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“PLAYING GOD”: 5 TO 4

(THE SUPREME COURT AND THE POLICE)*

FRED E. INBAU

Over the past several years, whenever the Supreme Court of the United States rendered a decision that imposed a new restriction upon the police, many persons were heard to say: “If only the police, prosecuting attorneys, the organized bar, the state courts, or the legislatures had taken the initiative and done something about the situation there would have been no need for the Court to step in.” To some of us this always seemed to be a naïvé [sic] explanation of the motivation of a majority of the Justices.

Recent developments have established, to my satisfaction, the fact that the Court’s majority has been determined all along to do its own policing of the police *regardless* of what any other group or any other branch of government might do by way of attempting to solve the law enforcement problems about which the Court has been so concerned. The Court’s one man majority was going to continue to “play God”. And “play God” it did in its June, 1966 decision in *Miranda v. Arizona* (384 U.S. 436).

For the past several years an American Law Institute committee, composed of lawyers, law teachers, and judges, with divergent viewpoints upon the subject, has devoted a tremendous amount of time and effort toward the formulation of a proposed tentative legislative code prescribing interrogation procedures for the police to follow. These endeavors of the American Law Institute began a year before the Court’s 5 to 4 decision of June, 1964 in *Escobedo v. Illinois* (378 U.S. 478), and the tentative draft of the Committee’s proposed code had been printed and disseminated at least three months before the *Miranda* decision.

As the Institute’s committee was working on its project, so was a comparably composed American Bar Association Commit-

* Originally printed in 57 J. CRIM. L., CRIMINOLOGY & P.S. 377 (1966).

tee on Minimum Standards of Criminal Justice. One of its subcommittees had been assigned to deal specifically with the police interrogation problem and to make recommendations, and it was working closely with the Institute's committee toward that end. Its existence and activities were also known to the Court long before the *Miranda* decision.

The President's Commission on Law Enforcement and the Administration of Criminal Justice was also deeply engaged in a study of many aspects of criminal investigation that inevitably would have produced facts and figures helpful to a full consideration of the interrogation-confession problem. And other studies were under way, such as those by the District of Columbia Crime Commission and the Georgetown Law Center. Also, the Ford Foundation had recently awarded a grant of \$1,000,000, in part, for a study of arrests and confessions in New York.

Here, then, was action—in truly democratic fashion—seeking to find a proximate solution to some very difficult problems.

All of these efforts would have resulted in a full airing of the interrogation-confession problem, based upon practical as well as legal considerations. But a one-man majority of the Court in *Miranda* “pulled the rug” from underneath all of these studies and research groups, and effectively foreclosed a final evaluation of their ultimate findings and recommendations. It did so by branding as unconstitutional a substantial segment of the very practices and procedures that were under consideration by these various groups. As Justice Harlan said in his dissenting opinion in *Miranda*, “the legislative reforms” that may have emanated from such group efforts “would have had the vast advantage of empirical data and comprehensive study” and “they would allow experimentation and use of solutions not open to the courts”. Also, in Justice Harlan's opinion, “they would restore the initiative in criminal law reform to those forums where it truly belongs”.

With its *Miranda* limitations upon the validity of a suspect's waiver of the Court's newly conceived “rights” about which he must be informed, there will be many instances where police investigators are deprived of an essential means for the solution of a substantial percentage of the serious crimes that now plague this country. Only by a deliberate evasion of the *Miranda* rules might the police prevent this consequence; and this they should not do! Legally, as well as morally, the police have no alterna-

tive but full and good faith compliance. Whatever deleterious effects their compliance may bring with respect to the safety and security of law abiding citizens do not constitute a responsibility with which they should concern themselves. To use the words of one of the Supreme Court Justices in another context, "There are others who must shoulder much of that responsibility".

Considering the complexity of the interrogation-confession problem, a summary 5 to 4 nullification of much of the aforementioned group efforts directed toward the preparation of legislative guidelines is awesomely inconsistent with fundamental democratic concepts.

It's more like "Playing God: 5 to 4".

