

# SELLING THE IDEA TO TELL THE TRUTH: THE PROFESSIONAL INTERROGATOR AND MODERN CONFESSIONS LAW

Joseph D. Grano\*

CRIMINAL INTERROGATION AND CONFESSIONS (3d edition). By *Fred E. Inbau, John E. Reid, and Joseph P. Buckley*. Baltimore: Williams & Wilkins. 1986. Pp. xvii, 353. \$28.50.

Of necessity, therefore, interrogators must deal with criminal suspects on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs. That plane, in the interest of innocent suspects, need only be subject to the following restriction: Although both "fair" and "unfair" interrogation practices are permissible, nothing shall be done or said to the suspect that will be apt to make an innocent person confess. [p. xvii]

I share the view that not many *innocent* men (at least those of average intelligence and educational background) are likely to succumb to these "methods of debatable propriety." But how many *innocent* men are likely to be *subjected* to these methods? How "tough" would the American lawyer's reaction be if he had some notion of "the price" we pay in terms of human liberty and individual dignity?<sup>1</sup>

## I. INTRODUCTION

The third edition of *Criminal Interrogation and Confessions* is a book in two parts. The first part, an instruction manual, strives to teach professional interrogators how to obtain a confession from a guilty suspect who is not inclined to confess. The second part contains an analysis of the law pertaining to police interrogation. Touted as "an entirely new book" (p. v), the third edition, particularly in the first part, actually replicates much of what is found in the earlier editions. The organization, however, is much more elaborate: while the second edition, for example, simply listed from *A* to *Z* the tactics and techniques for successful interrogation,<sup>2</sup> the third edition has rearranged

---

\* Distinguished Professor of Law, Wayne State University. A.B. 1965, J.D. 1968, Temple University; LL.M. 1970, University of Illinois. — Ed.

1. Kamisar, *What is an "Involuntary" Confession: Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963) (emphasis in original) (footnote omitted).

2. F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS ix-x (2d ed. 1967). Joseph Buckley did not join the book until the third edition.

move" to eliminate police interrogation.<sup>10</sup> Indeed, those who worship at *Miranda's* shrine view several of the Court's recent decisions as the prelude to *Miranda's* ultimate demise.<sup>11</sup> Emboldened by these recent developments, the authors now confidently urge the police to read *Miranda* more narrowly than they suggested in the second edition.<sup>12</sup>

While the authors have good reason for much of their confidence, the third edition nevertheless should leave informed readers with an uneasy sense that a fundamental tension exists between the book's suggested tactics and the underlying principles, if not the most recent holdings, of modern confessions law. The interrogation tactics the authors advocate do not comfortably coexist with the normative foundations of cases like *Escobedo* and *Miranda*, even as narrowly read. Similarly, as the introductory quotations to this essay illustrate, the philosophy of the authors is poles apart from that of *Miranda's* most passionate defenders, such as Professor Yale Kamisar.<sup>13</sup> While the authors continue to insist on compliance with *Miranda*, their view of the function and proper scope of police interrogation is clearly not the view of *Miranda* and its defenders.<sup>14</sup>

The present Supreme Court would not have spawned *Miranda*. Nevertheless, perhaps because of institutional considerations, the Court seems disinclined to take the drastic step of overruling *Miranda* and rethinking the basic premises of confessions law. Although judicial restraint is usually praiseworthy, in this context it can only assure continuation of the tension between *Miranda's* philosophical assumptions and those that to a large extent the present Court and the authors share. Moreover, the Court's failure to resolve this tension increases the likelihood that a future Court will take the step that worried the authors twenty years ago, for someday the tension will have to be resolved.

---

10. See *Moran v. Burbine*, 106 S. Ct. 1135 (1986).

11. See, e.g., Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really, So Prosecution Oriented?)*, and *Police Investigatory Practices in THE BURGER COURT: THE COUNTER REVOLUTION THAT WASN'T* 82-86 (V. Blasi ed. 1983); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99. But see Kamisar, *supra* at 86-90. As a critic of *Miranda*, I recently have argued that the Court has undermined *Miranda's* legitimacy by its current understanding of what it did in that case. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985).

12. For example, the recommended warnings and waiver procedure are not as explicit and detailed as in the second edition. Compare pp. 229-30 with F. INBAU & J. REID, *supra* note 2, at 181-82. In addition, the authors now emphasize that police should not repeat or embellish the warnings, give them prematurely, or substitute written for oral waivers. Pp. 220-32.

13. See note 1 *supra* and preceding text. Over the years, Professor Kamisar has been Professor Inbau's most persistent critic. See Kamisar, *Fred E. Inbau: "The Importance of Being Guilty"*, 68 J. CRIM. L. & CRIMINOLOGY 182 (1977). Professor Kamisar's writings on confession law are collected and updated in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* (1980).

14. *Miranda's* extensive criticism of the first edition of the authors' book makes this apparent. See 384 U.S. at 448-55 & nn.9-23.

these tactics into "nine steps to effectiveness" (pp. 77-84).<sup>3</sup> Beginning with immediate efforts to "disarm" the suspect from the moment the interrogator is introduced (p. 84-85), moving deliberately to the "critical stage" when the increasingly apprehensive suspect has become indecisive about whether he should continue to lie (p. 159), proceeding quickly thereafter to the suspect's first admission of guilt (pp. 165-70), and concluding with a detailed oral and then written confession (pp. 171-78), the new organization offers the interrogator a systematic strategy for "selling the suspect on the idea to tell the truth" (p. 154).

While the authors' suggested interrogation tactics, even if refined and rearranged, have remained largely the same, each edition of this book has come forward against a different backdrop of constitutional law. Because then prevailing due process doctrine made denial of counsel merely one factor to consider in a voluntariness determination,<sup>4</sup> the first edition, published in 1962, appropriately could suggest means to dissuade a suspect from persisting in an expressed desire to remain silent or to consult a lawyer.<sup>5</sup> *Escobedo v. Illinois*<sup>6</sup> and *Miranda v. Arizona*,<sup>7</sup> however, prompted a second edition just five years later. Although the embittered authors conceded that the police had a legal and moral obligation to comply with the strictures of these new cases, they also insisted that most of the first edition's tactics still could be used after such compliance.<sup>8</sup> Nevertheless, the authors had doubts and fears:

If we are in error with regard to our interpretation of the *Miranda* case, then the Supreme Court has but one more move to make, and that is to outlaw all interrogations of criminal suspects. We say this because of our confidence that effective interrogations can only be conducted by such procedures as the ones we herein describe.<sup>9</sup>

As the authors recognize in the preface to the third edition, the law governing police interrogation has changed considerably since they expressed these fears (p. v). *Miranda* remains alive, but the present Supreme Court has signaled clearly that it will not make "one more

---

3. The second step, "theme development," offers eleven themes for the interrogator to develop, pp. viii-ix; each was presented as a "tactic" or "technique" in the second edition. *Id.* The authors have summarized the nine steps on a small card that accompanies the book. While convenient, the card is less wieldy than the *Miranda* cards the police often carry.

4. See *Crooker v. California*, 357 U.S. 433 (1958).

5. F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 111-12 (1962).

6. 378 U.S. 478 (1964) (recognizing sixth amendment right to counsel, at least upon request, during custodial police interrogation). *Miranda v. Arizona*, 384 U.S. 436 (1966), with its much broader holding, quickly eclipsed *Escobedo*. While *Escobedo*'s result would remain the same today under *Miranda*, the Court is now of the view that *Escobedo* should have been decided on fifth and not sixth amendment grounds. See note 19 *infra* and accompanying text.

7. 384 U.S. 436 (1966) (promulgating, pursuant to the fifth amendment, elaborate warning and waiver requirements prior to custodial interrogation).

8. F. INBAU & J. REID, *supra* note 2, at 1.

9. *Id.*; see also *id.* at 195-97 (expressing some concern that the Court might prohibit police trickery).

In section II of this essay, I attempt to illustrate the tension between the authors' suggested tactics and the premises of modern confessions law. My purpose is to show that the authors' approach to police interrogation is pervasively, not just occasionally, inconsistent with both strands of thought that have influenced current legal doctrine. Section III critiques these two strands of thought and argues that the tension should be resolved by rejecting the premises of modern confessions law.<sup>15</sup>

## II. THE TENSION BETWEEN PROFESSIONAL INTERROGATION AND THE PREMISES OF MODERN CONFESSIONS LAW

Putting aside specific doctrinal holdings and concentrating on philosophical underpinnings, two strands of thought have influenced modern confessions law. The first, most apparent in sixth amendment cases but infecting fifth amendment cases as well, is that a suspect needs and should have assistance in matching wits with the police during interrogation.<sup>16</sup> The second, most prevalent in fifth amendment cases, is that a custodial suspect needs and should have protection against the pressures to confess that are generated by interrogation. For those who typically applaud Warren Court decisions, these strands are not separate and independent but rather interrelated expressions of what human dignity requires.<sup>17</sup>

---

15. This essay does not review the authors' legal analysis in part two of the book. It should be noted, however, that this part of the book is not completely satisfactory. First, although chapter eight is intended for nonlawyers and chapter nine for prosecutors, p. xiii, the chapters are equally lacking in depth and largely repetitious. Second, the authors' treatment of the law is sometimes confusing if not misleading. For example, they continue to suggest, contrary to the facts, that the old due process voluntariness test was based on the concern of excluding untrustworthy confessions. Pp. 246-47. In addition, they fail to distinguish clearly fifth and sixth amendment cases, pp. 238, 295, 303, even though the Court's doctrine in these two areas is different. Their repeated discussion of *Brewer v. Williams*, 430 U.S. 387 (1977) (sixth amendment holding) in the context of *Miranda* issues is particularly distracting.

As an overview for police officers, the authors' legal analysis may be sufficient. Unfortunately, the authors could have done much more to support their philosophy of police interrogation.

16. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court's primary concern was the presence of "compulsion," but the concern discussed in the text is also apparent. For example, the Court frowned on the use of trickery. 384 U.S. at 451-53. It also expressed concern about the suspect's ability to make an "intelligent" decision whether to remain silent, a decision in which he would appreciate the consequences of agreeing to talk. 384 U.S. at 468-69. The Court suggested that the suspect should be reminded that the police are not acting solely in his interest, and it opined that those who do not request counsel typically are most in need of counsel's assistance. 384 U.S. at 469-71. *Miranda's* defenders similarly combine a concern about compulsion with a concern about the suspect making an intelligent, rational choice. See the authorities cited in note 17 *infra*.

The Court today is much less inclined to mix sixth amendment concerns in its fifth amendment analysis. See *Moran v. Burbine*, 106 S. Ct. 1135 (1986) (failure of police to inform suspect that lawyer wanted to see him does not invalidate *Miranda* waiver or otherwise violate Constitution).

17. See, e.g., Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v.*

### A. Police Interrogation and Intelligent Choice

Although *Escobedo v. Illinois*<sup>18</sup> has little vitality today as a sixth amendment case,<sup>19</sup> its reasoning, which illustrates the first strand of modern confessions thinking, still exerts influence. After the police confronted Escobedo with an accomplice who accused him of the fatal shooting, Escobedo responded that the accomplice, not he, had fired the shots. The Supreme Court sympathetically observed that Escobedo as a layman undoubtedly was unaware that his admission of complicity was as damaging as an admission that he had fired the fatal shots.<sup>20</sup> The Court stated that Escobedo needed counsel's legal aid and advice, because what resulted during the interrogation could affect the later trial.<sup>21</sup> Absent the right to counsel's advice, the trial would be "no more than an appeal from the interrogation," with conviction virtually assured by the suspect's confession.<sup>22</sup>

We can appreciate how remarkable this reasoning is only by focusing clearly on the evils the Court identified as warranting relief. The primary evil is the suspect making an uninformed and unintelligent decision to confess. To assure an informed and intelligent decision, one that comports with the suspect's best interests, counsel should be present to provide aid and advice. A second evil is the police obtaining evidence from the suspect that will help assure his conviction. The suspect will not have much chance of mounting an effective defense at trial — that is, of winning an acquittal — if he confesses, and for some reason, not articulated, this is undesirable even when the suspect is guilty.<sup>23</sup>

If these concerns are legitimate, the tactics the authors advocate should have no place in our law. Indeed, if one takes *Escobedo*'s reasoning seriously, all police interrogation should be prohibited until the defendant has had an opportunity to consult with a lawyer. Under

---

Arizona, 52 S. CAL. L. REV. 1, 42 n.174 (1978); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); see also Y. KAMISAR, *supra* note 13, at 211-24.

18. 378 U.S. 478 (1964).

19. Since *Escobedo*, the Court has held that sixth amendment rights attach not at custody but only at or after the start of adversary judicial proceedings. See *Moran v. Burbine*, 106 S. Ct. 1135 (1986); *United States v. Gouveia*, 467 U.S. 180 (1984); see also Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 5-31 (1979) (reviewing the Court's cases). The demise of *Escobedo* as a sixth amendment case actually occurred in *Miranda*. See *id.* at 6 n.38. *Escobedo*'s reasoning still controls sixth amendment analysis, however, when the interrogation occurs after the start of adversary judicial proceedings. See *Michigan v. Jackson*, 106 S. Ct. 1404 (1986).

20. *Escobedo*, 378 U.S. at 486.

21. 378 U.S. at 486-89.

22. 378 U.S. at 487-88.

23. See Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1438-43 (1985). *Escobedo* also referred to the danger of compulsory self-incrimination. See 378 U.S. at 488-89. This facilitated the Court's subsequent reinterpretation of *Escobedo* as a fifth amendment case. See note 19 *supra*.

*Escobedo's* constitutional vision, we cannot rest comfortably with a system that permits the availability of legal assistance to turn on the suspect's hurried response to a less than enthusiastic police warning. Indeed, the procurement of legal advice must depend in such a system more on chance than on a reasoned exercise of judgment.<sup>24</sup> Of course, as the authors and others know, provision of counsel to all defendants before interrogation would facilitate intelligent choice only by virtually eliminating the possibility of confessions, for the only advice a competent lawyer typically will give, particularly if the suspect is guilty, is not to make a statement.<sup>25</sup> This, however, is the necessary price of taking *Escobedo* seriously.

To avoid having to justify either *Escobedo's* premises or our tolerance of unexacting waivers, some may be willing to accept the present system as an uneasy compromise between the logical ramifications of these premises and the feared elimination of police interrogation. Those with this understanding may think it more productive to use *Escobedo's* reasoning to identify interrogation tactics that undermine the suspect's ability to appreciate the significance of an admission or confession. The contradictions in modern confessions law, however, cannot be avoided by this strategy, for candid analysis necessitates the conclusion that *Escobedo's* reasoning prohibits not just certain interrogation tactics but interrogation itself.

The authors' book illustrates this point. The tension between *Escobedo* and the authors' philosophy does not arise in isolated passages that graphically depict successful strategies of deceit and trickery but rather permeates the entire book. In the Preface, for example, Inbau praises Reid, his now deceased coauthor, as an interrogation specialist who "personally trained many persons to become excellent interrogators" (p. v). Similarly, the authors argue that ideally only intelligent officers who have studied "the art of criminal interrogation" should be permitted to conduct interrogations (p. 35). An intelligent, well-trained interrogator, however, is likely to convince a guilty suspect to tell the truth, a decision that will help assure conviction and that the suspect typically will come to regret. In the battle of wits, the professional interrogator trained in psychology is more likely than the untrained officer to outsmart the suspect and obtain an incriminating statement. Under *Escobedo's* reasoning, an excellent, professional interrogator should be deplored rather than applauded.

The professional interrogator is only the first difficulty. In the name of human dignity, academic commentators frequently denounce

---

24. Cf. Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 40-41 (1961) (effectiveness of warning depends upon its emphasis and spirit).

25. See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting). A confession in a plea bargaining context may be advantageous, but a confession to the police typically is not in the suspect's interest.

as improper interrogation tactics that take advantage of inexperienced and ignorant suspects.<sup>26</sup> Undoubtedly to the consternation of such critics, the authors demonstrate in their book that morally neutral procedures, which no one would condemn, and courteous, polite procedures, which critics would applaud, have as their purpose and effect the same function of outwitting the suspect. For example, the authors instruct the interrogator not to take notes, for taking notes "may grimly remind the suspect of the legal significance or implication of an incriminating remark" (p. 36). They insist that the interrogator should wear civilian clothes, for otherwise "the suspect will be reminded constantly of police custody and the possible consequences of an incriminating disclosure" (p. 36). They even warn against bad breath, distracting facial appearances, and clothing disarray, for all of these may annoy or distract the suspect and reduce "the effectiveness of an interrogation" (pp. 37-38). If the authors' advice is sound, those who aim to protect the suspect's ability to act in his best interests should insist that only inexperienced, disheveled, uniformed officers, with garlic on their breath, conduct interrogations.

The authors also admonish the interrogator to be polite and courteous to the suspect. For example, the interrogator should use the suspect's last name, preceded by Mr., Mrs., or Miss, particularly if the suspect has a low economic status (pp. 38-39). By thus flattering the person and providing him a sense of dignity from such unaccustomed courtesy, "the interrogator will enhance the effectiveness of whatever he says or does thereafter" (p. 39). To illustrate the importance of courteous behavior, the authors tell of a murder suspect whom a police officer inappropriately addressed as an "old whore." To counter this negative tactic, and to win the suspect's confidence, the interrogator (one of the authors) displayed respect and concern for the suspect. Thus, upon learning that she had not eaten, he obtained food for her. By treating her "as a 'lady,'" he soon had the desired confession (pp. 39-40). Similarly, the authors instruct the interrogator not to use derogatory names, even in jest, toward homosexuals or racial minorities (pp. 40, 199). Indeed, in dealing with a homosexual, "[i]t is much more effective" for the interrogator to act as if homosexuality is morally acceptable (pp. 40, 99). The skillful interrogator must "[r]ecognize that in everyone there is some good," for the suspect's good characteristics can be utilized in the effort for a successful interrogation (p. 42).

While many will applaud this advice, the authors offer it not because they believe such police behavior is morally mandated but because such behavior will help the interrogator to obtain a confession.

---

26. See Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40-41 (1981); Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275; see also White, *supra* note 17.

As candidly stated in an appendix reviewing the psychological principles of police interrogation, the goal of the entire interrogation process is "to decrease the suspect's perception of the consequences of confessing" (p. 332).<sup>27</sup> This is precisely what *Escobedo* and *Miranda* aimed to combat<sup>28</sup> and what the defenders of these cases excoriate.

To be sure, most of the authors' suggested stratagems are not so benign. Having directly confronted the suspect with belief in his guilt at the beginning of the interrogation (pp. 84-93), the interrogator should next develop a "theme," which either will present a moral excuse for the crime or minimize its moral implications (p. 93). Possible themes include, among others, that anyone under similar conditions would have done the same thing (pp. 97-99), that the suspect had a more acceptable motivation for the crime than the one actually surmised (pp. 102-06), that others, including the victim, deserve condemnation (pp. 106-18), and that the victim or witnesses must be exaggerating (pp. 120-25). By seeking to convince the suspect that he is less morally reprehensible than the facts of the case indicate, the various themes "establish the psychological foundation to achieve an implicit, if not explicit, early, general admission of guilt" (p. 97). If the suspect denies the crime, the interrogator may use a "baiting" question, such as "Jim, is there any reason you can think of why one of Mary's neighbors would say your car was seen parked in front of her home that night?" Not knowing whether his car was seen, the suspect, if he is guilty, must decide whether to deny or explain this accusation; either way, he runs the risk of being caught in a lie (pp. 68-73).<sup>29</sup>

The authors' case examples illustrate the significance of deceit in the interrogation process. In one case, an interrogator told a seventeen-year-old arrested for rape that the youth hardly could avoid what he did; the interrogator also stated that he too, as a boy in high school, had "roughed it up" with a girl attempting to have intercourse. The boy, who thereafter confessed, was so relieved that he later explained to his father that the interrogator had once done the same thing (p. 98). In a child molestation case, the interrogator suggested that the child was well advanced for her age and probably tried to excite the suspect (p. 108). The authors contend that the same tactic frequently

---

27. The Appendix, twenty pages entitled "The Psychological Principles of Criminal Interrogation," was authored by Brian C. Jayne, who is Director of the Reid College of Detection of Deception. Pp. 327-47.

28. With regard to *Miranda* and this concern, see note 16 *supra* and accompanying text.

29. Similarly, if Jim says he was out driving on a certain road, the interrogator can ask him about a fictitious accident that interfered with traffic. If Jim has been lying, he now faces a dilemma: if he denies observing the accident and it occurred, the interrogator will have caught him in a lie; if he admits observing the accident and it did not occur, the interrogator again will have caught him in a lie. P. 74. Although I have stated in the text that this tactic is less benign than those previously discussed, I cannot comprehend why anyone would object to it.



is successful in rape cases (pp. 108-09).<sup>30</sup> While this strategy of casting blame on innocent victims may seem of doubtful utility, the authors maintain that it works because offenders want to blame their victims for their crimes (p. 108).

The authors indicate that the interrogator may ease certain suspects into an admission by suggesting excuses like accident, intoxication, or self-defense (pp. 102-03, 166). Indeed, the seventh step in the interrogation plan is to offer the suspect an alternative question, one that presents a choice between a repulsive motivation for the crime and an error attributable to human frailty (p. 165). Once the suspect makes an admission, the interrogator should begin to develop a detailed and true account. Often the interrogator will have to persuade the suspect to abandon the moral excuse that he successfully used to prompt the suspect's first admission (pp. 103, 173). Even if the suspect does not abandon this excuse, the inconsistency between his original denial and the assertions in his confession will make the excuse seem implausible at trial (p. 104). In developing a full confession, the interrogator should abandon his earlier reluctance to use words that might conjure up the legal consequences of confessing, like burglary and rape (pp. 37, 85). With an admission in hand, the interrogator now freely should use such descriptive words "so that when these words are used in the formal written confession, the suspect will be accustomed to them" (p. 172).

Whatever one thinks of these tactics, they all have the objective previously mentioned: to convince a suspect who is not so inclined to abandon a false denial and to admit the truth (p. 154). Telling the truth, however, typically is not in the best interests of guilty suspects. In terms of preserving defenses for trial or a position of strength for plea bargaining, the rational, intelligent course of action for a guilty suspect, assuming he chooses to respond at all, is to persist in a denial of the crime.<sup>31</sup> Thus, if we were serious about enabling the suspect to protect his best interests during police interrogation, everything the authors recommend, from insincere politeness to overt trickery, would be disallowed.

Of course, some of the authors' tactics may seem more offensive than others. Although, as the authors demonstrate, the issue of what is offensive may be debatable, most would agree, at least in concept, that truly offensive interrogation techniques should be prohibited. Once distinctions are made on grounds of perceived offensiveness, however, it must be conceded that protection of the suspect's ability to appreciate the significance and consequences of his actions is not our

---

30. During interrogation, the goal is not to defend the victim's honor, protect the victim's sensibilities, or vindicate the themes of law and order; the goal is to persuade the guilty suspect to confess. Once the suspect confesses, of course, these other concerns will be satisfied.

31. Of course the most intelligent course of action is simply to refuse to answer questions.

real concern. At least this must be conceded absent empirical evidence that "offensive" tactics outwit the suspect more successfully than inoffensive ones.

To shift the legal focus from the suspect's ability to make an intelligent choice to offensive police tactics is to move in the direction of vindicating the authors' position on police interrogation. First, such a shift eliminates *Escobedo's* line of argument for a right to counsel's assistance during police interrogation. While counsel may be necessary to ensure intelligent choice, counsel is not necessary to prohibit offensive interrogation techniques: neutral observers behind one-way mirrors could accomplish such a limited goal. Second, such a shift in the legal concern resolves some of the tension and contradictions in the status quo. It does this by denying *Escobedo's* unsupported premise that an evil occurs whenever an interrogator outsmarts the defendant by persuading him to admit, truthfully and against his best interests, involvement in the crime.

### B. Police Interrogation and Compulsion

Although *Miranda v. Arizona*<sup>32</sup> reflects some of *Escobedo's* reasoning, it primarily illustrates the second strand of modern confessions thinking — the desire to protect the suspect from compulsion. While the due process voluntariness doctrine always reflected this concern,<sup>33</sup> *Miranda* for the first time viewed as evil the mere "inherent compulsion" of custodial interrogation.<sup>34</sup> As Justice Harlan's dissent demonstrated, before *Miranda* the Court had not read the fifth amendment as prohibiting "all pressure to incriminate one's self";<sup>35</sup> rather, the Court's concern had been "to sift out *undue* pressure, not to assure spontaneous confessions."<sup>36</sup>

The *Miranda* Court viewed the warnings it promulgated and the waiver requirements it imposed as "protective devices" that would "dispel the compulsion inherent in custodial surroundings."<sup>37</sup> Of course, contradictions immediately were apparent. If a simple response to a single custodial question must be viewed as presumptively compelled, the possibility of having a voluntary waiver is difficult to understand.<sup>38</sup> Similarly, if the right to counsel's presence in this fifth amendment sense arises because "[t]he circumstances surrounding in-

32. 384 U.S. 436 (1966).

33. See generally Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 874-80, 896-909 (1979).

34. 384 U.S. at 458, 467, 468, 478.

35. 384 U.S. at 512 (Harlan, J., dissenting) (emphasis in original).

36. 384 U.S. at 515 (Harlan, J., dissenting) (emphasis in original).

37. 384 U.S. at 458.

38. 384 U.S. at 536 (White, J., dissenting). The incongruities help explain why the present Court has found it so easy to read *Miranda* as having promulgated a mere "prophylactic rule," one designed to combat the *potential* for compulsion rather than actual compulsion. While such

custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege,"<sup>39</sup> allowing the defendant to subject himself to such overbearing pressures by waiving his rights is incomprehensible. One can comprehend the concept of waiver with respect to rights such as trial by jury, but as Justice Marshall remarked in a different context, "no sane person would knowingly relinquish a right to be free of compulsion."<sup>40</sup> Apart from whether a sane person would make such a waiver, no decent system of law would permit a person to relinquish his right not to be subject to pressures that overbear the will.<sup>41</sup> Finally, even if the concern is an "intelligent decision" with regard to the exercise of fifth amendment rights,<sup>42</sup> the likelihood of achieving intelligent choice when the waiver decision must be made quickly in the police station is small.<sup>43</sup>

Inherent compulsion is the compulsion that is present in any custodial interrogation. If inherent compulsion is an evil to be eradicated, it must follow that any additional pressures the police bring to bear upon the suspect also are impermissible. As before, however, this cannot be taken seriously unless one is prepared to prohibit all custodial questioning by a professional interrogator. For if the first goal of the skillful interrogator is "to decrease the suspect's perception of the consequences of confessing,"<sup>44</sup> the second is to "increas[e] the suspect's internal anxiety associated with his deception" (p. 332).

The authors' suggestions for increasing anxiety begin with the interrogation room, which should be free of any small objects that the suspect might fumble with as a tension-relieving activity. Such activity "can detract from the effectiveness of the interrogation, especially during the critical phase when a guilty person may be trying desperately to suppress an urge to confess" (p. 29). Similarly, because smoking may relieve tension or "bolster . . . resistance to an effective interrogation," the room should be free of ashtrays. Moreover, the

---

a reading can help make sense of *Miranda*, it destroys the case's legitimacy as constitutional law. See Grano, *supra* note 11.

39. 384 U.S. at 469.

40. *Schneckloth v. Bustamonte*, 412 U.S. 218, 280-81 (1973) (Marshall, J., dissenting).

41. Semantic precision is important here. If we are talking about "a right of silence," the concept of waiver makes sense: by agreeing to talk, the suspect waives his right of silence. While *Miranda* does make reference to such a right, the passage under discussion in the text, which is truer to the constitutional language, speaks of the defendant's right not to be "compelled" to become a witness against himself. If custodial interrogation very quickly can "overbear the will" of a suspect, even one warned of a right not to answer, then the Court's waiver doctrine permits the suspect to waive his right to be free of such overbearing pressure. One can put this in perspective by imagining such a waiver doctrine with regard to torture.

*Miranda*'s supporters may be tempted immediately to switch from a "compulsion" argument to a "right of silence" argument. In reality, the latter right does not exist. See text at notes 121-22 *infra*.

42. 384 U.S. at 468.

43. See notes 24-25 *supra* and accompanying text.

44. See text at note 27 *supra*.

will be lost (p. 159). The interrogator should now move his chair closer: "This will decrease the suspect's confidence while simultaneously increasing anxiety" (pp. 159-60). The interrogator should move in small increments without stopping the conversation or losing eye contact: "A guilty suspect will usually be aware of an increased feeling of uneasiness as the interrogator moves closer but often will not consciously recognize that the cause for it is the physical proximity of the interrogator. The suspect simply senses or perceives that lying is becoming more uncomfortable" (p. 161).

The authors do impose limits on what "a professionally skilled and ethical interrogator" (p. 129) may do to increase the suspect's anxiety. Although the interrogator must be patient and persistent, conveying the impression that he has "all the time in the world," he may not engage in "unreasonably long interrogations" (pp. 195-96).<sup>45</sup> Likewise, while the interrogator should confront the suspect with belief in his guilt, he should not extend an accusation "beyond the point where mental distress becomes a reasonable probability" (p. 93). The interrogator should avoid anger and personal involvement, for interrogation "should be strictly a professional undertaking" (p. 195). The authors do endorse the "friendly-unfriendly" act when other techniques of sympathy and understanding have failed, but during the unfriendly episode the interrogator may resort only to verbal condemnation of the suspect; "under no circumstances should physical abuse or threats of abuse or other mistreatment ever be employed" (pp. 151-53). Indeed, as the appendix explains, the concept of increasing the suspect's anxiety refers only to "the suspect's internal feelings of uneasiness as a result of his own cognitive dissonance"; it is not intended to suggest "use of any threats, coercion, or abuse to the suspect" (p. 332).

As with tactics designed to outsmart the suspect, distinctions can be made in terms of perceived offensiveness among tactics designed to increase the suspect's anxiety. The point remains, however, that all such tactics, whether or not "offensive," are intended to increase the pressure — the compulsion — on the suspect to confess. The "inherent compulsion" of custodial interrogation would be present if an untrained, uniformed officer questioned the suspect in the stationhouse receiving room.<sup>46</sup> The professional interrogator, with his anxiety-inducing tactics, is employed precisely because the inherent pressures of custodial interrogation usually are insufficient by themselves to pro-

45. The authors suggest that a skillful interrogator rarely will need more than four hours to obtain a confession. P. 310.

46. In the authors' view, "[t]he principal psychological factor contributing to a successful interrogation is privacy." P. 24. The authors condemn interrogation efforts that occur with large numbers of spectators present. Pp. 24-28.

interrogator should discourage smoking by abstaining himself and by suggesting, if a request is made, that the suspect wait until he leaves the room (p. 38). Likewise, chairs that induce slouching or leaning back are "psychologically undesirable" (p. 30). The interrogator should sit about four or five feet away from the suspect, with no furniture in between them. "Sitting or standing a long distance away or the presence of an obstruction of any sort . . . affords a guilty suspect a certain degree of relief and confidence not otherwise attainable" (p. 37).

The emphasis on increasing anxiety is evident throughout the book. The authors suggest that someone other than the interrogator should escort the suspect into the interrogation room, direct him to the appropriate chair, and provide him the name of the person who will be talking to him. This formal identification procedure "tends to heighten the apprehension of a guilty suspect by reason of the apparent exalted status of the interrogator"; it also tends to diminish the suspect's confidence in his ability to evade detection (p. 37). After about five minutes, the interrogator should enter deliberately and with "an air of confidence." Emulating a busy medical specialist, the interrogator should be polite but professional. If the suspect offers his hand, the interrogator should respond with a "very casual handshake"; otherwise the interrogator should offer a brief greeting without shaking hands (p. 84). The preliminaries over, the interrogator's first step, at least with suspects whose guilt seems reasonably certain, should be a direct, positive statement, expressed in a "slow, deliberate, and confident manner," that the police believe the suspect committed the offense (pp. 84-85). Psychologically, this "tends to shatter the well-developed network of defense mechanisms that the suspect has established since committing the crime" (p. 345).

As the interrogation proceeds, the interrogator should increase the suspect's feelings of uneasiness about lying and prevent occurrences that would enable the suspect to regain confidence. If the suspect begins to cry, the interrogator should not leave the suspect alone to "cry it out," for "the suspect who is given that opportunity may fortify himself and return to the denial stage" (p. 164). Because the interrogator must not permit role reversal to occur, he should correct a suspect who attempts to flatter the interrogator by inflating his title (p. 120). The interrogator must make "every discreet effort" to prevent repeated denials of the crime, for this "deprives the guilty suspect of the psychological fortification that would be derived from repetitious disclaimers of guilt" (pp. 142-43).

The critical stage of the interrogation occurs when the suspect experiences tension between an "aroused impulse to confess" and his perception of the consequences of confessing. At this point, if the suspect regains his composure, the gains of the interrogator's prior efforts

duce the desired confession. If they were sufficient, the who and how of police interrogation would not be the subject of a manual.

The tension, therefore, between the authors' book and *Miranda's* premises is inescapable. If orchestrated properly, the warnings and waiver will occur not simply in the inherently compelling atmosphere of the stationhouse but in a room purposefully designed to increase the suspect's anxiety.<sup>47</sup> While those who invoke their *Miranda* rights will be spared the inherent pressures of questioning, their luckless counterparts who decide to match wits with the police will be subject to pressures that make the inherent compulsion of a simple question, such as "Where were you last night?"<sup>48</sup> pale by comparison. If we take seriously *Miranda's* reasoning, we should not feel comfortable with the authors' "professional interrogator." Conversely, if we approve the authors' goal of training professionals for successful interrogation, we should be candid in recognizing our disapproval of *Miranda's* premises. Without hypocrisy, we cannot have it both ways.

### III. A CRITIQUE OF THE PREMISES OF MODERN CONFESSIONS LAW

The authors' suggested tactics are based upon the empirical claim that because self-condemnation and self-destruction are abnormal, criminal offenders "ordinarily do not utter unsolicited, spontaneous confessions" (p. xvi). This proposition is not controversial.<sup>49</sup> Similarly, a police officer rarely will obtain a confession by lecturing the suspect about morality, providing him pencil and paper, and trusting that the suspect's conscience will compel the truth (p. xvii). It necessarily follows that if confessions are viewed as desirable and important, police interrogation must be recognized as a legitimate institution. It also follows, just as necessarily, that permissible police interrogation must include tactics designed both to outsmart the suspect and to put pressure on him to confess:

If interrogation is the undoing of deception, what are the elements of deception that can be undone or influenced? To answer this question it is useful to evaluate why a person chooses to confess. An individual will confess (tell the truth) when he perceives the consequences of a confession as more desirable than the continued anxiety of deception. If, on the other hand, the consequences of the confession are perceived as less desirable than the anxiety associated with deception, the individual will continue to lie. . . . The goal of interrogation, therefore, is to decrease

47. The authors condemn the giving of premature *Miranda* warnings. Pp. 224-25.

48. *Miranda*, 384 U.S. at 536 (White, J., dissenting). Justice White thought that it defied common sense to suggest that an unwarned response to such a question was compelled. 384 U.S. at 533-34.

49. Cf. *Ashcraft v. Tennessee*, 322 U.S. 143, 160-61 (1944) (Jackson, J., dissenting) (voluntary confession is not voluntary "in the sense of a confession to a priest merely to rid one's soul of a sense of guilt").

the suspect's perception of the consequences of confessing, while at the same time increasing the suspect's internal anxiety associated with his deception . . . . [p. 332]<sup>50</sup>

The above, of course, does not resolve the debate, for the option of disfavoring confessions remains. The tension in existing confessions law can be resolved either by rejecting the premises of *Escobedo* and *Miranda* or by taking these premises seriously and accepting their consequences. Forced to choose, many would prefer the logical ramifications of *Escobedo* and *Miranda* over a system that permits a professional interrogator to take advantage of an uncounseled suspect.<sup>51</sup> Of course, others may counterclaim that confessions are essential to the task of solving crime (p. xiv). As a matter of hard reality, this counterclaim seems difficult to refute, and it may explain the "compromise" that the status quo reflects: the *Miranda* Court, though perhaps desiring to go further, may have believed it impractical to do so.<sup>52</sup> Nevertheless, such practical compromises ultimately are unsatisfactory, for they are built upon intellectual dishonesty.<sup>53</sup> We should confront directly whether good reasons exist to support the premises of *Escobedo* and *Miranda*. In my view, we have not taken the premises of these cases seriously because they are fundamentally unsound.

#### A. *The Argument for Permitting the Interrogator To Outsmart the Suspect*

*Escobedo's* premises provoke some difficult questions. Why should the law be concerned that *Escobedo* admitted involvement in a homicide without realizing that this was as damaging as an admission that he fired the fatal shots?<sup>54</sup> Why was the Court concerned that the "entire thrust" of *Escobedo's* interrogation was to put him "in such an

50. Unless the perceived consequences of confessing are reduced *and* anxiety is increased, the suspect will not confess. P. 342. The authors emphasize throughout that they oppose tactics that would increase the risk of an innocent person confessing. P. xiv. Also, the police may not reduce the perceived consequences of confessing by making promises of leniency. Pp. 196-97. As described earlier in this essay, the interrogator aims to reduce the perceived consequences of confessing by offering a "theme" that suggests a moral excuse for the offender's behavior. See text at notes 28-29 *supra*.

51. Although he states that *Miranda* required enough things "at one gulp," Professor Kamisar also has stated that "a rule that a suspect needs counsel to waive counsel is by no means unthinkable." Y. KAMISAR, *supra* note 13, at 47 n.11. It is clear that Professor Kamisar would eliminate confessions before he would reconsider *Miranda*. See *id.* at 222-23 (suggesting the need to go further than *Miranda*), 59-64 (rejecting the argument that confessions are essential to successful law enforcement).

52. Cf. *id.* at 87-89 (suggesting that *Miranda* reflects a compromise between two competing positions).

53. Cf. Kuh, *Interrogation of Criminal Defendants: Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 233, 235 (1966) (intellectual honesty would require conclusion that voluntary, intelligent waiver is not possible).

54. See note 20 *supra* and accompanying text.

emotional state as to impair his capacity for rational judgment"?<sup>55</sup> Why did the Court express concern that Escobedo's confession virtually assured his conviction for the crime?<sup>56</sup> Stated more directly, why should we not rejoice that Escobedo's lack of intelligence, rational judgment, or sophistication enabled the police to obtain reliable evidence to prove his guilt? Why would we prefer to increase the likelihood that defendants like Escobedo will prevail over their interrogators and thereby increase their chance of winning erroneous acquittals at trial?<sup>57</sup>

No reasonable person who accepts the basic legitimacy of society and its laws can endorse the view that a guilty suspect, like a fox during a hunt, must be given a sporting chance to escape conviction and punishment.<sup>58</sup> Eschewing sporting theory terminology, many courts and commentators nevertheless express dismay that the suspect is on an "unequal footing with his interrogators."<sup>59</sup> Reduced to its essentials, however, the desire for equality between the suspect and interrogator reflects the same sporting theory that the commentators carefully avoid.<sup>60</sup> To advocate such equality is to express indifference, if not actual hostility, to the likelihood of police success in the interrogation process. Were ascertainment of truth the desideratum, inequality would be a concern only to the extent it created a risk of a false confession. Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment.<sup>61</sup>

It should be apparent that the desire for equality between the suspect and the interrogator is not a reason for limiting interrogation but rather a conclusion itself in need of justification. Echoing *Escobedo*,

---

55. *Miranda*, 384 U.S. at 465 (discussing *Escobedo*).

56. See notes 21-22 *supra* and accompanying text.

57. In attempting to answer these questions, I am drawing on a currently unpublished talk, *Police Interrogation and Confessions: A Rebuttal to Misconceived Objections*, which I delivered on February 10, 1986, at the New York University School of Law Center for Research in Crime and Justice.

58. Bentham was especially critical of what he labeled the "fox-hunter's" argument for excluding evidence. See 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 238 (1827); 7 *THE WORKS OF JEREMY BENTHAM* 454 (Bowring ed. 1843); see also Caplan, *supra* note 23, at 1441-43 (arguing that *Escobedo* embraced a sporting theory of justice).

59. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); see also, e.g., White, *supra* note 17, at 604 (criticizing police trickery because of the "relative strengths of the suspect and the police in this context").

60. The adversary model, which depends on the parties for the development of evidence, requires relatively even resources at trial because inequality increases the risk of inaccuracy. Assuming, however, as the authors insist, that we prohibit police tactics that are likely to induce an innocent person to confess, the concern for accuracy does not demand equality between a suspect and police interrogator. Indeed, equality in the police station, unlike equality at trial, impedes the discovery of truth.

61. Unfortunately, "[p]rofessionals sometimes give the appearance of believing that procedure was created for their special interests, not least to provide the entertainment of a fascinating play." Hall, *Objectives of Federal Criminal Procedural Revision*, 51 *YALE L.J.* 723, 724 (1942).



some commentators have argued that the suspect needs equality in the police station "to protect his chances at the forthcoming trial."<sup>62</sup> Unfortunately, to justify this latter goal, one must again fall back on a sporting theory. A system committed to ascertainment of truth would not value for its own sake the goal of giving guilty defendants some chance to escape conviction. Of course, the rules of procedure sometimes purposely increase the risk of erroneous acquittal because of our special abhorrence of erroneous conviction.<sup>63</sup> It is one thing, however, to increase a guilty defendant's chances of acquittal at trial to serve some overriding goal, such as protection of the innocent; it is another to do so when no such other goal exists. In any event, the purpose of pretrial investigation is to develop an airtight case against the offender. Nowhere, except in the rhetoric of confessions law, does the law reflect anxiety that the investigation may be too successful and thus deny the defendant a chance for acquittal at trial.

The argument for suspect-interrogator equality cannot be so easily dismissed when it is made on moral grounds. Professor Schulhofer, for example, has argued that police manipulation of the suspect is morally offensive:

The voluntariness test ostensibly took account of special weaknesses of the person interrogated, but because it did permit the use of substantial pressures, suspects who were ignorant of their rights, unsophisticated about police practices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation. . . . [T]he point [is] simply that we do (and should) find it unseemly for government officials systematically to seek out and take advantage of the psychological vulnerabilities of a citizen. Whether or not one considers such tactics necessary for effective law enforcement, they convey a feeling of manipulation and exploitation of the weak by the powerful that many would tolerate with at best considerable reluctance.<sup>64</sup>

Similarly, Professor Greenawalt has maintained that tactics that "make rational, responsible choice more difficult," such as playing on a suspect's weaknesses or deceiving the suspect about crucial facts (for example, whether a confederate has confessed), do not accord with "autonomy and dignity."<sup>65</sup>

---

62. White, *supra* note 17, at 593. Professor Dix has argued "that a person confessing [should be] afforded the same opportunities as a person pleading guilty who has not previously confessed." Dix, *supra* note 26, at 330.

63. *Cf. In re Winship*, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt is constitutionally required). The standard of proof beyond a reasonable doubt increases the number of mistaken verdicts in the interest of protecting the innocent. C. MCCORMICK, MCCORMICK ON EVIDENCE 962 (3d ed. 1984).

64. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871-72 (1981) (footnote omitted).

65. Greenawalt, *supra* note 26, at 40-41; see also Schrock, Welsh & Collins, *supra* note 17, at 42 n.174; White, *supra* note 17, at 627-28.

Of course, as discussed above, if such manipulation is morally offensive, police interrogation should be abolished, for few suspects will confess unless rational, responsible choice is made more difficult. This is the point of the authors' book. As Professor Schulhofer observed in the above quotation, however, such a practical concern does not seem to address the moral issue. The more powerful response is that society's morality does not dictate such conclusions. Confessions law will begin to make sense only when we have the courage to rebut such moral claims without hedge or apology. In the context of police interrogation, it simply is not morally offensive to "take advantage of the psychological vulnerabilities of a citizen."<sup>66</sup>

Debate about morality often is unsatisfactory. Professor Dix, for example, has stated that the issue of police interrogation tactics "is not . . . susceptible to logical debate or empirical inquiry and thus is a matter that must be resolved according to an intuitive definition of human dignity."<sup>67</sup> This relativistic approach, however, concedes too much to those who find the tactics of successful interrogation immoral. If the Constitution or morality condemned manipulation and deception, the legal system would have to prohibit altogether practices such as wiretapping and the use of informants. These practices do not give the suspect a rational choice between silence and self-damaging admissions, nor do they ensure that his admissions will be made "with as complete an understanding of his tactical position as possible."<sup>68</sup> From a comparative standpoint, these practices do not seem more respectful of "autonomy and dignity" than the ordinary tactics of police interrogation. In *Hoffa v. United States*,<sup>69</sup> for example, the informant, Partin, certainly manipulated and exploited Jimmy Hoffa as much as custodial interrogation would have done;<sup>70</sup> indeed, direct rather than surreptitious interrogation at least would have alerted Hoffa to the risk of trickery and deceit. Of course, the police often employ wiretapping and informants before they take the suspect into custody, but the fact of custody does not seem relevant to the moral question of inappropriate exploitation.

It may be countered at this point that the analogy to wiretapping and the use of informants begs the question, for these practices also may be morally offensive.<sup>71</sup> Such a claim, however, is counterintui-

---

66. Schulhofer, *supra* note 64, at 872. The authors weaken their case by arguing that both "fair" and "unfair" practices are acceptable in police interrogation. P. xvii. The better argument is that the authors' suggested tactics are not unfair in this context.

67. Dix, *supra* note 26, at 336.

68. *Id.* at 330-31.

69. 385 U.S. 293 (1966).

70. See 385 U.S. at 294-300 (detailing how Partin deceived and manipulated Hoffa).

71. Cf. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 41-42 (suggesting that police deception in the investigatory stages may breed a willingness to commit perjury).

tive, and it does not comport with society's morality as reflected in its law. While limits exist, such as in the law of entrapment,<sup>72</sup> trickery and deception as weapons in the arsenal of law enforcement have a long history of approval. Indeed, even outside of law enforcement, lying and deception always have been difficult issues that still lack categorical answers.<sup>73</sup> While commentators such as Schulhofer may be in the vanguard of a new morality, they clearly are not in step with either the past or present thinking of our society. Moreover, it must be remembered that the moral issue in the law of confessions arises in a constitutional context. The argument for imposing through constitutional dictate a minority morality, rooted neither in history nor tradition, is not apparent.

In considering the moral issue, it also is appropriate to recall that while the police often use informants to develop probable cause, custodial interrogation typically occurs after a lawful arrest supported by probable cause. "The subjects of such interrogation, therefore, cannot be presumed innocent in a literal sense but instead must be viewed as persons justifiably subject to certain state restraints and inconveniences that otherwise would not be acceptable."<sup>74</sup> In the authors' words, many situations exist in which the "public welfare requires relinquishment of some personal comfort or even a sacrifice of a measure of protection from governmental intrusion" (p. 91). I have made the same point previously in another context:

Legal scholars have constructed various "models" to describe the criminal justice system. These models, often couched in loaded terms, include the due process model, the crime control model, and even the family model. . . . In thinking about the criminal justice system, we need a renewed commitment to the common law view that the individual cannot live in isolation, oblivious to the community's needs. One who shares the benefits of community living may legitimately be expected to make reasonable sacrifices on behalf of the community's efforts to solve and control crime.<sup>75</sup>

This may seem excessively utilitarian, but assessment of the community's interests must inform to some extent moral evaluations of governmental conduct.

None of this is to deny that constitutional and moral limits exist on what an interrogator may do to outwit a suspect. As previously discussed, deception is not acceptable when it is likely to induce a false

72. See *United States v. Russell*, 411 U.S. 423 (1973) (taking a narrow view of the entrapment defense).

73. For recent attempts to treat the subject, see S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978); C. FRIED, *RIGHT AND WRONG* 54-78 (1978).

74. Grano, *supra* note 33, at 902 (footnote omitted).

75. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 497 (1984); cf. Caplan, *supra* note 23, at 1454 (questioning how human dignity is advanced when a suspect maintains silence in the face of justifiable accusation).

confession (p. 216). Likewise, it would not be acceptable for an interrogator to induce a confession by making a false promise of leniency<sup>76</sup> or by posing as a jail chaplain or defense lawyer (pp. 216-17). That some trickery and deception are morally acceptable does not mean that "some extreme version of the battle model"<sup>77</sup> governs the investigatory process. Whether viewed in terms of what shocks the conscience, as the authors state it (p. 216), or in terms of moral principles "rooted . . . in history or in widely shared contemporary morality," as I once stated it,<sup>78</sup> some interrogation tactics exceed the bounds of moral tolerance. The line between the acceptable and the unacceptable sometimes may be difficult to draw, but this should not count as a reason for throwing the baby out with the bath.

The moral argument against successful interrogation tactics sometimes is varied to express a concern about equality among suspects. Professor Greenawalt, for example, has complained that tactics such as deception "work unevenly by undermining the inexperienced and ignorant [while] having little effect on the hardened criminal."<sup>79</sup> This argument does not have merit. The inexperienced and ignorant suffer disadvantages at every turn: they are more apt to leave clues at the crime scene, less likely to take precautions against wiretapping and informants, and more likely to be caught in deception by skillful cross-examination at trial. In any event, the ability of the sophisticated criminal to escape conviction and punishment hardly counts as a legitimate argument for providing others similar means of escape. In Professor Robinson's words, "[t]here seems to be no justifiable end in equal acquittal of the guilty."<sup>80</sup> It should follow that the moral acceptability of police tactics does not depend upon an equal distribution of success.

Concededly, the argument for equality among defendants has more force if the concern is unequal distribution of legal rights. If, for example, all defendants have a right to counsel during police interrogation, exercise of the right should not depend upon preexisting knowledge, which only the rich or sophisticated may have. The pur-

---

76. *Cf. Santobello v. New York*, 404 U.S. 257 (1971) (due process violated by failure to keep promise that induced guilty plea).

77. Greenawalt, *supra* note 26, at 41.

78. Grano, *supra* note 33, at 918-19.

79. Greenawalt, *supra* note 26, at 41 (footnote omitted).

80. Robinson, Massiah, Escobedo, and *Rationales for the Exclusion of Confessions*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 412, 421 (1965) (footnote omitted); see also Caplan, *supra* note 23, at 1456-58; Grano, *supra* note 33, at 914-15; Inbau, *Over-Reaction—The Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797, 808-09 (1982); Letter from Attorney General Nicholas Katzenbach to Judge David Bazelon (June 24, 1965), reprinted in Kamisar, *Has the Court Left the Attorney General Behind?—the Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 461, 490-94 (1966) (questioning why the gangster should be the model and all others raised, in the name of equality, to the same level of success in suppressing evidence).

pose of the analysis to this point, however, has been to determine what legal rights a suspect should have. *Escobedo* premised a right to counsel on reasons that this essay has attempted to show lack merit. If *Escobedo*'s reasoning is found wanting, its right to counsel is left without justification. Thus, the equality argument is needed to support the right to counsel. To attempt now to premise the equality argument on a preexisting right to counsel is to engage in circular reasoning.

All else having failed, the temptation will arise to insist that the Constitution itself is the justification for the right to counsel. This, of course, is a makeweight argument. If the Constitution spoke in unmistakable terms, the Court in *Escobedo* would not have been compelled to offer reasons for applying the right to counsel to the police station. While the sixth amendment guarantees the assistance of counsel in "all criminal prosecutions,"<sup>81</sup> the applicability of this right to the investigatory stages of the criminal process is not self-evident from the text. This is why the emphasis on underlying theoretical justification is necessary.<sup>82</sup>

No more than its textual language, the sixth amendment's history does not support its extension to protect a suspect from the investigatory process. The right to counsel evolved on the battleground of the criminal trial; it sprang from complaints that a defendant without counsel's assistance could not adequately defend himself in court against legal charges.<sup>83</sup> The use of counsel to shield the defendant from detection is fundamentally different, and is not supported by the history of the right to counsel.<sup>84</sup> As I have shown in another article, precedent also did not support the Court's extension of the right to counsel to shield a suspect from the discovery of incriminating evidence.<sup>85</sup> The only remaining justification for so extending the right to counsel is policy. I have attempted to demonstrate in this essay, however, that we do not have good reasons for injecting counsel as an obstacle to successful police interrogation. To the contrary, as the authors maintain, we have sound reasons for permitting the police, within limits, to employ interrogation tactics designed to outwit the

81. U.S. CONST. amend. VI.

82. Cf. Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1298-99 (1983) (making a similar argument with regard to the first amendment).

83. See Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1190-92 (1970).

84. See Grano, *supra* note 33, at 943. I previously have defended application of sixth amendment rights to investigatory procedures once adversary, judicial proceedings have commenced. See *id.* at 942-44; Grano, *supra* note 19, at 18-31. This is the Court's current view. See note 19 *supra*. I now have doubts whether the sixth amendment's "shield" function is appropriate at any stage of the process.

85. See Grano, *supra* note 19, at 19 n.117. The Constitution still does not provide a right to counsel during questioning by an investigative grand jury. *United States v. Mandujano*, 425 U.S. 564 (1976).

suspect.<sup>86</sup>

### B. *The Argument for Permitting Some Pressure To Confess*

The above discussion, though adequate in terms of *Escobedo's* reasoning, has not taken account of the fifth amendment concerns that informed *Miranda*. Even if we lack good reasons for assisting the suspect to make informed, intelligent decisions, limitations on police interrogation may be defended as necessary to protect the suspect's right not to be compelled to become a witness against himself. Similarly, even if *Escobedo's* reasoning does not support a right to counsel, such a right, as *Miranda* concluded, may be defensible in the interest of protecting fifth amendment rights. My purpose now is to show that *Miranda's* premises are equally as unsound as *Escobedo's*.

The first step to sound analysis is to recognize that, despite the frequent incantation of the phrase, no "privilege against self-incrimination" exists in our law. Because the fifth amendment protects only testimonial or communicative evidence, the state may compel a person to produce self-incriminating physical evidence.<sup>87</sup> More fundamentally for present purposes, the fifth amendment protects not against self-incrimination but against the state *compelling* a person to be a witness against himself.<sup>88</sup> Absent compulsion, a self-incriminating admission is not presumptively suspicious. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."<sup>89</sup> Finally, unlike true privileges that protect the privacy of communications, the fifth amendment "privilege" is not concerned at all with securing a zone of privacy for the individual, for with a grant of immunity, the state can compel the individual to tell all regardless of how embarrassing disclosure may be.<sup>90</sup>

Because confessions are testimonial evidence intended for use in the criminal trial, the fifth amendment issue turns on the concept of compulsion. What does it mean to compel a person to be a witness

---

86. In one of their most colorful examples, the authors describe how an interrogator called his secretary into the interrogation room where one suspect was being questioned, leaving a co-suspect alone in the waiting room. Thereafter, the secretary returned to the waiting room and began typing, ostensibly from the note pad she had taken into the interrogation room. She even paused to ask the co-suspect how the suspect in the interrogation room spelled his name. When the interrogator subsequently called the co-suspect in for interrogation, he had little trouble obtaining the confession. Why we would want to protect guilty suspects from such brilliant trickery escapes me.

87. *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (handwriting sample); *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (blood sample); *see also Fisher v. United States*, 425 U.S. 391, 396-401 (1976) (subpoena for documents).

88. *Andresen v. Maryland*, 427 U.S. 463, 470-77 (1976) (search for incriminating documents); *United States v. Mandujano*, 425 U.S. 564 (1976).

89. *United States v. Washington*, 431 U.S. 181, 187 (1977).

90. *Kastigar v. United States*, 406 U.S. 441 (1972).

against himself? Historically, compulsion was nothing more than the requirement, under penalty of law, that the individual respond to questions under oath.<sup>91</sup> This requirement subjected the individual to "the cruel trilemma of self-accusation, perjury or contempt."<sup>92</sup> Such legal compulsion, with its concomitant trilemma, is not present in the stationhouse, and powerful arguments have been made, though they lately have been ignored, that the fifth amendment simply has nothing to do with the issue of police interrogation.<sup>93</sup> Semantically, of course, it is virtually impossible for the Supreme Court to reverse its position on this. One can imagine the reaction were the Court to rule that the Constitution no longer prohibits the police from compelling a custodial suspect to incriminate himself. Realistically, therefore, we are left with the task of defining compulsion in the context of police interrogation.

Mere questioning by itself is not equivalent to compulsion. Thus, a grand jury may question even a target of its investigation, and the target must invoke the right not to answer incriminating questions.<sup>94</sup> Similarly, although the police have no authority to insist on answers outside the custodial context,<sup>95</sup> a person subject to noncustodial questioning must assert the right not to answer. Absent a claim that the interrogator has a right to an answer, to question is not to compel.

Because compulsion in the context of police interrogation refers neither to legal compulsion nor to the mere fact of questioning, it can be understood only as a synonym for coercion. That is, the fifth amendment in this context protects a person from being coerced to become a witness against himself. This, of course, is precisely what the due process voluntariness cases protected against. Professor Kamisar may rail against those who view the fifth amendment in the police station as "little, if anything, more than the 'voluntary' test masquerading under a different label,"<sup>96</sup> but it cannot be anything more. While the meaning of coercion may differ for due process and

---

91. Grano, *supra* note 33, at 926-28 & n.347; see also Y. KAMISAR, *supra* note 13, at 36-37 (but finding this an unpersuasive reason for not applying the fifth amendment to the police station).

92. *Andresen v. Maryland*, 427 U.S. 463, 476 (1976) (quoting *Murphy v. Waterfront Commn.*, 378 U.S. 52, 55 (1964)).

93. See, e.g., 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 823 at 250 n.5 (3d ed. 1940); see also *id.* at §§ 817-20, 823 (Chadbourn rev. 1970); 8 *id.* §§ 2250, 2266 (McNaughton rev. 1961). But see Y. KAMISAR, *supra* note 13, at 36-37 (fifth amendment's "tangled and obscure history" permits, although it does not dictate, its application to the police station).

94. *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976).

95. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Beckwith v. United States*, 425 U.S. 341 (1976).

96. Y. KAMISAR, *supra* note 13, at 67.

fifth amendment purposes, both doctrines necessarily address the same evil.

The difficulty lies in determining when permissible pressure shades into coercion or "compulsion." Professor Kamisar has attempted to provide an answer:

It has been said that "there are a thousand forms of compulsion" and that "our police show great ingenuity in the variety employed." But "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion." If the police conduct is designed and likely to pressure or persuade, or even "to exert a tug on" a suspect to incriminate himself . . . then that conduct is "compulsion" as *Miranda* defines the self-incrimination clause. Then it *augments* or *intensifies* the tolerable level of stress, confusion, and anxiety generated by unadulterated arrest and detention to the impermissible level of "compulsion."<sup>97</sup>

A confession must be excluded "whatever may have been the character of the compulsion"? A tactic imposes "compulsion" even if it merely exerts "a tug" on the suspect? If Professor Kamisar is correct, everything the authors recommend in their book is "compulsion." But is Kamisar correct? Does even he really believe these claims?

Professor Kamisar acknowledges that "[d]istinguishing degrees . . . is inherent in the process of defining 'compel.'"<sup>98</sup> While acknowledging that all police questioning, whether custodial or not, generates some pressure, he candidly concedes that the fifth amendment does not protect against all pressure.<sup>99</sup> Indeed, Professor Kamisar has stated forthrightly that "[z]ero-value pressure conditions" are impossible to attain.<sup>100</sup> If the definition of "compel" is a matter of degree,<sup>101</sup> some justification is needed for defining the word in the way *Miranda* did and Kamisar would. Recognizing that the fifth amendment does not prohibit the pressure generated by the officer's badge in the non-custodial context, we need to ask why it should prohibit the inherent pressure of custodial questioning or even the pressures generated by the authors' tactics. Stated differently, only a policy analysis can provide the appropriate definition of compulsion.

An expansive view of "compulsion" cannot be premised on a dis-

97. *Id.* at 160 (footnotes omitted, emphasis in original).

98. *Id.* at 42 n.2.

99. *Id.*

100. *Id.* at 155 n.20.

101. Of course, the definition of "compel" must be a matter of degree. Kamisar is right that zero-value pressure simply is impossible. On the other hand, no matter how great the pressure, an undrugged, conscious person always can choose to endure. Thus, unless the issue is seen as one of degree, either all statements are coerced or none are. From a legal perspective, neither alternative is satisfactory. Words like "compel," "coerce," and "voluntary," therefore, must draw their meaning from policy considerations, and their meaning accordingly should vary in different legal contexts. Grano, *supra* note 33, at 862-63, 880-86. Try as we may, we cannot escape Justice Harlan's insight that the question must be "how much pressure on the suspect [is] permissible." *Miranda*, 384 U.S. at 507, 515 (Harlan, J., dissenting); see also note 36 *supra* and accompanying text.



like of self-incriminating statements. As discussed in the last section of this essay, our morality approves interrogation tactics, including trickery and deception, intended to convince a suspect to confess. Moreover, as noted above, the fifth amendment does not provide protection against self-incrimination as such.<sup>102</sup> If we prefer that suspects tell the truth — if, that is, we prefer the police to succeed with interrogation — we should not define compulsion so as to eliminate all “tugs” on the suspect to confess. The Supreme Court itself has recognized that the fifth amendment does not require such protection:

The Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions. Of course, for many witnesses the grand jury room engenders an atmosphere conducive to truth-telling, for it is likely that upon being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses will feel obliged to do just that. But it does not offend the guarantees of the Fifth Amendment if in that setting a witness is more likely to tell the truth than in less solemn surroundings. The constitutional guarantee is only that the witness not be *compelled* to give self-incriminating testimony.<sup>103</sup>

The policies underlying the fifth amendment do not suggest that we should protect the defendant from either the inherent pressures of custodial interrogation or the authors' anxiety-inducing tactics. The protection embodied in the fifth amendment arose in the midst of stormy political controversies concerning the English church courts and the Star Chamber.<sup>104</sup> We cannot be sure whether this protection developed as a tactical weapon against these institutions or whether it had its own independent justifications. The justifications we typically see today are largely after-the-event formulations.<sup>105</sup> For this reason, they deserve especially careful scrutiny.

In *Miranda*, the Court stated that the “one overriding thought” underlying the fifth amendment “is the respect a government . . . must accord to the dignity and integrity of its citizens.”<sup>106</sup> As discussed in the previous section of this essay, however, our morality does not consider the tactics of successful interrogation an affront to human dignity. *Miranda* also indicated that the fifth amendment seeks to maintain a “fair state-individual balance” and to require the government “to shoulder the entire load.”<sup>107</sup> The concept of fairness, how-

102. See notes 88-89 *supra* and accompanying text.

103. *United States v. Washington*, 431 U.S. 181, 187-88 (1977) (citations omitted, emphasis in original).

104. See L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* (1968).

105. For an exhaustive review of possible underlying policies, see McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, in *POLICE POWER AND INDIVIDUAL FREEDOM* 223 (C. Sowle ed. 1962).

106. *Miranda*, 384 U.S. at 460.

107. 384 U.S. at 460 (quoting 8 J. WIGMORE (McNaughton rev.), *supra* note 93, at 317).

ever, like the concept of dignity, requires analysis. The previous section argued that our morality does not consider it "unfair" for the state to succeed in obtaining a confession or a conviction. Likewise, only a sporting theory of justice could favor equality between the suspect and the state for its own sake.<sup>108</sup> It also is fiction to say that our legal system requires the government to shoulder the entire load. We require the defendant to stand in lineups for identification, to provide fingerprints, blood, and handwriting samples, to submit to psychiatric examinations, to provide pretrial discovery of certain defenses and witnesses, and sometimes even to respond to subpoenas for documents.<sup>109</sup> We also permit grand juries to subpoena targets of their investigations.<sup>110</sup> Of course, one may attempt to distinguish these practices from police interrogation. The point remains, however, that in defining the concept of compulsion, the old saw that the government must bear the entire load does not provide assistance, for it simply is not true.

*Miranda* also drew support from the aphorism that ours is an accusatorial system of justice.<sup>111</sup> This, however, is no more true than the proposition that the government must bear the entire load. Indeed, if our system did not have both accusatorial and inquisitorial attributes, the investigative grand jury and the other procedures mentioned in the previous paragraph would not be possible. Because we in fact have a mixed system of justice,<sup>112</sup> the question cannot be whether police interrogation is inquisitorial, which it is, but whether we have reasons for distinguishing this inquisitorial institution from the others we permit in our system.

Professor Kamisar's protests notwithstanding, good reasons do not exist for defining fifth amendment compulsion any differently than due process coercion. As a policy word, the concept of compulsion necessarily must reflect society's desire, on the one hand, for successful police interrogation and society's revulsion, on the other hand, of certain offensive police methods.<sup>113</sup> Only such a balancing can define the

---

108. See notes 58-63 *supra* and accompanying text.

109. See Grano, *supra* note 33, at 934 (reviewing cases).

110. *United States v. Washington*, 431 U.S. 181 (1977).

111. *Miranda*, 384 U.S. at 460.

112. See Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974). The error of regarding our system as "accusatorial" and not "inquisitorial" is not harmless. See, e.g., *Moran v. Burbine*, 106 S. Ct. 1135, 1148 (Stevens, J., dissenting) (building on premise that ours is an accusatorial system).

113. See generally *Culombe v. Connecticut*, 367 U.S. 568 (1961) (opinion of Frankfurter, J.). Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (drawing on the due process confession cases to define the concept of voluntary consent). In its recent *Miranda* cases, the Court has recognized these competing concerns. See *Moran v. Burbine*, 106 S. Ct. 1135, 1144 (1986). The Court has never recognized, however, that these concerns cannot properly be balanced as long as *Miranda* remains viable.

point at which the pressure to confess becomes "undue."<sup>114</sup> To ignore this reality is to overlook, as even Professor Kamisar has conceded,<sup>115</sup> that distinguishing degrees is inherent in the process of defining the concept of compulsion.

This approach to fifth amendment compulsion actually comports with both pre-*Miranda* and post-*Miranda* precedent. When the Court in the nineteenth century first suggested in a federal case that the fifth amendment had some bearing on police interrogation, it expressed the applicable test in terms of a voluntariness standard, and it declined to hold that either custody or questioning automatically invalidated a confession.<sup>116</sup> Similarly, a fifth amendment voluntariness test controlled questioning of the defendant at the preliminary examination, a practice that persisted in this country until the middle of the nineteenth century.<sup>117</sup> When the Court first applied the fifth amendment to the states, it observed that the due process voluntariness doctrine in state confession cases reflected fifth amendment requirements.<sup>118</sup> Outside the custodial context, where the fifth amendment but not *Miranda* applies, the admissibility of confessions is governed by a voluntariness test.<sup>119</sup> Moreover, while *Miranda*'s prophylactic rule does not prevent the use for impeachment purposes of a statement obtained in violation of *Miranda*, an "involuntary" statement cannot be used for any purpose.<sup>120</sup> In short, as the Court reiterated only recently, outside the trial context the fifth amendment has imposed only a voluntariness requirement: "The constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of circumstances, the free will of the witness was overborne."<sup>121</sup>

The remaining question is whether the suspect's "right of silence" dictates greater protection than a voluntariness approach affords. If, as I have suggested, the first step to sound analysis is to recognize that no "privilege against self-incrimination" exists, the second step is to recognize, again despite the frequent incantations of the phrase, that there is no right of silence. The fifth amendment right is a right not to be *compelled* to become a witness against oneself. The right of silence

114. See note 36 *supra* and accompanying text; see also Caplan, *supra* note 23, at 1468-76.

115. See note 101 *supra* and accompanying text.

116. *Bram v. United States*, 168 U.S. 532, 542, 558, 562 (1897).

117. *Powers v. United States*, 223 U.S. 303, 313-14 (1912); *Wilson v. United States*, 162 U.S. 613, 623 (1896). The practice of questioning the accused at the examination ended in the middle of the nineteenth century. L. MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT?* 16 (1959).

118. *Malloy v. Hogan*, 378 U.S. 1, 6-8 (1964).

119. *E.g.*, *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976).

120. *New Jersey v. Portash*, 440 U.S. 450 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978).

121. *United States v. Washington*, 431 U.S. 181, 188 (1977) (emphasis in original).

exists only in the limited sense that the state cannot compel a person to answer.

This is not just a semantic quibble. If a right of silence as such existed, we could not justify protecting that right only for those in custody, for the fifth amendment applies to the noncustodial as well as the custodial suspect. Similarly, the concept of waiver would have to apply whenever the police engage in questioning, for any response to interrogation would be a relinquishment of the "right of silence." Thus, if we truly recognized a right of silence, *Miranda's* limitation of its warning and waiver requirements to custodial interrogation could not be defended. Of course, *Miranda* imposed its requirements to combat the inherent compulsion of custodial interrogation, but this is precisely the point; *Miranda's* concern, despite its loose language, was compulsion, not a right of silence as such. If the fifth amendment guaranteed a right of silence, even wiretapping and the use of informants could raise troubling issues. Certainly the use of a suspect's silence as evidence would not be impermissible only when the police provided antecedent *Miranda* warnings.<sup>122</sup>

In summary, then, we have no reason to read the fifth amendment as prohibiting police interrogation, as protecting against the inherent pressure of custodial interrogation, or as prohibiting the tactics the authors suggest to increase the suspect's anxiety in the police station. The authors' tactics are inconsistent with *Miranda's* premises, but it is those premises, not their tactics, that lack persuasive justification.

#### IV. CONCLUSION

I have attempted to show in this essay that the authors' suggested tactics for successful police interrogation are inconsistent with the two strands of thought that have influenced modern confessions law. I also have attempted to demonstrate that both of these strands of thought are unsound. Nothing in our Constitution or our morality precludes the police, within limits, from trying to outsmart the suspect and to increase the pressure on him to tell the truth. Indeed, our morality actually approves such interrogation efforts.

The Supreme Court has applied the right to counsel to police interrogation both to help the suspect make informed, intelligent decisions and to protect him from interrogation's inherent pressures. I have tried to show in this essay that neither justification is persuasive and that both run counter to the appropriate functions and goals of police interrogation. Of course, with unexacting waiver requirements, the authors' program for professional interrogation can coexist with a right of counsel, but only intellectual dishonesty can make such coexistence theoretically compatible. If my arguments against the prem-

---

122. See *Wainwright v. Greenfield*, 106 S. Ct. 634 (1986).

ises of *Escobedo* and *Miranda* are persuasive, counsel should be barred, for all defendants, from the interrogation room.

The law openly should permit, as the authors desire, a reasonable period of custodial interrogation once a suspect has been arrested on probable cause.<sup>123</sup> While the police should not be permitted to assert that the suspect must answer their questions, they should have leeway to attempt to convince him to tell the truth. The law should preclude tactics that are likely to induce a false confession, and it likewise should preclude tactics that offend well-established moral principles. In short, whether under due process or the fifth amendment, some form of voluntariness test should control.<sup>124</sup>

If we really believed in the philosophy that underlies cases like *Escobedo* and *Miranda*, we would have to regard *Criminal Interrogation and Confessions* as a blueprint for police illegality. It is no such thing. The book is a manual for successful interrogation that a free, civilized, and just society can and should endorse without apology. We are indebted to the authors for helping to demonstrate how misguided our recent direction has been.

---

123. Cf. Proposed Mich. Ct. R. 6.104(A): "An arrested person must be taken without unnecessary delay before a judicial officer for arraignment in accordance with the provisions of this rule. A delay is not "unnecessary" solely because the police interrogated the accused before bringing him to court." 422A Mich. 10 (1985). [The author of this review is reporter of the committee that submitted Proposed Rules of Criminal Procedure to the Michigan Supreme Court. The Court has published the proposed rules for public comment.]

124. I previously have recommended that the Court revert to a modified voluntariness test. Grano, *supra* note 33; see also Caplan, *supra* note 23, at 1467-76 (arguing that *Miranda* should be overruled).