Confessions by the Accused--Does Miranda Relate to Reality?

Robert G. Lowen
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Procedure Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
CONFESSIONS BY THE ACCUSED—DOES
MIRANDA RELATE TO REALITY?

Introduction

Joey is a killer—a Mafia hit man. By self admission he is a murderer of thirty-eight men: thirty-five for money, three for revenge. Joey is neither the anti-hero of a modern movie nor the protagonist of a novel. He is real. He is the subject of a book\(^1\) and has appeared as a guest on television talk shows.\(^2\) On at least one occasion, although his identity was concealed from the audience and specific statements that would constitute viable evidence in a criminal trial were avoided, Joey made the equivalent of a confession on television.\(^3\) At the time, he stated that his revelations were made in the public interest; that if the public were aware of the inadequacy of laws relating to vice (e.g., prostitution, gambling, drugs), it would pressure legislators to repeal such laws and eliminate the need for "hit-men" such as himself. In his own words, he emphasized that his occupation exists only because "people want certain things and that makes me a job. Without the public, there ain't no me."\(^4\) Two questions came to mind as I watched the show: (1) why is this man freely walking the streets and (2) what would motivate a professional killer to publicly confess?

The purpose of this note is to consider the ramifications of these questions raised by Joey and others like him. However, because this paper is not a note in the classical sense, some words of explanation are appropriate. Though the questions raised by Joey present several possible areas of analysis, the scope of this note is restricted to confessions, focusing on *Miranda v. Arizona*\(^5\) as the major United States Supreme Court statement in the area. Further, although certain conclusions and proposals are presented herein, the thrust of this note is intended to be provocative rather than explanatory or expositive of a particular viewpoint. It endeavors, as such, to expose to the reader a new, and to some extent unique, perspective from which to analyze criminal procedure relating to confessions. In developing this discussion the following format will be followed:

---


\(^2\) Joey appeared on the David Susskind Show on June 17, 1973 [hereinafter cited as the Susskind Show].

\(^3\) These conclusions are based on the observations of the author from viewing Joey on the David Susskind Show, June 17, 1973.

\(^4\) The Susskind Show.

(1) the relevant portions of criminal procedure; (2) an examination of the policy behind the present law of criminal procedure with respect to confessions; (3) a discussion of how other disciplines (i.e., psychology and literature) relate to the law of confessions; (4) a proposal to alleviate certain conflicts in the law.

I. THE MECHANICS OF ADMISSIBILITY OF CONFESSIONS

The primary thrust of the Supreme Court's decisions in Jackson v. Denno and Lego v. Twomey has been to ensure that any confession used in a court of law be made voluntarily. This voluntariness, as a constitutional mandate, must be determined prior to trial by the judge using a "preponderance of the evidence" rather than a "beyond a reasonable doubt" standard. Thereafter, it is not imperative that the jury also be given an opportunity to determine the voluntariness of the purported confession.

In Jackson, a case in which a murder conviction was based in large part on a confession, the defendant, after committing an armed robbery of a hotel clerk, fled from the scene. In the course of his flight Jackson encountered a policeman, and an exchange of gunfire left Jackson wounded and the policeman dead. Jackson was eventually traced by the police to a hospital where he had gone for treatment. When questioned at the hospital by a police detective investigating the case, Jackson told the detective, "I shot the colored cop. I got the drop on him." At the trial, the detective testified that when Jackson confessed at the hospital he was in good physical condition. Several hours after this initial questioning, during a subsequent interrogation, Jackson was given as medication 50 milligrams of Demerol and 1/50 grain of scopolamine, and shortly thereafter admitted having committed the robbery. At one point Jackson purportedly said, "Look, I can't go on," but after more questioning, he admitted having shot the policeman.

At trial, in attempting to exclude the confession, Jackson contended that he was denied water and was gasping for breath.

---

7 404 U.S. 477 (1972).
10 Id.
12 Id. at 371.
13 Id.
14 At the time this case was tried, New York criminal procedure dictated that a confession had to be introduced into testimony when there was an issue regarding voluntariness. The jury then was instructed to determine whether the confession was given voluntarily and to accept or reject the confession accordingly. Id. at 377.
Witnesses present during the interrogation admitted that this was true but stated that the water was withheld only for medical reasons prior to the injection of the medication.

At the time this case was tried, New York criminal procedure dictated that a confession had to be introduced into testimony. The jury then was instructed to determine whether or not the confession was given voluntarily and to accept or reject the confession accordingly. In holding this procedure unconstitutional, Mr. Justice White, speaking for the Court, stated that the due process clause of the fourteenth amendment requires that a defendant be afforded a determination of the reliability of his confession notwithstanding its truth or falsity. Such a determination was unavailable under the New York procedure because, where the jury returns only a general verdict as to guilt or innocence, "[i]t is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it." In comparison to New York procedure, it was noted that in Massachusetts when an issue of voluntariness arises, the jury does not hear a confession until the trial judge determines that the confession was made voluntarily. Although the jury may disagree with the judge and exclude the confession from its deliberation, the Court stated that the preliminary determination by the judge alone did not violate the defendant's rights as did the New York procedure.

The rationale behind Jackson seems sound if the policy of the law is that a defendant's constitutional rights are paramount when balanced against society's interest in obtaining convictions regardless of police methods. The reason for this policy was explained when the Court stated that involuntary confessions are rejected:

... because of the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminal as from the actual criminals themselves.

Accepting this policy, the Court logically had no choice but to decide as it did, since it is simply unreasonable to assume that a jury confronted with a true, though perhaps coerced, confession would acquit the defendant.

---

15 Id. at 374-75.
16 Id. at 379.
17 Id. at 378 n.8.
Unresolved by Jackson was the question of whether after a determination of voluntariness by the trial judge, the jury was also entitled to decide the same question. Lego v. Twomey answered this inquiry in the negative and established a test whereby the question of voluntariness is to be determined by a preponderance of the evidence as opposed to a test of beyond a reasonable doubt. Lego, whose conviction for robbery was based primarily on a confession, claimed that his confession was the result of police brutality. Photographs taken of Lego shortly after his arrest showed him to have a swollen face and traces of blood. The police officers who testified at the trial contended that the injuries ensued from Lego's scuffle with his victim and denied the charges of brutality. The trial judge, agreeing with the police, ruled that the confession was voluntary and refused to instruct the jury on the question of voluntariness.

Under Illinois law at the time of Lego's trial all that was required was that the judge base his decision on a preponderance of the evidence. Lego argued, in accord with In Re Winship, that the proper test is that the confessions must be voluntary beyond a reasonable doubt. The Supreme Court, concluding that the test for admissibility need not be the same as the standard used by the jury in determining guilt or innocence, held Winship inapplicable to Lego and similar situations. It reasoned that the function of exclusionary rules was to prevent police abuses and that the lighter burden of proof would not affect that behavior. Although the states are free to adopt a higher standard, the Court held that in a pre-trial hearing "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." Additionally, the Court held that once a judicial determination of voluntariness has been made, the question need not be decided again by the jury. The states are divided in their application of Lego, but the better reasoned cases have required not only that the judge use a reasonable doubt standard in deciding the question of voluntariness, but also that, after such a determination, the jury be allowed to resolve the issue for itself.

In comparing Jackson and Lego, it is at once apparent that Jackson is the better reasoned decision, because it recognizes that the admissibility of a confession is primarily, or at least initially, a question of law. Traditionally, our system of jurisprudence has recognized

1974] Confessions 797

---

20 People v. Wagoner, 133 N.E.2d 24 (Ill. 1956).
the need for excluding inadmissible evidence from the jury's deliberations, although our procedures have not always achieved this result. Nonetheless, it follows logically that if society makes a policy choice to exclude involuntary confessions, it is incongruous to allow the jurors to hear a confession and then to instruct them to disregard it. If there is to be any reality behind exclusionary rules of evidence, involuntary confessions must be totally excluded from the jury. Jackson, by treating voluntariness as a question of law, provides this protection.

Lego, however, not only weakens Jackson, but also may create a situation less beneficial to the defendant than the New York procedure struck down in Jackson by allowing confessions to be admitted by a preponderance of the evidence and then precluding the jury from determining the voluntariness of the confession.24 This means that, in effect, a defendant may be convicted on the basis of a preponderance of the evidence because if the confession is the key element of the state's case and if it is admitted by a preponderance of the evidence, then the general conclusionary instruction of "beyond a reasonable doubt" for conviction may be functionally inoperative. This reasoning is based on the assumption that a confession not seriously challenged virtually assures conviction. With such potential results, it is commendable that states such as New York25 have adopted standards higher than the minimum required by Lego.

II. POLICY BEHIND THE PRESENT LAW OF CONFESSIONS

Modern confession law is a product of the rise of the incorporation doctrine. It was not until 1964, in Malloy v. Hogan,26 that the Supreme Court incorporated or applied the fifth amendment to the states via the fourteenth amendment. However, in the federal system, controlled by the fifth amendment, voluntariness has been the criterion since 189727 and it has been long established that any type of compulsion invalidates a confession.28

The state courts, where most criminal cases were tried, meanwhile were limited in their procedure relating to confessions only by Supreme Court decisions decided on the basis of due process. In the early Supreme Court cases overturning state procedures, one can denote a different focus from that of modern law. Whereas recent opinions focus largely on controlling police behavior to ensure an effective

---

opportunity for defendants to assert their constitutional rights, the earlier cases seemed to concentrate on discerning what types of circumstances would warrant a conclusion that a purported confession was unreliable. This earlier position is in part explained by the fact that many of the early cases involved black criminals or suspects, subject to "white man's law." One cannot help but speculate that a desire to give the black man his rights was as significant as a desire to protect criminal defendants in cases such as Brown v. Mississippi,29 Chambers v. Florida,30 and Ward v. Texas.31

In Brown,22 a black man was arrested for the murder of a white man and after a perfunctory trial on the day following the arrest, a sentence of death was imposed. The Supreme Court, speaking through Mr. Justice Holmes, concluded that without the defendant's confession, there would have been insufficient evidence to submit the question to the jury. After his arrest Brown was apparently beaten and hanged, as evidenced by marks on his neck at the trial, and allegedly he had been threatened "with more of the same" if he retracted the confession thus elicited. The Supreme Court concluded that such a brutally induced confession violated the due process clause of the fourteenth amendment.

In the Chambers33 case a black man was accused of the murder of an elderly white man. The crime occurred one evening about nine o'clock and so enraged the white citizenry that within an hour 25 to 40 black men had been arrested without warrants and taken to jail some distance from their homes, presumably to protect them from mob violence. The suspects were questioned for five days and subjected to considerable physical abuse before Chambers confessed to the murder. The Supreme Court concluded that the Constitution protects those who "might suffer because they are non-conforming victims of prejudice and public excitement,"34 and that due process required reversal in such circumstances.

In Ward,35 once again, a black man was accused of the murder of a white man and once again the Supreme Court noted that, but for the confession, the conviction was a legal impossibility. Ward, arrested without a warrant and taken to a jail over a hundred miles from his home, claimed that he was whipped, beaten and burned. The

---

29 297 U.S. 278 (1936).
30 309 U.S. 227 (1940).
31 316 U.S. 547 (1942).
32 297 U.S. 278 (1936).
33 309 U.S. 227 (1940).
34 Id. at 242.
35 316 U.S. 547 (1942).
Court held that the "petitioner was no longer able freely to admit or to deny or refuse to answer, and that he was willing to make any statement that the officers wanted him to make."\(^{36}\)

Several factors are clear from reading these cases. First, if the factual allegations were true, any sense of due process and justice was clearly violated. Second, confessions obtained under the fact situations in \textit{Brown}, \textit{Ward}, and \textit{Chambers} are highly suspect as to their truthfulness. Third, one might suspect that the Supreme Court was reprehending southern discrimination as well as protecting criminal rights.

With the criminal rights revolution in the 1960's the problem of confessions moved from severe abuses to more refined technical points of law. It is not necessarily true that decisions based on mere technicalities are wrong; however, one must recognize that there has been an important shift in this area of the law. For example, in \textit{Brown}, especially in light of the history of that period, it would not be unreasonable to believe that the confessions were unreliable due to the excessive physical abuses. In later decisions, however, it is quite possible that the confessions invalidated by the Court were actually true. The first shift in emphasis was manifested in 1964 in \textit{Escobedo v. Illinois}.\(^{37}\)

\textbf{A. Escobedo v. Illinois}

\textit{Escobedo} arose in conjunction with the right to counsel, as enunciated in \textit{Gideon v. Wainwright}.\(^{38}\) Escobedo, charged with the murder of his brother-in-law, was arrested the night of the murder and released. Ten days later one Benedict DiGerlando told the police that Escobedo had shot the victim. Escobedo then was arrested for a second time and taken to the police station. On the way, he was told he had "better admit it".\(^{39}\) The defendant asked for his lawyer and was told his lawyer did not wish to see him; in reality Escobedo's lawyer was trying to see him but was denied access by the police. Escobedo claimed that during the interrogation a police officer, Montesano, who like Escobedo was a Spanish-American, told him in Spanish that he "could go home if [Escobedo] pinned it on Benedict DiGerlando."\(^{40}\) DiGerlando was then brought into the room and, according to the police, Escobedo said to DiGerlando, "I didn't shoot

\(^{36}\) Id. at 555.


\(^{38}\) 372 U.S. 335 (1963).

\(^{39}\) 378 U.S. at 479.

\(^{40}\) Id. at 482.
Manuel, you did it." Thereafter, Escobedo made further statements of an incriminating nature.

The Supreme Court, in overturning the conviction, stated that the defendant "was undoubtedly unaware that under Illinois law an admission of mere complicity in the murder plot was legally as damaging as an admission of firing the fatal shots. . . . The guiding hand of counsel was essential to advise petitioner of his rights in this delicate situation." It is important to note the change in the attitude of the Court during the 30 year period between Brown and Escobedo. As previously noted, the emphasis in Brown was on the veracity of the confession, whereas in Escobedo the Court dealt with procedural protections without regard to the truthfulness of the confession. This distinction can perhaps best be seen by analyzing two motion pictures depicting crime in the two respective periods and public reaction to those films.

The public has accepted numerous films illustrative of the Brown period depicting Southern injustice to blacks. One such film, To Kill a Mockingbird, concerns a black man wrongfully accused of raping a white girl. The black man is defended by a courageous attorney who unsuccessfully tries to secure the black man's freedom. Conversely, Hollywood recently has incorporated the Escobedo-Miranda safeguards into its movies in such a manner as to provoke public indignation. Perhaps the best known film of this nature is Dirty Harry, in which a particularly offensive killer is captured by the hero-policeman, Harry, who elicits information utilizing tactics reminiscent of the Brown era. This obviously psychopathic criminal is released by the district attorney on procedural grounds. When Harry once again meets the criminal, instead of arresting him, he kills him to the delight of the moviegoers. Although Dirty Harry was not a cinematic masterpiece, it reflects an important factor often ignored by the Supreme Court—the public mood. Certainly the Court should not base its decisions on public opinion, but it must, in its search for remedies, avoid unnecessary antagonism of the public. For if the public becomes too cynical about the Supreme Court, the public may

---

41 Id. at 483.
42 Id.
43 297 U.S. 278 (1936).
45 Based on J. Lee, To Kill a Mockingbird (1960).
46 Dirty Harry, directed by Harry Guardino, was released in March, 1972, by Warner Bros. 1973 INTERNATIONAL MOTION PICTURE ALMANAC 294.
grow irretrievably distrustful, disrespectful and disdainful of the law's ability to effect justice. After all, the public is concerned with results rather than legal theory.

B. Miranda v. Arizona

The next major development in criminal procedure following Escobedo was the landmark decision of Miranda v. Arizona, the definitive case in the area of confessions. In large measure, what has followed Miranda has been mere gloss, modification and application of that decision. Consequently it deserves considerable discussion, first from a legal standpoint and second as a major policy pronouncement.

The Miranda decision, based on the fifth amendment, is actually four cases consolidated into one due to the similarity of fact patterns. It is significant that the facts of the four cases are discussed briefly at the end of the opinion almost by way of footnote, which further suggests that the Court chose Miranda merely as a vehicle to announce a major policy refinement.

In Miranda the defendant was arrested at home, taken to a police station in Phoenix and interrogated in a secluded room without being told he had the right to an attorney. He did, however, sign a statement claiming he made the confession "with full knowledge of my legal rights." The Supreme Court reversed Miranda's conviction.

The second case considered with Miranda was Vignera v. New York, a case in which the defendant was questioned without being advised of his right to counsel. In addition, the New York trial court judge instructed the jury that "[t]he law doesn't say that a confession is void or invalidated because the police officer didn't advise the defendant as to his rights." The third case, Westoner v. United States, involved a witness who was interrogated by both the FBI and the Kansas City police for fourteen hours prior to signing a confession. Although the FBI did warn Westoner of his rights after the Kansas City police had questioned him, the Court concluded that "an intelligent waiver of constitutional rights cannot be assumed."

The last case decided along with Miranda was California v. Stewart. In Stewart, the record was silent as to whether Stewart

---

48 Id. at 492.
49 Id. at 493.
50 Id.
51 Id. at 494.
52 Id. at 496.
53 Id. at 497.
was advised of his rights. The Supreme Court stated that a knowing and intelligent waiver cannot be predicated on a silent record.

The import of *Miranda* is now common knowledge and familiar to any layman who watches the numerous police detective stories on television. The prosecution is precluded from using any statements arising out of a custodial interrogation (i.e., where a person is in police custody or is otherwise deprived of his freedom) without demonstrating that procedural safeguards were taken to protect an accused's right against self-incrimination. The Court enunciated certain measures to be taken to ensure that the accused is cognizant of his constitutional rights. These measures were stated as follows:

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.54

Furthermore, the Court held that the mere fact that an accused may have volunteered information to the police does not preclude him from refusing to answer any further questions until he has secured legal advice.

What followed *Miranda* was largely an attempt to determine the parameters and scope of the decision which stands as the last major step in the Court's redirection of emphasis from the determination of a confession's truthfulness to a determination of whether or not a defendant was apprised of his constitutional rights. This change in policy had been manifested in early cases. For example, in 1961, in *Rogers v. Richmond*,55 the Court stated the issue to be "whether the behavior of the state's law enforcement officials was such as to overbear the petitioner's will to resist and bring about a confession . . . [], a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."56

Because of the multitude of situations that can arise under *Miranda*, the case law determining its scope is vast, ranging from tax57 prosecutions to traffic cases;58 however, limits have been found. In *Harris v.*

54 Id. at 444-45.
58 E.g., City of Piqua v. Hinger, 234 N.E.2d 321 (Ohio 1967).
New York, for example, the Supreme Court held that a confession inadmissible under Miranda could still be used for purposes of impeachment. The sheer number of decisions modifying, limiting, interpreting and explaining Miranda, however, forbids further detail in this note. Moreover, Miranda alone still represents the major policy pronouncement in this area of criminal procedure.

A discussion of the policy behind Miranda is perhaps now in order. The Supreme Court was very direct in setting the tone of the case; Chief Justice Warren opened by stating that "the cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence." He then put the issue in terms of balancing individual rights of constitutional protection against police abuse. Noting America's long standing aversion to forced confessions, the Court stated:

"[t]he maxim *memo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions ... made the system so odious as to give rise to demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonies that the States ... made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

The Court then declared that it had a long standing obligation to enforce those rights, which were traceable to abuses in the British system. Miranda, however, is not merely an attempt to judicially

60 384 U.S. at 439.
ensure those rights in one particular case—it is, rather, a mandate for the police to affirmatively act to make individuals aware of those rights in every case.

In justifying the rather stringent test and series of warnings required by *Miranda*, the Court cited the Wickersham Report and the findings of the Commission on Civil Rights as evidence of police “strong arm” tactics in eliciting confessions. The Court illustrated its point by citing *People v. Portelli*, a New York case in which the defendant was brutally beaten and burned. The Court conceded, perhaps subverting intellectual honesty to political expediency, that police abuses were undoubtedly exceptions but concluded that “unless proper limitations upon custodial confessional interrogation is achieved, there can be no assurance that practices of this nature will be eradicated in the foreseeable future.” The Court adopted the Wickersham Commission’s conclusion that “it is not sufficient to do justice by obtaining a proper result by irregular or improper means.”

To this point in the opinion, the Court’s analysis is subject to minimal controversy. The Court initially looked to patent police misconduct, similar to the type found in *Brown*, a type of behavior clearly violative of the plain meaning of the fifth amendment and our jurisprudential conception of fairness.

The Court then addressed itself to the problem of psychological coercion, stating that it “has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.” Noting that interrogation invariably occurs in private, the Court concluded that this procedure affords the interrogator a psychological advantage. This conclusion was prompted, at least in part, by the Justices’ examination of police manuals wherein the technique of isolating the suspect for questioning was heavily emphasized.

Considerable importance was placed on these police manuals as evidence that police were making concerted efforts to “dupe” suspected criminals into confessing. This general procedure, as outlined by the Court, is as follows:

> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the
suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.\textsuperscript{71}

In the event this approach fails to produce a confession, other techniques, as the Court noted, are suggested by the manuals. One of the better known methods is the "Mutt and Jeff" routine, where one of the officers appears to be tough, vengeful and threatening while his partner is easy-going, apparently sincere and helpful. The implication, bordering on an actual threat of force, is that the suspect is in a better position by talking with the friendly policeman rather than with the "tough guy," who is not in the room at this point.\textsuperscript{72} Another suggested technique designed to induce confessions is a falsified lineup. In this procedure a fictitious witness identifies the suspect, who then is asked to confess to make it easier for himself, since he will now almost assuredly be convicted.\textsuperscript{73} If none of the suggested techniques is fruitful and the suspect continues to assert his fifth amendment right to silence, a final technique is suggested. The officer is instructed to emphasize that suspicious actions, left unexplained, imply guilt.\textsuperscript{74} If the suspect requests a lawyer, the manuals suggest that the police tell him that if he has nothing to hide, it is useless to bother with the expense and trouble of obtaining a lawyer when a few answers will clear up the matter.\textsuperscript{75}

The Supreme Court may well be correct in its determination that these techniques are clearly coercive. On the other hand, it could be argued that these techniques are not as coercive as they outwardly appear, since the suspect may have a real compulsion to confess. Therefore, these techniques might be viewed as merely testing a suspect's actual will to resist confession. Furthermore, even if the Court's analysis is correct, it is questionable if the Court's remedies

\textsuperscript{71} Id. at 450 (footnotes omitted).
\textsuperscript{72} Id. at 452.
\textsuperscript{73} Id. at 453.
\textsuperscript{74} Id. at 454.
\textsuperscript{75} Id.
provide a realistic tool for preventing such police abuses. Hastily reading to the suspect a statement of his constitutional rights is not likely to minimize the coercive impact of a police station itself and the legitimate police procedures that precede and follow the suspect's arrival there.

The Court nevertheless pointed to specific situations to buttress its contention that without adequate warnings a defendant is unfairly coerced. Among the cases thus cited were *Townsend v. Sein*, where a 19-year old heroin addict and near mental defective was coerced into confessing, and *Lynumn v. Illinois*, in which a woman confessed after being "importunated [sic] to cooperate in order to prevent her children from being taken away." It should be noted, however, that these situations easily could be dealt with under the tests propounded prior to *Miranda*; the latter, for example, is clearly violative of due process.

After reciting certain facts relevant to the *Miranda* cases the Court concluded:

[In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.]

The importance of this statement is readily apparent—the Court implicitly is saying that the fifth amendment privilege against self-incrimination is not merely a right that an individual may assert, but rather is one which the government must ensure that the defendant is cognizant of and waives actively, affirmatively, and with knowledge of the consequences, if at all. This view appears to be a long step from the original and popular notion that the right was created to protect the innocent from abusive procedures. It is submitted that the Founders conceptualized the right against self-incrimination to be applicable in Brown-type cases rather than as a veil for actual, admitted wrongdoers. The Court conceded this point, but asserted that in order to protect innocent persons from police abuses in the relatively few cases in which they come under suspicion, procedural safeguards must be employed in every case.

The Court enunciated a second policy behind its decision by stating that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce evidence by

---

79 384 U.S. at 457.
its own independent labors, rather than by the cruel, simple expedient of compelling it from [the suspect's] own mouth."\textsuperscript{80} This assertion, though apparently sound at first blush, may be a bit naive in view of many modern criminal practices. For example, often the only way to convict a mugger is by confession, since there rarely are witnesses to his criminal acts.

The Court, furthermore, made it very clear that the procedures set forth in \textit{Miranda} must be followed, not just in police stations and courts of law, but rather "in all settings in which [a person's] freedom of action is curtailed in any significant way."\textsuperscript{81} It is noted that "in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."\textsuperscript{82} It is obvious that the Court departed from the subjective "voluntariness" test and established as a basic constitutional doctrine the premise that without the \textit{Miranda} warnings, a suspect is not capable of voluntarily waiving his fifth amendment rights. Even though the Court argued that \textit{Miranda} is not a "constitutional straight jacket"\textsuperscript{83} and stated that it will consider other procedures that "are at least as effective"\textsuperscript{84} as those outlined in \textit{Miranda}, the decision appears to be an unwarranted stretching of constitutional doctrine. For example, it apparently assumes that without police warning, even a professor of criminal law is not sufficiently apprised of his rights.

In outlining the specific safeguards, the Court stated that the police must "show the individual that his interrogators are prepared to recognize his privilege."\textsuperscript{85} This requirement is unrealistic because if the basic problem is control of police behavior, it is unreasonable to assume that even if the police do give the warnings, they will exhibit any effort to make the suspect feel at ease. Indeed, such an attitude is simply alien to the role society asks the police to play. It is equally unrealistic to assume that a \textit{Miranda} warning will minimize the coercive atmosphere, since the notification requirement can be satisfied (and probably often is) by a mere mechanical recitation of the accused's rights.

The Court, in further explaining the new warnings, declared that the right to counsel is not waived unless "specifically made after the

\textsuperscript{80} Id. at 460.
\textsuperscript{81} 384 U.S. at 467 (emphasis added).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 468.
warnings\textsuperscript{88} and cited with favor \textit{People v. Dorado},\textsuperscript{87} suggesting that a defendant who waives counsel is the one most in need of representation. Carrying this rationale to a logical extreme, one can likewise argue that anyone who confesses is clearly in need of a lawyer, because no rational man wants to make incriminating statements. This approach is clearly contrary to the Court's earlier statements that a confession voluntarily made and properly received is clearly admissible; however, one could argue that proper warnings are needed to ensure that the confession is truly voluntary. But as will be discussed later, the problem is in defining "voluntary," because if a confession is an irrational process, a rational system of warnings is an altogether ineffective device.

Perhaps the strongest requirement established by the \textit{Miranda} Court is that the warning must include notice that if an indigent desires an attorney, one will be provided for him at no cost. The Court stated that, without assurances of court appointed counsel,

the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.\textsuperscript{88}

If, after all these warnings have been given, the suspect still confesses to a crime, \textit{Miranda} imposes a "heavy burden"\textsuperscript{89} on the prosecution to prove that the suspect "voluntarily, knowingly, and intelligently"\textsuperscript{90} waived his constitutional rights. Realistically, this exercise is pointless, because if the waiver is in fact freely given, there is no problem. On the other hand, if the waiver is improperly obtained, there is no reason to assume that the same policemen who used questionable tactics to obtain a confession will not use unethical tactics to prove the voluntariness of the confession.

The \textit{Miranda} decision, finally, was the result of a counter-balancing of two fundamental and often conflicting societal interests: (1) the protection of individual rights, and (2) the desire and the need to

\textsuperscript{88} Id. at 470.
\textsuperscript{87} 398 P.2d 361, 42 Cal. Rptr. 169 (1965).
\textsuperscript{88} 384 U.S. at 473 (footnotes omitted).
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 475.
punish wrongdoers.91 The Court tipped the scale in favor of individual rights of the accused on the premise that if the government becomes a “law breaker, it breeds contempt for the law, [and] . . . it invites anarchy.”92 This last proposition propounded by the Court is not disputed, but there may be alternative remedies to those chosen in *Miranda* which can serve both society’s interest in preserving individual rights and its need to punish criminals.

III. Ramifications of *Miranda*

In discussing the ramifications of *Miranda*, it is essential to analyze the present policy regarding criminal procedure as it affects law, psychology, literature, and the “mass reality”.

A. Law

The best starting point for an analysis of the effects of *Miranda* on the law is the dissenting opinion in that case of Mr. Justice Harlan, who refused to subscribe to the majority view that abusive police tactics were widespread. In a critical analysis of the new rules, he stated:

I think [that] it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light “to speak of any confessions or crime made after arrest as being ‘voluntary’ or ‘uncoerced’ is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser.” . . . Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.

The Court’s new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all. In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description.93

---

91 Id. at 479.
92 Id. at 480, citing Olmstead v. United States, 277 U.S. 438, 471 (1936) (Brandeis, J., dissenting).
In part, Justice Harlan is suggesting that the majority chose a remedy that is neither realistic nor viable. This conclusion is warranted by several major studies, perhaps the best being one conducted by the Yale Law School.\(^9\) This study, run over an eleven week period on an around-the-clock basis in the summer of 1966, was undertaken "to evaluate the claims that interrogations are inherently coercive and that Miranda will substantially impede successful law enforcement."\(^{95}\) As might be expected, the study revealed that the more serious the crime in question, the more rigorous the interrogation. Likewise, it showed that the more serious the crime, the more likely it is that the defendant will realize the advantage of asserting his constitutional rights. For example, a potential defendant arrested for vandalism at age 16 is justified in believing that if he cooperates he may be treated leniently, whereas it is hardly reasonable for a murder suspect to believe that cooperation will result in leniency.

The Yale study did substantiate the Supreme Court's assertion that the tactics illustrated in police manuals were in fact utilized; however, those tactics were found to be employed in a haphazard manner.\(^9\) As a result, fears of a hardened professional interrogator facing a helpless criminal are largely baseless. In fact, in a number of situations, the suspect may be an experienced "conman" who is, in fact, in a superior position to that of the interrogator. Moreover, the feared techniques are not very sophisticated. The "Mutt and Jeff" routine, for example, is just a version of a familiar parental technique by which a child is disciplined by the threat of punishment when his father returns home.

This is not to suggest that abuses never occur. Three of more than 100 suspects involved in the Yale study were told that there would be trouble for their families if they failed to cooperate. This type of abuse, however, could have been dealt with by pre-Miranda due process decisions.\(^9\) It should be noted that, although the study produced no evidence of physical abuse,\(^9\) this was probably to a great extent due to the presence of the Yale student in the interrogation room.

The incidence of strict compliance with the Miranda warnings was very low—only 25 out of 118 suspects received the warnings as

---

\(^{94}\) Note, Interrogation in New Haven: The Impact of Miranda, 76 YALE L.J. 1519 (1967) [hereinafter cited as Interrogation in New Haven].

\(^{95}\) Id. at 1522.

\(^{96}\) Id. at 1543.

\(^{97}\) E.g., Brown v. Mississippi, 297 U.S. 278 (1936).

\(^{98}\) Interrogation in New Haven, supra note 94, at 1549.
set forth in the decision.\textsuperscript{99} The reason given for such non-compliance was that the police were unfamiliar with the new rules; the same excuse would have little credibility today.

In addition, the study indicated that a number of suspects were at first unsuccessful in terminating the interrogation by asserting their \textit{Miranda} rights. It was only when they became adamant that the police ceased the interrogation. Even where the suspect did remain silent, the benefit was not as great as one might expect, since the study suggested that in only one of seven cases where the suspect remained silent would a plea of not guilty have had a sound basis.

"Since most suspects probably will eventually plead guilty whether or not they confess at the police station, \textit{Miranda}'s effect may be simply to postpone confession from interrogation to the plea-bargaining stage."\textsuperscript{100} One factor mentioned in this regard was that the stronger the prosecution's case, the more likely it was that a confession would result.\textsuperscript{101}

It is suggested that the circumstances surrounding the crime may be more useful in determining the voluntariness of a confession than are the procedures and criteria established in \textit{Miranda}. For example, if a criminal assault occurs in a crowded bus terminal, in full view of witnesses, it is reasonable to assume that the ordinary suspect would voluntarily confess, whereas a professional like Joey would be unlikely to confess. Of course, this is an extreme illustration, but the point is that the circumstances relating to the crime and the criminal are more indicative of the likelihood of a voluntary confession than the mere application of (or failure to apply) procedural safeguards.

The study, further, supports the observation, \textit{supra}, that \textit{Miranda} warnings can do little to minimize the "inherently coercive atmosphere" of a police station.\textsuperscript{102} The crux of the study's findings in this regard was expressed in the following language:

\begin{quote}
    The suspect arrested and brought downtown for questioning is in a crisis laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights. Unless he is a professional, the suspect is unlikely to know the movements of the law enforcement machinery. The likely consequences of the alternatives open to him are unclear—how much leniency cooperation may earn, how likely fast talk is to succeed,
\end{quote}

\textsuperscript{99} \textit{Id.} at 1550.
\textsuperscript{100} \textit{Id.} at 1607.
\textsuperscript{101} \textit{Id.} at 1608-09.
\textsuperscript{102} \textit{Id.} at 1613.
how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to ‘throw the book’ at him. 103

Given this situation, the study hypothesizes, the suspect’s prior knowledge of his rights may be of much greater importance than Miranda. This suggests that a more reasonable (though admittedly idealistic) approach to inform potential defendants of their rights is in a forum before they are apprehended (e.g., in public schools).

The conclusion of the study is striking. “Our data and impressions in New Haven converge to a single conclusion: Not much has changed after Miranda. Despite the dark predictions by the critics of the decision, the impact on law enforcement has been small.” 104 Two reasons are suggested for this lack of impact. First, confessions play only a secondary role in solving crimes, at least in New Haven and in towns of similar size. Second, even when utilized, the Miranda warnings seem to have only a minimal effect on the frequency of confessions. 105

B. Mass Reality

The impact of Miranda surely has not been confined solely to the area of law; the ramifications of this decision extend far afield. Courts cannot operate in isolation but rather must respect and reflect the common will. The law cannot disregard the public will without running the risk that the public will disregard the law. To measure the full effect of Miranda, then, it is necessary to examine what may be termed the “mass reality” (i.e., the public mood), 106 the field of psychology, and literature.

As a preface to a consideration of the first of these areas, it is suggested that empirical studies may be of little importance in that the “mass reality” or public mood is not merely a function of values but is a conglomerate of emotions, values and impressions. It is founded upon common sense rather than logic. 107 To the man on the street, Miranda, Escobedo, Jackson, and the other landmark criminal rights decisions are not cases of great legal and constitutional significance,

---

103 Id. at 1613-14.
104 Id. at 1613.
105 A similar study affirmed the conclusions reached by the Yale study and found that although there was a minor decrease in the rate of confessions, Miranda had had no major impact on police behavior. Seeburger & Wetlick, Miranda in Pittsburgh—A Statistical Study, 29 U. Prr. L. Rev. 1 (1967).
106 “Mass reality” denotes a common sense impression of the contemporary American scene.
107 At this point, it is only fair to note that I am making two assumptions which I cannot prove. First, any legal system will fail without public support and respect. Second, an evaluation of the public mood must be impressionistic and not empirical.
but rather represent a series of tools and legal technicalities which enable skillful lawyers to thwart the course of justice. In his eyes it is justice to the highest bidder. Money will buy a "mouthpiece" who can twist and turn the law to release the guilty, but wealthy defendants. Perhaps, too, a few lucky indigents will be chosen by liberal professors as test cases.

It is difficult for the law abiding citizen to comprehend how a man like Joey can, for all practical purposes, confess to 38 murders and walk the streets with apparent immunity from prosecution. It is even more difficult, if not impossible, for him to condone such a situation or to respect the law that has created it. Freedom for a confessed rapist like Miranda or murderers like Jackson and Escobedo is almost unfathomable. To the laymen, confessions represent a routine facet of our system of criminal justice; they are not "beaten" out of people, but if a little force is used, it is for the public benefit anyway. His experience with confessions came from watching Perry Mason, who, invariably defends a "framed" party and secures a spontaneous confession from the real culprit by confronting him with the facts. As a result, this, rather than what actually happens in the back room of a New York police station, represents reality for him.

Additionally, to many Americans, confessions are not only normal and prevalent but are also simply the right thing to do. How many Americans have not been educated in a school where an appropriately matronly teacher has not lectured on the benefits of "fessing up" to one's misdeeds? Miranda and similar cases openly affront these traditional American values. Jack Webb always devotes a significant amount of time to demeaning the virtues of procedural due process. Naturally, Jack does not abuse his suspects, make deals, take gratuities or the like. This is the image many middle class Americans have of their police.

It is not suggested that the Supreme Court should modulate its interpretation of the Constitution based on public sentiment. However, when fashioning a remedy the Court must take this factor into account. To many Americans, the value of "fessing up" is of higher priority, along with reducing street crime, than protecting the rights secured by the fifth amendment. Analogously, the recent public mood about the Watergate tapes suggests that the public is far more concerned with hearing the tapes than with the doctrine of executive privilege. In short, the public is concerned with results. Foremost among its objectives is getting the criminal behind bars; assuring procedural due process is very likely far down the list.
C. *Psychology*

As unsophisticated as the lay approach to confessions may be, it is not without support from the field of psychology. At this point, it is only fair to note that the thrust of the following psychological analysis is Freudian. The author realizes that there are many who feel that Freud is now discredited. However, the reader is reminded that this note is intended to be provocative rather than conclusionary, a purpose which the controversial analytical approach employed hereinafter serves well.

As a basic proposition, Freud contends that man's mental processes are divided into an id, ego and superego. The ego represents the conscious state as it is generally perceived in everyday experience. The id represents the unconscious processes and is more primitive and impulsive than the other two. It symbolizes our base desires. The superego represents another aspect of the conscious which can be conceptualized as the right/wrong mechanism—in short, our conscience. It is the battle between the id and the superego that results in a confession.

The basic Freudian conception was utilized by Theodor Reik in his work *The Compulsion to Confess*.\(^{108}\) The title is suggestive of the author's basic thesis—that when a person is confronted with an act contrary to what is known to be right, at least by the superego, the conflict between the id and the superego compels a confession. For example, a young man is vacationing in a resort hotel, where he meets an attractive girl at a social encounter on a particular evening. He obviously has certain sexual designs (\(i.e., \) id desires) which are thwarted. The following morning at breakfast he sees the girl and says:

*Good morning! I thought of you still in bed. He meant to say, of course, I thought you were still in bed. He became quite embarrassed because of this silly slip. For us there can be no doubt that this slip of the tongue is tantamount to a confession which might be put into these words: How I longed for you still in bed. It is, therefore, the confession of his tender and sensual wishes that forced itself past his lips, into the middle of a conventional sentence. Their expression would have been impossible otherwise for reasons of propriety. It is clear that here the suppressed, as in a Putsch, put itself impetuously in the place of the suppressing powers, and, almost undistorted, made the break-through.\(^{109}\)*

Reik suggests that this "confession" is due to the repression of the

---

\(^{108}\) T. REIK, THE COMPULSION TO CONFESS (1945) [hereinafter cited as REIK].
\(^{109}\) Id. at 188.
id drives, which are thereby forced to the surface by the compulsion to confess, in order to relieve the conflict between the id and the superego.\textsuperscript{110} He theorizes that the process of confession is, therefore, not the result of external pressures but rather is a function of internal forces which are essentially irrational and unconscious. He further contends that the confession is a modified urge for the expression of the id drives and, because of the superego forces, that it is also in part the product of a desire for punishment for the urges or actions. Both of these are forced to the ego or conscious level—hardly a rational process. The confession, then, serves the dual purpose of satisfying the superego's feelings of guilt and need for punishment and of allowing the id's "forbidden wishes [to] find a partial satisfaction. . . ."\textsuperscript{111}

The above analysis can best be illustrated by placing it in the context of \textit{Jackson v. Denno}.\textsuperscript{112} There, Jackson told the police that "I shot the colored cop—I got the drop on him."\textsuperscript{113} This confession can be seen as modified drives, which can be viewed as either an archetypical killing of a father figure or repressed aggression. In either event Jackson's confession served to relieve the conflict between id and superego and at the same time, as Reik suggests, served as a partial satisfaction in the verbal reenactment of the drive/crime.\textsuperscript{114}

The obvious question is: "Why should a man like Jackson confess?" It was not a rational decision. Later, he balked at telling the confession in toto. Why then did he confess? Could it be that the confession served to satisfy his need for punishment for having committed a serious, if not archetypical crime? One could argue that Jackson's confession was in fact an attempted resolution of the Oedipal conflict. If one views the act of killing a policeman as the destruction of the father-figure (the central desire in the Oedipal conflict), then the confession, viewed as an articulated realization that one cannot kill the father to have the mother, served as a resolution of that Oedipal conflict.

To summarize, confession serves several important functions. It relieves guilt and anxiety, satisfies the need for punishment, and helps to resolve the Oedipal conflict. All of these processes are irrational, operating on an unconscious level. Confessions therefore cannot be dealt with by rational legal tests. When the law invalidates a confession through procedural devices this serves to disrupt the psycho-

\textsuperscript{110} \textit{Id.} at 190.
\textsuperscript{111} \textit{Id.} at 201.
\textsuperscript{112} 378 U.S. 368 (1964).
\textsuperscript{113} \textit{Id.} at 371.
\textsuperscript{114} \textit{Reik, supra} note 108, at 203.
logical equilibrium for the criminal and society. First, it creates psychic confusion. The superego compels the criminal to confess, but then the law, which is the societal counterpart of the superego, releases a suspect due to violations of *Miranda*. The criminal is frustrated psychologically; he confesses, expects punishment but instead he is released. He may then commit another act in his search for punishment. Second, society is confused as well. Its members observe the criminal actuate certain urges which they too may possess but have suppressed for fear of punishment. These same individuals see the criminal who has so acted go free. The system does not mesh with their emotional reality, especially when serious crimes, such as rape and murder, are involved. If the ordinary citizen’s superego, which is in part the product of social mores, becomes thereby programmed so as not to prevent such actions, the repressed drives of an entire society may burst forth onto the streets. Of course, this is melodramatic, but in a sense it explains the public outrage at *Miranda* and its progeny.

The above Freudian analysis may be, at least in part, open to serious challenge. However, it is submitted that if there is any substance at all to the psycho-analytic approach to confessions, then *Miranda* has created an intolerable situation. The very system which is supposed to enforce the collective social conscience acts, in terms of results, in a manner directly opposite to the values espoused. Consequently, forbidden desires, effectuated in equally forbidden acts, are not punished and wreck havoc with psychological balances in individuals.

The psychological processes that produce confessions are unconscious and irrational. The law, however, is logical and presumes the confession process to be logical. Courts impose voluntariness as a standard, safeguarded by a logical system of procedural rights with a logical remedy for police misdeeds. Such a patterned approach simply is not workable, because an irrational process is at the very core of the problem; and, since these psychological processes cannot change, the law must give way to resolve the contradictions.116

116 If the reader finds this Freudian analysis a “bit much”, consider a non-Freudian hypothetical couched in layman’s terms. Assume that a teenage boy steals a sixpack of beer from his father, leaves the house and consumes the beer with a friend. Upon returning home, the boy is visibly drunk. It would not be unreasonable to assume that when confronted by his parents he might confess. Such confessions would serve to relieve a certain anxiety he had about getting caught. In addition, it would partially re-satisfy the id drives in that it also serves as a partial re-enactment of the act—the boy is not only confessing but also “bragging” about his adult exploits. Reik notes this fact by pointing out that it is often not the punishment one fears as much as the anticipation of the punishment.
D. Literature

By observing confessions from a literary standpoint, one may gain valuable insight into how non-legal intellectuals approach the problem. Fyodor Dostoyevsky’s *Crime and Punishment*\(^{116}\) is probably the classic work on this subject. The chief protagonist, Raskolnikov, a would-be intellectual scholar floundering in Petersburg in the late 19th century, considers himself above the law as defined by mortal men. The following excerpt is illustrative:

> I simply hinted that an extraordinary man has the right, that is not an official right, but an inner right to decide in his own conscience to overstep... certain obstacles, and only in case it is essential for the practical fulfillment of his idea (sometimes, perhaps, of benefit to the whole of humanity)... I maintain in my article that all... well, legislators and leaders of men, such as Lycurgus, Solon, Mahomet, Napoleon, and so on, were all without exception criminals, from the very fact that, making a new law, they transgressed the ancient one, handed down from their ancestors and held sacred by the people, and they did not stop short at bloodshed either, if that bloodshed—often of innocent persons fighting bravely in defence of ancient law—were of use to their cause. It’s remarkable, in fact, that the majority, indeed, of these benefactors and leaders of humanity were guilty of terrible carnage. In short, I maintain that all great men or even men a little out of the common, that is to say capable of giving some new word, must from their very nature be criminals—more or less, of course. Otherwise it’s hard for them to get out of the common rut; and to remain in the common rut is what they can’t submit to, for their very nature again, and to my mind they ought not, indeed, to submit to it. You see that there is nothing particularly new in all that. The same thing has been printed and read a thousand times before. As for my division of people into ordinary and extraordinary, I acknowledge that it’s somewhat arbitrary, but I don’t insist upon exact numbers. I only believe in my leading that men are in general divided by a law of nature into two categories, inferior (ordinary), that is, so to say, material that serves only to reproduce its kind, and men who have the gift or the talent to utter a new word. There are, of course, innumerable sub-divisions, but the distinguishing features of both categories are fairly well marked.\(^{117}\)

In pursuance of his right as a superior man, Raskolnikov decides to commit the perfect crime by killing an old woman pawnbroker whom he considers a menace to society. This pawnbroker has a sister, and the plan calls for the murder to occur when the sister is

\(^{116}\) F. DOSTOEVSKY, CRIME AND PUNISHMENT (G. Garnett transl. 1956).

\(^{117}\) *Id.* at 234-35.
gone. However, as fate would have it, the sister enters the apartment
during the crime and Raskolnikov is forced to kill her as well.

Through his writings Raskolnikov becomes acquainted with the
investigating officer, Porfiry Petrovitch. Porfiry retains Raskolnikov
as an expert and assistant in solving the crime. Raskolnikov is clearly
a suspect in the *Miranda* sense, at least in the mind of Porfiry.
Illustrative is the following passage wherein Porfiry explains to
Raskolnikov his theory of how he will apprehend the criminal:

I leave one man quite alone, if I don't touch him and don't worry
him, but let him know or at least suspect every moment that I know
all about it and am watching him day and night, and if he is in
continual suspicion and terror, he'll be bound to lose his head.
He'll come of himself, or maybe do something which will make it
as plain as twice two are four—it's delightful. It may be so with a
simple peasant, but with one of our sort, an intelligent man cul-
tivated on a certain side, it's a dead certainty. For, my dear fellow,
it's a very important matter to know on what side a man is culti-
ved. And then there are nerves, there are nerves, you have over-
looked them! Why, they are all sick, nervous and terrible!
... And then how they all suffer from spleen! That I assure you
is a regular gold mine for us. And it's no anxiety to me, his run-
ning about the town free! Let him, let him walk about for a bit!
I know well enough that I've caught him and that he won't escape
me. Where could he escape to, he-he? Abroad, perhaps? A Pole
will escape abroad, but not here, especially as I am watching and
have taken measures. Will he escape into the depths of the country
perhaps? But you know, peasants live there, real rude Russian
peasants. A modern cultivated man would prefer prison to living
with such strangers as our peasants. He-he! But that's all non-
sense and on the surface. It's not merely that he has nowhere to
run to, he is psychologically unable to escape me, he-he!118

During the course of the investigation, Raskolnikov is also involved
with a prostitute named Sonia, to whom he eventually makes his first
confession as follows:

"You can't guess, then?" he asked suddenly, feeling as though he
were flinging himself down from a steeple.

"N-no . . ." whispered Sonia.

"Take a good look."

As soon as he has said this again, the same familiar sensation
froze his heart. He looked at her and all at once seemed to see
in her face the face of Lizaveta [the pawnbroker's sister]. He
remembered clearly the expression in Lizaveta's face, when he
approached her with the axe and she stepped back to the wall,
putting out her hand, with childish terror in her face, looking as

118 *Id.* at 306-07.
little children do when they begin to be frightened of something, looking intently and uneasily at what frightens them, shrinking back and holding out their little hands on the point of crying. Almost the same thing happened now to Sonia. With the same helplessness and the same terror, she looked at him for a while and, suddenly putting out her left hand, pressed her fingers faintly against his breast and slowly began to get up from the bed, moving further from his and keeping her eyes fixed even more immovably on him. Her terror infected him. The same fear showed itself on his face. In the same way he stared at her and almost with the same childish smile.\textsuperscript{119}

This passage well illustrates the compulsion outlined in Reik. Raskolnikov, of course, ultimately confesses to the police.

From \textit{Crime and Punishment} we can clearly discern a pattern similar to that found in Reik's \textit{Compulsion to Confess}. This similarity manifests itself in a compulsion to confess to crimes that one believes to be wrong—when the id and superego collide. \textit{Crime and Punishment} is, of course, only a novel and not valid legal authority. However, one must not dismiss such literature as "mere fiction". Dostoyevsky seems to have touched up on some basic human behavior patterns one of which is that when one does an act clearly beyond the social mores, confession acts as a catharsis, as it did for Raskolnikov. Yet it is not a rational process. It is an unconscious operation to relieve the conflict between the id and superego forces.

There are surely many who will question the relevancy of the literary approach. Perhaps some of this skepticism can be overcome by approaching a modern-day hypothetical in common sense terms. The never ending confessions seen on Perry Mason are certainly within the pale of reason. Moreover, Jackson's blurtling out "I shot the colored cop—I got the drop on him"\textsuperscript{120} is not farfetched. Both of those fit into our system of reason and plausible reality. However, what if a college student is stopped by the police and questioned about drug use? It is unreasonable to expect him to blurt out, "I confess, I confess, I've used illicit drugs. Save me from the killer weed marijuana." It's simply ludicrous. Why? Because there is no realistic conflict between id and superego. However, if caught "red-handed" with the drugs, the suspect might make a rational choice to bargain for leniency. All this points to the conclusion that, save physical abuse or extreme mental disorder, all confessions are either rational choices to bargain for leniency or compelled confessions which are voluntary in a psychological but not a legal sense. "Vol-

\textsuperscript{119} Id. at 369.
\textsuperscript{120} 378 U.S. at 371.
untary”, of course, is not the proper term, because a compelled confession is not equivalent to a voluntary one. This is due to the aforementioned conflict between rational legal systems and irrational psychological behavior.

Compulsion, by Meyer Levin, affords an opportunity to view confessions from a perspective that is at once fictional and factual. This largely fictional work is based on the story of Leopold and Loeb (Strauss and Steiner in the novel), the famous kidnappers of the 1920’s who were defended by Clarence Darrow. In the novel the two teenagers are represented as twentieth-century Raskolnikovs who, like Dostoyevsky’s character, have a feeling of moral superiority in terms of the law. For “kicks”, they plot the “crime of the century”. The plan is an intricate kidnapping in which they abduct a friend of one of their brothers. The money is to be thrown off a moving train, timed so as to minimize the risk of being caught. The victim is killed, and the plot fails for three reasons. First, the body, improperly buried, is found prior to the delivery of the ransom. Second, one of the kidnappers leaves his glasses at the scene. The frames, a rare make, are easily traceable to the suspects but not to the point of giving the police an airtight case. Third, the typewriter used for the ransom note is not destroyed.

Although the police developed a fairly solid case by physical evidence, it is bolstered considerably by a confession obtained when the boys are “tricked” by the ancient technique of playing one off against the other. Steiner, confronted with an alleged confession by Strauss, divulges the whole story. It is quite probable that, in reality, Strauss and Steiner wanted to be caught. Why else would extremely intelligent persons neglect such obvious details as the glasses, the burial, and the typewriter. More importantly, why did they confess, when they were clearly aware of the legal consequences?

Clearly Strauss, Steiner, and Raskolnikov may not be the type of person Miranda was intended to protect, but it is equally clear that it would. The confessions in all these cases were necessary for the welfare of the individuals and society both legally and psychologically. To void them on procedural grounds is foolish.

**CONCLUSION**

This note has outlined the basic substance of criminal procedure as it relates to confessions and has explored the policies behind the

---

121 M. Levin, Compulsion (1956).
122 *Id.* at 252.
law as espoused by the Supreme Court. Hopefully, it has revealed the inevitable conflict that exists between the natural instinct to confess and the Supreme Court's restrictions in this area of the law. Confessions, compelled by an unconscious process, are necessary to resolve deep psychological needs and are crucial to any proper rehabilitation of criminals. Modern criminal procedural law, especially *Miranda*, interrupts this normal psychological process.

Confessions are viewed with favor by the police, society, writers and psychologists. The law *must* find a procedure which both reflects this attitude and provides a remedy for the constitutional violations which may be involved. To accomplish this, *Miranda* must first be circumvented. This need not be done by specifically arguing for reversal in the Supreme Court, because the Court itself left open the possibility of alternative remedies.

Second, the exclusionary approach should be used only in those cases that could be decided on the basis of due process. As discussed above, the due process cases turn not on the violation of constitutional rights but on the believability of the confessions in light of severe police misconduct used to elicit them. The truthfulness question should be determined by the procedures set forth in *Lego* and *Jackson* coupled with the utilization of a reasonable doubt standard and a mandatory provision for the jury to consider the issue of truthfulness if the judge rules against the defendant.

Third, realizing that traditional civil remedies are ineffective, I propose the creation of an administrative agency based on the format of the National Labor Relations Board, which would be subject to judicial review. In the event that a defendant alleged police misconduct and lost on the issue of truthfulness (i.e., the court finds his confession true but in violation of constitutional rights), he would submit a claim to the agency. Clearly unwarranted and unfounded claims would be dismissed. This would protect both the defendant and avoid wasting police time defending frivolous claims. However, if the claim were found to be valid, the agency would be empowered to redress the grievance with remedies (e.g., damages, fines, suspensions from duty or discharges). The damages awarded to any criminal would be held in trust and subject to a lien in favor of the victims of the crime in question.

---

Such a system, it is submitted, would be more apt than the measures currently employed to prevent police misconduct. First, an officer is much more likely to reform his conduct when faced with the prospect of a fine than with the chance of a suspect being freed. Second, the criminal would be afforded the psychological benefit of a confession. Third, the public interest would be served in that admitted criminals would have a remedy for their wrongs but would not be free. Finally, a measure of the respect for the law lost by Miranda might be restored.

Such a system, if put into operation would certainly not cure all of the present ills of the law of criminal procedure. Indeed, the above stated proposals may be subject to many infirmities. At least, however, they may serve as a much needed catalyst for solving the conflict between Miranda and Reality.

Robert G. Lowen