Law Quadrangle (formerly Law Quad Notes)

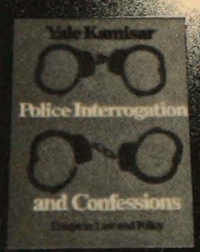
Volume 24 | Number 3 Article 8

Spring 1980

Police Interrogation and Confessions

Yale Kamisar
University of Michigan Law School

POLICE INTERROGATION AND CONFESSIONS:



The 1960's and 1970's look like history now.

by Yale Kamisar
Henry K. Ransom Professor of Law
The University of Michigan

[The following is based on Professor Yale Kamisar's introduction (written on December 30, 1979) to his newly published *Police Interrogation and Confessions: Essays in Law and Policy* (University of Michigan Press, 1980). These essays, written over two decades, constitute an historical overview of the Supreme Court's efforts to deal with the police interrogation-confessions problem from pre-*Miranda* days to the present time and provide provocative analyses of the issues that have confronted the Court along the way.

Before deciding to publish a collection of Kamisar's essays on confessions, the University of Michigan Press asked for evaluations from two of the current leading writers on the subject, Professor Joseph D. Grano of Wayne State University Law School and Professor Welsh S. White of the University of Pittsburgh School of Law. Professor Grano wrote: "These essays, singularly or as a whole, are unrivaled in the literature. . . . The starting point for a student of the area. . . . Required reading for anyone contemplating the directions the Court should take in the future." Professor White commented: "There really is no competing work in the field. . . . No one explores fundamental issues of constitutional law more intensely and more incisively. No one writes with more power and clarity."]

Despite appearances to the contrary, I never planned to write a series of articles on police interrogation and confessions. My first article on the subject, "What Is an 'Involuntary' Confession?", was not part of a grand design but merely a response to an invitation by the *Rutgers Law Review* to review a new edition of the Inbau-Reid interrogation manual. Until then, although I had written a number of articles on other criminal procedure issues, I had never wrestled in print with the police interrogation-confessions problem.

When, in 1963, I did finally get around to writing about confessions (the Inbau-Reid "book review" grew into an article and was published as such), it was later than I thought. Before I had finished the project, Winston Massiah (who had lost in the United States Court of Appeals for the Second Circuit) and Danny Escobedo (who had lost in the Supreme Court of Illinois) were seeking review in the United States Supreme Court, and one Ernesto Miranda—whose case would, in three years, push even the famous *Escobedo* and *Massiah* decisions off center stage—had been arrested for, and had confessed to, kidnapping and rape.

Thus, although I was unaware of these cases at the time, let along the significant ways in which they would change our thinking about the law of confessions, my first confessions article turned out to be one of the last ever written about the "voluntariness"—"totality of the circumstances" test (at least until the 1980s).

I had no intention of starting work on another piece about the subject so soon after the appearance of my Rutgers article, but a year later a member of the Magna Carta Commission of Virginia, Professor A. E. Dick Howard, persuaded me otherwise. For one thing, Professor Howard assured me that my remarks could be quite brief. For another, since my first article on the subject had been published, the Supreme Court had handed down two very interesting and highly controversial cases, *Massiah* and *Escobedo*. And after all, as Professor Howard reminded me, the 750th anniversary of Magna Carta does not come along every day.

So I agreed to give a talk at the College of William and Mary in February of 1965, contrasting the largely unregulated and unscrutinized practices in the police station—the "gatehouse," where ideals are checked at the door and "realities" are faced—with the proceedings in the courtroom—the "mansion," where the defendant is "even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated." How, I asked, can we reconcile the proceedings in the "mansion" with those in the "gatehouse"—through which most defendants journey and beyond which many never get? How can we explain why the Constitution requires so much in the "mansion," but means so little in the "gatehouse"?

When published some months later, along with essays by Professor Fred E. Inbau and Judge Thurman Arnold, in *Criminal Justice in Our Time*, my remarks, "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure," were anything but brief. I had spent months revising and expanding the original William and Mary speech. . . .

A number of commentators who had arrived on the scene before me contributed much to my early writing on the subject: Professors Francis Allen, Albert Beisel, Charles McCormick, Bernard Meltzer, Monrad Paulsen and Claude Sowle; and a young civil liberties lawyer (who was to file a splendid brief in the *Escobedo* case), Bernard Weisberg. But the root from which I drew the juices of indignation, I am convinced, was the tape recording of the six-hour interrogation in the 1962 *Biron* case.

This was not simply a tape recording of a confession (they are not that rare), but of the interrogation itself—beginning with the first interrogator's opening remark (there were five interrogators in all) and the suspect's initial response. The decision to record the interrogation was not made with the intent to offer the tape in evidence or with any expectation that it would ever appear in the record. (Some of the interrogators didn't even realize that their remarks were being taped.) Most, if not all, of the detectives who interrogated Biron had been questioning murder suspects for years. There is no reason to think that the essential thrust and basic features of the Biron interrogation were any different from those that these same detectives had conducted in dozens of other cases. Indeed, if the various "how-you-do-it" and "how-we-did-it-ourselves" manuals are any indication, the "interrogation atmosphere"

established by Biron's interrogators and most of the tactics they employed were standard practice. Yet, as far as I know, the *Biron* confession—the only one accompanied by a tape of the interrogation—was the only confession obtained by any of Biron's interrogators that a court ever excluded.

If the Biron interrogation had been an extraordinary instance of "wrenching from [an accused] evidence which would not be extorted in open court with all its safeguards," the tape recording would have been a good deal less troublesome. But it was not "an exhibit in a museum of third degree horrors." For the most part, rather, it was a vivid illustration of the kinds of interrogation practices that at the time satisfied the best standards of professional police work and fell within the bounds of what the courts of that day called "fair and reasonable" questioning. Even the state supreme court that struck down Biron's conviction (on the narrow ground that false legal advice by the police had vitiated the confession) repeatedly characterized the interrogation sessions as "interviews."

"Interviews"? How can anyone who listens to the tapes call the interrogation sessions that? How can anyone listen to the insistent questioning of Biron and to the many different ways his interrogators urged, cajoled, and nagged him to confess without feeling the relentless pressure, without sensing Biron's confusion and helplessness, without getting the message—confess now or it will be so much the worse for you later—and without wondering: what ever happened to the privilege against self-incrimination and the right to the assistance of counsel?

A year after the "gatehouses and mansions" essay appeared, the Supreme Court decided *Miranda*—the case that has come to symbolize the Warren Court's "revolution" in American criminal procedure. *Miranda*, especially the three *dissenting* opinions in the case, produced the only "self-initiated" confessions article I have ever written, "A Dissent from the *Miranda* Dissents."

For some time I had been one of those who had applauded the direction in which the Warren Court was moving—catching heavy fire for doing so in various meetings of the Advisory Committee to the American Law Institute's *Model Code of Pre-Arraignment Procedure* project and in other professional gatherings. Thus I welcomed *Miranda*. But when, a short time after the decision had captured the headlines, I attended the annual meeting of the American Bar Association, it was plain that I was in the distinct minority. When I met with the chief justices of the states (whose annual meeting was held at about the same time) and participated in a series of confessions "workshop sessions" with them, I was struck by their overwhelming opposition to the recent confession ruling.

Even before the imperfections in Chief Justice Warren's opinion for the Court in *Miranda* were brought into sharp focus by the new prodding of the facts of subsequent confession cases, it could not be denied that various portions of the long opinion left something to be desired. But there would be no shortage of commentators to spotlight these warts and blemishes. I feared, however, that in the hue and cry over *Miranda*, few, if any, would dwell on the weaknesses in the *dissenting* opinions. (It is much easier, it has always seemed to me, to take pen in hand when one is distressed by a decision than when one is content with it.)

In my judgment—and this was the primary thrust of my article—the *Miranda* dissents were far more vulnerable to criticism than the majority opinion. Although the *Miranda* dissenters still proclaimed the virtues of the old "voluntariness" test, the old test had proved to be highly elusive, largely unworkable, and woefully ineffective. Although the *Miranda* dissenters expressed astonishment at how the Court had managed to bring the privilege against self-incrimination into the police station, more wondrous, I thought, was how the courts had managed to keep it out for so many years.

About a decade after I had said a few good words for *Miranda* (and many bad ones about the old "voluntariness" test), the death of my senior colleague, Paul G. Kauper (1974), and the retirement from teaching of my old adversary, Fred E. Inbau (1977), caused me to return to the confessions topic.

Kauper's proposed remedy for the third degree was written way back in 1932 (when he was still a third-year law student)—four years *before* the Supreme Court first imposed the "voluntariness" test on the states as a matter of fourteenth amendment due process. Although he was not the first to offer a judicially supervised interrogation procedure as the solution to the "confessions problem," he seems to have been the first to deal in any comprehensive way with the practical, policy, and constitutional considerations involved in such a proposal. When the editors of the *Michigan Law Review* asked me to re-examine Kauper's article in the light of 40 years of subsequent developments, I could not resist the opportunity to do so.

Inbau had been an outstanding interrogator himself and had taught many hundreds of others how to practice the art. He was the leading police-prosecution spokesman in academe and a longtime critic of the Court. Not only had he joined with others in criticizing the Warren Court for handing down *Escobedo* and *Miranda*, but a generation earlier he had also reproached the Stone Court for deciding *McNabb* (1943) and *Ashcraft* (1944).

Moreover, although many had attacked the *Miranda* decision, none had done so with Inbau's gusto. *Miranda* was the case that Inbau had feared, and had tried to head off, for most of his professional career. Nor was it any comfort to him that the *Miranda* opinion had quoted from or cited his manuals no less than ten times—never with approval. "If *Miranda* is a monument to anyone," Judge George Edwards had observed at the time, "perhaps it is to Fred Inbau."

I had, as the editors of the *Journal of Criminal Law* described it, "tilted swords with Inbau many times, both in print and face-to-face." So when the *Journal* editors invited me to sum up and reflect upon Inbau's rich, colorful career, I could not refuse.

When I started writing my comments on Kauper's article, I did not know that I would end up finding a modernized version of his proposal, what I called the Kauper-Schaefer-Friendly model,* as attractive an alternative to the *Miranda* model as I did. Nor did I know that I would express as much disappointment in *Miranda* as I did. Similarly, when I started work on the piece about Inbau I did not think I would view him as sympathetically as I wound up doing. In a sense each article "wrote itself."

Perhaps the best examples of how articles can "write themselves" are the last two essays in this collection. No sooner had I finished the Inbau piece than the *Georgetown Law Journal* editors asked me to write a short preface to their "Circuits Notes" (an annual survey of federal appellate decisions dealing with criminal procedure), reminding me that Justice William O. Douglas had written the preface the previous year.

*In the late 1960s, first Justice Walter Schaefer and then Judge Henry Friendly, two of the most eminent critics of *Escobedo* and *Miranda*, had in effect returned to and built upon the old Kauper proposal.

I yielded. I had become quite interested in a new confessions case, *Brewer v. Williams* (the so-called Christian burial speech case),† and the Georgetown editors readily agreed that it was a case worth highlighting in a preface to the "Circuits Note." All that was expected of me, and all I promised myself I would do, was a three- or four-page comment on the *Williams* case. Surely I could do that in a few days. Besides, it would be nice to "succeed" Justice Douglas, if only in one respect.

The roots of the 1977 *Williams* decision were to be found in the 1964 *Massiah* case. Decided only a few weeks before the more famous *Escobeda* case, *Massiah* seemed to say that the filing of an indictment, or the initiation of other adversary judicial proceedings, marks an "absolute point" at which the sixth amendment right to counsel attaches. Until the recent decision in *Brewer v. Williams*, however, there was good reason to think that *Massiah* had only been a steppingstone to *Escobedo* and that both cases had been more or less displaced by *Miranda*. But *Brewer v. Williams* made plain that despite the Court's shift from a "right to counsel base" in *Escobedo* to a "compelled self-incrimination base" in *Miranda*, the *Massiah* doctrine was still very much "alive and well." It had emerged as the other major Warren Court confessions rule.

In the process of revivifying *Massiah*, however, the *Williams* case, I feared, had blurred the *Massiah* and *Miranda* rationales. Although this was not clear from the *Williams* opinion, the *Massiah* doctrine has nothing to do with "custody" or "interrogation," the key *Miranda* concepts.

When Massiah made incriminating statements, he was unaware that he was dealing with a government agent. He thought he was simply talking to a friend and co-defendant. There is no indication that he was ever "interrogated" (as that term is normally used) or "compelled" to speak or "restrained" of his liberty in any way. But a government agent had "deliberately elicited" statements from him after he had been indicted and retained counsel and while he was out on bail. The government, *Massiah* held, cannot do this—*either* directly, by means of a uniformed officer, *or* indirectly, by means of a "secret agent"—once adversary judicial proceedings have been initiated. *Massiah* represents a "pure right-to-counsel" approach.

The suspect in the *Williams* case was plainly in "custody" when given the "Christian burial speech," and arguably the speech was a form of "interrogation." Thus, the incriminating disclosures *might have been* excluded on *Miranda* grounds. But the *Williams* Court chose to decide the case on the basis of *Massiah* rather than *Miranda*. Once it did so, once it chose to rest on "sixth amendment—*Massiah*" *rather than "fifth amendment-Miranda"* grounds, there was no longer any need to consider whether the Christian burial speech constituted police "interrogation." All that mattered was that a government agent, by means of the speech, had deliberately elicited incriminating statements from a person after adversary proceedings had commenced against him. (Moreover, although I do not think this is necessary to trigger the *Massiah* doctrine, Williams was also represented by counsel at the time.)

†Williams, suspected of murdering a young girl in Des Moines, Iowa, surrendered himself to the Davenport, Iowa, police. Captain Leaming and another Des Moines detective went to Davenport to pick up Williams and drive him back to Des Moines (some 160 miles away). By the time the two Des Moines officers arrived in Davenport, adversary judicial proceedings had already commenced against Williams, and he had already retained counsel. On the return trip, admittedly in an effort to induce Williams to reveal the location of the girl's body, Captain Leaming remarked to Williams: "[Y]ou yourself are the only person that knows where the little girl's body is. . . . I feel that [the parents] should be entitled to a Christian burial for [their] little girl [and that] we should stop and locate [the body] on the way [back to Des Moines]."

Nevertheless, the *Williams* majority evidently thought it important, if not crucial, to establish that the Christian burial speech did amount to "interrogation"—but all four dissenters insisted it was not. The Christian burial speech, I am convinced, did *happen to be* a form of *"Miranda* interrogation," but *it did not have to be* in order for the *Massiah* doctrine to have protected Williams.

What I have said above is pretty much all I wanted to say, and planned to say, about the *Williams* case in my preface to the "Circuits Note." Somehow, however, what began as a very modest project took on a life of its own. Before I was able to call a halt—more than a year, 130 printed pages, and 600 footnotes later—two separate articles had more or less "written themselves."

The three- or four-page preface had already grown into a 15-page foreword when I dipped into the *Williams* record to clarify a point. I had a great deal of difficulty ever getting back out. I found the record incomplete, contradictory, and confusing.

For one thing, although neither the Supreme Court nor other courts which had mulled over the Christian burial speech seem to have been aware of this, the police captain who had rendered the speech had given one version of it at a pretrial hearing and, in my view, a significantly different version at the trial itself. Moreover, as I read the record, there was a distinct possibility that during the five-hour drive to Des Moines, the captain had delivered more than one Christian burial speech. But this point, along with many others, had never been adequately explored at the trial.

Williams sharply disputed the captain on many points but, as might be expected, no court paid any attention to what he had to say. Yet whenever the captain got into a "swearing contest" with Williams's lawyers, as he did on three occasions, he lost every time. Doesn't this raise serious questions about the swearing contest the captain won when he disputed Williams?

The woefully inadequate *Williams* record underscored the need, whenever feasible (and I think it was feasible in the *Williams* case), to record all police "interviews" or "conversations" with a suspect, and all warnings and "waiver transactions" as well. Why, after all these years, were police interrogators still able to prevent objective recordation of the facts? A police interrogator, no less than the rest of us, is inclined to reconstruct and reinterpret past events in a light most favorable to himself. As long as he is permitted to be "a judge of his own cause" in this sense, *any* confessions rule, I feared, would be "a house built upon sand."

What began as a textual footnote describing the unsatisfactory condition of the *Williams* record grew into a separate section—one that eventually became so large that it dwarfed the rest of the article. (Moreover, I had yet to complete the rest of the article.) There could be only one solution, and the Georgetown editors, growing frantic at my inability to finish the piece, quickly concurred: I had to pull out the analysis of the record from the unfinished manuscript and run it by itself as the foreword to the "Circuits Note." Thus emerged "Foreword: *Brewer v. Williams*—A Hard Look at a Discomfiting Record."

I agreed that at a later date I would return to and complete my appraisal of the various *Williams* opinions in light of *Miranda*, *Massiah*, and other cases and that I would publish this discussion as a separate second article. Eventually I did— but not before adding three major sections that I had never contemplated writing when I first took on the assignment.

In the course of presenting some hypotheticals designed to illustrate the differences between the *Miranda* and

Massiah approaches, I discovered that the applicability of these doctrines to the use of "jail plants" and other "secret agents" was a good deal more complicated than I had suspected. This led to a 25-page treatment of that subject. Although, as I have already indicated, I was convinced that "interrogation" was constitutionally irrelevant for *Massiah* purposes, I, too, could not resist the temptation to discuss whether, *in any event*, the Christian burial speech did amount to "interrogation." This led to a twenty-page discussion of the general problem.

At this point I had done all that I had originally set out to do, and considerably more. But I felt the article still needed an "ending." It had grown so large that it was no longer enough simply to compare and contrast how the *Miranda* and *Massiah* doctrines worked. I felt the need to appraise their relative strengths and weaknesses and to consider the merits of a third approach as well—New York's *Donovan-Arthur-Hobson* rule. Under the New York rule (a first cousin to *Massiah*), regardless of whether adversary proceedings have commenced or whether the suspect is willing to waive his *Miranda* rights, once an attorney "enters the picture" (a phone call to the police department central switchboard will suffice), the state is prohibited from "interfering with the attorney-client relationship" by questioning the suspect in the absence of counsel.

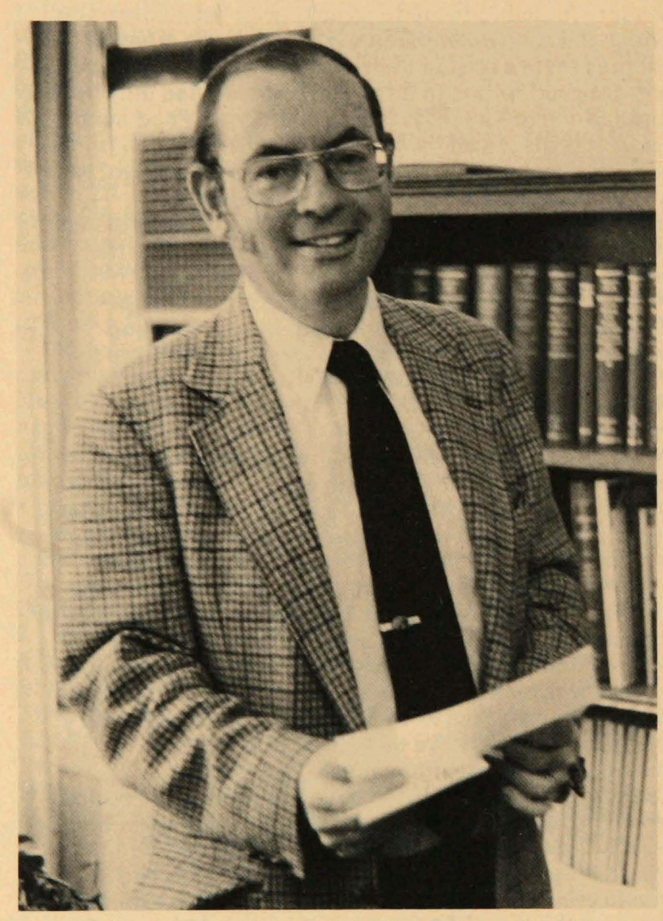
The *Massiah* doctrine and the New York rule each have a certain neat logic and a strong symbolic attractiveness, and it is not inconceivable that either or both will outlast *Miranda*. After 30 pages of "further thoughts," however, I concluded that there was less to be said for *Massiah* or the New York rule than for the basic *Miranda* approach. Whatever its shortcomings, *Miranda* tried to take the "police interrogation"—"confessions" problem by the throat. I did not see how the same could be said for either *Massiah* or the New York rule. Both, rather, turn on nice distinctions that seem unresponsive to either the government's need for evidence or a suspect's need for "a lawyer's help."

Thus emerged what is, by a wide margin, the longest confessions article I have ever written—"*Brewer v. Williams*, *Massiah*, and *Miranda*: What Is 'Interrogation'? When Does It Matter?"

The early and middle 1960s were exciting times for students of criminal procedure. The 1970s, if less exciting, were no less interesting. Nor were they without controversy. Depending upon one's viewpoint, they were a time of re-examination, correction, consolidation, erosion, or retreat.

History, it has well been said, "never looks like history when you are living through it. It always looks confusing and messy. . . ." [John W. Gardner, *Hazard and Hope*, in No Easy Victories 169 (1968).] But the 1960s and 1970s look like history now. Hopefully the combination of these seven essays, written during a period of unprecedented change in American constitutional-criminal procedure, constitute a useful historical overview of the Supreme Court's efforts to deal with a most troublesome and most controversial cluster of problems. Hopefully, too, these essays contribute significantly to an analysis of the constitutional and policy issues that confronted the Court along the way.

In the 1960s those who shared my outlook on the criminal justice system celebrated various victories. But events in the 1970s reminded us that here, as elsewhere, "there is no final victory. However great the triumph, it is ephemeral. Without further struggle, it withers and dies." [Francis A. Allen, *On Winning and Losing*, in Law, Intellect and Education 16 (1979).] In the 1980s we may have to remember what Allen, Paulsen, and other commentators of the 1950s never forgot—there is no final defeat, either.



Yale Kamisar