SMU | Dedman School of Law

SMU Law Review

Volume 21
Issue 1 *Annual Survey of Texas Law*

Article 19

January 1967

Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure

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COMMENTS

CUSTODIAL INTERROGATION AS A TOOL OF LAW ENFORCEMENT: MIRANDA V. ARIZONA AND THE TEXAS CODE OF CRIMINAL PROCEDURE

by W. Richard Jones

The concept of limited government is both a compromise and a contradiction: a compromise, because the purposes of government are to be achieved by methods acceptable to the governed; a contradiction, because restraints upon the exercise of power necessarily impede the accomplishment of those goals for whose achievement power was conferred. Throughout the field of criminal law the limited government concept creates compromise and contradiction. These elements are especially apparent when power is limited by requirements of fair procedure in an effort to attain a truly just system of law enforcement.

Seeking to implement constitutional directives, the United States Supreme Court has limited the power of state police to interrogate by imposing stringent requirements of fair procedure.[1] While the Court has been criticized by some for developing a criminal code from the fourteenth amendment's broad guarantee of due process,[2] a majority of the justices today view the implementation of strict standards as the only guarantee that due process will be preserved inviolate.[3] Adhering to this policy, an emphatically specific Court has delineated exacting rules for interrogation of suspects by state police. *Miranda v. Arizona* declares that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards"[4] including an adequate warning to the suspect of his rights, and the presence of counsel at interrogation if de-

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Mr. Justice Harlan, dissenting, in Miranda v. Arizona, *supra* note 1 at 504, declared that the Court's opinion in that case is a "new constitutional code of rules for confessions." See also GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 134 (1966); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[3] It has been established that the increasingly stringent requirements imposed by the Court excluding the use of certain types of evidence are not necessarily required by the Constitution, but are rather methods adopted by the Court for the protection of constitutional rights. Thus, in his concurring opinion in Mapp v. Ohio, 367 U.S. 643, 661 (1962), Mr. Justice Black stated: "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." See also note 85 *infra*.

[4] 384 U.S. 436 at 444.

sired. Earlier cases, such as *White v. Maryland*[5] and *Hamilton v. Alabama*,[6] had developed due process prior to the formal trial. As soon as the legal process reached the point where "definable rights could be won or lost"[7] certain constitutional rights attached.[8] In *Escobedo v. Illinois*[9] the Supreme Court declared that when an investigation has "focused on the accused" he is entitled to representation by counsel. Because counsel in *Escobedo* had been retained by the accused prior to his arrest, however, much controversy concerning its correct interpretation developed. *Miranda v. Arizona* attempts to clarify and extend the *Escobedo* holding.[10]

The new Texas Code of Criminal Procedure also places limitations upon the power of police to interrogate suspects.[11] An extensive warning must be administered by a magistrate to the individual before interrogation, and he is given the right to consult with an attorney at that time. The development of additional duties of fair procedure by *Miranda* and by the new code necessitate substantial correlation. And, the limitations which both impose must be harmonized with the requisite efficiency of police activity within the concept of due process of law.

I. Interrogation as a Tool of Law Enforcement

Police interrogation has been the focus of considerable controversy in

[5] 373 U.S. 59 (1963). The defendant pleaded guilty at a preliminary hearing where he was not assisted by counsel. Upon later entering a plea of not guilty, his guilty plea was introduced against him. The Supreme Court held that this preliminary hearing was a "critical stage" of the case at which the denial of counsel offended due process standards.

[6] 368 U.S. 52 (1961). Counsel was denied at arraignment on a capital charge at which the accused was required to enter a plea. The case was reversed for lack of counsel at this stage.

[7] Mr. Justice White, discussing these cases in his dissent in Escobedo v. Illinois, 378 U.S. 478, 497 (1964).

[8] The majority in *Escobedo* stated: "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation. This was the 'stage when legal aid and advice' were most critical to petitioner. It was a stage surely as critical as was the arraignment in Hamilton v. Alabama and the preliminary hearing in White v. Maryland. What happened at this interrogation could certainly 'affect the whole trial.'" (Citations omitted.) 378 U.S. 478, 486 (1964).

Similar cases are Walton v. Arkansas, 371 U.S. 28 (1962) (arraignment was held 'critical' because the accused had to acknowledge the voluntariness of his confession); Chewning v. Cunningham, 368 U.S. 443 (1962) (appointed counsel was held necessary at such a hearing); Reynolds v. Cochran, 365 U.S. 525 (1961) (suspect was held to have a right to his own retained counsel at arraignment for violation of a second offender statute); Chandler v. Fretag, 348 U.S. 3 (1954) (same). *But cf.*, Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287 (1959), holding that a hearing on problems of ambulance chasing not sufficient to require the presence of retained counsel.

[9] 378 U.S. 478 (1964).

[10] The case of Griffin v. California, 380 U.S. 609 (1965) held that the prohibition against self-incrimination is a part of due process as guaranteed by the fourteenth amendment. *Miranda* extends the application of this protection beyond the holding in *Griffin*.

Although predicated upon the fifth, rather than the sixth amendment, *Miranda* extends the right of an accused to counsel, and thus clarifies the interpretation of the latter amendment in Gideon v. Wainwright, 372 U.S. 335 (1963). In light of such cases as Hamilton v. Alabama, 368 U.S. 52 (1961), which had declared that the right to counsel was not limited to the trial itself, the extent of this guaarntee was in doubt until *Miranda*. While *Miranda* thus extends the doctrines of several decisions, it primarily clarifies and extends the holding of *Escobedo*, relating to the limitations upon police interrogation.

[11] Acts 1965, ch. 722, Tex. Code Crim. Proc. Ann. arts. 15.17, 38.21-.23 (1966).

recent times. On the one hand prosecutors and police argue that it is an indispensable tool, the quickest, and often the only means of obtaining needed information.[12] Those more concerned with due process considerations argue that government should not impose penal sanctions upon the basis of information obtained from the accused's own mouth.[13] Contradictions of a limited government, however, are not to be resolved by choosing between conflicting values, but rather by harmonizing potentially complementary ideas. To reconcile these views the role of the police in a limited governmental system must be examined.

A principal function of police in the criminal process is to prevent criminal activity.[14] The mores of society and the threat of ultimate apprehension are the basic factors deterring criminal conduct. However, the affirmative presence of police power also serves to prevent crime, and therefore at the periphery of legal police conduct are such devices as momentary detention, impromptu searching or questioning, and arresting and releasing practices.[15] While these tools are either extra-legal or illegal, they serve as a powerful deterent to criminal conduct.[16] Interrogation has been used as a similar instrument for the control of society. Just as the arrest procedure can and has been used to apprehend prostitutes, gamblers, drunks, and similar violators without the intention of prosecution,[17] so also the interrogation procedure can be used as an end in itself, by imposing sanctions of a kind at this stage, frightening and harrassing the individual.[18]

Once a crime is committed, however, the function of the police turns to its detection, and the apprehension of its perpetrators. This function is in large measure accomplished by independent investigation. While police science as an empirical study has advanced amazingly during the last century, "the art of criminal investigation has not developed to a point where the search for and the examination of physical evidence will always, or

[12] "Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects." Inbau, *Police Interrogation—A Practical Necessity*, in POLICE POWER AND INDIVIDUAL FREEDOM 147 (Sowle ed. 1965).

[13] "[T]here is no longer a need for abusive questioning, or, indeed, in many cases for any questioning at all. A professional police renders its proof in a professional manner very much without the defendant's personal participation and not by what today is a morally and legally abusive practice." Mueller, *The Law Relating to Police Interrogation*, in POLICE POWER AND INDIVIDUAL FREEDOM 145-46 (Sowle ed. 1965).

[14] CLIFT, GUIDE TO MODERN POLICE THINKING 18 (2d ed. 1965) classifies police functions in this manner: "(1) preservation of the public peace, (2) protection of life and property, (3) prevention of crime, (4) enforcement of the laws, and (5) arresting of offenders and recovery of property."

[15] Perhaps the most exhaustive examination of this topic is to be found in LAFAVE, ARREST 439-82 (1965).

[16] *Ibid.*

[17] *Ibid.*

[18] *Cf.*, SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966).

even in most cases, reveal a clue to the identity of the perpetrator."[19] Interrogation facilitates detection and apprehension in two ways: first, by securing information otherwise unavailable to the police, and, second, by speeding up police investigation. Interrogation may take the form of questioning actual suspects or of questioning individuals not actually suspected to obtain information implicating others.[20] Questioning in order to obtain information, the "fishing expedition" of the interrogation process, has been defended vigorously because this is an area where the only clue to the perpetration of crime may be locked up in the mind of a witness or suspect.[21] Denying the opportunity to question here, it is argued, will permit the guilty to go unpunished.[22] And such interrogation might serve to dispell suspicions of the innocent.[23]

A related function of law enforcement officials is to provide prosecutors with evidence sufficient to obtain a conviction. The confession is a favored type of evidence. Emphasis upon confession as proof of guilt is a carryover from the medieval practice of requiring confessions for convictions[24] —hence the inquisition, and in England the atrocious *peine forte et dure*.[25] This emphasis upon confessions, although somewhat diluted, has continued to the present day. Moreover, the impact of the confession upon the jury is likely to be greater than that obtained by merely circumstantial evidence, and prosecutors are therefore understandably desirous of strengthening their cases in this manner. While a recent study by the Los Angeles District Attorney's office has indicated that the necessity for confessions is not as great in securing convictions as had been previously supposed,[26] there is no doubt that to some extent confessions lead to otherwise unobtainable convictions.

By serving as an instrument of control, of incrimination, and of substantiating a case, interrogation is a tool which can effectively increase police efficiency. When the purpose of interrogation is to verify a case, its goal is truth; but when it has the anterior purpose of societal control, its goal is police efficiency. Interrogation has been used for all of these purposes. Some, of course, are well within the legal framework of law enforcement. Some are not.

Control of society by administrative discretion cannot be seriously considered within the value system framework of a limited government. Un-

[19] INBAU & REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 203 (1962).
[20] *Id.* at 88-120.
[21] Inbau, *supra* note 12, at 147-48.
[22] *Ibid.*
[23] *Id.* at 150-52; INBAU & REID, *op. cit. supra* note 19, at 204.
[24] Mueller, *supra* note 13, at 145.
[25] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 652 (2d ed. 1923).
[26] Office of the District Attorney of the County of Los Angeles, Dorado-Miranda Survey, August 4, 1966.

bridled and unrestrained power is the antithesis of the system and cannot exist within it. Strong arguments, however, can and have been made for the retention of interrogation for informational purposes, especially custodial interrogation of arrested persons. It has been argued that such interrogation is the only method of solving many crimes and of removing suspicion from the innocent.[27] It has been pointed out that criminal apprehension is a different sort of activity from the affairs of law-abiding citizens, and consequently its methods must of necessity be "less refined."[28] Limitations upon interrogation are said to allow irreparable injury to society. However, to protect the individual from unrestrained exercise of power, limitations have been placed upon the use of interrogation. Both constitutional and statutory restraints must be examined to determine the permissible scope of interrogation today.

II. The Substantive Law of Confessions

Statements Deemed Admissible Early decisions determining the admissibility of challenged confessions emphasized the veracity of the statement rather than the voluntary nature of its procurement.[29] Increasing attention, however, has been directed to voluntariness in recent years, and today the truth of a statement is not at issue until its voluntary nature has been ascertained.[30] Voluntariness is no longer strictly a fact question, however. Instead, the imposition of more stringent constitutional and statutory restraints upon law enforcement require that statements be taken only under specified procedures. While enforcement of both constitutional and statutory restraints is primarily predicated upon negating confessions unless obtained in accordance with required procedures, the scope of constitutional limitations has been broader than those imposed by state legislatures. *Miranda*, on the one hand, sets out explicit requirements for all interrogation, irrespective of whether the goal is a confession or merely information. The Texas Code of Criminal Procedure, on the other hand, looks ex-

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[27] Inbau, *supra* note 12, at 150-52; Inbau & Reid, *op. cit. supra* note 19, at 204.

[28] Inbau & Reid, *op. cit. supra* note 19, at 207.

[29] In Strait v. State, 43 Tex. 486 (1875), the Texas Supreme Court approved of the fact that the lower court "admitted so much of the statements as was thus shown to be true." *Id.* at 488. Many of the English and American precedents are discussed in People of Illinois v. Fox, 319 Ill. 606, 150 N.E. 347 (1926).

[30] Rogers v. Richmond, 365 U.S. 534 (1961). Mr. Justice Frankfurter stated that:

> [O]ur decisions . . . have made clear that convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Id. at 540-41. It has also been stated that "the constitutional inquiry is . . . whether the confession was 'free and voluntary'." Malloy v. Hogan, 378 U.S. 1, 7 (1964).

clusively to the confession.[31] Under both standards no direct sanctions control police interrogation when there is no intention of prosecution.

Another difference in emphasis between *Miranda* and the new code is the nature of the statement covered by each. *Miranda* is concerned with all "statements to police." The term "statements to police" includes those oral or written confessions or partial admissions inculpatory or exculpatory in nature produced as a result of in-custody interrogation.[32] Thus any statement to police *made in response to interrogation* is covered by the decision. Excluded, however, are spontaneous voluntary admissions made by an individual prior to being placed in custody. As Mr. Chief Justice Warren states:

> Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.[33]

The Texas code, however, primarily regulates use of written confessions, setting out strict standards of form, and making inadmissible all types of oral admissions when the defendant is in police custody except possibly the *res gestae*.[34] The new Texas provisions are concerned with both admissions to a magistrate (judicial confessions) and those made prior to indictment while the suspect is in the custody of police (extra-judicial). The former normally present no question of voluntariness; the latter often do. Article 38.21 of the code provides that a confession is admissible only "if it appear that the same was freely made without compulsion or persuasion."[35] The legislature implemented this requirement in article 38.22 by declaring all confessions inadmissible, and then by enumerating exceptions to this general rule aimed at guaranteeing that a statement was voluntarily made.[36]

In its emphasis upon form, the code seems to require that a confession be witnessed by some person other than the police.[37] The name of the mag-

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[31] TEX. CODE CRIM. PROC. ANN. arts. 38.21-.23 (1965).

[32] 384 U.S. 436 at 444, 476-77.

[33] 384 U.S. 436 at 478.

[34] "The test in this state is spontaneity." Rubenstein v. State, 407 S.W.2d 793 (Tex. 1966). See also the cases cited in Moore v. State, 380 S.W.2d 626, 628 (Tex. 1964). The *Rubenstein* case reaffirms this principle under the new code.

[35] TEX. CODE CRIM. PROC. ANN. art. 38.21 (1965).

[36] TEX. CODE CRIM. PROC. ANN. art. 38.22 (1965).

[37] TEX. CODE CRIM. PROC. ANN. art. 38.22(3) (1965) provides that a confession shall be inadmissible unless, "In connection with said confession he makes statement [sic] of facts or circumstances that are found to be true, which conduce to establish his guilt; such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed, *such statement shall not be admitted in evidence, unless it is witnessed by some person other than a*

istrate administering the warning, as well as the date and time of this event, must be included on the written statement.[38] However, an exacting compliance with statutory formalities has never been emphasized by the court of criminal appeals,[39] and therefore minor variations may be permitted.

Warnings In placing limitations upon interrogation procedure the focus of both *Miranda* and the new code is upon warnings. Today article 15.17 provides that the accused must be advised at his arraignment of his constitutional rights. This warning to the accused must include (1) notification of the charges against him, and of any affidavit filed therewith; (2) advisement of his right to an examining trial, and to make bail; (3) information that there is no requirement that the suspect make a statement and that any statement may be used against him; and (4) notification as to his right to retain counsel, and of his right to have counsel appointed if he is unable to procure this assistance.[40] Article 15.17 further provides that at arraignment "the magistrate shall allow the person arrested reasonable time and opportunity to consult counsel."[41] According to interpretive commentary[42] the latter requirement was inserted in response to the decision of *Escobedo v. Illinois*.[43] Escobedo guaranteed counsel in certain instances, but there was no clear answer as to the extent of its protection. The Texas Court of Criminal Appeals had interpreted *Escobedo* to require counsel only where the accused had requested the assistance.[44] Article 15.17 seems to

peace officer, who shall sign the same as a witness." (Emphasis added.) As it presently reads, of course, this provision makes little sense. In a special commentary Justice Onion sugests potential problems of construction: whether all statements must now be in writing so that some person other than a peace officer will have something to sign, or whether the third person could merely witness the signature of the officer of his report of the incident. Justice Onion further suggests that the present wording was a typographical error resulting from the omission of a sentence referring to confessions of illiterate persons. Onion, *Special Commentary*, 4 TEX. CODE CRIM. PROC. ANN. 487 (1966).

[38] TEX. CODE CRIM. PROC. ANN. art. 38.22(2) (1965).

[39] See Delespine v. State, 396 S.W.2d 133 (1965) (signature of only the first name of the defendant on the confession is sufficient); Pate v. State, 171 Tex. Crim. 126, 345 S.W.2d 532 (1961) (a confession does not have to be dictated in the words of the accused); Sutton v. State, 166 Tex. Crim. 580, 317 S.W.2d 58 (1958) (action by two officers, referred to in the confession as one individual, does not vitiate a confession).

[40] TEX. CODE CRIM. PROC. ANN. art. 15.17 (1966). It has been noted that, as of publication date of the code, Texas is the only state which requires a warning. Onion, *Special Commentary*, 4 TEX. CODE CRIM. PROC. ANN. 486 (1966).

[41] TEX. CODE CRIM. PROC. ANN. art. 15.17 (1965).

[42] Morrison, *Special Commentary*, 4 TEX. CODE CRIM. PROC. ANN. 485 (1966).

[43] 378 U.S. 478 (1964).

[44] *Ex parte* Bertsch, 395 S.W.2d 620 (Tex. 1965). The interpretations of *Escobedo* have been many and varied. California's interpretation was one of the broadest. In California v. Durado, 398 P.2d 361 (Cal. 1965) the California Supreme Court declared: "The question presented here then centers upon whether the failure of the accused to retain or request counsel justifies the application of a rule of law different from that established in *Escobedo*. The basic reasoning of the court's opinion in *Escobedo* will not permit such a formalistic distinction." *Id.* at 367. The Fifth Circuit agreed that a request for counsel under *Escobedo* is not required. Collins v. Beto, 348 F.2d 823 (5th Cir. 1965).

Texas courts, however, were not inclined to read such broad requirements into the *Escobedo*

broaden this holding, affording the right to consult with an attorney without a request. However, the new code does not go so far as to require specifically that counsel be present at the interrogation itself.

Miranda, like the Texas code, emphasizes warnings. The warning required by this decision must include the following: (1) that the suspect may remain silent;[45] (2) that his statements may be used against him at a later trial;[46] (3) that he is entitled to the presence of counsel at this interrogation;[47] and (4) that if he cannot afford counsel an attorney will be appointed to represent him.[48] This warning appears mandatory to the admission of any subsequent confession. As the Court declares, "no amount of circumstantial evidence that the person may have been aware of this right will suffice" in place of a warning.[49]

Problems of correlation are minimized by the extensive reorganization which was undertaken by the Texas code, anticipating many of the rules of *Miranda.* While both *Miranda* and the new code declare that an accused must be warned (1) of his right to remain silent; (2) of potential use of his statements; and (3) of his right to retained or appointed counsel, *Miranda* states that the only method for implementing the latter right is to allow counsel to be present at interrogation proceedings. Although the code allows the suspect to consult with counsel at this stage, it does not guarantee him the presence of counsel at the interrogation itself. In other respects the warning provided by the Texas code is broader than that required by *Miranda,* incorporating as it does statutory as well as constitutional requirements.

The Texas code, unlike *Miranda,* provides two warnings. First the suspect must be taken "immediately" before the magistrate for administering of

opinion. The basic limitation imposed by the Texas courts was to require that the suspect request the presence of counsel. *Ex Parte* Bertsch, 395 S.W.2d 620 (Tex. 1965). Texas decisions imposed the additional requirement that the suspect testify to his request for the assistance of counsel. Corry v. State, 390 S.W.2d 763 (Tex. 1965). This requirement merely reflected the Texas rule that questions of admissibility must be raised at the trial. McKinney v. State, 391 S.W.2d 435 (Tex. 1965); Conley v. State, 390 S.W.2d 276 (Tex. 1965). The Texas rule that failure to request counsel acted as a waiver of this right was directly contra to dicta in an earlier United States Supreme Court case, Carnley v. Cochran, 369 U.S. 506 (1962), where the Court declared that "the right to be furnished counsel does not depend upon a request," *id.* at 513, but nevertheless found additional circumstances which amounted to a waiver. *Cf.,* McNeal v. Culver, 365 U.S. 109 (1961).

For additional Texas interpretations of *Escobedo,* see Hinkey v. State, 389 S.W.2d 667 (Tex. 1965); Davis v. State, 388 S.W.2d 940 (Tex. 1965); Mathews v. State, 388 S.W.2d 948 (Tex. 1965); Miller v. State, 387 S.W.2d 401 (Tex. 1965), 17 BAYLOR L. REV. 376.

[45] 384 U.S. 436 at 467-68.

[46] *Id.* at 469.

[47] *Ibid.*

[48] *Id.* at 472.

[49] In effect the decision overrules the decision of Crooker v. California, 357 U.S. 433 (1958), where a confession was admitted on the basis of circumstantial evidence that the accused was aware of his constitutional rights. The dissent in *Miranda* declares that this case is expressly overruled.

the warning.[50] In addition, article 38.22(2) commands that the written statement "must further show that the person to whom the confession is made warned the accused"[51] that he was not required to make a statement and that it might be later used against him. Thus a double warning is provided, emphasizing the legislative concern that the suspect be sufficiently informed.[52] It seems that there are good reasons for incorporating the *Miranda* warning concerning the right to the presence of counsel at interrogation into the warning administered by the magistrate under the present statute. First, the magistrate can probably appoint counsel for indigents although the police cannot.[53] Second, the magistrate's warning is free from any taint of coercion that might accompany a warning administered by the police. Third, the magistrate should possess sufficient legal experience to

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[50] LeFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 996 n.47 (1965) lists four advantages for prompt appearance before a magistrate: (1) to review the grounds for arrest; (2) to limit coercion; (3) to give the suspect a chance to make contact with counsel or friends; and (4) to allow him the rights of bail, counsel, and similar guarantees.

[51] TEX. CODE CRIM. PROC. ANN. art. 38.22(2) (1965).

[52] The code seems to provide an alternative to administering a warning; see note 37 *supra*, art. 38.22(3). The section is somewhat vague, and it is difficult to determine whether the legislature intended to require additional corroboration or merely to validate a confession which was truthful although potentially involuntary. Reading this passage as an alternative to warning the suspect and not as a requirement in addition to voluntariness, however, is in line with Texas law as it existed prior to 1925. Article 38.22(3) is a direct quote from TEX. CODE CRIM. PROC. art. 727 (1925); although similar language appears even earlier, this passage seems to be taken directly from the case of Weller v. State, 16 Tex. App. 200 (1884):

> At common law . . . a confession induced by promises or threats . . . such as might have influenced the mind of the prisoner in making the confession would not be evidence against him under any circumstances. (Citations omitted.) But, while this is the general rule prescribed by the provisions of our statute, we think that statute makes an exception. . . . Where, in connection with the confession, the prisoner makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed, then, in our opinion, his entire confession, as well as his statements to such extraneous facts, are admissible evidence against him.

Id. at 211-12.

Thus, under this interpretation of the statute even a coerced confession was admissible when corroborated. See also Selvidge v. State, 30 Tex. 60 (1867); Johnson v. State, 91 Tex. Crim. 291, 238 S.W. 933 (1922); Oritz v. State, 68 Tex. Crim. 524, 151 S.W. 1056 (1912); Allison v. State, 14 Tex. App. 122 (1883). It seems that this passage is an anachronism inadvertently remaining in the statute, and, in the face of present constitutional standards, *supra* note 30, cannot be read as an alternative to warning the suspect of his rights.

This requirement is in no way connected with proof of the corpus delecti. While any confession must be corroborated by a showing that a crime was in fact committed (see Preston v. State, 157 Tex. Crim. 228, 242 S.W.2d 436 (1961); Hernandez v. State, 110 Tex. Crim. 159, 8 S.W.2d 947 (1927)), art. 38.22(3) requires that the evidence obtained as the fruit of the confession must "conduce to establish *his* guilt." (Emphasis added.) Thus this evidence is entirely distinct from that required to show the corpus delecti, and seems to imply that the truthfulness of the confession will render it admissible.

[53] TEX. CODE CRIM. PROC. art. 16.01 (1966) gives the magistrate the power to appoint counsel in certain instances, at least for the examining trial itself. There is some question, due in part to the wording of the statute, as to whether the magistrate can appoint counsel in other instances. See Semann, *Bail, Examining Trials, Magistrate Justice and Corporation Courts, Right to Counsel in Magistrate Courts*, 29 TEXAS B.J. 245 (1966).

insure that this warning adequately complies with the statutory and constitutional requirements.

Waiver Under the Texas Code a confession is admissible once the state establishes that the statutory warning was administered and that the written confession complies with the requirements of form. Federal constitutional requirements, however, are not so easily satisfied. Under *Miranda* the police must take affirmative steps to protect the rights of individuals in addition to administering the warning. For example, under *Miranda* no questioning can continue after an accused has declared that he no longer wishes to submit to interrogation.[54] Once it has been established that the statement has followed the administration of a warning or a "fully effective equivalent,"[55] the prosecution's problem is to prove that there was an intelligent waiver of the fifth amendment privilege against self-incrimination, and, in the absence of counsel, a waiver of this guarantee. In *Miranda* the Court declares that if statements made during the period of custodial interrogation are to be admisisble "a heavy burden rests on" the state to prove voluntariness.[56] The Court declared, "since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders."[57] In effect, the Court has created almost a "presumption of perjury"[58] against the police.

Partial admissions do not constitute a waiver of constitutional rights;[59] nor can waiver be presumed from a silent record.[60] There must be affirmative evidence "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[61] The easiest method of proving waiver of the self-incrimination protection is to demonstrate the presence of counsel at the interrogation.[62] However, as has been pointed out,[63] in most cases no attorney will advise a suspect to talk to police.[64]

Proving waiver of the right to counsel may be far more difficult. The prosecution must show that an adequate warning was given *before* the

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[54] 384 U.S. 436 at 473-74.

[55] *Id.* at 476. The Court never explains what would constitute a "fully effective equivalent."

[56] *Id.* at 475.

[57] *Ibid.*

[58] GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 120 (1966).

[59] 384 U.S. 436 at 475-76.

[60] *Id.* at 475.

[61] *Ibid.*

[62] *Id.* at 474 n.44.

[63] Mr. Justice Jackson, in Watts v. Indiana, 338 U.S. 49, 59 (1949).

[64] In addition, the attorney may be able to testify to the presence of any coercive circumstances. 384 U.S. 436 at 470.

waiver occurred, and "no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead."[65]

Evaluation of the Confession The criteria for determining the voluntary nature of the statement has evolved from *Miranda* and other United States Supreme Court decisions. When the new code was enacted, police conduct was measured by the general yardstick of due process,[66] as evaluated through the "totality of the circumstances" doctrine.[67] *Escobedo v. Illinois*, although confined to its particular facts by many interpretations, indicated that a more specific standard for determining voluntariness would be applied.[68] *Miranda* establishes this standard.

Before *Miranda* and the new Texas code a confession was generally admissible unless the defense introduced evidence to block its admission.[69] *Miranda* and the Texas code require that the state first establish a prima facie case of voluntariness by showing adequate warning and waiver, in order to secure the admission of any confession. Upon such showing the

[65] See note 49 *supra*.

[66] Note, *Constitutional Law—Pointer v. Texas—Guarantee of an Accused's Right To Confront the Witnesses Against Him in a State Proceeding According to Federal Standards*, 19 Sw. L.J. 632 (1965) presents an excellent description of the due process theories and cites the foremost authorities.

[67] The treatment accorded to state confession cases by the Supreme Court has varied considerably since the issue was first presented in Brown v. Mississippi, 297 U.S. 278 (1936). The first standard was based on ascertaining if there was evidence of actual coercion from the entire record, in which case the confession was declared to conflict with the requirement of due process of the fourteenth amendment. In Ashcraft v. Tennessee, 322 U.S. 143 (1944), however, Mr. Justice Black laid down the "inherently coercive" test, determining coercion on an abstract appraisal of the facts, and not on the probable effect which such facts would have on the particular defendant. *But cf.*, Lyons v. Oklahoma, 322 U.S. 596 (1944). The "inherently coercive" criteria was again applied in the abstract in Malinski v. New York, 324 U.S. 401 (1945) ("humiliating" the defendant held inherently coercive) and in Haley v. Ohio, 332 U.S. 569 (1948) (same). See also Mr. Justice Jackson in Watts v. Indiana, 338 U.S. 49, 57 (1949).

The Truman appointees seemed to effect a change in the attitude of the Court. In Gallegos v. Nebraska, 342 U.S. 55 (1951), and Stroble v. California, 343 U.S. 181 (1952), the Court returned to the test of voluntariness which had been used prior to the first *Ashcraft* decision. The test employed in these cases was to determine if there was *voluntariness in fact*, and not to judge the circumstances in the abstract. Stein v. New York, 346 U.S. 156 (1953) carried this retreat further and declared that a conviction could stand unless there was an "actual overpowering of the will" of *this* defendant in obtaining the confession, clearly an *ad hoc* test.

Subsequently, however, a change again occurred in the Court's attitude. Fikes v. Alabama, 352 U.S. 191 (1957) declared that the "totality of the circumstances" surrounding the procurement of a confession was such as to coerce the defendant, although there was no evidence of actual physical brutality or psychological tricks. This test was also employed in Blackburn v. Alabama, 354 U.S. 393 (1957), and Payne v. Arkansas, 356 U.S. 560 (1958). For the application of the doctrine see Townsend v. Sain, 372 U.S. 293 (1963); Columbe v. Connecticut, 367 U.S. 568 (1961); Harris v. South Carolina, 338 U.S. 68 (1949); Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 229 (1940). Some doubt is cast upon this doctrine by *Miranda* and *Escobedo*. In *Escobedo* the Court expressly spoke of this doctrine, when it declared that in previous cases, "applying 'these principles' to 'the sum total of the circumstances during the time petitioner was without counsel,'" the Court had determined that there was no coercion. The Court in *Escobedo* thereupon expressly overruled the portions of the decisions under question: Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958). At the preesnt time there seems to be a combination of previous tests, coupled with a presumption of invalidity when required procedures are not met. The *ad hoc* "totality" doctrine, however, is by no means dead.

[68] See note 44 *supra*.

[69] See note 67 *supra*.

confession becomes admissible unless the defendant can bring forth other factors to which he attributes coercion.[70] Although the evidence of the accused seems to weigh more heavily than that of the prosecution, and although the burden of meeting any evidence of coercion is basically upon the state, in the final analysis this decision merely requires additional methods of procedure. It does not impose upon the police the impossible task of proving that at no time during the period of custody was coercion present. Prior to *Miranda* Texas law gave greater credence to the evidence of the prosecution by requiring some showing of a causal connection between the defendant's evidence and the statement which he made.[71] *Miranda*, however, provides that many facts, such as delay in arraignment, or the use of trickery or psychological pressure, are in themselves strong evidence of coercion without any showing of a causal connection to the making of the statement,[72] and must therefore be met by the prosecution.

The procedure for challenging a confession in Texas follows the decision of the United States Supreme Court in *Jackson v. Denno*,[73] embodying the so-called Massachusetts Rule for determining the voluntary nature of a statement. Texas article 38.22, codifying this rule, provides that upon challenge at the trial the judge holds a hearing outside the presence of the jury at which he permits the introduction of all relevant evidence.[74] The statement is then admitted only if the judge is satisfied that it was made with the free choice of the defendant. If the judge determines that the confession was voluntary he submits it to the jury. If there is any evidence of coercion, the jury is instructed to make an independent determination of the voluntariness of the confession and to disregard it unless they decide that there was no compulsion in its procurement.

III. SUMMARY: THE TEXAS RULE AFTER MIRANDA

Today Texas law relating to admissions made by a suspect during interrogation may be briefly summarized as follows:

[70] If the state's evidence is not controverted the confession is admissible. Hopt v. Utah, 110 U.S. 574 (1884). See, *e.g.*, Conley v .State, 390 S.W.2d 276 (Tex. 1965); Marrufo v. State, 172 Tex. Crim. 398, 357 S.W.2d 761 (1962).

[71] Smith v. Heard, 315 F.2d 692 (5th Cir.), *cert. denied*, 375 U.S. 883 (1963); Dixon v. State, 397 S.W.2d 454 (Tex. 1966); Garza v. State, 397 S.W.2d 847 (Tex. 1965); Ferrell v. State, 397 S.W.2d 86 (Tex. 1965); Lopez v. State, 171 Tex. Crim. 585, 352 S.W.2d 841 (1961), *cert. denied*, 370 U.S. 954 (1962); Smith v. State, 171 Tex. Crim. 313, 350 S.W.2d 344, *cert. denied*, 368 U.S. 883 (1961). For a different factual situation see *Ex Parte* Bertsch, 395 S.W.2d 620 (Tex. 1965), holding that a 30-hour delay in arraignment over Sunday when the magistrate was sick did not vitiate a confession made during this period.

[72] See Massiah v. United States, 377 U.S. 201 (1964), 19 Sw. L.J. 384 (1965). See also 384 U.S. 436 at 476.

[73] 378 U.S. 368 (1964), 18 Sw. L.J. 729. See also the Texas holdings, Lopez v. State, 384 S.W.2d 345 (Tex. 1964), 43 TEXAS L. REV. 396 (1965); Smith v. Texas, 236 F. Supp. 857 (S.D. Tex. 1964), 19 Sw. L.J. 190 (1965).

[74] Rodriguez v. State, 373 S.W.2d 490 (Tex. 1963); Bownds v. State, 362 S.W.2d 858 (Tex. 1962).

First, no questioning can began after the accused has been detained until he is given an adequate warning of his rights. The accused must be taken immediately before a magistrate, who must notify him (1) of the charges against him, and of any affidavit filed therewith; (2) of his right to an examining trial, and to make bail; (3) of his right to remain silent and that any statement, if made, may be later used against him; and (4) of his right to retained or appointed counsel, and to consult therewith at this time. It is suggested that since the magistrate probably has the power to appoint counsel, which the police do not, and since he is empowered to inform the accused of the above rights, the magistrate should notify the suspect at this time (5) that he has the right to have counsel present at any interrogation; and (6) that he does not have to submit to any interrogation against his wishes.

Because failure to give this warning prior to the *beginning* of questioning will invalidate any confession made later, the police should be extremely careful not to question the suspect prior to this point. One definite advantage of this procedure to the prosecution is that a waiver of the right to counsel at this stage will be far easier to prove if made before the magistrate than if made while the suspect is held in the custody of police.

Second, before any confession is made in response to interrogation the person to whom it is made should again warn the accused (1) that he may remain silent, and (2) that any statement which he makes may later be used against him.

Third, a confession should be witnessed by one person not an employee of the police, and must be in the required form showing that both warnings were administered in accordance with law.[75]

Fourth, prior to the admission of the confession into evidence the prosecution has a heavy burden to prove that there was a freely made, intelligent waiver of the above-enumerated rights.

Fifth, if the prosecution meets this burden the defendant must bring forward other coercive circumstances.

Sixth, if the judge is satisfied in a hearing away from the jury that the admission is voluntarily made and constitutes a valid waiver of the constitutionally protected freedom from self-incrimination, it is received in evidence. The issue of its voluntariness must be submitted to the jury if there is any evidence to justify such an instruction, with instructions that they should disregard the confession or the fruits thereof if found to have been involuntary.

IV. Conclusions

The procedures required by *Miranda* and the new code are admittedly a

[75] See note 37 *supra.*

limitation upon police efficiency, justified by a concern for the basic freedoms of the individual. The question remains: will these limitations serve to protect individuals without placing unnecessary burdens on law enforcement?

Statutes have long required "immediate" arraignment.[76] These new rules merely put teeth into the requirement by invalidating confessions obtained without compliance with this safeguard. Warning a suspect of his basic rights serves only to place the ill-informed on a parity with their more enlightened counterparts. The ignorant, not the habitual criminal, is likely to be protected by the warning requirement.[77]

The presence of counsel at interrogation, however, is another matter—is this really justified? Should the attorney defend his client at interrogation, or does he have an obligation to reach truth? Heretofore, a defense counsel has been an advocate, stoutly maintaining the innocence of his client. This is the role which he must assume when trial commences. Is it, then, reasonable to assume that a defense counsel will be interested in allowing the prosecution to obtain evidence to convict his client? Further, would such a role be violative of professional ethics and the duty which the attorney owes to his client? As the Canons of Professional Ethics point out, "having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits."[78] It cannot reasonably be assumed that defense counsel will abandon his role as partisan advocate during the interrogation. As a well-informed defender of the accused, he will be a great hindrance to police. No longer will psychological methods, such as those described by "police manuals,"[79] be effective.

Is the requirement of counsel justified in light of the obstacle which it will raise for police? The answer must be an emphatic "yes." While there are other methods which might serve the same function,[80] the attorney now has this responsibility. Allowing counsel at interrogation is merely extending back to the police station those rights which are so solemnly accorded at the trial, and which are wholly ineffective at the trial if abridged long before, during interrogation. Unless the ignorant are to be denied rights available to their better-informed counterparts the presence of the attorney is essential.

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[76] TEX. CODE CRIM. PROC. ANN. art. 727 (1925).

[77] See Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B.U.L. REV. 423 (1964).

[78] Canon 5, Canons of Professional Ethics.

[79] The following have been cited as examples of police manuals: ARTHUR & CAPUTO, INTERROGATION FOR INVESTIGATORS (1959); DIENSTEIN, TECHNIQUES FOR THE CRIME INVESTIGATOR (1952); KIDD, POLICE INTERROGATION (1940); MULBAR, INTERROGATION (1951); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956), as well as INBAU & REID, *op. cit. supra* note 19.

[80] See notes 83 and 84 *infra*, and accompanying text.

The police are handicapped by the new rules; they are not handcuffed. Recent studies have indicated that only a small percentage of cases actually require a confession for conviction.[81] When those instances in which additional police work could have uncovered sufficient evidence for conviction and those in which the confession was not actually necessary to convict are taken into consideration, the number of cases in this category may be comparatively small. Moreover, considerable latitude for permissible interrogation still remains: of the individual before he is actually "placed in custody or otherwise deprived of his freedom of action,"[82] of the individual who is willing to be interrogated with or without counsel, and of individuals who are not suspects. The prohibition of the new rules applies only to protect those who are accused and who do not wish to confess. Nevertheless, there are those cases where only by custodial interrogation can police solve a particular crime. Whether such a confession would be obtained by the blunt questions of police, by the subtle tactics of police psychologists, by threats or promises, or by the use of a rubber hose or gun butt, the result is the same—eliciting a confession from one against his will, to be used to secure his conviction.

Other methods for securing the rights of individuals, and yet allowing police broader latitude, come to mind. Judicial interrogation, or the presence of the judge at police interrogation,[83] limited interrogation, as to either time or tactics,[84] and the use of electronic devices such as tape recorders, or motion pictures, to record the events of interrogation, all have been proposed as an effective method of reconciling the rights of individuals with the needs of law enforcement. Each of these solutions recognizes the seemingly contradictory requirements of the concept of limited government, the individual's right to be free from abuse, and society's right to prevent violations of the law. The Supreme Court's decision in *Johnson v. New Jersey*[85] indicates that there may be some other method for achieving the necessary compromise. In declaring that *Miranda* and *Escobedo* have no retroactive effect *Johnson* emphasizes that these cases impose a means of judicial enforcement of a constitutional command.

As has been pointed out,[86] much interrogation is unnecessary to convict violators—it merely serves to strengthen an existing case. In those cases where interrogation of the arrested person without administering a warn-

[81] See text accompanying note 26 *supra.*

[82] See text accompanying note 32 *supra.*

[83] Pound, *Legal Interrogations of Persons Suspected of Crime,* 24 J. CRIM. L., C. & P.S. 1016 (1934). This seems to be a favorite proposal. See also LaFave & Remington, *supra* note 50, at 988.

[84] Williams, *Interrogation,* in POLICE POWER AND INDIVIDUAL FREEDOM 185-87 (Sowle ed. 1965); Vouin, *id.,* at 193-96.

[85] 384 U.S. 719 (1966). See also Tehan v. Shott, 382 U.S. 406 (1966) (right to counsel under Griffin v. California, 380 U.S. 609 (1965); Linkletter v. Walker, 381 U.S. 618 (1965) (exclusionary rule).

[86] See note 26 *supra,* and accompanying text.

ing is essential, as, for example, where police seek to extricate a kidnap victim, the effect of *Miranda* and of the Texas rules will be to free the suspect. While these rules only prohibit interrogation after the suspect has been arrested, it must be admitted that some violators, often guilty of the most heinous crimes, will go free. This obviously disturbing result, that the criminal is freed because the constable blundered, is not new to American jurisprudence, however. Given unlimited authority law enforcement could be more efficient, and yet the rights of individuals would suffer in the balance.