The great variety of response by the lower courts was predictable in light of the public furor aroused by the *Escobedo* case. The Seventh Circuit took the position that sixth amendment rights are not violated unless the accused has asked for and been denied the help of an attorney.[22] The Eighth Circuit, however, indicated it would still use the traditional measure of voluntariness for a confession obtained in the absence of counsel.[23] The Tenth Circuit refused to give *Escobedo* a "broad interpretation,"[24] while the Fifth Circuit took an expansive view.[25] And in the District of Columbia Circuit, the *Escobedo* problem met a division within the circuit itself.[26] A few states, the most notable being California, made broad interpretations of *Escobedo*;[27] most of the state supreme courts, however, sought to limit application of its doctrine to facts identical to those in the *Escobedo* case.[28] As a result of this narrow view of the nature of the pre-arraignment process and the unanswered question of the retroactivity of *Escobedo*, the federal courts were flooded with applications for post-conviction relief from state prisoners.[29]

This widespread refusal by the courts and the police to look beyond the unique facts in *Escobedo* in order to understand the language of the opinion, made it clear that the court would have to clarify its position. The *Miranda* cases, because they were so ordinary and so typical of the cases in our state criminal courts, were selected for that purpose:

> We have undertaken a thorough re-examination of the *Escobedo* decision and the principles that it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that 'No person . . . shall be compelled in any criminal case to be a witness against himself,' and that, 'the accused . . . shall have the Assistance of Counsel'—rights which were put in jeopardy in that case through official overbearing.[30]
>
> This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in

22. United States v. Kountis, 350 F.2d 869 (7th Cir. 1965).
23. Hayes v. United States, 347 F.2d 668 (8th Cir. 1965).
24. Davidson v. United States, 349 FR.2d 530, 534 (10th Cir. 1965).
25. Clifton v. United States, 341 F.2d 649 (5th Cir. 1965).
26. *Compare* Jackson v. United States, 337 F.2d 136 (D.C. Cir. 1964), *with* Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964).
27. People v. Dorado, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).
28. State v. Fox, 131 N.W.2d 684 (Iowa 1964).
29. The question of the retroactivity of both *Escobedo* and *Miranda* was decided by the Supreme Court (7-2) in Johnson v. New Jersey, 384 U.S. 719 (1966). The Court, with Justices Black and Douglas dissenting, held the rules of each case would be available only to persons whose trials began after the date of the decisions and would not be applied retroactively. The dominant consideration seemed to be the flood gates argument.
30. 384 U.S. at 442.

> assessing its implications, have arrived at varying conclusions. A wealth of scholarly material has been written tracing its ramifications and underpinnings. Police and prosecutor have speculated on its range and desirability. We granted certiorari in these cases . . . in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.[31]

What was decided in *Miranda* was no surprise. The Court reversed the convictions of Miranda, Westover, and Vignera and affirmed the reversal of Stewart's conviction. The surprising feature of the Court's opinion centered around the very specific and detailed rules laid down for future regulation of pre-arraignment interrogation in both state and federal courts.[32] The Court provided a concise summary of its holding with these words:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from

31. *Id.* at 440-42.

32. (a) ". . . if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." *Id.* at 467-68.

(b) "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." *Id.* at 469.

(c) ". . . we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471.

(d) ". . . it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." *Id.* at 472.

(e) "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74.

(f) "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474.

(g) If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-inerimination and his right to retained or appointed counsel." *Ibid.*

(h) "No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. . . . [n]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Id.* at 475.

answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[33]

E. *Summary*

Throughout the years from *Bram* to *Miranda*, the Court constantly re-examined the multiplicity of interests—individual, social and governmental—visible in the process of in-custody interrogation. Its persistent use of the twin terms "voluntary" and "involuntary," however, tended to obscure much of the evolution in this area. Originally, the Court excluded only inculpatory statements made under circumstances where an innocent man of reasonable firmness might have given a false confession; all other statements are acceptable. Then the list of acceptable statements was narrowed to give the courts more effective control over police procedure. The focus centered upon the accused, seen not as an innocent man forced into an untrue confession but as an individual who was also a citizen and, as such, entitled to certain basic rights without regard to guilt or innocence. Primarily in an effort to discover why the accused chose not to exercise these rights, the Court asked whether he even knew that they existed. The age, experience and intelligence of the accused became the dominant considerations. With the decision in *Miranda*, however, the Court has again shifted its perspective. The focus is now not on the man alone, but on the man in his environment. The inquiry is not whether there was a waiver, nor whether there was an intelligent waiver. Instead, the Court asks whether there was an intelligent waiver in an environment that would permit and honor nonwaiver. There is less concern with the fact of waiver and more concern with the accused's awareness and understanding of the other alternatives available to him.

A natural by-product of the evolution of judicial acceptance of inculpatory declarations has been the erosion of the fiction that inculpatory statements, exculpatory statements, and confessions are discreet entities entitled to differential judicial treatment. Now the Court views them for what they are—the fruits from one tree—the products of in-custody interrogation.

IV. Some Observations

Any comments on a case as important as *Miranda* must be tentative until sufficient time has elapsed to accumulate accurate data about its impact upon the criminal law processes. The court laid down very specific rules and made it clear that any deviation from these rules would cause a confession, otherwise admissible, to be excluded on constitutional grounds. Nothing useful can be said now about the wisdom of making comprehensive law today for cases not to be heard until

33. *Id.* at 444-45.

tomorrow. Nevertheless, some questions may be raised about the foundation on which *Miranda's* black letter rules stand. For example, is it possible that, with the exception of confessions extracted by brute force, all confessions are voluntary because they are prompted by an inward compulsion to confess? If so, upon whom should we place the burden of proving that the confession was voluntary? Are there ethical problems for the attorney who tries to meet the burden of proof requirements set out in *Miranda*? Does *Miranda* affect the poisoned tree doctrine? These are only some of the questions which must be considered in any attempt to evaluate this decision.

A. *The Voluntary Confession*

Is *Miranda* a step forward or a step backward in the search for a rational, constitutional method for dealing with confessions? The courts, both state and federal, have for many years refused to accept an "involuntary" confession. The hallmark of involuntariness has evolved from the original "blood of the accused" test to today's incommunicado, attorneyless and unadvised criterion. Those who thought the cases following *Escobedo* would declare unconstitutional the use of all confessions were doomed to disappointment. Mr. Chief Justice Warren ended that speculation with these words:

> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.[34]

Thus a line is drawn, albeit an unclear one, between the "volunteered" confession and the confession produced by interrogation. Is it realistic to draw such a line? Modern psychiatric knowledge, which fails to distinguish between inward and outward compulsion, provides us with little insight into why a man confesses his transgressions. But this we do know: there is a phenomenon recognized as a compulsion to confess, and it exists independent of visible outside pressure. Should such compulsive action be given formal recognition by the legal process? Chief Justice Warren speaks of confessions "given freely and without any compelling influences."[35] Is there such a confession, or are they all the products of compelling influences?[36] Unfortunately,

34. *Id.* at 478.
35. *Ibid.*
36. Surely not all "compelling influences" are dressed in police blue.

Miranda does not give us a definitive answer to the question, how compelling is "compelling"?

Any parent has seen his child confess to a yet undiscovered offense against the law of the household. The child thus reasserts his claim to family status which, he suspects, may have been lost because of his offense. At the same time he asks, unconsciously, for some sanction to be imposed—hopefully to be imposed with love—by the lawgiver in his household. Most adults remember their own "George Washington and the cherry tree" episode; some, no doubt, without a happy ending. This compulsion to confess and be re-admitted to society does not end with childhood. Ask any policeman how many times he has investigated the scene of a crime and found evidence that is as clear an indication of the identity of the culprit as an engraved calling card. Uncounted times men have been caught and convicted for making the same childish mistake in the execution of their crime. This cannot always be solely attributed to the fact that they are too stupid to learn from their mistakes. It must also be attributed, at least in part, to an underlying desire to be caught and sanctioned. Any large police station has a *modus operandi* file. This file is indexed, not by the criminals' names, but by the methods used in the commission of criminal acts. Are these methods repeated solely because of the success enjoyed; is it because the offender is too lazy or too stupid to change his technique; or is there an overtone somehow related to the child's compulsion to confess? Nor to be forgotten are the numerous senseless crimes. For example, someone burglarizes a filling station but takes only a few cans of oil and some candy, while the cash register, plainly visible, remains untouched. Too many adults have been caught and convicted of such apparently meaningless crimes for us merely to accept the answer that this is a child-like mind at work. Self-identification at the scene of the crime ranges from lipstick writing on a wall screaming "catch me before I kill again" to graffiti on a public monument identifying the writer, his phone number, address, and the name of his current love. If the layman and the policeman can see and recognize these things, the psychiatrist should be able to give us some clear insight into this remarkable compulsion to confess.[37] Unfortunately, when we turn to the psychiatric

37. The author spent several years as a prosecuting attorney in a small town. During this time it was his job to take confessions from many accused persons. Out of the multitude of confessions only one was knowingly attempted by any form of physical or mental coercion, and that attempt was completely unsuccessful. The chief recollection of the others is that the accused seemed anxious for the recitation of their rights to end so that they could start to tell their wonderful tale of derring-do. In fact, the major problem was to get the accused to stop confessing. Once the dam of silence was cracked the waters of confession poured forth in a mighty flood. It must also be reported that after giving their confession, and thus securing whatever psychological relief it brought them, they were placed in jail where some self-made "lawyer"

writings we discover little to benefit courts or lawyers. We further discover that little investigation has been done on this recurrent phenomenon.

In the book *Why Men Confess,* O. John Rogge lists the component parts of the compulsion to confess. They are: (1) feelings of guilt and sin, (2) feelings of rebellion against parents and society, (3) lack of parental love, and (4) the need for punishment.[38] Rogge's thesis is based on historical examples of confession and on collaboration by prisoners of war. There is little to indicate that he observed the data available at local police precincts.

A more conventional psychological approach is that propounded by Guttmacher and Weihofen:[39]

> A large number of criminals voluntarily confess immediately following apprehension. This is more likely to occur in the neurotic than in the normal individual. The neurotics either have a harsher superego than the normal or they are less capable of tolerating its strictures.
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> * * *
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> Some criminals have a conscious need to rid themselves of their intolerable feeling of guilt. Others confess impulsively, being themselves unaware of why they do so. They are following the harsh mandates of the unconscious portion of their superegos in order to reduce their internal tensions.
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> * * *
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> Certainly criminals spontaneously confess after arrest, even when the evidence against them is meager and when there is apparently little for them to gain through their admission of guilt. This same phenomenon, in somewhat exaggerated form, is frequently exhibited by errant spouses. It

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inmate would promptly advise them—"Don't tell nobody nuthin." Their next visitor being their defense counsel, he was generally met with a complete concoction of lies about the crime and the prisoner's role in it. The accused having satisfied, at least for a time, the compulsion to confess, was not about to give any secrets to his own lawyer. This is one advantage possessed by the State that the *Miranda* case is unlikely to seriously affect. The professional criminal is unlikely to admit his role in a crime and no amount of pressure short of extreme physical brutality will wring a confession from him. Mention must be made of the succession of mentally ill people who show up after any notorious crime to "confess" their part in it. Sometimes their story is so convincing that days are lost before it is learned that they had nothing to do with the crime. These cases usually occur when the crime has received extended coverage by the news media.

38. "Those who confess are trying to obtain or regain love and ward off feared retaliation. They are in effect saying: forgive me and love me again; punish me, beat me, but love me again. . . .

"If the innocent will confess in order to gain love, of course so will the guilty. That is why there are so many kinds of confessions. Those who are guilty of some criminal offense are under such anxiety lest they have lost love and lest there will be retaliation that they usually confess . . . . Lady MacBeth walked in her sleep, rubbed her hands as if washing them, and cried: "Out, damned spot! Out, I say!'" ROGGE, WHY MEN CONFESS 227-28 (1959). While this book is not an in-depth examination of the psychological process, it is a fascinating compendium of the confession through the ages in both fact and literature.

39. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 377-79 (1952).

> is a mistake to assume that the criminal population is without conscience. The neurotic component in the personality of criminals is generally higher than in the population as a whole and they are therefore more, rather than less, likely to be plagued by doubts and misgivings.
>
> Strictures from the superego generate anxiety which can be most effectively reduced by confession. The transgressor has aligned himself, by disavowing his antisocial acts, with the representatives of good. He can feel at peace with images of his parents that he has incorporated within himself. He is no longer beyond the pale.[40]

Both books merely describe, although in somewhat more technical language, that which the layman has already observed for himself. The reference to "strictures from the superego" means no more and no less than "conscience." Is there no more substance to the compulsion to confess than a hyperactive conscience? Surely that one simple explanation cannot alone explain the weird variety of confession-oriented crimes.

Other writers have made descriptive references to this kind of human behavior.

> [T]here is another point of comparison between neurosis and crime, and that is the sense of guilt. A feeling of guilt is an outstanding feature seen in a compulsory obsessional neurosis, anxiety hysteria, and in schizophrenia or other types of psychosis. Some crimes are motivated not by the wish for profit but by an unconscious need to be punished. In this case one would expect to find the same psychological mechanisms behind the performance of a crime as behind a neurosis of a psychosis. There is clinical support for the belief that self-punishment should be thought of as a cause of crime.[41]

This descriptive treatment of the phenomenon of criminal confession appears no more profound when attempted by the trained psychiatric writer than when attempted by the layman. Although both agree that "confession is good for the soul," neither carries this observation below the first level of descriptive analysis.

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40. "There are, of course, some perfectly obvious reasons for criminals to confess: hope of obtaining the consideration of the court in its sentence; hope of preventing conviction in certain crimes by admitting guilt in others; hope of protecting confederates by relating apparently full and frank details of the crime, etc. . . ." *Id.* at 377.

41. ABRAHAMSEN, CRIME AND THE HUMAN MIND 32 (3d ed. 1944). It must not be supposed that the lack of psychological writing about the confessional mechanism means that the other aspects of the same crimes have not been examined in depth. Crime is as complex as the mind of the human who commits the act. In describing a burglary where little of real value was taken, Bromberg makes this statement: "This speculation—of an unconscious rape fantasy in the psychologieal matrix of burglary—receives added support from the fact that younger burglars often steal inexpensive or even worthless articles. The excitement of entering a locked area seems a greater stimulus for the burglary than the intrinsic value of the articles stolen." BROMBERG, CRIME AND THE MIND 231 (1965). The rape fantasy explanation of the selection of the erime to be committed does not exclude the desire to be caught and punished which could be expressed in the same crime in a variety of ways.

The rationale of prohibiting police brutality in the guise of obtaining a confession from a criminal is obvious—we cannot permit the commission of crime in the name of the state. Nevertheless, we discover the continued use of the term "involuntary" to describe confessions even when we move beyond this level of the interrogation problem. While it is true that police manuals describe in detail methods to scare or seduce a confession, there is no evidence that such techniques will work in the absence of an inward compulsion to confess. And yet the appellate courts in our state and federal systems have predicated major policy decisions in the criminal law exclusively on an elaborate analysis of the outward and external indicia of what must be largely an internal compulsion.[42] Perhaps the objection comes too late. We may have already woven too fine an artificial mesh of rules and notions to permit ever again an in-depth analysis of the confessional process. The tightly elucidated rules governing interrogation of an accused which were announced in *Miranda* seem to leave little room for change. Yet, the Chief Justice stated that this listing was not intended forever to close the door.[43]

If these statements are viewed in conjunction with the portion of the opinion indicating that the Court did not intend to exclude confessions "given freely and voluntarily without compelling influences,"[44] there may yet be room for fundamental changes in the manner in which the law treats the confession. If different rules are needed, however, it is clear that they must preserve the spirit of the *Miranda* decision—that is, the effective elimination of real outward compulsion. For example, if future psychological research should reveal that most confessions are compelled from within (and therefore "voluntary" using the Court's meaning of the term) and that only a few examples of actual outward compulsion exist,[45] new rules could be devised to take advantage of, and be completely compatible with, this new knowledge and the old spirit. Such rules, of course, would have to continue to prohibit real external compulsion through either exclusionary rules, or,

42. There seems to be a real analogy between the method we have adopted to secure a confession and the methods adopted by the Indians who danced for rain. If they danced on a cloudy day it usually rained. When we apply our sophisticated techniques of interrogation to a person whose conscience is filled with guilt feelings, he confesses. One cannot help wondering what would have been the result had the United States Weather Bureau predicated some of its important weather forecasting techniques on an elaborate analysis of the dance movements of Indian rain makers.

43. 384 U.S. at 479.

44. *Id.* at 492.

45. The existence of real outward compulsion should not depend on what the interrogator believes himself to be accomplishing but on what is actually taking place—*i.e.*, the rain of admissions would have come whether or not he performed his ritual dance.

perhaps, direct sanctions on interrogators.[46]

In any event, there is ample evidence from the mutually complementary disciplines of psychology and psychiatry to indicate that the rules announced in *Miranda* may lack a firm foundation. While many may now consider it to be too large a step forward into the unknown, future psychiatric knowledge may prove it to have been too large a step backward.

B. *Burden of Proof*

In the least publicized, but in legal effect perhaps the most important, portion of the *Miranda* opinion, the Court placed the burden of proving the voluntary nature of the confession squarely upon the prosecution.[47] This burden of proof will not be met by showing silence on the part of the accused when informed of his right.[48] Furthermore, any evidence of threat or trick or cajolery in inducing the confession will disprove the state's contention of voluntariness.[49]

Wigmore[50] states there are five distinguishable attitudes among the states on the issue of how the burden of proof of voluntariness is to be met. The two dominant positions are:

> (1) The prosecution must show the confession was made voluntarily. (This appears to be the majority view held by twenty-nine states, the United States Supreme Court, England, Ireland, Canada, the Philippines, and Puerto Rico).
> (2) The confession is prima facie admissible and the burden is on the accused to show improper inducement. (This is the view held by Wigmore and fourteen states).[51]

The current English rule[52] takes a middle path and receives the confession unless attacked as improperly induced, at which time the prosecution must carry the burden of convincing the court that the confession was voluntary.[53]

All this is now prologue. *Miranda* places that "heavy" burden of proof on the state "if the interrogation continues without the presence of an attorney." Presumably, this aspect of the decision does not

46. The other possible result of such expanded knowledge could be a determination that any confession, no matter how voluntary it may appear, is still involuntary because of the irresistable nature of the inward compulsion. This result is highly unlikely in view of the useful nature of the confession.

47. 384 U.S. at 475.

48. *Ibid.*

49. *Id.* at 476.

50. 3 WIGMORE, EVIDENCE § 860 (3d ed. 1940).

51. Several states have appeared on both sides of this issue at different times and depending on the nature of the crime and the type of impropriety. See the collected cases. *Ibid.*

52. Regina v. Thompson [1893] 2 Q.B. 12.

53. *Cf.* State v. Mares, 43 Utah 225, 192 P.2d 861 (1948).

materially affect the federal practice, which had placed the burden on the prosecution prior to *Miranda*. But what effect does it have upon the states wherein the confession was presumed to be admissible? Clearly, in the absence of an attorney, the rule in those states must now conform to the federal practice. Not so clear, however, is what these states must do with a confession, inculpatory or exculpatory statement given in the presence of an attorney. May they continue the old practice and presume such a statement to be prima facie admissible, leaving the burden of proof of involuntariness to the accused? The fact that a full confession given in the presence of counsel may be rare does not alter the basic question involved. Time alone will answer the concomitant question of whether supposedly exculpatory statements uttered in the presence of counsel and later offered as declarations against interest or for purposes of impeachment will be of any substantial significance. It is not difficult to imagine a situation where an inexperienced counsel called to a police station confers briefly with the accused, believes the accused's exculpatory explanation, and advises him to talk with the police—only later to regret this decision when he learns that the statement is a fabric of lies. In states where the burden of proof has traditionally been on the state, there would appear to be somewhat more opportunity for the defendants to challenge such a statement than in the minority jurisdictions.

Mr. Chief Justice Warren makes it clear that waiver will not be presumed from a silent record. The state must prove that the accused was properly warned, that he understood the warning, and that he voluntarily and intelligently waived his rights.[54] Obviously, none of the questions of waiver or burden of proof would be raised in the absence of an incriminating statement by the accused. The state will always be faced with the problem of gathering and preserving two distinct lines of evidence in any interrogation—(1) the incriminating statements, and (2) proof that they were voluntarily made. Superficially, this would appear to be no additional problem for those jurisdictions that have traditionally placed the burden on the state. Of course, now they must prove more—offer of counsel to the indigent, agreement to hold up interrogation until counsel is present and the like—but the techniques of this proof would not appear to have been altered. Yet, what effect will the following language in *Miranda* have on this traditional technique? "Moreover, *any evidence* that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (Emphasis added.)[55] Does "any" evidence mean "any evidence

54. 384 U.S. at 475.
55. *Id.* at 476.

at all"? If it does, then to prevent the use of a confession or inculpatory statement, an accused need only assert at the hearing on his motion to suppress that he was "threatened, tricked, or cajoled." If "any" does not mean "any evidence at all" but rather "any substantial" evidence, questions of waiver still cannot be handled as they have been in most jurisdictions in the past. In practice, burden of proof has been met by recitations in the proferred confession that it was voluntary and that the defendant voluntarily waived his rights, coupled with statements from one or two witnesses to this same effect. The defendant has not been able to overcome this evidence simply by stating that he was acting involuntarily; instead, he has had to corroborate his assertion by bringing in other evidence to demonstrate involuntariness. This other evidence usually included such things as length of the interrogation, physical evidence of brutality, and the accused's age and intelligence. The best evidence would be the testimony of the police officer who conducted the interrogation that he overbore the will of the accused. This kind of evidence, obviously, will be most difficult, if not impossible, to produce.[56]

Will the state be able to overcome the simple assertion of involuntariness? It is obvious it will not be overcome by an equally simple assertion of voluntariness. To what extent must the defendant's assertion be answered? The Court speaks of a "heavy" burden on the prosecution.[57] It is not unrealistic to presume that this means a quantum of proof equivalent to "beyond all reasonable doubt." How the state will meet such a requirement, how it will make open and public that which was done in seclusion and private remains to be seen. While such a requirement does not diminish the usefulness of interrogation as an aid to criminal investigation, it does lessen the likelihood of the direct product of such interrogation being used at the trial of the confessor. But then, perhaps "any" does not mean "any" after all.[58]

C. *The Ethical Dilemma*

Directly related to the problems of proof raised by *Miranda* is the issue of the role of the defense lawyer who appears at the interrogation on behalf of the accused. If the lawyer is convinced that the state-

56. At least one exception to this statement was reported in an article bylined by Kathy Couric, The Eufaula Tribune (Alabama), Aug. 18, 1966, p. 1. "[Defense counsel's] objections were overruled, despite the facts that [the arresting officer] admitted from the stand that he had conducted both the search of private property and arrest without warrants, and at the arrest had failed to inform [the accused] of his constitutional rights."

57. 384 U.S. at 475.

58. A variation on this sentence was a favorable teaching tool of Thomas Porter Hardman during his years as Dean of the West Virginia University College of Law. "Perhaps 'any' doesn't mean 'any' after all." No graduate of that school could ever forget his rolling combination of West Virginia and Oxford accents as he took a full ten seconds to speak those few words.

ment of his client was or might have been the product of coercion, may he continue to represent the client at the trial of the case? His evidence, as a witness, of involuntariness would be of material benefit to the accused should the state offer the client's confession into evidence,[59] yet it is improper to serve as both attorney and material witness in the same trial. Canon Nineteen of the Canons of Professional Ethics of the American Bar Association provides:

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.[60]

In no sense could testimony of coercion be considered merely a formal matter when the question is the admissibility of a confession. This may well mean that the lawyer who appears at an interrogation and sees evidence of coercion will be precluded from further representation, at least at the trial, of the person he was expected to represent.[61]

Nor should the other side of the coin be forgotten. If the lawyer is present during an interrogation and the client gives a statement to the police, may the lawyer properly raise the issue of coercion if he is personally convinced there was no coercion? This is not the same as the question of whether an attorney can properly represent one whom he knows to have committed the charged offense. In the latter case, the attorney is not called upon to proffer an untruth to the court, but rather to see that his client receives all of the incidents of a fair trial. In the case of the confession, however, he would have to participate with his client in offering to the court evidence of coercion which he knows or believes to be untrue. Of course, he need not take the stand himself; but he must permit his client to offer evidence that the confession was involuntary. If such conduct does not cross the line between ethical and unethical practice, it most certainly comes close to that line. To require an attorney to move into the gray zone of questionable conduct is beyond the power of the court or of the client. Yet, if the client is to be permitted to raise

59. The Court mentions this role but does not comment further on it in *Miranda*. "With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court." 384 U.S. at 470.

60. For a detailed analysis of Canon 19, see DRINKER, LEGAL ETHICS 158-59 (1953).

61. To a limited extent this gives the police some control over who shall represent any given defendant. If the defendant sends for counsel whom the police would prefer not handle the case, they could trade a confession for a lawyer. While it is not likely this would happen often it is grossly improper that it happen even once. Some rather sophisticated iuterpretation of the Canons or of *Miranda* will have to be done in this exceptional case to prevent the state from profiting from its own wrong. And, unfortunately, the old maxim that hard cases make bad law is still very much with us.

questions of coercion, he must also be permitted to have the services of an attorney.

The concept of representation in the station house is a new one to the legal profession; and the old Canons, predicated on office and courtroom practice, may well have to be modified to encompass this new role for the lawyer. This is not to say that we must loosen the Canons to make ethical that which has been unethical. What it does mean is that fresh thought must be given to the ethical role of a lawyer who wants to give his client full representation from interrogation through appeal.

V. Some Further Questions

Miranda has an assured place in future criminal law textbooks. It will be the basis for countless appeals. But it did not resolve all problems concerning the use of confessions. Where, for example, will the police officers secure the services of an attorney for the indigent-accused whom they wish to interrogate? *Miranda* leaves no choice—either the police produce counsel when counsel is requested, or they forego the interrogation. Even if an attorney is made available, the presumption seems to be almost conclusive that he will advise his client not to make any admissions to the police. If this assumption is correct, will the resultant loss in numbers of confessions bring about a concomitant loss in the number of successful prosecutions? In an article in the *New York Times Magazine*,[62] Judge Irving R. Kaufman collected educated, but divergent guesses on this issue,[63] and concluded that "once again, an authoritative and unequivocal answer is

62. N.Y. Times, Oct. 2, 1966, § 6 (Magazine), p. 37.

63. "A recent survey of the procedures adopted by police and prosecutors in Kings County led Judge Nathan Sobel to conclude that the significance of confessions to criminal prosecution has been vastly overstated. Of the cases which he examined, Judge Sobel found that '"confessions" constitute part of the evidence in *less* than 10 per cent of all indictments.' A New York statute requires that the prosecution give the defense advance notice that it will offer incriminating statements of the accused in evidence; since Judge Sobel found that such notice was given in only 86 of 1,000 recent cases, he concluded that 'in the great majority of cases, guilt [is] established without the police . . . ever having questioned the defendant at all.'

"But the Kings County statistics disclosed by Judge Sobel may not be representative of the country as a whole—and perhaps not even of New York City's four other boroughs. Shortly after publication of Judge Sobel's study, Manhattan's District Attorney Frank Hogan responded by citing figures of his own. In 27 per cent of the homicide cases then pending in New York County, Mr. Hogan insisted, an indictment would not have been obtained without a confession. He added that he planned to offer confessions in evidence in no less than 68 per cent of these cases.

"Finally, to further complicate the 'numbers game,' Detroit's Chief of Detectives Vincent Piersante has offered additional statistics which seem to indicate that the *Miranda* requirements may not prevent the securing of confessions after all. More than a year before the *Miranda* decision was announced, the Detroit police decided to notify all suspects of their right to remain silent and to retain counsel. In the first nine months after this policy was adopted, Chief Piersante noted, confessions were

impossible."[64]

One ancient state-federal conflict was resolved by *Miranda*: the controversy over the amount of time that could elapse between arrest and presentation of the arrested person to a committing magistrate. The federal rule was set forth in *McNabb v. United States*.[65] There the Court excluded the product of an interrogation because the accused had not been brought promptly before a committing magistrate. This requirement is formally embodied in rule 5(a) of the Federal Rules of Criminal Procedure.[66] In *Upshaw v. United States*, [67] the Court made it clear that the adoption of rule 5(a) implied no relaxation of the *McNabb* doctrine. But then, in 1957, the Supreme Court decided *Mallory v. United States*.[68] This case focused on the meaning of the phrase "without unnecessary delay" found in rule 5(a), and muddled the waters by using "as quickly as possible" and by stating that a "brief delay" is permissible. Completely obscured by the controversy over "elapsed clock time" was the reason for the rule:

> Since such unwarranted detention led to tempting utilization of intensive interrogation, easily gliding into the evils of the third degree, the Court . . . [referring to *McNabb*] held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted willful disobedience of law.[69]

Almost all of the states refused to adopt and enforce the federal practice required by *McNabb* and *Mallory*. They preferred to focus their attention on the question of "elapsed clock time" between arrest and preliminary hearing rather than face the more fundamental question of the evil spawned by this detention.[70] Although the Supreme Court has never made the *McNabb-Mallory* doctrine one of constitutional dimension by applying the rule directly to the states under the fourteenth amendment, it seems clear that the decision in

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obtained in 56.1 per cent of all homicide cases, as against 53 per cent four years earlier, when no such warnings were offered." *Id.* at 47, 50.

64. *Id.* at 47.

65. 318 U.S. 332 (1943).

66. RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

> (a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or any other officer, a complaint shall be filed forthwith. FED. R. CRIM. P. 5(a).

67. 335 U.S. 410 (1948).

68. 354 U.S. 449 (1957).

69. *Id.* at 453.

70. See cases collected in INBAU & REID, LIE DETECTION AND CRIMINAL INVESTIGATION 210 n.157 (3d ed. 1953). Such avoidance is usually justified by reference to rule 5(a) as a matter of federal proeedure designed only for federal affairs, thus suggesting that the rationale of *Mallory-McNabb* is without constitutional dimension.

Miranda has so carefully proscribed the procedure the police may follow in an interrogation that it has rendered the clock time argument not only moot but quite dead. *Mallory* and *McNabb* have been imposed on the states not in the form of their specific rule but in the shape of the reason that gave rise to the rule.

Many problems are inseparably tied to any consideration of the *Miranda* rules. If the police fail to give appropriate warning to the subject of an interrogation, will the fruits of his statement, as opposed to the statement itself, still be admissible in court? If the subject should fully admit his part in a robbery and tell the police where the stolen goods are hidden, will the prosecution be able to introduce at his trial these fruits of the crime and other physical evidence such as the accused's fingerprints found on the stolen property? Such evidence, though circumstantial, could be even more effective for the prosecution than would have been his inadmissible signed statement.

May the police accomplish indirectly that which they cannot accomplish directly? They might decide to use coercive interrogation techniques on John Doe to secure information for use in the prosecution of Richard Roe. We are told that constitutional rights are personal and cannot be claimed by another. We are also told, however, that one of the principal ends to be served by the exclusionary rule is to force the police to obey the law while enforcing the law. When these concepts clash, as they would in the above example, which one must give way?

We do not know yet whether a confession obtained without apprising the confessor of his rights can properly serve as a club to induce a guilty plea. Nor does *Miranda* solve the major problem of the judicially coerced confession, *i.e.*, the guilty plea given under duress. The classic example of this problem is found in those courts where the judge has the reputation of handing out harsh sentences to those who are tried and found guilty, and moderate sentences to those who plead guilty. Even more flagrant is the example of a judge joining with the prosecution in the plea-negotiation-process by informing an accused of the compromise sentence he will impose if the accused enters a guilty plea. If one regards the confession as an extrajudicial plea of guilty, the matter of a judicially coerced confession then is not unduly remote from the *Miranda* rationale. The pressure to enter a guilty plea, coupled with the inducement of a lesser sentence, is closely related to the pressure to confess coupled with a promise to seek leniency. Even though the accused has the assistance of counsel, he may not be so completely free of pressure that his choice to plead guilty can be regarded as entirely voluntary.

What is to be regarded as "harmless error" in the application of the

Miranda rules? If an arrested person is placed in isolation for several hours and is only fully informed of his rights when he is brought into the detective's office for interrogation, the letter of *Miranda* has been met—but not the spirit. Consider the man who is warned of his rights on Wednesday night by the arresting policeman and is interrogated on Thursday afternoon by a detective who fails to repeat the warning. The man placed in a line-up of suspects and required to speak certain words is not being interrogated for a confession. Can he agree to cooperate without the requisite warning?

The list of questions is as endless as the parade of accused who will raise them. Nevertheless, one fact remains relatively clear. The Court has established some firm boundaries by the *Miranda* rules; and these boundaries give the accused, the police, and the lower courts more guidance than they have ever had in the past. Without this black-letter law, the language of *Escobedo* might have been interpreted into nothingness. As Chief Justice Traynor has observed:

> The loftier the message and the more removed from the local scene, the more difficult it is for the judges on the ground to work out the ground rules. If they fail to transpose the message into earthy language, either because of their own ineptitude or because the message itself defies transposition, it continues to plane in the stratosphere with ill effect to itself as well as to those who are grounded. A rugged constitution, by definition the law of the land, suffers a loss of vitality when it must circle in thin air indefinitely.[71]

The lack of acceptance of *Escobedo* was perhaps caused as much from its lofty language as from the unique facts which gave rise to its claim. But *Miranda* may run the danger of the other extreme. Black-letter law, specific rules designed to cover the infinite variety of possible human conduct, has for centuries invited ignorance of principle by artful construction conforming to the letter of the law but wholly avoiding its spirit. The spirit of *Miranda* could similarly become obscured.

Miranda v. Arizona must be regarded as the standard by which the conduct of pre-arraignment interrogation will be measured for years to come. But unlike the flexible standard of Plimsoll's mark, which legally establishes varying submersion levels for ships according to their loads and the seas, *Miranda* establishes only a single standard to be applied in every case. Perhaps it would have been more useful if the Court had given some latitude for evaluation of pre-arraignment interrogation against a scale which takes account of the loads and seas of human conduct. Only time will tell.

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71. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 21 RECORD OF N.Y.C.B.A. 359 (1966).