The Supreme Court, Confessions, and Judicial Schizophrenia

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Schizophrenia literally means "split mind."[1] Consequently, it should not be too surprising that the United States Supreme Court, which is a theoretically continuing body with nine ever-changing minds, would say things in one year that seem schizophrenic when contrasted with last year's jurisprudence. Unfortunately, many of the inconsistent statements remain good law, and the result largely depends on which doctrine the Court chooses to trot out.

In this essay, four such statements and the extent that each should be taken seriously will be examined:

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1. THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 897 (1999).

(1) "Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful interrogation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.'"[2]
(2) "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[3]
(3) "We have held that a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or information that 'might . . . affec[t] his decision to confess. . . . [W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' Here the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature."[4]
(4) "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . . Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"[5]

I. *WATTS V. INDIANA*

A first reaction to the *Watts v. Indiana* language is that the Court did not mean it when it said it, never meant it before it said it, and it certainly does not mean it today. With incredible regularity, the law "suffer[s] a prisoner to be made the deluded instrument of his own

2. Watts v. Indiana, 338 U.S. 49, 54 (1949) (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 46, § 34, at 595 (8th ed. 1824)).
3. Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964) (citations omitted).
4. Colorado v. Spring, 479 U.S. 564, 576–77 (1987) (quoting Moran v. Burbine, 475 U.S. 412, 422 (1986)).
5. McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (quoting Moran v. Burbine, 475 U.S. 412, 422 (1986)).

conviction."[6] Indeed, Justice Frankfurter, the author of the *Watts* plurality opinion, joined some such opinions.[7]

The harder question is whether we should mean it. Consider the following: (A) The police falsely tell Carl that his fingerprints were found in the victim's home so he may as well confess. Carl does confess.[8] The confession is admissible.[9] (B) A policeman points a gun at unarmed Ben, whom he has cornered in a supermarket. Believing that Ben has hidden a gun nearby, he asks, without giving *Miranda* warnings: "Where's the gun?" Ben tells him.[10] Both the confession and the gun are admissible.[11] (C) The FBI arrests John for transporting guns. Without warning (in regard to topic) they start questioning him about a murder. John makes an inculpatory statement.[12] The statement is admissible.[13]

In all three of these cases, and numerous others that could be cited, the suspect has been made the "deluded instrument of his own conviction," and the Court is not at all unhappy about it. In Carl's case, he was actually deluded twice. He was asked by the police officer if they could meet to discuss a burglary. By "mutual agreement," they agreed to meet at the police station.[14] Thus, Carl was not in custody. Consequently, he received no *Miranda* warnings. So, despite the tricks and lies, the confession was admitted.[15]

The *Watts* language suggests that we really do not want the police behaving this way. We know that the Court does not believe that, and much of society probably does not believe it either. Society, like the

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6. *Watts*, 338 U.S. at 54 (quoting 2 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 46, § 34, at 595 (8th ed. 1824)).

7. *See, e.g.*, Crooker v. California, 357 U.S. 433, 434 (1958), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966); Cicenia v. Lagay, 357 U.S. 504, 505, 510 (1958), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966).

8. Oregon v. Mathiason, 429 U.S. 492, 493 (1977).

9. *Id*. at 495.

10. New York v. Quarles, 467 U.S. 649, 652 (1984).

11. *Id*. at 651.

12. Colorado v. Spring, 479 U.S. 564, 567 (1987).

13. *Id*. at 577.

14. *Mathiason*, 429 U.S. at 493.

15. *Id*. at 495. In fairness, the Court did emphasize that the false statements about fingerprints were not at issue in the case, only the question of whether Mathiason was in custody. *Id*. at 495–96. Thus, in theory, his conviction could have been reversed at a later time because of the false fingerprints statement. The Court, however, has never so much as hinted that false inculpatory statements by the police will render a confession inadmissible. Indeed, their use has become a staple of modern police practice.

Court, probably believes that if the suspect is given his warnings,[16] and he confesses anyway, society wins and nobody loses. Whether we should believe that may well depend on how we resolve the "wisdom vs. intelligence" issue, which will be discussed later.[17] But suffice it to say, it is highly unlikely that we will see "the deluded instrument of his own conviction" trotted out any time soon.

II. *ESCOBEDO V. ILLINOIS*

In view of the conclusions from Part I, it is obvious that neither the Court nor society would accept a strong reading of *Escobedo v. Illinois*.[18] While some might agree that other evidence is better than a confession, no member of the Court seems prepared to junk confessions entirely. On the other hand, most jurisdictions, for good reason, will not allow a conviction to rest on an uncorroborated confession.[19] By way of illustration, consider the recent case of John Karr, who confessed to the murder of JonBenet Ramsey.[20] With no evidence to support the confession, the Colorado officials chose to not prosecute, as indeed they were required to do by law.[21]

Of course, most confession cases that are actually prosecuted involve no such problem. Sometimes there is extrinsic evidence available, such as real evidence of the suspect's fingerprints at the scene of the crime. Other times the suspect's confession will provide the corroborating detail; for example, finding the victim's body where the suspect says he left it. Of course, if the confession itself was involuntary, ordinarily the body would also be inadmissible.[22] But if the confession was validly obtained, so is the corroborating evidence.

Suffice it to say, *Escobedo*'s strongest anti-confession rhetoric will not even cause a modern court to pause and think about it.

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16. This, of course, did not happen in *Mathiason.*

17. *See infra* Part III.

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

19. *See* United States v. Reynolds, 367 F.3d 294, 297 (5th Cir. 2004); United States v. De Georgia, 420 F.2d 889, 890 (9th Cir. 1969); Arena v. United States, 226 F.2d 227, 234 (9th Cir.1955); Hunt v. State, 304 S.E.2d 576, 577 (Ga. Ct. App. 1983); State v. Whittington, 450 So. 2d. 47, 48 (La. Ct. App. 1984); State v. Lyle, 182 S.W.2d 530, 532 (Mo. 1944); Smith v. State, 361 S.W.2d 390, 391 (Tex. Crim. App. 1962).

20. Rick Lyman & Ralph Blumenthal, *Arrest in Ramsey Case Presents More Questions Than Answers*, N.Y. TIMES, Aug. 18, 2006, at A1.

21. *See* Martin v. People, 499 P.2d 606, 608 (Colo. 1972).

22. Unless the police can establish that they would have inevitably discovered it. *See* Nix v. Williams, 467 U.S. 431, 448 (1984). Or unless the confession was merely conclusively presumed to be involuntary under *Miranda,* as opposed to actually involuntary. *See* United States v. Patane, 542 U.S. 630, 634 (2004) (holding that confessions obtained in violation of *Miranda* will not exclude real evidence established by virtue of that confession).

III. *COLORADO V. SPRING* AND *MORAN V. BURBINE*

The statement in *Colorado v. Spring*, "We have held that a valid waiver does not require that an individual be informed of *all* information 'useful' in making his decision or all information that '*might* . . . affec[t] his decision to confess,'"[23] is an obvious truism. Were it otherwise, defense lawyers could have a field day. Imagine a defense lawyer arguing: "You told my client 27 relevant pieces of information. But there was a 28th piece that you missed. If only my client knew that, he might not have confessed." Obviously, the Court was correct in not going down that road—unless it wanted to outlaw all confessions of suspects with good lawyers.

On the other hand, the fact that *all* information need not be given merely begs the question as to what information does need to be given. The fact that all useful information need not be given does not mean that *no* useful information need be given. The question in *Spring* should have been whether the police should have told the suspect that he was going to be questioned about a murder, even though he was arrested on a weapons charge.

Undoubtedly, Spring was blindsided by the question, and, if you will, was "made the deluded instrument of his own conviction." Whether this is good or bad largely depends on the other question raised by *Spring* and *Moran v. Burbine*—namely whether wisdom matters and whether it is something different from a "knowing and intelligent" waiver.[24]

If we are only concerned about coercion, there is a good deal to support the Court's dichotomy. Only if you believe that you are compelled to speak and the law enforcement officers reinforce, rather than disabuse you of, that notion, are Fifth Amendment concerns implicated. If, however, we care about the adversary process, different concerns become relevant.[25]

IV. *MCNEIL V. WISCONSIN*

Undoubtedly, a truly uncoerced truthful confession is an unmitigated good. Obviously, a false confession such as John Karr's does more harm than good in that it: (1) raises false hopes; and (2) diverts the police and

23. Colorado v. Spring, 479 U.S. 564, 576 (1987) (citations omitted) (emphasis added).
24. *Id.* at 577; Moran v. Burbine, 475 U.S. 412, 422–24 (1986).
25. *See infra* Part VI.

the District Attorney from performing more useful work than trying to confirm or disprove the false confession. Similarly, a false uncoerced statement by one who has been convinced by a skillful police officer that he really did it is likely to result in a wrongful conviction, which harms all society, except the real culprit, or at the very least, will delay the police in their search of the real criminal, perhaps making him harder to apprehend.

It is also questionable whether confessions obtained in accordance with *Miranda* are unmitigated goods. They may be called "uncoerced," but few human beings outside of the legal profession would attach that accolade to them. For example, in *Miller v. Fenton*,[26] a very skillful interrogator, fully compliant with *Miranda*, verbally dominated a suspect to the point that after confessing, the suspect collapsed in a catatonic state.[27]

Maybe such a confession is not coerced within the meaning of *Miranda* and the voluntary confessions cases, but it can hardly be called an unmitigated good. At best, it may be something that we have to tolerate in pursuit of the greater good of obtaining more convictions—although even that is questionable—but it is, at best, the lesser of evils.

V. THE SUPREME COURT AT ITS WORST: *DAVIS V. UNITED STATES*

Davis v. United States was a relatively simple case for which certiorari should have been denied.[28] Instead, the Court granted certiorari and decided a question not before it, in the process gratuitously retarding the law of confessions. The facts were simple enough. Davis, a sailor, won a thirty dollar bet at the pool hall from another sailor, Keith Shackleton, who refused to pay. Shortly thereafter, Shackleton was found beaten to death. The apparent murder weapon, found at Shackleton's side, was a bloody pool cue, owned by Davis. After having told two others that he had killed Shackleton, Davis was arrested.[29]

Upon arrest, Davis was given and waived his *Miranda* rights, whereupon questioning began. About an hour into the questioning, Davis said: "Maybe I should talk to a lawyer."[30] The officers then stopped the interview and asked Davis whether he wanted a lawyer. Davis replied: "No, I'm not asking for a lawyer. No, I don't want a lawyer." After clearing that matter up, interrogation continued for another hour when Davis said: "I

26. 796 F.2d 598, 625 (3d Cir. 1986) (Gibbons, C.J., dissenting).
27. *Miller*, 796 F.2d 598 app. at 628–43.
28. 512 U.S. 452 (1994).
29. *Id*. at 454.
30. *Id*. at 455.

think I want a lawyer before saying anything else."[31] At that point, all interrogation ceased.

Not surprisingly, the lower court found that the military police acted properly.[32] Somewhat more surprisingly, Davis's lawyers convinced the Supreme Court that this was a certiorari-worthy case, a move that surely proved Pyrrhic for defense lawyers and defendants everywhere. The Court, unsurprisingly and unanimously, concluded that none of Davis's rights were violated, and affirmed the conviction.[33] Much more surprisingly, five of the Justices, in an opinion by Justice O'Connor, concluded that the police had actually done *more* than they needed to do, and that it would have been perfectly acceptable if they had simply ignored Davis's ambiguous request and continued the interrogation.[34]

This was a truly extraordinary opinion. It is difficult to find any other case in which the Court agreed to hear the case at the behest of the defendant, listened to the arguments, and held that the police did more for the defendant than they had to do. And, there is good reason why such an opinion is so rare. No one is there to argue the benefits and detriments of the rule being promulgated. Davis's lawyer was not going to argue the downside of the police not stopping to ask for clarification. His argument was that the police should not ask; they should just assume that "maybe" means "yes." The crucible of litigation frequently picks up pitfalls that would cause a court to rethink what it is doing.

In this case, for example, the Court seemed concerned that *Miranda* and its progeny had already produced too much prophylaxis.[35] Consequently, it was unwilling to allow anything short of a clear, certain assertion for the right to counsel to apply. But, as Justice Souter's concurrence mentioned, but merely adumbrated, there is a danger of the Court's rule violating the core of the Fifth Amendment.[36] To illustrate, imagine the following hypothetical dialogue in *Davis*, as now apparently permitted by the Supreme Court:

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31. *Id.*
32. *Id*. at 456.
33. *Id*. at 462
34. *Id*. at 459.
35. *Id*. at 462.
36. *Id*. at 472 (Souter, J., concurring in the judgment).

DAVIS: Maybe I should talk to a lawyer.

MILITARY POLICE (M.P.): So why did you kill Keith Shackleton?

DAVIS: I'm thinking that maybe I should talk to a lawyer before I answer any more questions.

M.P. (Firmly): I said, why did you kill Keith Shackleton?!

DAVIS: Shouldn't I talk to my lawyer first?

M.P. (Loud and firm): *LOOK DAVIS. I SAID WHY DID YOU KILL KEITH SHACKLETON? AND THIS TIME I WANT SOME STRAIGHT ANSWERS. DO YOU READ ME SAILOR?!*

DAVIS (Convinced his request will go unheeded): Because the son of a bitch welshed on his thirty dollar bet with me.

One would hope that if this had been the fact pattern, at least one Justice in the five Justice majority would have joined the concurring Justices in concluding that running roughshod over an ambiguous request is itself coercive, very much like Danny Escobedo's ignored request in *Escobedo v. Illinois*.[37] Perhaps the Court could still reach that result on grounds that the hypothesized confession was in fact coerced, as opposed to merely conclusively, presumptively coerced. Precipitously reaching out to decide a question not presented by the record, however, certainly set confession jurisprudence back significantly.

VI. GAUGING THE SEVERITY OF THE PROBLEM

If one believes that a legally uncoerced confession is "an unmitigated good," the Court's current jurisprudence probably only requires minor tweaking. On the other hand, if one's belief is that "a prisoner should not be made the deluded instrument of his own conviction," the Court's jurisprudence probably needs some serious root and branch retooling. The current jurisprudence does not likely allow too many legally coerced confessions through, except perhaps those cases analogous to the *Davis* hypothetical[38] or the *Quarles* case (Officer points gun at suspect, does not give *Miranda* warning, and says "Where's the gun"?).[39] Theoretically, in those cases, it is possible that the Court could hold the confession to

37. 378 U.S. 478, 481 (1964).
38. *See supra* Part V.
39. *See supra* Part I.

be factually involuntary, though that is surely not a secure backup.[40] Nevertheless, for the most part the Court's jurisprudence does not permit the admission of confessions that are the equivalent of legally compelled confessions.

On the other hand, any student of criminal procedure can tick off a large number of cases where the accused has been made "the deluded instrument of his own conviction." To the extent that this is bothersome, it is mostly out of a sense that this is not the way the adversary process is supposed to work. That is, some of us believe that once a defendant is arrested, the police should attempt to convict him by evidence other than that tricked or cajoled from his own mouth.

Ultimately, the latter view should be supported. Coerced confessions are a problem, but they are not the only problem. *Miranda*, to a greater or lesser extent, takes care of the problem of coercion. It does not, however, even purport to deal with compromising the adversary process. But it should.

VII. FIXING THE PROBLEM

To fix the problem, *Miranda* should be reconceptualized as a Sixth Amendment right to counsel case. If it were, and one or two other cases were appropriately tweaked, *Miranda* could more adequately protect the adversary process. It is worth noting that once the Sixth Amendment takes effect, the police may not deliberately elicit a confession. It does not matter whether the defendant is in custody or even subject to interrogation. So long as the police deliberately elicit a confession—even through false friends who are cooperating with the police—the confession is inadmissible.[41]

There can be no question that once adversarial positions harden, neither side should be able to surreptitiously seek information from the other side. Consider the following hypothetical: Alan, who is on trial for first degree murder, persuades his friend Bob to listen in on a prosecutorial strategy session. Bob, a friend of the attorney general, Charles, arranges to drop by for lunch when he knows that Charles and his colleague, Donna, will be discussing the case. Bob persuades Charles and Donna to let him join them for lunch while they discuss the case. During the

40. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986).

41. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 164–66 (1985); Massiah v. United States, 377 U.S. 201, 202–03 (1964).

discussion, Charles and Donna conclude that they should try very hard to strike a deal for murder in the second degree, but, if Alan adamantly insists on a trial, to accept manslaughter. Bob reports this conversation to Alan, who in turn tells his own lawyer, Elana, to accept nothing greater than manslaughter during negotiations. Subsequently Charles yields and Alan pleads guilty to manslaughter.

Surely there can be no question that Bob's behavior is grossly unethical and probably criminal. In a fair trial, what is sauce for the goose should be sauce for the gander. If Alan cannot surreptitiously get information from Charles, Charles should not be able to get surreptitious information from Alan.[42]

The issue is: When do the parties become adversarial? Conventional wisdom suggests that it is at the onset of official judicial proceedings. But this has not always been the rule. In *Escobedo v. Illinois*, the Court held that when the proceedings move from "investigatory to accusatory," the right to counsel and the adversary process begins.[43] Of course, the Court retreated from this in *Miranda*; but, if the Court was right the first time, one can always hope for a return to wisdom.

The Court was right in *Escobedo*. First, the police may not arrest without probable cause. If they do, a voluntary confession in full accord with *Miranda* may be inadmissible.[44] Second, probable cause is precisely the standard that a grand jury must satisfy in order to justify an indictment that would trigger the right to counsel.[45] Quite frankly, when a police officer grabs a suspect by the scruff of the neck, handcuffs him, and hauls him down to the police station, it is nonsense to pretend that this is nonadversarial. Consequently, *Miranda* should be reconceptualized as a right to counsel case.

Let us now look at what might flow from this characterization. At some level, the defendant may be no better off. Sixth Amendment cases are offense-specific. Thus, if *Miranda* was only a Sixth Amendment right, the police could question an arrested subject, who had *already* invoked his *Miranda* rights, about any crime for which he was not arrested. Consequently, in addition to being a Sixth Amendment case, the *Miranda* prophylactic rules would have to remain to protect against genuinely coerced confessions under the Fifth Amendment.

But in some particulars, the Court has refused to treat Sixth Amendment

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42. *Cf.* Weatherford v. Bursey, 429 U.S. 545, 557–58 (1977) (reversing the Fourth Circuit's per se rule forbidding an undercover agent from meeting with a defendant's counsel, so long as the agent did not receive privileged information that otherwise would have implicated the defendant's Sixth Amendment right to counsel).

43. 378 U.S. 478, 492 (1964).

44. *See, e.g.*, Taylor v. Alabama, 457 U.S. 687, 694 (1982).

45. *See, e.g.*, *Massiah*, 377 U.S. at 206.

rights as any different from Fifth Amendment rights. In *Patterson v. Illinois*, for example, the Court held that *Miranda* warnings were sufficient protection to an indicted murder suspect.[46] Two factors influenced the Court. First, counsel did an incredibly poor job of explaining what additional warnings should be given and how they would help.[47] Second, the Court emphasized the minimal role that counsel could play during interrogation. In essence, the Court did precisely the opposite of what is being advocated here. The Court reduced counsel's role to preventing coerced confessions rather than increasing counsel's role under *Miranda* to what the Sixth Amendment should embody.

Specifically, the following words should be added to the *Miranda* warnings after being informed of the right to counsel (including appointed counsel): "In deciding whether to accept counsel, you should understand that policemen like me frequently try to get people they arrest to confess. You should know that there is a possibility that I, or one of my colleagues, will do that. A lawyer can help protect you from that."

Of course, the Court as a whole probably thinks that suspects have too much rather than too little protection.[48] Consequently, it is highly unlikely that this proposal will be implemented any time soon. Nevertheless, such a change would bring us closer to the adversary model we are supposed to live by.

VIII. CONCLUSION

The proposal advocated in this Article will not eliminate all confessions. It will not even eliminate all confessions obtained by making the suspect "the deluded instrument of his own conviction." For example, the result in *Colorado v. Spring* is not likely to change.[49] The right to counsel is offense specific, so that right would give him no extra protection when questioned about a separate crime. Thus, Spring, unless he asked for counsel as a result of the beefed up *Miranda* warnings, would still be subject to questions about murder even though he was arrested for gun

46. 487 U.S. 285, 296–98 (1988).
47. *Id*. at 295 n.7.
48. *See, e.g.*, Davis v. United States, 512 U.S. 452, 462 (1994); *supra* Part V. Although Justice O'Connor, who wrote the opinion, and Chief Justice Rehnquist, who joined it, are no longer on the Court, there is no reason to believe that Chief Justice Roberts and Justice Alito will have significantly different views on the question—though one can always hope.
49. *See supra* Part III.

running. And, of course, if the suspect were not yet in custody, obviously the adversary process would not have begun. Thus cases like *Mathiason*[50] will remain the law and perhaps even be expanded by more and more police stratagems not counted as custodial arrests.[51]

Nevertheless, this proposal does come closer to recognizing the nature of the adversary system. It also strikes a decent balance between not making a suspect "the deluded instrument of his own conviction" and treating "uncoerced confessions as an unmitigated good." It will allow some, though assuredly not all, uncoerced confessions to be admitted. At the same time, it will sometimes, but not always, prevent a suspect from becoming "the deluded instrument of his own confession." It is too bad that the current Court will not take it seriously.

50. Oregon v. Mathiason, 429 U.S. 492 (1977).

51. *See, e.g.*, Yarborough v. Alvarado, 541 U.S. 652, 664–65 (2004) (holding that suspect was not in custody when the police had suspect's parents bring him in for questioning, denied the parents the opportunity to participate in the meeting, and held the suspect until he confessed, whereupon the police released him).