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Criminal Justice and the Rule-Making Power*

HONORABLE J. EDWARD LUMBARD**

The *Miranda*¹ decision of June 1966 and the ensuing debate regarding the effect of that decision on law enforcement is an appropriate starting point for a discussion of the methods which are best suited to enable our courts to bring about many of the needed improvements in the administration of criminal justice. I propose to contrast the Supreme Court's exercise of the rule-making power and its control of standards of evidence with the exercise of its power to interpret and apply provisions of the Constitution to federal procedures and to state procedures.

Let me state my thesis and then examine it in the light of the recent developments regarding the use of confessions obtained by in-custody interrogation embodied in the *Miranda*² decision. Of course, up until that time all the state courts and all federal appellate courts judged the admission of confessions by whether they were voluntary in the light of all the surrounding circumstances. No court had held that the failure to give warnings and to advise of the right to counsel, by itself and without more, rendered a confession inadmissible.

It was obvious from the Court's opinion in *Escobedo v. Illinois*,³ that many members of the Court entertained serious doubts regarding in-custody interrogation by the police and the admissibility of any confession resulting therefrom. Although the case turned on the use of Escobedo's confession of murder which had been obtained after he had been denied access to his counsel who had come to the

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

² *Id.*

³ 378 U.S. 478 (1964).

police station, much of what Mr. Justice Goldberg wrote for the majority of five looked like handwriting on the wall for all in-custody interrogations.

What should the Court have done in order to fashion rules for in-custody interrogation? We must, of course, take account of the nature of our federal system.

In my opinion, the Court could and should have used the machinery of the rule-making power for federal criminal cases which Congress gave it in 1940 and which it has used many times since in promulgating and later amending the Federal Rules of Criminal Procedure. While of course any federal rules would bind only the federal courts, they would set an example for state action. In the light of experience under federal rules, and in the States under whatever procedures the States chose to follow, rules and procedures found acceptable and practicable might eventually become the due process standard for judging all state action under the Fourteenth Amendment. It was in just this way that the doctrine of *Gideon v. Wainwright*,⁴ which required counsel to be furnished to indigents in felony trials, developed from the Supreme Court decision of 1938 in *Johnson v. Zerbst*.⁵ Subsequently a provision was inserted in the Federal Rules of Criminal Procedure in 1946, and more than twenty States took voluntary action before the *Gideon*⁶ decision in 1963.

The use of the federal rule-making machinery provides many advantages. In 1964, a distinguished Advisory Committee on Criminal Rules was at work on further revision of the rules under the chairmanship of Circuit Judge John C. Pickett of the Tenth Circuit. The committee consisted of three federal judges, three well-known professors of law and five distinguished practicing lawyers. In addition, Professor Edward L. Barrett, Jr. was the reporter. The practice of the advisory committee, and of all such advisory committees, has been to solicit suggestions from judges and lawyers throughout the country, to publish and distribute their proposals for discussion and further study and to revise the proposals accordingly. With the original Federal Rules of Criminal Procedure this part of the process took three years, and with the most recent

⁴ 372 U.S. 335 (1963).

⁵ 304 U.S. 458 (1937).

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

amendments, which became effective July 1, 1966, it took over two years. Thus the bench and the bar and federal law enforcement agencies are allowed ample opportunity for the submission of facts and opinions, and, what is equally important, they have ample notice of any new requirements which mandate a change in their practices.

After the advisory committee has agreed on its proposals, the rules are passed on by the Committee on Rules of Practice and Procedure, a standing committee of the Judicial Conference of the United States, of which Circuit Judge Maris has been chairman. The proposals are then submitted to the Judicial Conference. Of course they come as no surprise to that body; the twenty-five judicial members of the Conference have received copies of each successive draft, they are consulted and they themselves make suggestions.

With the approval of the Conference the rules then go to the Supreme Court. If the Court approves, the Chief Justice then transmits the rules to the Congress and they may become effective not sooner than ninety days after such submission to Congress. The latest amendments were submitted February 28, 1966, with the provision that they would be effective July 1, four months later.

The Supreme Court has exercised the power to fashion rules for the admission of evidence in criminal cases since its earliest days. In *McNabb v. United States*,⁷ where the Court excluded confessions obtained after protracted interrogation of the defendants before their arraignment, Mr. Justice Frankfurter wrote:

The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory power over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions . . . and in formulating such rules of evidence in federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

And more recently we find Mr. Justice Black, writing for the Court in *Hawkins v. United States*,⁸ where the Court adhered to the rule

⁷ 318 U.S. 332, 341 (1943).

⁸ 358 U.S. 74, 78 (1958).

excluding the testimony of the defendant's wife, upon the defendant's objection:

But Congress or this Court, by decision or under its rule-making power, 18 U.S.C. Sec. 3771, can change or modify the rule where circumstances or further experience dictates.

After Congress, in 1940, had given the Supreme Court the power to prescribe "rules of pleading, practice and procedure with respect to any or all proceedings prior to and including verdict" of a jury or judgment of the Court, or a plea of guilty, in criminal cases,⁹ the well settled power of the Court to fashion rules of evidence was expressly confirmed in Rule 26 of the Federal Rules of Criminal Procedure, effective in March 1946, in these words:

The admissibility of evidence and the competence and privileges of witnesses shall be governed, except when an Act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Moreover, these federal criminal rules of 1946 did deal explicitly with evidence in Rule 41 which lays down requirements regarding search warrants and which provides for a motion to suppress any evidence where the property has been illegally seized without a warrant, or under a warrant which is insufficient, or where the property was not described in the warrant, or where there is a failure of probable cause to issue the warrant, or where the warrant has been illegally executed.

Thus, after *Escobedo*¹⁰ in 1964, when the Supreme Court was petitioned to review cases involving in-custody interrogation it could have chosen either one of two well-defined methods for dealing with the problem in federal cases. It could have referred the question to the Advisory Committee on Criminal Rules which was then considering further amendments to these rules, or it could have announced a new rule of evidence for federal cases. I submit that there was no need whatever for the Court to take the constitutional route and discover a new rule by a novel interpretation of the Fifth and Sixth Amendments. There was even less reason to go one step further and engraft the newly discovered constitutional requirements

⁹ 18 U.S.C. § 3771 (1964).

¹⁰ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

upon state criminal procedures by way of the Due Process Clause of the Fourteenth Amendment.

There are several reasons why changes such as those which were made in the *Miranda*¹¹ decision and those which must follow as a consequence should be made by announcing new rules of evidence rather than by thrusting a constitutional straitjacket on both federal and state courts.

First, if it had been a rule of evidence that confessions could not be received unless the warnings had been given then such a rule could have been changed or modified by the same rule-making process, or by Act of Congress, in the light of experience. We do know that many prosecutors, including Frank Hogan of New York County, are finding that *Miranda* is preventing the solution of many serious crimes such as homicides.

Second, the *Miranda* decision holds only that evidence must be excluded unless certain warnings have been given in advance of taking any statement from a defendant in custody. The decision does not and cannot directly reform and supervise police action. As the *Miranda* decision is a rule of evidence it should have been treated as a rule of evidence.

Third, as the *Miranda* decision represented a complete break with all past procedures, it was all the more desirable to see how the new rule of evidence would affect prosecution of federal crimes before deciding whether it was a denial of due process for the States to receive confessions where *Miranda* warnings were not given. Until the Court announced its *Miranda* discoveries no jurisdiction in this country or anywhere in the world barred the use of confessions in the absence of such warnings. The rule in this country had always been that the only test was whether the confession was voluntary.

Fourth, had the *Miranda* decision been introduced as a rule of evidence for the federal courts alone, the States would have been left free to experiment with other ways of handling the admittedly difficult problems of reducing to a minimum the possibilities of coercion during in-custody interrogation.

Although the 1914 decision of *Weeks v. United States*¹² which announced the federal rule that evidence illegally obtained would

¹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹² 232 U.S. 383 (1914).

not be received in a trial was not binding on the States, in due course some of the States later followed the federal rule. Consequently, by the time the Supreme Court finally held in *Mapp v. Ohio*¹³ that due process required the States not to receive illegally seized evidence, it was apparent that the rule would not cripple law enforcement. The requirement that counsel be provided in felony cases where the defendant is unable to retain counsel is an even better example of Supreme Court leadership. The rule was announced for the federal courts in 1938 in *Johnson v. Zerbst*,¹⁴ and was soon followed by many States. When *Gideon*¹⁵ was argued in 1963, twenty-two States supported reversal of the Florida conviction, an impressive demonstration that the rule was workable. The Supreme Court decision was unanimous in holding that the Florida conviction must be reversed as Gideon's trial for felony, without the counsel for which he had asked, was a denial of due process.

Fifth, if it should turn out that police adherence to the new ritual makes impossible the solution of many serious crimes, and the prosecution of those thought responsible, the new rule cannot be modified under ordinary rule-making procedures. The Court has imbedded it in the concrete of constitutional construction and it can be blasted out only by an overruling decision of the Court or by constitutional amendment. I should mention one additional way in which the States might be relieved and that is if the Congress were to provide otherwise under the exercise of its express power under Section 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the provisions of the Amendment.

Sixth, the Court's indulgence in constitutional decision-making, rather than adopting rules fashioned under the rule-making power, deprives the Court and the country of the benefit of the considered views and experience of other federal judges, of state judges, members of the bar and law enforcement officers. The Court thus loses the benefit of the views of those who have a broader and deeper involvement and knowledge than the nine members of the Court can possibly have.

Even Mr. Justice Douglas has recently taken the position in dissenting from the Supreme Court promulgation of the amendments to criminal rules that the responsibility for issuing the rules should

¹³ 367 U.S. 643 (1961).

¹⁴ 304 U.S. 458 (1938).

¹⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

rest with the Judicial Conference and not with the Supreme Court. In his dissent he said:

“Members of the Judicial Conference, being in large part judges of the lower courts and attorneys who are using the rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.”¹⁶

It is true that in his opinion in *Miranda* the Chief Justice indicated that the States still had responsibility in this area and that they had the power to regulate the protection of the privilege.

We cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional strait-jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.¹⁷

Yet the Court knew full well that the American Law Institute, after laboring eighteen months, had already published tentative proposals for a pre-arraignment code, which were distributed on March 1, 1966, more than three months before the *Miranda* decision was announced. These proposals had the scrutiny of an advisory committee of forty members of which fifteen were members of Committees of the American Bar Association Criminal Justice Project. The proposals were drafted and studied in much the same way that the Advisory Committee of the Judicial Conference had drafted the Federal Rules of Criminal Procedure.

The Court's complete disregard of these proposals points to reason number seven, which is that by using the decision route, instead of the rule-making route, the Court provided for only a small fraction of the many problems which follow in the wake of so complete a break with the past.

Any comprehensive consideration of these problems, such as rule-making permits, would consider in addition the circumstances under

¹⁶ AMENDMENTS TO RULES OF CRIMINAL PROCEDURE, 383 U.S. 1090 (1965).

¹⁷ *Miranda v. Arizona*, 384 U.S. 426, 467 (1966).

which interrogation could be conducted before arrest and custody, the protection which should be accorded while in custody, the records which should be kept, the circumstances under which the defendant may waive his rights and what provision should be made for recording this and any statement which is obtained thereafter. The American Law Institute proposals dealt with these matters. Work on this code is now going forward to ascertain what modifications are required by *Miranda* and with what subjects the code can and should deal in light of that decision. For example, can the trial court be given discretion to admit confessions where it can be said that any neglect in giving any part of warnings was insubstantial and harmless and where there would be a failure of justice if the confession was not used?

A further question is the extent to which the prosecution should be permitted to use tangible evidence such as a gun, a knife, or a body which has been found as a result of a confession which for some reason it cannot use.

Reason number eight is that in promulgating rules the Court must specify an effective date which is some time in the future. As the rules are a matter of common knowledge long in advance of such effective date, law enforcement officers are thus given plenty of time to prepare the adjustments in practice and regulation which may be required. Promulgation by decision in particular cases usually means that new procedures must go into effect immediately, with no advance notice whatever. In addition the Court must decide the exact date to which the decision is retroactive. While the Court promptly limited *Miranda* to all trials commencing after the date of the *Miranda* decision, it did have the effect of frustrating the prosecution of many cases involving serious crimes, where confessions had been obtained without warning and the cases had not yet been tried or disposed of.

In short, I can see no good reason for announcing such rules of evidence as *Miranda* by way of court decision. In no event would the Court be foreclosed from casting the rule in constitutional terms if and when the point is reached, after suitable experience by the States, when it can say that due process then requires the observance of certain procedures by all States. This is precisely what occurred regarding the use by the States of illegally obtained evidence and also regarding assignment of counsel in felony cases. But the reverse process of starting with constitutional declaration is far more difficult

to undo or modify if later experience should teach the advisability of change.

Can the States, through their legislatures or their courts, take any action which may make it more desirable for the Supreme Court to withhold for a suitable time decisions which result in new requirements in state criminal procedures which are cast in constitutional terms?

Of course, many of the States are moving in this direction by revisions of their codes of criminal procedure, through commissions appointed to prepare such revisions. I suggest this process would move forward more rapidly and more certainly if the States, by legislative action, or constitutional amendment where necessary, empowered their highest courts to draft and promulgate rules of criminal procedure as the Congress has empowered the Supreme Court to do.

The next step would then be for the state supreme courts to make wise and constant use of this power, through committees of their bar and their judiciary.

We have learned that improvement of our criminal procedures is too sporadic and uncertain where it has been left solely to legislative action supplemented only by occasional court decisions which can govern only particular and very limited areas of the criminal process. Under the rule-making power as authorized by Congress, the Court has the initiative, the bar through the Judicial Conference does most of the work, the Court retains a veto power and the power of proposal, and the Congress has the ultimate veto power. In addition the Congress still retains undiminished its power to legislate. Thus the rule-making power is a joint undertaking of all those who have a special responsibility for the administration of criminal justice. All the reasons which support the proposition that the Supreme Court should promulgate its Code of Criminal Procedure through the process of making rules, I submit, are also reasons why the States should deal with the many current problems of criminal justice by having such rules formulated under the supervision of their highest court, subject to the approval of, and modification by, the state legislature. The rule-making process is thus a joint undertaking of all the agencies of government and the bar.

Our experience with criminal justice over the past one hundred years teaches us that the improvements required by changing times,

and made possible by a more affluent society simply will not come about without the active supervision of the courts. This is the responsibility of the courts—to lead the way, to suggest those methods which will best enable the States, whose ministers of justice they are, to provide the laws, the rules and the machinery so that law enforcement may be sufficiently effective and individual rights will be suitably observed.

My preliminary research discloses that only in twelve States (including New Jersey, Massachusetts and Virginia) do the courts have power to enact rules of procedure. I doubt that any of these States have attempted to deal with the admission of evidence secured through police interrogation; and there may be some doubt whether the enabling statute gives them authority to do so.

While the acceptance of this responsibility and its discharge through supervision of the rule-making power is, of course, some additional burden for an already busy court, the responsibility can be so delegated and organized that it is reduced to a minimum. In any event, the Court is really dealing prospectively and wholesale with problems which it is bound to face at some time. It is far better for all concerned to attempt to formulate solutions of the principal problems in a thorough, considered way than it is to deal with them piecemeal and retail.

Moreover, the rule-making power provides a means of continuing supervision. As new problems arise and experience shows that amendments are required the machinery is already at hand and can be set in motion without delay. Rule-making as a constant and continuing process also provides a means of using in a constructive way the knowledge and learning of the law school professors.

From a reading of recent Supreme Court opinions and the views of the individual Justices it is easy to see some areas which the Court may soon be considering further, such as the handling of charges against juveniles, the obligation of the prosecutor to disclose evidence and information to the defense, the State's obligation to advise of the right to counsel in misdemeanor cases and the obligation to furnish counsel in those cases, the need for hearings and counsel in procedures for revocation of probation and parole.

I will add one item which I believe cries out for action by the appellate courts, and that is delay. Delays at every stage of the

criminal process are increasing and this trend will continue to escalate as counsel are brought into many more cases at an earlier stage and are provided also at later stages. Trial and appellate courts, through better administration and by rule making, can meet this challenge, and even reduce present delays, if they are given the power and the means to do so. Among the needed means are more trial court judges and more better qualified supporting personnel and administrative assistants for all the courts.

Judges ordinarily are too bashful and backward about stating the needs of their courts and asking for what the courts need. We cannot be expected to keep up the quality of our work, and accept added obligations of the nature I am suggesting unless we are given the help and the money to do the job.

If delays in the disposition of criminal cases keep mounting, with the inevitable adverse effect on the administration of criminal justice, the courts will get the blame. We had better keep the record straight from the beginning and speak our needs so that we may be adequately prepared instead of waiting until we are overwhelmed.

While considerable progress has been made toward making the administration of criminal justice a process which more fairly judges those charged with crime and more fairly treats them if they are found guilty, we must recognize that the net result of the past six years has been to make it more and more difficult to arrest and prosecute those suspected of crime and prove the guilt of those who have offended. Only by adopting comprehensive plans can we begin to restore to the police and prosecutors the means of getting evidence and proving their case in court. Piecemeal decisions which one by one chip away at the powers of the police, without preserving their ability to act when serious crimes are committed, should give way to the consideration and adoption of procedures, rules and statutes which are designed to keep the balance true between enforcement of law and the safeguarding of individual rights.

The shopkeeper ought not to feel that his life and property can be protected only by his own gun; the juror ought not to feel that he must convict every defendant because court decisions have gone too far to prevent offenders from being brought to justice; the judges ought not to feel that they must compensate for procedures which they dislike, and sentences which are too harsh, by finding some way

of reversing convictions, with the result that law enforcement everywhere must be conducted under new restrictions.

I hope that, as the result of all the studies now under way, including the ABA Minimum Standards Project for Criminal Justice, the judges of our country will conclude that by their acceptance of additional responsibility they can lead the way toward more effective and just enforcement of the criminal laws.