

INTERROGATION

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INTERROGATION

Achieving Confessions Using
Permissible Persuasion

By

CHARLES L. YESCHKE



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This book is dedicated to my mentor, John E. Reid, who developed advanced ways of seeking the truth. Mr. Reid was a pioneer in the detection of deception. His control question technique is now the basis of modern-day forensic psychophysiological detection of deception.

MISSION STATEMENT

This text is intended to help those who want to become better at interrogating and for those who are brave enough to venture into that scary part of investigating. There are but a few investigators who are comfortable gaining confessions or admissions from the culpable. As it is with most skills, where personal motivation is the key element to improvement, interrogating requires dedication and focus to break out of mediocrity. All I can do is present you with some hints as to how you may reach a higher level of skillfulness as an interrogator. The perseverance is left to you.

PREFACE

If we consider historical works as sources of information, and not as philosophical or religious teachings, we can use such sources to look more closely at human behavior. Everyone has the free will to select or not select to use religious teachings. The following observation is not offered as a religious teaching, and there certainly is no intention to offend anyone. Instead, I use the following as a starting point for a discussion of the fundamental roots of interrogation.

Hence, I observe that, apparently, the Garden of Eden may have been the first place where interrogation took place. Reportedly, God told Adam not to eat from the Tree of Conscience, because, if he did so, he would become aware of right and wrong, good and bad. God created a woman to be Adam's wife. Neither Adam, nor his wife, Eve, were embarrassed or ashamed, even though they were naked. The crafty serpent convinced Eve to eat the fruit from the Tree of Conscience. The serpent pointed out how lovely and fresh looking the fruit was, and, that by eating the fruit, Eve would become wise. She ate some of the fruit and gave some of that fruit to her husband to eat. They suddenly became aware of their nakedness, and were embarrassed. They hid from God when he entered the garden because they were embarrassed about being naked. God noticed they were hiding and asked: "Why are you hiding?" Adam replied, "I heard you coming and didn't want you to see me naked. So I hid." God asked: "Who told you that you were naked? Have you eaten fruit from the tree I warned you about?" "Yes," Adam admitted, "but it was the woman you gave me who brought me some, and I ate it." Then God asked Eve: "How could you do such a thing?" She replied: "The serpent tricked me."

Deductive reasoning, apparently, brought God to the conclusion that Adam had eaten fruit of the Tree of Conscience; otherwise, how

would Adam know of his nakedness? God confronted Adam. Adam admitted his culpability but blamed his wife for offering the fruit to him, which he ate. Even though he knew not to eat from that tree, he did. Did he eat the fruit to fulfill a social need of belonging and/or intimacy? And, after all, God gave the woman to Adam, so isn't God somewhat to blame for the woman's behavior? Why didn't God tell Eve not to eat of the fruit? Or possibly, Adam, knowing better, acted much as a child seeking autonomy, doing what he wanted when he wanted and gaining power over himself and the things around him.

Seemingly disappointed, God confronted Eve, who blamed the serpent for tricking her into eating the fruit. Possibly, Adam did advise Eve not to eat of the Tree of Conscience and she didn't take him seriously. Let us not forget that God instructed Adam about not eating the fruit before God created woman. It seems that God relied on Adam to inform the woman not to eat of the tree. Maybe Adam did not clearly advise the woman about the tree and its dangers. Or, maybe he did tell her of the restriction and, she, too rebelled against the prevailing rule of God. Let's not forget the serpent's role in all of this.

We might say that the above-mentioned biblical account is illustrative of interrogation and its relationship to human behavior. Apparently, rationalization and face-saving started a long time ago, as did deductive reasoning and getting at the truth by asking questions.

This book explores practical and legal tactics of interrogation by which to seek a difficult target: the truth. While hunting for the truth, it is necessary to watch for and study the verbal and nonverbal responses of both interviewees and interrogatees to dissect and contemplate what makes people do what they do. Your honorable crusade to learn why people confess will cause you to delve into the depths of the human soul. This campaign will help you become wiser and of greater service to your community. Fear not! Hesitate not! Your quest is worthwhile. The goal of interrogation is to persuade the culpable to confess or to reveal information that may be the equivalent of a full confession.

Charles L. Yeschke
Minneapolis, 2003

INTRODUCTION

Some critics say that using interrogation tactics to take advantage of inexperienced and ignorant subjects is not dignified behavior. I am convinced that by using neutral, courteous, polite procedures to outwit culpable subjects, an interrogator's effectiveness is increased. Of course, if a subject is innocent, such procedures will also reveal that truth. We need to recognize that there is some good in everyone, and using this realization gives good advantage during interrogations. We can then take satisfaction in having the ability to achieve confessions and admissions that are provided knowingly, intelligently, and voluntarily.

It is unreasonable to give culpable subjects a sporting chance during interrogations. I cannot think of any circumstances that would justify a culpable individual being on an even footing with investigators. Yes, investigators do manipulate vulnerable culpable subjects, but taking such action does not mean that those subjects are caused to make false confessions. On the contrary, a properly trained professional interrogator using ethical methods, such as those suggested herein, is mindful of the necessity to be careful not to promote false confessions from psychologically vulnerable individuals. I affirm tactics such as playing on a subject's human needs, which render it difficult for culpable subjects to make rational, responsible choices to avoid responsibility. Further, in my view, it simply is not logically offensive to take advantage of culpable individuals. As long as I treat subjects compassionately, without using duress and or coercion, I am respecting their human dignity even though I may use trickery and deceit to attain their confession. Lying and deception by investigators during interrogations have always been difficult issues without definite answers.

Black's Law Dictionary defines a confession as a statement by which a subject acknowledges himself to be culpable of the offense

charged and discloses the circumstances of the act or the share and participation that he had in it. An admission is defined as the acknowledgment of a fact or of circumstances from which culpability may be inferred, but not a confession of culpability. Apparently, no effective distinction can be made between confession and admission. Because virtually all confessions probably contain at least some minor deviation from the truth, it could be argued they are transformed into admissions.

Based on my experience, a confession is a voluntary statement in which a person concedes committing wrongdoing or having assisted in its commission. It will contain most, if not all, of the elements vital to proving a person culpable.

An admission, too, is a statement, but one that does not contain all of the acknowledged or admitted facts from which culpability may be inferred. It is a direct or implied statement of facts pertinent to the matter under investigation. If it is considered with other facts as related to the relevant circumstances, such statements may imply culpability. Depending on the circumstances, I believe admissions are equivalent to confessions.

A confession, to be admissible in court, has to be voluntary and trustworthy. To be voluntary, a confession or admission must be made willingly. It is intentional, deliberate, and not coerced in any way. To be trustworthy, a confession ought to be characterized by integrity and frankness. Hence, for a confession to be admissible, it is required to be provided knowingly, intelligently, and voluntarily.

What follows is a guide to assist interrogators in attaining legally acceptable confessions and admissions, and resolving some of these “gray area” issues in a reasoned, humane way.

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INTERROGATION

Chapter 1

ROAD MAP

A road map to the truth can be difficult to read. As with most road maps, there are signs, symbols, and signals that can be misleading to a new traveler. There is no easy way to teach how to travel that rough road called interrogating. The goal herein is to explore various elements of a cohesive method of interrogating. I have successfully used a unified system for over forty years that I have applied in thousands of inquiries. My method has been reviewed by various courts and found not to contain psychological coercion (a complete example of such a case is included as Appendix A in Chapter 9). Part of my approach is made up of a type of skeleton, a backbone, so to speak. This functional, adaptable, and extremely useful technique has been used in some of the most secret national espionage matters. I have adapted my process to investigations involving murders, rapes, and other investigative issues. It can be the foundation for inquiries of all kinds, including fraud and embezzlement matters.

In this presentation, my road map for interrogating will be reviewed in its many facets as generally related to specific matters. Each inquiry brings with it particular details, facts, and information, which make each unique in its own right. I consider such data to be the so-called meat to be applied to the bones of the investigative skeleton. For example, if we are investigating a bank robbery, the meat for the bones of that type of inquiry is typically specific to that type of theft. The technical details related to the bank inquiry are unique to such investigations and are, obviously, different from those related to rape, or espionage investigations. So, each inquiry, of any kind, has similar underpinnings with unique and specific differences reflected in

their circumstances. With the system suggested in this presentation, and with your imagination, you can resolve investigative challenges. The balance of this chapter is a guide to the other chapters in this book. You can use this guide to find topics of particular interest to you, as well as to get a quick overview of the facets of an interrogation method that has repeatedly proven successful in obtaining confessions.

Chapter 2 mentions John Rawls and his philosophical influence upon society. Those views complement my own in that they show a compassion for people. It is not the political stance presented by Rawls that is intriguing or promoted herein, but what is promoted is his observation that all of mankind deserves fair treatment and is worthy to be acted toward with compassion. Those who feel doomed, unlucky, or in culpable circumstances seek offers of rationalization and face-saving assistance as they contemplate and try to solve life's problems. Rawls knew that most of mankind is trying to find a type of forgiveness pertaining to the wrongs they have done. He echoes my view of mankind and its related needs.

Further, without writing a complete work dealing with the Sixth Amendment and its influence on interrogating, I have, in part, referred to how the Constitution impacts on the conduct of interrogations. How to outsmart culpable individuals in legal ways is the objective of this writing, rather than studying specific laws that regulate doing so. Comprehending related laws is vital, and functioning by the rules is essential to professional investigators.

Chapter 3 reflects elements of the Polyphasic Flow Chart and related topics, which are interrelated between interviewing and interrogating. A foundation for interrogating is built from the beginning of the investigative interview. It is not that an accusation is made in the interview, but a base is laid upon which an interrogation can subsequently be built if needed. All of the elements developed in the interview are needed in the interrogation. Elements, such as rapport, active listening, and the self-fulfilling prophecy introduced during interviewing are intended to subtly carry over into interrogating.

Chapter 4 deals with difficult interviewees or subjects with regard to whom seeking the truth can be most difficult for the investigator. Considering personality characteristics of such difficult interviewee types may assist in comprehending how to persuade them to divulge the truth. Of those difficult types, psychopaths may create the most challenge because they have no conscience. A rather lengthy explo-

ration of psychopaths in this chapter is intended to assist the learner to realize that psychopaths are unique among human beings. They are so much unlike the typical investigator in psychological makeup that dealing with them may be extremely thorny or awkward.

Chapter 5 considers interview question formulation, which is such a critical assignment because many investigators fall into a trap sprung upon them by the cunning delinquent intellectually dancing around the inquiry. So tuned in are some interviewees that they can endure an interview without giving up vital information.

Chapter 6 explores how the Self-Fulfilling Prophecy (SFP) is a major element of interviewing and interrogating, which, if applied with confidence, can render the inquiry a success. Working in conjunction with that prophecy are support elements such as patience, active listening, and intuition to encourage the truth to come out.

Chapter 7 looks at aspects of the detection of deception that have always been an overwhelming task in every stage of history. It is only during the past 70 years, or so, that we have had a reasonably good chance of determining whether or not a person is truthful. This chapter considers aspects of the detection of deception and its relationship to interrogating.

Chapter 8 ponders how to smoothly transition from an interview to an interrogation once you have made up your mind that the interviewee is culpable. At this point, the interviewee becomes the subject, and your goal becomes to obtain a self-incriminating confession.

Chapter 9 reviews the basic considerations and techniques of interrogating that can be applied to any interrogation. This chapter echoes the themes running throughout the book. These are that abuse of the subject is not only illegal, but also does not yield the kind of trustworthy confessions you are seeking; that it is important that you be confident and vigilant in your approach; that you may have to try several approaches, and then repeat them to see if they are successful; that it is vital that you assist the subject to rationalize and save face; that you carefully observe and become knowledgeable of human nature so as to tap into the subject's possible latent urge to confess.

Chapter 10 contemplates how interrogation tactics are face-to-face means by which to encourage culpable subjects to admit or confess responsibility. In the hands of skillful investigators, a certain course of action can logically work to assist the interrogatee to confess. It is not merely the approach used; it is how to apply that approach as related

to the dynamics of human communication.

Chapter 11 scrutinizes elements of actual, real-world confessions as representing my investigative experience. But, let us not forget the category of false confessions. It is understandable that, because of certain unfortunate circumstances, false confessions do take place. Because of coercion, abuse, and so forth, some nonculpable people feel compelled to confess falsely. Yes, our court system does guard against admitting false confessions into court; however, I believe investigators also have responsibilities to be vigilant against that happening.

Chapter 12 deals with one of the most difficult topics for investigators to work with—sexually related offenses. Those can cause the most seasoned investigators to back away and become confused. Numerous sexual abuse matters are studied in this presentation for that reason. Although some of us may not ever become comfortable in handling such cases, we ought to at least try. It is with trying that we learn and become moderately comfortable. Victims deserve our best effort. Who else stands up for them if not the skilled investigator?

Chapter 13 delves into a bank theft investigation using the Polyphasic Flow Chart as a backdrop to give you insight regarding the elements involved. This study illustrates how the Polyphasic Flow Chart fits into this inquiry and points up how the Chart might be used in other investigations. Because crimes dealing with personal injury and damage to property consume most of the investigator's time, this bank study is offered for review. Since white-collar crimes still seem to be out of bounds to many investigators, more and better training ought to be provided for them to be able to successfully handle fraud and embezzlement cases.

Chapter 2

PHILOSOPHICAL AND LEGAL UNDERPINNINGS OF INTERROGATION

THE FAIRNESS OF JUSTICE

In my opinion, John Borden Rawls is the most influential philosopher of the late twentieth century. He believed it necessary to have social rules to help our society, to help the luckless.

Not too many years ago, there did not seem to be basic rules applicable to how interrogating ought to take place—there were few prescribed specifics related to such an interaction. I am referring to the face-to-face dynamics of an interrogation, not the legal aspects. Yes, there were, and there still are, opinions about the various techniques pertaining to interrogating, but seemingly no acceptable specifics on how to ethically conduct interrogations. Beyond the political aspects of interrogating are the philosophical facets of human interaction. My recurrent messages throughout this presentation are related to the positive principles taught by Rawls, which I use to assist the culpable to admit or confess involvement in outrageous behavior. Please keep in mind that I am not advocating the liberal political principles taught by Rawls. I am, however, using some of his views as those held knowingly or unknowingly by many who have selected to commit unacceptable conduct. People tend to rationalize and or save face regarding those things they do. Hence, it is the investigator's responsibility to assist the culpable out of the quagmire of his or her ill-fated circumstances.

Rawls put individual rights ahead of the common good. He had a profound sense of “there but for the grace of God go I.” He had a

much more developed moral and social instinct than most people, much more tact. Rawls believed that the most distinctive feature of human nature is our ability to freely choose our own ends. He considered “the first duty of the liberal state was to safeguard the individual’s civil liberties,” and that “the loss of freedom for some” can never be “made right by the greater good shared by others” (*The Guardian*, Obituary, by Ben Rogers, Wednesday, November 27, 2002).

Fairness, mutual respect, and compassion are sought by the luckless, but often to no avail. They struggle and struggle to make it in this world but cannot find a way out of their unfortunate circumstances. In an effort to satisfy their personal needs, they possibly act out in delinquent ways. They seem doomed, in their eyes, to a situation that contributes to their status or position in life. Sometimes, they view those who are not jinxed with envy or resentment, or even with anger, which tends in their minds to justify their theft, molestation, murder, and many other of peoples’ inhumanity to other people. The unlucky, as they see themselves, can rationalize their behavior as okay to the same degree that they think and feel those who are not doomed in life deserve to be swindled, raped, or abused in some way (enter the psychopaths, whose personalities are reviewed in Chapter 4).

Rawls thought it important that citizens do their part to assist society to function properly by:

- Supporting just institutions
- Giving mutual respect and aid to one another
- Doing no harm to other citizens
- Doing one’s fair share in the community
- Being faithful (keeping one’s promises)

So, both the citizen and society have related obligations. When citizens do not live up to their duties as citizens, they are considered delinquent, not meeting their part of the deal with society. That is why society has laws, to punish the wayward. As long as the citizen lives up to those laws, society stands back to permit various freedoms based upon our U.S. Constitution and Bill of Rights. Now, are Rawls’s suggestions realistic? They are quite so when we consider how our society functions, to a large degree. It is the exception that proves what actually goes on in our society. The exceptions are those who are disobedient, who stand out as delinquent. In large part, most of society is law-abiding and would never need to be interrogated, and would

never encounter or be subjected to the techniques and tactics presented in this book.

Rawls referred to justice as fairness. Fairness is about treating individuals only as ends and never as means. His theory may be considered a liberal theory, meaning primarily that he was in favor of a society designed to help out the less fortunate. The connection between Rawls's urging to treat people with fairness and the suggested method of this presentation is that even the unfortunate can differentiate if they are being treated with fairness or being abused and mistreated and that even the luckless in our society need to save face or rationalize their delinquent conduct. In many ways, our courts can discern if a defendant was treated in a way that exemplifies coercion. In my view, Rawls's theory has permeated our society and is helping protect the common citizen. In his efforts to suggest a just society, much like our own, he points out that people's actions are governed by self-interest. So then, as we consider why people confess, let us keep in mind a little of Rawls's theory, which I have touched upon ever so lightly.

WHAT LEGAL RIGHTS SHOULD A SUBJECT HAVE?

This section is not intended to turn into a thesis regarding legal matters. Having said that, confessions are essential to the task of solving crime. I do not take the premises of the U.S. Supreme Court's decisions in *Escobedo v. Illinois* and *Miranda v. Arizona* seriously because I believe that they are fundamentally unsound and that we need to rethink the basic premises of current confessions law. Another key case in this area is *Massiah v. U.S.*, 377 U.S. 201 (1964) because *Massiah* is considered the influential case when a Sixth Amendment right to counsel attaches when law enforcement is seeking to secure an inculpatory statement. As to *Massiah v. U.S.*, that case held that once adversary judicial proceedings have commenced against an individual, government efforts to deliberately elicit statements from him in the absence of counsel violates the Sixth Amendment. *Massiah* was not displaced by *Miranda* because even after *Miranda* warnings have been given, a defendant is still denied his constitutional rights, when, after arraignment, the police deliberately elicit information from him without giving him the opportunity to consult with his attorney—any incriminating statements are still not admissible. Unlike the due

process approach, the Sixth Amendment approach under *Massiah* does not require a finding of coercion, and, unlike *Miranda*, neither custody nor interrogation is a prerequisite to applicability. Of course, under this case, law enforcement agents can interrogate before formal proceedings are initiated (indictment, arraignment, formal hearing, and so forth).

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Supreme Court held that where a police investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect in police custody who has been refused an opportunity to consult with his counsel and who has not been warned of his constitutional right to keep silent, the accused has been denied the assistance of counsel in violation of the Sixth and Fourteenth Amendments; and, no statement extracted by the police during the interrogation may be used against him at a trial. *Miranda v. Arizona*, 384 U.S. 436 (1966) is the case that requires the police to tell a criminal suspect who is taken into custody that “You have the right to remain silent, anything you say can and will be used against you, you have the right to consult with an attorney and to have the lawyer with you during interrogation. . . .” In *Miranda*, the Supreme Court held that the Fifth Amendment’s privilege against self-incrimination applied to extra judicial custodial interrogation. This means that law enforcement’s efforts to secure confessions are regulated not only by the general requirement of due process, but also by the dictates of the Fifth Amendment. The Court also concluded that the Fifth Amendment mandates that a confession must be “truly the product of [a subject’s] choice.”

Although interrogation tactics suggested in this presentation may not comfortably coexist with cases like *Massiah*, *Escobedo*, and *Miranda*, the tactics herein are presented in anticipation of the Supreme Court causing *Miranda*’s collapse in the near future. In recent years, the Court has curtailed the constitutional limitations on law enforcement’s powers, and it is not unreasonable to anticipate that the Court will rethink its position in *Miranda*.

Miranda primarily reflects the desire to protect the subject from the inherent compulsion and undue pressure of custodial surroundings.

QUESTIONING THE ASSUMPTIONS OF MODERN CONFESSIONS LAW

The philosophical and policy underpinnings of modern confessions law emphasize that to preserve human dignity:

- A subject needs and should have assistance in matching wits with the police during interrogation.
- A custodial subject needs and should have protection against the pressures to confess that are generated by interrogation.

It seems that Rawls tends to support modern confessions law in that he is for the underdog and wants to give him help against society, even though confessions are desirable and important to society. Hence, it is vital to use interrogation tactics designed to assist subjects to rationalize and save face. In that process there are some inherent pressures as the interrogator outsmarts the culpable subject. Interrogation is a process for soliciting and eliciting information. The conscience of culpable subjects cannot be trusted to promote spontaneous admissions of guilt. If the culpable are to condemn themselves through confession, the stage needs to be set for it to happen. They ought to be convinced that they are satisfying some basic need by confessing. The effective interrogator's influence is subtle, but determined. The goal is to cause the subject to engage in a process that will lead to self-destruction, so to speak.

Many individuals, such as psychopaths, reportedly have no continued anxiety of deception as typically expressed through conscience, sense of blame, or guilt (see Chapter 4). They do not fear the consequences of their crimes and do not experience anxiety associated with deception. People who have a conscience can be approached with tactics that may assist them in reducing their perception of the consequences of confessing. With them, and with psychopaths, rationalization and face-saving tactics can be useful. For these reasons, the basic premises of current confessions law are not suitable for achieving desirable social goals, and need to be modified to permit interrogators to outsmart the subject and to allow for some pressure to confess.

PERMITTING THE INTERROGATOR TO OUTSMART THE SUBJECT

For the reasons just given as to why the assumptions of confessions law are not justified, I disagree with those who think it unfortunate that subjects are on an unequal footing with interrogators. I cannot think of any circumstances under which it would be justified to have a subject on equal footing with an interrogator. Police do indeed manipulate vulnerable culpable subjects, but taking such action does not mean that those subjects are caused to make false confessions. Custodial interrogation typically occurs after a lawful arrest supported by probable cause. Although our law proclaims that one who has been lawfully arrested is “presumed innocent,” in a literal sense, we cannot presume subjects to be innocent after they have been arrested lawfully. But, instead, let us view them as justifiably subject to certain state restraints and inconveniences.

Constitutional and moral limits exist regarding what an interrogator may do to outwit a culpable subject. For example, using deception or promise of leniency is not acceptable if it is likely to induce a false confession. Moreover, inducing a confession by making a false promise is unacceptable. Even though trickery and deception are morally acceptable in the law enforcement context, some interrogation tactics exceed the bounds of moral tolerance. Sometimes, acceptable and unacceptable tactics are difficult to differentiate but not to the extent that all tactics of interrogation are unacceptable. Even hardened criminals succumb to interrogative deception; their sophisticated ways do not protect them from the skilled interrogator. We have sound reasons for permitting the police, within limits, to employ interrogation tactics designed to outwit the subject.

ALLOWING FOR SOME PRESSURE TO CONFESS

It is for these reasons that I contend that there is no good reason to assist subjects to make informed, intelligent decisions during interrogation. As previously indicated, the provisions of *Miranda* and *Escobedo* are unsound.

As a matter of constitutional law, there is no protection per se against self-incrimination. The Fifth Amendment does not protect

against self-incrimination but only protects against the state compelling a person to be a witness against himself. Admissions of culpability by the culpable, if not coerced, are inherently desirable.

Because confessions are testimonial evidence intended for use in a criminal trial, the Fifth Amendment issue turns on the concept of compulsion. To compel a person to be a witness against himself is nothing more than the requirement, under penalty of law, that the individual respond to questions under oath. Hence, I contend that the Fifth Amendment simply has nothing to do with the issue of police interrogation. Historically, before *Miranda*, this was the court's understanding of the scope of the Fifth Amendment. Nonetheless, because of the advent of *Miranda*, compulsion in the context of police interrogation must be examined.

In my view, simply questioning in and of itself is not equivalent to compulsion. A person subjected to noncustodial questioning may assert the right not to answer. To question is not to compel. The Fifth Amendment in this context protects a person from being coerced to become a witness against himself. This, in particular, is what the due process voluntariness cases that preceded *Miranda* protected against. Although the meaning of coercion may differ for due process and Fifth Amendment purposes, both constitutional doctrines fundamentally speak to the same damage inflicted by government compulsion.

It is not reasonable to consider all interrogative efforts as impermissible levels of compulsion. It seems reasonable to cause the culpable subject to engage in self-incrimination as the objective of an interrogation, as long as nothing is done that would cause nonculpable individuals to confess to something they have not done.

All police questioning, whether custodial or not, generates some pressure. The Fifth Amendment does not protect against all pressure, nor does it prohibit the pressure generated by the officer's authority in the noncustodial context. Why, then, should it prohibit the inherent pressure of custodial interrogation? The Fifth Amendment does not provide protection against self-incrimination as such. Modern society prefers that the police succeed with interrogation. As Rawls might conclude, if a person confesses, his confession may exonerate someone who was wrongfully jailed. The constitutional guarantee is only that the witness not be compelled to give self-incriminating testimony. The policies underlying the Fifth Amendment do not suggest that we should protect the defendant from the inherent pressures of custodial

interrogation or anxiety-inducing tactics.

In *Miranda*, the Court was saying that there is a requirement that the government respect the dignity and integrity of its people. Our ethics do not consider the tactics of successful interrogation as disrespectful of human dignity. To succeed in obtaining a confession is not inherently unfair.

I consider Fifth Amendment compulsion the same as due process coercion. My comprehension of *Miranda* is that it was a response to perception that the due process standards were insufficient to control undesirable interrogation methods. The real issue is how can we protect against unacceptable, compulsive interrogations. I think proper training is the answer, followed by strict adherence to legally acceptable policy, accompanied by reasonable punishment for those who do not follow policy.

Although certain police methods of interrogation seem offensive or even revolting to some in society, let us not lose sight of the reality that society desires successful police interrogations. Moreover, defining the concept of compulsion is no easy task when we consider the need to balance the interrogator's efforts to succeed against the subject's informed, intelligent decision to confess. The Fifth Amendment has imposed only a voluntariness requirement outside the trial context, and, at trial, a requirement that the witness not be compelled to give self-incriminating testimony. The test is whether, considering the totality of circumstances, the free will of the witness is overborne or defeated (*Arizona v. Fulminante*, 499 U.S. 279, 1991).

No privilege against self-incrimination exists in the interrogation situation; there is no right of silence, even though under current law, the subject has the right to know that he has the right to remain silent. The Fifth Amendment right is a right not to be compelled to become a witness against oneself. The right of silence exists only in the limited sense that the state cannot compel a person to answer during legal proceedings. *Miranda* imposed its requirements to combat the inherent compulsion of custodial interrogation, but this is precisely the point: *Miranda's* concern, despite its wobbly language, was compulsion, not a right of silence as such; the Fifth Amendment applies to the noncustodial as well as the custodial subject.

There is no reason to read the Fifth Amendment as prohibiting police interrogation, as protecting against the inherent pressure of custodial interrogation, or as prohibiting tactics designed to increase a

subject's anxiety in the police station. In my opinion, the *Miranda* premises lack convincing justification.

Nothing in our Constitution or our morality precludes the police, within limits, from trying to outsmart the subject or from increasing 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 subject make informed, intelligent decisions, and to protect him from interrogation's inherent pressures. Because, as discussed above, I believe that subjects do not require such assistance, counsel ought to be barred, for all defendants, from the interrogation room.

In my opinion, our laws should permit a reasonable period of custodial interrogation once a subject has been arrested on probable cause. Although the police should not be permitted to assert that the subject must answer their questions, they ought to have leeway to attempt to persuade him to tell the truth. The law ought to preclude tactics that are likely to induce a false confession, as well as those that offend well-established moral principles; for example, if a subject or his significant other is threatened with physical injury if a confession is not forthcoming. In short, whether under due process or the Fifth Amendment, some form of voluntariness test ought to prevail.

A NEW LEGAL MODEL FOR INTERROGATION—JUSTICE FOR ALL

It seems reasonable to believe that a free, civilized, and just society can endorse a set of rules and procedures for successful interrogation that will serve society's needs without violating subjects' constitutional rights. One of the objectives of this book is to consider legally acceptable procedures for obtaining confessions. Our justice system needs an understandable, organizationally reasonable means of evaluating the trustworthiness of specific confessions. We can assist juries in making better decisions by replacing *Miranda* with a system of videotaping. Having access to all of the evidence surrounding the taking of statements would undoubtedly improve the accuracy of jury findings. Juries occasionally make mistakes and even convict innocent persons. Even though juries are imperfect, they can do a good job of determin-

ing the truth. Juries can assess the evidentiary value of obtained confessions if given a clear view of the circumstances in which the confession was obtained, and providing juries with videotapes of interrogations would serve that purpose.

The foundation of our criminal justice system works, and I presume juries can readily evaluate potentially false confessions. In my view, false confessions are extremely unfortunate occurrences that tend to draw our attention away from the real issue of how legal confessions are obtained. I believe juries comprehend the risk of false confessions and can determine whether confessions are trustworthy.

Many culpable subjects do not confess to the crime but rather make only an incriminating statement. By definition, such a statement fails to fit the facts of the crime, even if it accurately suggests guilt. Incriminating narratives are often at odds with the facts of the case simply because culpable individuals may not confess to the crime in its entirety. Their incriminating statements provide something less than a “full” confession. Some culpable individuals, having confessed, might nonetheless provide a post-admission narrative that deviates from the facts of the crime. They do this to rationalize and save face. This problem is widely recognized. Time-honored judicial analysis spotlights the “voluntariness” of the confession.

Apparently the Supreme Court held in *Miranda* that, for self-incrimination purposes, no distinction can be drawn between statements that are direct confessions and statements that amount to admissions of part or all of an offense. I believe that *Miranda* impedes legally acceptable police interrogation and thereby restricts the acquisition of reliable, trustworthy confessions from the truly culpable. Such confessions are of prime importance in exonerating the wrongfully convicted, which is why I recommend replacing *Miranda* with a procedure of videotaping interrogations.

THE INNOCENT DO NOT LOSE THEIR LIBERTY OR DIGNITY

What price does society pay in terms of liberty and dignity when innocent people are subjected to interrogation procedures? I maintain that nothing should be done or said to the subject that is apt to make a nonculpable person confess. Nonculpable individuals of average intelligence and educational background are not likely to succumb to

the process presented in this book—a process that encourages culpable subjects to confession. Our social integrity approves interrogation tactics, including trickery and deception intended to persuade culpable subjects to confess. The first goal of the skillful interrogator is to reduce the subject's perception of the consequences of confessing, while the second is to increase the subject's uneasiness associated with his deception.

EVIDENTIARY RULES AND CONSIDERATIONS

The Hearsay Rule

A simple definition of hearsay is that it is an out-of-court verbal or nonverbal assertion offered to prove the truth of the matter asserted (Federal Rules of Evidence, §§ 801(a) and (c)). The hearsay rule is that hearsay is generally inadmissible unless it fits an exception specified by statute or rule. Also, prior statements by a testifying witness and admissions by party opponents are not defined as hearsay. Because the person who by all accounts knew the facts is not in court to state his/her exact words, the judge cannot discern the demeanor and credibility of the alleged actual witness, and the other party's lawyer cannot cross-examine him or her. The rationale for the hearsay rule is that by requiring live testimony, it helps to protect the right of cross-examination (and, in criminal cases, the rule helps ensure the defendant's Sixth Amendment right to confront the witnesses against him) and guard against testimonial infirmities, such as poor perception, memory, veracity, etc.; encourages testimony to be made under oath; and helps juries to assess whether a witness is telling the truth or not. Thus, the rule helps to ensure that evidence is trustworthy and reliable as to truth.

Exceptions to the Hearsay Rule

The following are some of the major exceptions to the hearsay rule, and any statements of hearsay subject to these exceptions are admissible evidence in court:

- Expressed confessions and admissions

- Tacit admissions
- Conversations in the presence of the defendant
- Dying declarations
- Res gestae declarations
- Public records
- Regular entries in the course of business
- Matters of pedigree
- Former testimony

These exceptions are justified by the belief that at least one of the testimonial infirmities is unlikely to be a factor in most of the instances they cover. This rationale is applicable to confessions and admissions.

Admissibility of Confessions and Admissions

A confession, to be admissible in court, has to be voluntary and trustworthy. To be voluntary a confession or admission is a willing, not forced, statement. It is intentional, deliberate, and is not coerced in any way. If a confession is to be admissible in court, it must contain integrity and frankness—it must be trustworthy. Hence, for a confession to be admissible, it must be provided knowingly, intelligently, and voluntarily.

“An expressed confession is a voluntary statement by an accused person acknowledging that he or she committed the offense or assisted in its commission. It is broad enough to comprehend every essential element necessary to make out the case against the defendant. There is an important distinction between a confession and a mere admission or incriminating statement. An admission is a declaration in which only one or more, but not all of the facts constituting the criminal act are admitted, from which guilt may be inferred but does not necessarily follow.”

The courts reason that when a defendant charged with a crime voluntarily admits something against his interests, the probability is that he is telling the truth, thus removing one of the principle objections to hearsay evidence, i.e., lack of trustworthiness and reliability as to truth. Secondly, a confession may constitute the prime basis of determining guilt. But a confession is never considered reliable unless it is freely given by the accused. That fact furnishes the key to the admissibility of all confessions.

Validity of Confessions

The burden is upon the prosecution to show that the confessor was under no compulsion or undue influence in making the confession. Many courts have presumed all expressed confessions to be involuntary and therefore inadmissible unless the contrary is first shown. For the reason that some confessions may be untrue, the courts uniformly reject those secured by either of the following means:

- Compulsion or coercion, as by personal violence, or threats of harmful consequences as an alternative to silence.
- Any promise or inducement, in the way of benefit or reward for making the confession, either present or future, when made in the presence of persons in authority.

I recommend:

- Not using “better” or “best”: “You better tell me, or else” (implied threat)!
- Not doing or saying anything that causes harm to, or creates fear in, the subject, which is likely to induce a false confession.

If compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity, you can be sure of court rejection.

Promise or Inducement

Unless the person attempting to obtain the confession has the power (apparent to the subject) to carry out the threat or promise, there is no reason for treating the inducement as likely to produce an untrue confession. It is in such cases not due to the inducement, but to the confessor’s own discretion.

Usefulness of Interrogation Techniques

Those who investigate, interview, or interrogate individuals involved in any of numerous types of crimes can probably use interrogation tactics presented in this text without worrying that they will violate the subject’s Fifth Amendment or Sixth Amendment rights, or that any admissions or confessions obtained will be inadmissible as evidence. The crimes for which these techniques are particularly helpful