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Criminal Interrogation and Confessions

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BOOK REVIEWS

Criminal Interrogation and Confessions. (2d ed.) FRED E. INBAU and JOHN E. REID. Baltimore: The Williams & Wilkins Company. 1967. Pp. xiii, 224. $8.00.

Since *Brown v. Mississippi*[1] in 1936 the Supreme Court has shown a continuing interest in the manner by which law enforcement officers obtain confessions from suspected criminals. Recognizing that confessions have a high probative value, the Court, in the exercise of its supervisory powers on the federal level and in reliance upon the due process clause of the fourteenth amendment on the state level, had insisted, prior to 1964, that such confessions be voluntary and trustworthy, that they not be the product of undue coercion, and that civilized means be used to elicit them. A "totality of circumstances" test was evolved, in which the background of the accused, the circumstances under which the confession was received, the atmosphere of the facility in which it was received, the duration of the interrogation, and the nature of the interrogation all were weighed in the ultimate determination of whether the confession was "voluntary," and hence constitutionally admissible. On the federal level a nonconstitutional disciplinary test was also imposed: if the confession was received during a period of unreasonable delay between arrest and production of the prisoner before a commissioner or magistrate, the confession was inadmissible, irrespective of whether, on any "totality of circumstances" basis, it was voluntary.[2]

Then in 1964 *Escobedo v. Illinois*[3] introduced the concept of a sixth amendment right to counsel *in the station house*. The Court reversed a state court conviction where the defendant had, in effect, confessed after requesting and being refused permission to see his attorney.

For two years after *Escobedo* law enforcement officers were at sea, because the decision contained no guidelines. Broad language in the opinion suggested that police should investigate rather than interrogate (and that there was something intrinsically wrong with the entire concept of police interrogation); that the right to counsel attaches immediately upon incarceration; that no statement may be taken from a suspect once police activity with respect to a crime has become accusatory rather than investigatory; and that before taking any statement from an ac-

1 297 U.S. 278 (1936).
2 McNabb v. United States, 318 U.S. 332 (1943).
3 378 U.S. 478 (1964).

cused the police must warn him that he has a right to remain silent, that any statement may be used against him, and that he has a right to counsel. What was in fact the law? When did an investigation focus on the accused? What was required of police officers with respect to the interrogation of suspects? Did *Escobedo* portend the complete elimination of post-arrest interrogation?

Between 1964 and 1966 police activity in the investigation of crime, and in the interrogation of suspects, was the subject of extensive and exhaustive studies by many different groups—among them the National Crime Commission, the American Law Institute (which was in the course of preparing a Model Code of Pre-Arraignment Procedure), and the American Bar Association's Project on Minimum Standards for Criminal Justice.

Without waiting for the product of any of these studies the Supreme Court in 1966 decided *Miranda v. Arizona*,[4] which completely recast the law concerning custodial confessions. *Miranda* enunciated the availability of a fifth amendment privilege against self-incrimination in the station house, and set forth definitive gnidelines governing the eliciting of custodial confessions. It required, as a condition of admissibility, a panoply of prior warnings to the confessor. He must be warned that he has a right to remain silent, that anything he says may be used against him, that he has a right to counsel and to have counsel present with him during interrogation, and that if he is indigent an attorney will be appointed to represent him. If, after the warnings are given, interrogation continues and a statement is taken, *Miranda* places the burden "on the government to demonstrate that the defendent knowingly and intelligently waives his privilege against self-incrimination and his right to retained or appointed counsel."[5]

It seems clear that the *Miranda* decision was sparked, not by the inequities of any particular case in which *certiorari* was sought, but by the Court's determination that the time had come for constitutional rule-making in the confession area. Chief Justice Warren, speaking for the majority, conceded that in the four cases decided in *Miranda*, the Court might not have found "the defendants' statements to have been involuntary in traditional terms."[6] The Court was aware of the debate touched off by *Escobedo*, and apparently used *Miranda* to resolve the issues debated:

> We granted certiorari in these cases, . . . in order further to explore

4 384 U.S. 436 (1966).

5 *Id.* at 475.

6 *Id.* at 457.

> 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.[7]

None of the cases decided in *Miranda* was more than summarily discussed in the majority opinion. The records in these cases, according to the Chief Justice, evinced neither "overt physical coercion [nor] patent psychological ploys."[8] The "patent psychological ploys" against which *Miranda* presumably provided safeguards were found by the Court in published texts pertaining to techniques of criminal interrogation, including the first edition of Inbau and Reid's *Criminal Interrogation and Confessions*. The thrust of Chief Justice Warren's opinion was very simply that if, as these texts professed, they present the "most enlightened and effective means presently used to obtain statements through custodial interrogation,"[9] then suspects need protection, via the fifth and sixth amendment warnings prescribed in the opinion. The Court stressed that modern in-custody interrogation was "psychologically rather than physically oriented."[10] But after reviewing the techniques prescribed by these texts, the Chief Justice asserted that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[11] He thus perceived "an intimate connection between the privilege against self-incrimination and police custodial questioning."[12]

Among the techniques of custodial interrogation recommended by these texts and cited by the Court as evidencing the need for constitutional procedural guidelines in the custodial interrogation field were the following:[13]

(1) "[P]rivacy—being alone with the person under interrogation."
(2) "The guilt of the subject is to be posited as a fact."
(3) Minimization of "the moral seriousness of the offense."
(4) Casting blame on "the victim or on society."
(5) Patience and perseverance on the part of the interrogator.
(6) Offering the suspect "legal excuses for his actions in order to

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7 *Id.* at 441-42.
8 *Id.* at 457.
9 *Id.* at 449.
10 *Id.* at 448.
11 *Id.* at 458.
12 *Id.*
13 *Id.* at 449-54.

obtain an initial admission of guilt," and then referring to circumstantial evidence which negates the explanation.

(7) Inducing "a confession out of trickery."

(8) Pointing out "the incriminating significance of the suspect's refusal to talk."

A second edition of Inbau and Reid's *Criminal Interrogation and Confessions* has now been published. It remains, in substance, a manual for law enforcement officers and prosecutors on the techniques of interrogation. It has been revised in the wake of *Miranda*, and it purports to be designed as a guide to interrogation that meets the standards enunciated in *Miranda*. In fact, its premise is that intensive post-arrest interrogation is still permissible in the post-*Miranda* era, so long as the proper warnings have been given and the requisite waivers have been made. The techniques recommended have not been materially changed since the first edition; there has certainly been no change in the concepts underlying the work—that interrogation is an essential technique of law enforcement, and that there are correct and incorrect methods of interrogation.

Inbau and Reid point out certain guideposts for the interrogator in determining whether a suspect has committed a crime. Thus, where circumstantial evidence with respect to a crime points to a particular person, he is usually the one who committed the crime;[14] where one being interrogated swears to the truthfulness of what he is saying, or invokes his past record to evidence his innocence, he is probably guilty;[15] where a suspect explains away nonexistent incriminating evidence referred to by the interrogator, he is probably guilty;[16] where a suspect evinces a willingness to make restitution, he is probably guilty.[17]

The authors warn against permitting the suspect to reiterate denials of gnilt.[18] They suggest various stratagems and deceptions to induce confessions. Certain questions should be asked in a manner implying that the answer is known: not "Do you know *X*?" but "How long have you known *X*?"[19] Co-suspects should be played one against the other, with the intimation to one that the other has confessed.[20] Efforts should be made through interrogation to place the suspect at the scene of the crime, or in contact with the victim, prior to seeking

14 INBAU & REID, p. 33.
15 Pp. 36-37.
16 Pp. 103-04.
17 P. 106.
19 P. 102.
18 P. 28.
20 Pp. 84-91.

a full confession.[21] Blame for the crime should be placed upon the victim, the accomplice, the government, society, or others. A spendthrift wife, an avaricious "fence," a voracious money-lender all are appropriate vehicles for this psychological ploy.[22] Understanding or sympathy should be displayed by the interrogator in urging that the suspect "tell the truth."[23]

In short, aside from a recognition of the *Miranda* decision and a prescription of the steps that must be taken to comply with *Miranda*, the most recent edition of *Criminal Interrogation and Confessions* seems very close to the version that vented Chief Justice Warren's judicial ire; deception and trickery are still among the interrogator's tools.

Is it not demeaning to democratic concepts to see law enforcement resort to such techniques? Certainly it is—to precisely the same extent that criminal violations of social order demean the democratic process by requiring us to maintain police forces in our midst. And no further.

Law enforcement serves two functions in our society. It preserves order by preventing crime, and it restores order by detecting crime already committed, solving that crime, and initiating the prosecution of those who have committed it. In the municipal context the prevention of crime is the prime law enforcement function, and it is accomplished most effectively by a pervasive and intelligent police presence on the streets. The secondary function comes into play, theoretically at least, only when the police force has failed in its primary function of prevention. But the detection and solution of crime committed is still essential if we are to identify and deal appropriately with those who disrupt our social order by committing crime.

Those who commit crime do not conform to the rules of our society—they flaunt those rules. Historically, deception and trickery have been essential techniques in the identification and apprehension of criminals. The narcotics agent—local or federal—who seeks evidence against organized criminals necessarily operates undercover, on the street, masquerading as someone he is not. Similarly the Secret Service agent attempting to capture counterfeiters assumes the identity of an underworld purchaser of counterfeit bills. Laws against consensual crimes, such as gambling and vice, can be enforced effectively only if police officers in plainclothes conceal their true identities and adopt other ones. Deception and trickery? Certainly. How else can we cope with sophisticated crime?

21 Pp. 70-71.
22 Pp. 47-59.
23 Pp. 59-64.

Much crime, of course, is anything but sophisticated. The crimes of violence that beset our cities and send the statistics soaring—murder, personal assault, rape—occur most often on the spur of the moment, in the context of families and acquaintances, with no witnesses and often with no tangible evidence relating the criminal to the crime. In *Escobedo,* Mr. Justice Goldberg suggested that a stricter rule with respect to confessions would encourage the police to solve such crimes by investigation rather than interrogation. The problem is that many of these crimes cannot be investigated except by interrogation; absent interrogation these crimes will not be solved.

Whether the crime being investigated is sophisticated or unsophisticated, interrogation techniques—and Inbau and Reid make this point very well—must necessarily be sophisticated. They must be adapted, psychologically, to the personality of the particular suspect. Save for those to whom confession is a catharsis, no person is willing, absent some element of suasion, to make statements that are certain to result in his conviction of crime. Some element of deception and trickery will necessarily be involved in criminal interrogation, just as considerable elements of deception and trickery are involved in much of law enforcement's crime detection activity.

Deception that does not involve threats or promises of rewards or immunity should not be prohibited. The techniques of interrogation delineated in the Inbau-Reid text are designed, not to elicit confessions irrespective of guilt, but to elicit confessions—or admissions or incriminatory statements—from the guilty. The touchstone of propriety suggested by the authors—and it seems to be a proper one— is that no techniques should be used or practices indulged that would be apt to make an innocent person confess.

Inbau and Reid assert that the presence of the element of psychological pressure prompted the formulation of the *Miranda* requirements. But they conclude that once law enforcement interrogators fully meet the *Miranda* requirements, they may continue to use the same interrogation techniques, since these techniques were simply provided against, not proscribed. I am not so sanguine. The deep-rooted suspicion of law enforcement techniques that prompted the *Escobedo* and *Miranda* opinions certainly bespeaks the pragmatic need for extreme caution.

Criminal Interrogation and Confessions is more than a manual in techniques of interrogation; it is also a textbook on the law governing confession. It is a textbook, moreover, for nonlawyers, a category that includes most law enforcement officers. It traces the development

of the law governing confession, and sets forth, lucidly, the present state of the law. Every law enforcement officer may have occasion, at some time in his career, to interrogate a person in custody. It is imperative that he understand the law, because the penalties for improper interrogation may be quite severe, going far beyond the mere exclusion of a resulting statement or confession from evidence. The application of the "fruit of the poison tree" doctrine to *Miranda* has not, to this point, been fully developed. But there are certainly indications that it will apply, and that evidence discovered as a result of an interrogation not conforming to *Miranda* will be inadmissible. Thus, the uniformed police officer on patrol who questions his prisoner without giving the *Miranda* warnings may effectively insulate the prisoner from effective prosecution by rendering inadmissible in court evidence discovered as a result of the interrogation.

Messrs. Inbau and Reid strongly assert that the procedures required by *Miranda* unduly complicate the law enforcement process. But they set forth fairly and completely the present state of the law with respect to criminal interrogation. As a result, their handbook is an extremely useful guide not only to police officers untrained in the law but also to prosecuting attorneys. At the same time it must be recognized that, by retaining in their text various techniques that entail the use, if only to a limited extent, of deception or trickery, the authors may be providing material for some future Supreme Court decision that will outlaw confessions completely.

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