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THE BASES OF JUDICIAL DECISION-MAKING: THE NEED FOR A REAPPRAISAL

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When Judge John Sirica announced that the basic purpose of the Watergate trials was to bring to light the truth and only incidentally to determine the guilt or innocence of the defendants,¹ the erratic subjectivity of judgment attributed to many of our activist jurists in recent years became obvious to even the most casual observer of our courts. Prior activist courts have been content to pass on the sapience of legislative acts and impose constitutional doctrines upon subjective individual judgment. However, Judge Sirica advanced judicial activism one step further when he used “end justifies the means” jurisprudence to dislodge the keystone of Anglo-American justice, i.e., the accusatorial trial procedure.

Under our legal system the sole purpose for bringing a person to trial is to determine whether or not the evidence proves that the individual committed the specific crime with which he has been charged. To this end, strict rules of evidence have been adopted to protect the sanctity of our accusatorial system against the possibility of inquisitorial encroachments by the government. It is, therefore, a perversion of our criminal court system to use it for any purpose other than to try a particular defendant on a particular charge. Judge Sirica’s comments on the Watergate trials present the student of the courts with a clear manifestation of the need for re-examining the merits of the doctrine of judicial self-restraint.

Operationally, the doctrine of judicial self-restraint implies the recognition by our jurists that the structural-functional limitations of our court system mandate a detachment from

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intervention into the affairs of state and local government.\textsuperscript{2} The doctrine also posits the belief that, "[t]he Court is the place for principled judgment, disciplined by the method of reason familiar to the discourse of moral philosophy, and in constitutional adjudication, the place for only that, or else its insulation from the political process is inexplicable."\textsuperscript{3}

The purpose of this article is to examine one of the major considerations for judicial self-restraint, namely, that our courts do not have the adequate fact-finding facilities necessary for making enlightened policy choices.\textsuperscript{4} This will be accomplished in the context of one controversial Supreme Court decision in the area of criminal procedure—\textit{Miranda v. Arizona}.\textsuperscript{5} Such a narrow focus should not distract the reader from the author's major premise, which is that judicial self-restraint should become the norm for judicial decision-making in all areas of the law.

\section{Supreme Court Suppositions Regarding Police Interrogations Practices}

The major hypothesis upon which the \textit{Miranda} decision rests is that police interrogation methods in general are harrowing and violative of a suspect's rights against self-incrimination.\textsuperscript{6} By imputing illegal motives to police interrogators, the Court apparently felt that certain universal and unsavory practices were being employed to secure custodial statements. These practices are commonly termed the "third degree."\textsuperscript{7}

\begin{itemize}
\item \textsuperscript{2} Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, \textit{Harv. L. Rev.} Oct. 25, 1893, at 17 \textit{passim}.
\item \textsuperscript{3} A. Bickel, \textit{The Supreme Court and the Idea of Progress} (1970).
\item \textsuperscript{4} See, e.g., the comments of the late Justice Frankfurter in Sherrer v. Sherrer, 334 U.S. 343, 365-66 (1948) (dissenting opinion).
\item \textsuperscript{5} 384 U.S. 436 (1966).
\item \textsuperscript{6} Id. at 445-66.
\item \textsuperscript{7} In the context of this paper, the term "third degree" means the use of physical or psychological coercion to extort confessions or statements. Etymologically, the word is believed to be derived from the ceremony conferring the third degree of Masonry—the Master Mason. \textit{See The Third Degree}, 21 \textit{Encyclopedia Britannica} 1049 (1972). Professor Wigmore took note of an evolution in the meaning of the term, i.e., from a term connoting the use of some sort of violence in securing confessions to one applicable to "any process of simple interrogation." \textit{See} 3 J. Wigmore, \textit{Evidence in Trials at Common Law} 314 (3d ed. rev. 1940). For some representative publications on the subject \textit{see} H. Barnes, \textit{The Story of Punishment} (1930); Parrot, \textit{Approval and Disapproval of the Third Degree Practices}, 28 J. Crim. L. C. & P. S. 526 (1937); Booth,
The Court premised its supposition on three principal sources of empirical data: (1) police manuals and texts, (2) the 1931 report of the National Commission on Law Observance and Enforcement, and (3) prior confession cases.

A. Police Manuals and Textbooks

In *Miranda*, the Court cites the fact that generally police interrogations are conducted in a setting of "privacy" and "secrecy." As a means for discerning what transpires within the inner sanctum of the station house, the Court looks to several "police manuals and texts" that describe and prescribe interrogation procedures. In dicta, the Court delineates several psychological procedures recommended in police textbooks for successfully interrogating suspects and expounds upon the dangers of these procedures.

The Court seemingly assumed that the corroborating textbooks and manuals were extensively utilized by law enforcement officers. This, however, was not generally the case. In 1966 there were approximately one hundred institutions of higher learning throughout the country offering police-oriented higher education programs. Most of these courses of instruction were housed in two-year degree programs and nearly one-third were in the California State College system. The author had seven years police experience with three different agencies

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8. One could assume that a Justice's prior assessment of police interrogation practices would most likely be evident in his later decisions relative to the same topic. For example, Justice Douglas in his concurring opinion in *U.S. v. Carignan*, 342 U.S. 36, 46 (1951) stated: "What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country . . . ."


10. *Id.* at 448-49.


prior to the *Miranda* decision. Much of this work was investiga-
tive in nature. During this interval the author never had the
casion to utilize any of the materials cited by the Court. In
fact, he was not even aware of them. Generally, investigative
techniques were learned from experienced personnel.

The weakness of the Court's argument was noted by one
Justice in dissent when he stated, "[n]ot one [textbook or
manual] is shown by the record . . . to be the official manual
of any police department, much less in universal use in crime
detection." 14

B. Report of the National Commission on Law Observance
and Enforcement—1931 15

As further evidence of what possibly took place in the "se-
crecy" of the interrogation room, the Court cited the findings
of the 1931 Wickersham Report. 16 This report was the product
of the Wickersham Commission that was appointed for two
years (June, 1929 to June, 1931) to study the problem of crimi-
nal law enforcement in the United States. It was the first com-
prehensive investigation of crime and criminal justice in Amer-
ica. 17

After examining some eighty books, articles, and numerous
press stories, studying the results of some sixty-seven appellate
court cases in which the use of third-degree methods to extort
confessions was evident, and scrutinizing police interrogation
procedures in fifteen cities, the Commission concluded that the
use of the third-degree was extensive in the United States. 18 In
another report, the Commission criticized police organization,
administration, and personnel. 19

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15. U.S. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT REPORT, 4
vols. (1931) [hereinafter cited as the WICKERSHAM REPORT].
16. 384 U.S. 436, 445-48 (1966). Specifically, the Court cites IV WICKERSHAM RE-
17. See Reports on the National Commission on Law Observance and
Enforcement, 30 Mich. L. Rev. 1 (1931) for an excellent analysis of the Commission's
fourteen reports.
18. See Report on Lawlessness in Law Enforcement, supra note 16, at 4. See also
Camp, Lawlessness in Law Enforcement—No. 11, 17 A.B.A.J. 865 (1932) for similar
comments.
19. Report on Police, supra note 15. For a good analysis of this report, see Vollmer,
Although the Commission put forth a commendable effort under adverse conditions, a thorough analysis of the Report on Lawlessness in Law Enforcement reveals serious methodological defects. For example, in reaching the conclusion that third-degree methods were widely utilized by the police, the Commission conducted very little direct empirical investigation of factual situations. Instead, it relied principally on secondary data sources. One critic of the Report states, "the reliance of the Commission's consultants upon 'books and articles' written by others, to amplify the negligible evidence of the relatively few authenticated cases, is both unscientific and misleading."

In seeking information relative to current police interrogation procedures, it would be somewhat questionable to place any reliance upon a report based primarily upon secondary sources and rendered over three decades ago.

C. Past Confession Cases Decided by the Court

The "incommunicado police dominated atmosphere" within which custodial interrogation takes place was the focal point of the *Miranda* decision. In dicta, the Court stated that even without physical or psychological coercion, "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Heavy reliance was, therefore, placed upon the facts in past and contemporary confession cases as a means of supporting the Court's contention.

The dangers inherent in using a court's past experiences as a means of authenticating a blanket violation of individual rights is exemplified in the following statement by a federal district court judge:

The Court, by virtue of its selectively controlled calendar, is unfortunately the recipient of a disproportionate number of police brutality cases. Conversely, the overwhelming majority of cases which involve no instances of police brutality or

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23. Id. at 466.
oppression of rights are . . . seldom, if ever, presented to the Court.24

If the Court had adequate research support, what data relative to police interrogation practices would have been available from the various congressional committees and governmental commissions for the Court's consideration?25 The remainder of this article will be directed toward an examination of such resource materials.

II. PUBLIC INVESTIGATIONS OF POLICE INTERROGATION PRACTICES

A. The 1943 House Judiciary Subcommittee Hearings26

In 1943 the United States House of Representatives conducted hearings in regard to the controversial Hobbs Bill, which proposed the nullification of the equally contentious McNabb rule. This rule resulted from the decision in McNabb v. United States,27 which held that evidence obtained between arrest and arraignment was not admissible in federal cases, if a defendant had not been immediately taken before a magistrate. These were the first hearings of any consequences pertaining to improper police practices and procedures subsequent to the Wickersham Report.

No credible empirical evidence of improper police practices was presented during the five-day session. Several opponents of the Hobbs Bill representing organized labor expressed opposition to illegal incommunicado detention generally. In order to buttress their argument, references were made to a case in which F.B.I. agents allegedly utilized the "evil effects" of unlawful detention to secure confessions from strikers.28 The crux


25. In only one instance was any of these sources of data cited by the Court in Miranda. See 384 U.S. 436, 446 (1966).


27. 318 U.S. 332 (1943).

28. Anderson v. United States, 318 U.S. 350 (1943). In this case several union members were arrested and convicted for blowing up TVA power poles that were servicing a struck mine. The union contended that the arrests were part of a plot to break the strike, and convictions resulted from coerced confessions, i.e., psychological coercion emanating from illegal incommunicado detention and prolonged questioning in a "hostile atmosphere."
of the labor spokesmen's position was "that the incommuni-
cado process can be used effectively against organized workers
to defeat their legal rights to struggle for collective bargaining,
when all the usual tricks of strike breaking and union smashing
have failed." The major concern of the union spokesmen
seemed to rest more with the possible utilization of incommun-
icado detention and interrogation as a strike-breaking tool
rather than with improper police practices in securing confes-
sions.

Several attorneys testified against the proposed measure,
however, their testimony appears to have been rooted in their
own subjective fears and preconceptions rather than in con-
crete empirical data. One attorney contended that his client
was "brutally beaten by the police." Questioning by committee
members, however, revealed that this importunity could be
sustained only by the client and his relatives. In any event, the
allegation was not upheld by the court and the confession was
eventually admitted as evidence.

On the basis of these hearings the primary issue during this
period was not police brutality per se, but simply that incom-
municado detainment provides the opportunity for the police
to utilize inhumane methods.

B. Report of the President's Committee on Civil
Rights—1947

The next revelation that something might be amiss in the
inner sanctum of the station house came in 1947, when Presi-
dent Truman's Advisory Committee on Civil Rights reported
that third-degree methods were still being used to extort confes-
sions. The Committee also declared that police brutality,
although not universal, was still an actuality.

The Committee's report was based upon data gleaned from
public hearings and information received from private citizens
and organizations, statements made by witnesses at private

29. 1943 House Hearings, supra note 26, at 87.
30. An example of this bias can be found in the following statement by one attor-
ney: "The police always shove around a suspect, especially a colored man." Id., at 69.
31. Id. at 65-67.
32. U.S. REPORT OF THE PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE
RIGHTS (1947) [hereinafter cited as the 1947 CIVIL RIGHTS REPORT].
33. Id. at 20-27.
conferences and "staff studies." The author, however, could find no evidence that any actual "staff study" of police practices and procedures had been made. Accusations were made of police improprieties, however, no empirical data were presented to support these charges. In fact, the Committee acknowledged that the police had achieved some degree of success in eliminating improper police practices.\textsuperscript{34}

Although praiseworthy as an effort to stimulate the federal government's interest in civil rights, the report offered no empirical evidence that the police were utilizing improper and illegal procedures.

\textbf{C. The 1957 House Hearings Relating to the Mallory Decision\textsuperscript{35}}

The 1957 decision in \textit{Mallory v. United States}\textsuperscript{36} initiated another round of hearings relating to police practices and procedures by the House of Representatives. In \textit{Mallory}, the Court held that a suspect in federal cases must be taken to a magistrate as soon as possible after arrest. Any "unnecessary delay" would invalidate a confession obtained from an accused prior to an appearance before a magistrate. The usual impressive array of witnesses testified for and against modifications of this rule.

From those testifying against any alteration of the \textit{Mallory} rule, the most revealing comments came from an attorney and seven-year veteran of the Washington, D.C., Police Department.\textsuperscript{37} Claiming personal knowledge of what transpired behind the "closed doors" of the station house, the witness advocated that restraints be placed upon the police. He made no allegations that any wrongdoings were being perpetrated by the police at the time of the hearings, but only that they had occurred during his tenure as a police officer. The witness further averred that the "illiterate" and those in the "lower economic-status" were the groups sustaining the impact of civil rights

\textsuperscript{34} Id. at 25.

\textsuperscript{35} \textit{Hearings to Study Decisions of the Supreme Court of the United States Before a Special Subcomm. on the Judiciary}, 85th Cong., 2d Sess. (1958) [hereinafter cited as the \textit{1957 House Hearings}].

\textsuperscript{36} \textit{Mallory v. United States}, 354 U.S. 449 (1957).

\textsuperscript{37} See the testimony of James Scullen, \textit{1957 House Hearings}, supra note 35, at 152-57.
violations by the police. The witness buttressed his point by concluding, "I am utterly convinced that the moment a person is under arrest by the police, he is in hostile hands."\textsuperscript{38}

A lengthy memorandum drafted by a committee of the American Bar Association headed by the distinguished civil libertarian Zechariah Chafee, Jr. was also offered in support of the \textit{Mallory} rule.\textsuperscript{39} However, the document makes no allegations of police misconduct and depicts the \textit{Mallory} rule as being a preventative measure against the possibility of improper interrogation practices.\textsuperscript{40}

Several police officials and other witnesses testified for a modification of the \textit{Mallory} rule. The statements of one attorney were particularly informative as to the practices of the police in Washington, D.C., at that time. Testifying on behalf of the District of Columbia Bar Association's Law Enforcement Council, a committee established by the District Bar Association to hear complaints relating to improper police procedures in the District, the individual downgraded implications of police brutality made by previous attestants. In four years of receiving complaints for the Council, the witness testified that none contained imputations of "police brutality."\textsuperscript{41} The Council's position was that "the Court's fear of illegal 'third-degree' methods by Federal or District of Columbia law enforcement officers . . . was without a basis or foundation in fact."\textsuperscript{42}

The 1957 House hearings afforded some insights into what transpires behind the "closed doors" of the station house. Two general themes, however, pervaded most of the testimony: (1) the need for measures such as the \textit{Mallory} rule to prevent third-degree tactics, and (2) the practical need for a limited period of police interrogation before arraignment. The matter was referred to the Senate.

\footnotesize{\textsuperscript{38} Id. at 155.  
\textsuperscript{39} This memorandum is entitled \textit{On the Detention of Arrested Persons and Their Production Before a Committing Magistrate}. Id. at 261-63.  
\textsuperscript{40} See especially id. at 261-63.  
\textsuperscript{41} Id. at 159.  
\textsuperscript{42} Id. at 158.}
D. The 1958 Senate Hearings Relating to the Mallory Decision

In 1958, Senate hearings were held to deal specifically with the arrest and detention of suspects and confessions obtained during detention. The usual parade of witnesses testified at the hearings, including a prominent judge and a scholar.44

Once again the prevailing theme of those supporting the Mallory rule was the prevention of police wrongdoings, not any allegations that misfeasance was being perpetrated by the police.45 There was only one claim of actual police misconduct, and this was in the form of a letter to the Committee.46 In this correspondence an individual engaged in prison rehabilitative work alleged that defendants in the District of Columbia were being brutalized, coerced and victimized by third-degree methods. Reportedly, the sources for the information were assertions from the witness' clientele. The end result was that the hearings provided no real evidence of police wrongdoing.

E. The Report of the 1961 Commission on Civil Rights

The 1961 Commission on Civil Rights Report was cited by the majority in the Miranda decision as evidence that the police used coercion to elicit confessions. The Court declared that, "[t]he 1961 Commission on Civil Rights found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions' . . . ."48 What was this "evidence" upon which the Commission based its conclusion?

An analysis of the Commission's report reveals that data from several sources were cited as the basis for its assess-

44. Federal District Judge Alexander Holtzoff testified against the Mallory rule and Professor Arthur Sutherland testified for it.
45. This theme is particularly apparent in the statement of one attorney who said: We don't have to fear in this country encroachments on our liberties by evil minded, badly motivated people because we are always alert to them. We have to fear encroachments on the liberty of individuals from well-meaning zealots without understanding.
See the statement of E. Williams, the 1958 Senate Hearings, supra note 43, at 98. Also see the testimony of J. Silard, id. at 155-58 and J. Hogan, id. at 166-69.
46. Id. at 182.
47. U.S. COMMISSION ON CIVIL RIGHTS REPORT, JUSTICE (1961) [hereinafter cited as the 1961 CIVIL RIGHTS REPORT].
ment\textsuperscript{49}—the 1931 Wickersham Report, the infamous Brown v. Mississippi case,\textsuperscript{50} the twenty-one cases reversed between 1936 and 1961 due to allegations of coerced confessions, the successful prosecution of two police officers under the Federal Civil Rights Acts in the 1950's\textsuperscript{51} and the Commission's Alabama Advisory Committee Report.

The major original source of data used by the Commission was the reports received from its fifty state advisory committees, which had been established under the 1957 Civil Rights Act. In its report, the Alabama Advisory Committee was the only reporting body to strongly intimate that the police were using third-degree methods to extort confessions and engaging in other forms of illegal practices.\textsuperscript{52} These conclusions were reached as a result of the committee's perusal of information obtained from questionnaires that had been forwarded to the committee by "well-informed observers" throughout the state. To the 120 questionnaires distributed, there were forty-six responses of which twenty-three reported that the police in their jurisdiction used third-degree methods to extort confessions.

It is interesting to note that "the administration of justice" was only one of the numerous topics considered by the various advisory committees. Only twenty-two states, however, found it necessary to even comment on the topic of police misconduct and many of these remarks were favorable.\textsuperscript{53} Of these, only seven reported instances of police brutality\textsuperscript{54} and only one, Alabama, reported that the police were using third-degree methods to extract confessions.

\textsuperscript{50} 297 U.S. 278 (1936) (where torture was used to extort confessions).
\textsuperscript{51} Pool v. United States, 260 F.2d 57 (9th Cir. 1958) and United States v. Lowery, Crim. no. 13235 S. C. Tex., Feb. 19, 1958. Both of the parties in these actions were small-town police chiefs who used physical coercion to obtain confessions.
\textsuperscript{53} Alabama, Alaska, Arizona, Colorado, Delaware, Idaho, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, and Wyoming.
\textsuperscript{54} Alabama, supra note 52; Delaware—scattered instances of brutality by some "untrained policemen" in the southern part of the state, supra note 52, at 94; Mississippi—many "unbelievable" reports of "atrocities" and "brutalities" by the police; however, no specific instances were cited. Id. at 317; Missouri—some scattered complaints concerning police brutality. Id. at 351; New Mexico—numerous complaints of police brutalizing arrested Indians but none were verified. Id. at 425; South Carolina—more general complaints of police brutality. Id. at 567; and Texas—there were a "few" alleged violations of civil rights by the police. Id. at 696.
The Commission summarized its findings regarding "unlawful police violence" in the United States as follows:

Police brutality—the unnecessary use of violence to enforce the mores of segregation, to punish, and to coerce confessions—is a serious problem in the United States. . . . Yet, most policemen have demonstrated that it is possible to perform their duties effectively without resorting to unlawful violence. . . .

The data utilized by the Commission to formulate this summary came from "the alleged facts in 11 typical cases of police brutality." These "alleged facts" emanated from dicta in Supreme Court cases, press accounts of instances of alleged police brutality, Justice Department files and transcripts, statements of victims, independent studies, minutes from police commission hearings dealing with purported instances of police brutality, and the Commission's own investigations.

In view of the indeterminate and unreliable nature of the materials used by the Commission to reach its findings, it is not possible to draw any sound general conclusions about police interrogation practices from its report. Anyone attempting to resolve questions relating to the seriousness of police misfeasance would have to judge the Commission's findings on the basis of personal values. Perhaps this was the majority's approach in Miranda.

F. 1962 District of Columbia Report on Police Arrest for Investigation

Although it deals only with the procedure practiced by the District of Columbia police in making arrests for investigation and without warrants in felony cases, the Horsky Report provides some insights into police behavior in the District of Columbia. The report contained no allegations of police misconduct. The major recommendation submitted by the Committee, that arrest for investigation be discontinued, was made on the assumption that it would eliminate the possibility of the third-degree. In fact, the Committee took pains to stress the point that it was not alleging misconduct on the part of the

56. District of Columbia, Commissioners' Committee on Arrest for Investigation, Report and Recommendations (1962) [hereinafter cited as the Horsky Report].
57. Charles Horsky was the chairman of the committee conducting the inquiry.
District police. A further manifestation of the Committee's confidence in the District police is perceived by its failure to propose procedures for carrying out its recommendations. Reliance was placed solely on the "integrity" of the District police to practice the new procedures. In the ultimate, the Horsky Committee's recommendations were not proposed as remedial but as preventative measures, i.e., to prevent police misfeasance and not eliminate an existent practice.

The Horsky Committee's work was the last investigation of any consequence regarding police interrogation practices prior to the Miranda decree. In the interest of effectuating a more in-depth analysis of the problem, however, information gleaned from hearings and commission reports subsequent to the Miranda ruling will be offered below as further means for evaluating the Court's assessment of police interrogation procedures in the Miranda decision.

III. PROCEEDINGS SUBSEQUENT TO THE MIRANDA DECISION RELATING TO POLICE INTERROGATION PROCEDURES

A. The President's Commission on Law Enforcement and Administration of Justice—1967

This eighteen-month study of crime in the United States was the most intensive probe of the problem since the Wickersham Report of 1931. The President's Crime Commission did not deal with the subject of confessions or interrogations, but its report contains the supplemental viewpoints of seven Commission members regarding the topic.

The probings of the Commission were conducted by several task forces, one of which carried out a comprehensive study of American law enforcement. This report of the Police Task

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58. See HORSKY REPORT, supra note 56, at 46-47.
59. Id. at 52.
60. Hearings were conducted by the Senate Subcomm. on Criminal Laws and Procedure in March and May of 1966 relative to admitting confessions as evidence. The content of these hearings, however, is inconsequential to this study. See Hearings, Criminal Law and Procedure Before the Senate Subcommittee on Criminal Laws and Procedure of the Committee on the Judiciary, 89th Cong., 2d Sess. (1966).
62. Id. at 94, where the Commission concludes that there is inadequate data for dealing constructively with the problem.
63. Id. at 303-08.
64. U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF
Force, like the general Commission report, does not delve into the issues of station house interrogation or confessions. It does, however, convey some judgments concerning police misfeasance. The document concludes that:

The Commission [the President's Commission on Law Enforcement and Administration of Justice] was not able to determine the extent of physical abuse by policemen in this country since recent studies have generally not been systematic. Earlier studies however, found that police brutality was a significant problem . . . . The Commission believes that physical abuse is not as serious a problem as it was in the past. The few statistics which do exist suggest small numbers of cases involving excessive use of force. Although the relatively small number of reported complaints cannot be considered an accurate measure of the total problem, most persons . . . believe that verbal abuse and harrassment, not excessive use of force, is the major police-community relations problem today.65

It is interesting to note that a newspaper reporter reached the same conclusion a year before the Police Task Force report was released.66

The Police Task Force did find that "excessive force remains a serious problem in parts of the South . . . and still remains as a significant problem outside the South as well."67 The "excessive force" referred to in the report relates to the manner in which the police reputedly dealt with blacks, civil rights workers and people whom they consider to be undesirables. There were no references made to police interrogation practices per se.

In its aggregate report, the Commission states that, "today the third degree is almost nonexistent . . . and few Americans regret its virtual abandonment by the police."68 In noting that many police officers and citizens assume that court decisions

JUSTICE, TASK FORCE REPORT: THE POLICE (1967) [hereinafter cited as the TASK FORCE REPORT].

65. Id. at 181-82. The "earlier studies" cited in the TASK FORCE REPORT are the WICKERSHAM REPORT, the 1947 PRESIDENT'S COMMISSION ON CIVIL RIGHTS REPORT, and the 1961 U.S. CIVIL RIGHTS COMMISSION REPORT.


67. TASK FORCE REPORT, supra note 64, at 182.

68. CRIME COMMISSION REPORT, supra note 61, at 93.
render the police's job of protecting the public more arduous, the Commission holds that this is partly due to the fact that:

[M]any . . . court decisions were made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court . . . . As a result, the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation.69

The Commission offers the Court's use of police manuals and textbooks in Miranda as an illustration of this assumption.70 The Commission's failure to delve into the question of police interrogation practices and confessions as they relate to court decisions was objectionable to several of the commissioners. Seven of the nineteen members inserted "additional views" on the issue into the final report. Generally, the commentators averred that an unmitigated application of the Miranda rule would virtually eliminate pretrial interrogation.71 The primary concern of the minority members can be summarized in the following quotation:

It is . . . true that the danger of abuse and the difficulty of determining "voluntariness" have long and properly concerned the courts. Yet, one wonders whether these acknowledged difficulties justify the loss at this point in our history of a type of evidence considered reliable and so vital to law enforcement.72

B. The 1967 House Hearings—Anti-Crime Program73

By 1967, crime had become a compelling national problem and, consequently, an important issue in the Congress. In his February 6, 1967 Special Message on Crime in America to the Congress, President Johnson outlined his program for confronting the dilemma. Included in his plan of action were the Safe Streets and Crime Control Act of 1967, a gun control law, a unified federal corrections system, a witness-immunity law, a

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69. Id. at 94.
70. Id.
71. Id. at 304.
72. Id. at 306.
narcotics convention, a proposed agency for making federal
court administration more effective and an anti-wiretapping
measure.  
Extensive hearings on the House version of the
administration's anti-crime legislation (HR 5073) were held
during March and April of 1967. Even though none of the pro-
posed legislation dealt specifically with police interrogation
practices, some comments relating to the topic were voiced at
the hearings. Former Attorney General Ramsey Clark, for ex-
ample, was questioned extensively concerning his impressions
of the Miranda ruling and its ramifications. Mr. Clark champi-
oned the Court's action in Miranda and minimized the role of
confessions, generally, in the "total criminal justice process." He was, however, adamant in his assurance that law enforce-
ment officers were no longer extorting confessions.

In their testimony, several congressmen proposed that legis-
lation be drafted for counteracting what they considered to be an "overzealous" Court. Others rebuked both the President's
Crime Commission and proponents of the administration's
anti-crime proposal for not taking into account the problems
that were reputedly being provoked by Supreme Court deci-
sions. Lastly, some offered specific legislation to cope with the
situation. For example, Robert Taft, Jr. offered a bill, The
Federal Interrogation Act of 1967 (HR 7384), that was designed
to permit three hours of interrogation under the scrutiny of a
special court official. The measure also contained penalties for
dettering overzealous police officers.

In addition to comments offered by congressmen and other
governmental officials, testimony regarding police interroga-
tion practices was tendered by several functionaries of the
criminal justice system. One prominent police official claimed
that "the Miranda decision has almost, if not completely,
taken the police out of the inquiry system." Subsequent em-
pirical studies, however, have discounted suggestions that

74. See Crime and Justice in America, CONGRESSIONAL QUARTERLY SERVICE (1968),
at 13-27. No legislation was offered by the administration to offset any court decisions.
75. See 1967 House Hearings, supra note 73, at 45.
76. Id. at 70-71.
77. See, e.g., the statement of William McCullock (R-Ohio). Id. at 297.
78. On this point see the remarks of Richard Poff (R-Va.). Id. at 1418-24.
79. Id. at 1453-55.
80. See the statement of Orlando Wilson, then Superintendent of the Chicago
Police Department. Id. at 404.
Miranda has had a discernible effect on the police’s ability to secure statements.\textsuperscript{81}

The most favorable testimonial in defense of police interrogation procedures was afforded by United States Federal District Court Judge William J. Campbell.\textsuperscript{82} Judge Campbell earnestly questioned the correctness of what he depicted as being the major premise of the Miranda decision, namely, “that the prevailing practice in police custodial interrogation is to abuse the constitutional rights of defendants.” It was his belief that “the invasion of individual rights incident to police custody is a rare instance.”\textsuperscript{83}

Since police confession and interrogation practices were not paramount concerns of this committee, there was no significant testimony offered to support the Court’s decision. On the other hand there were no imputations of police misfeasance in this regard.

C. The 1967 Senate Hearings—Anti-Crime Program\textsuperscript{84}

The Senate version of the administration’s bill (S.917) was not reported out by the Senate Judiciary Committee in 1967. An amended measure, however, was passed by the Senate Judiciary Subcommittee on Criminal Law and Procedures. The amended measure added “Title II: Confessions and Eyewitness” to the Act. This amendment was made for the purpose of overturning the Mallory, Miranda, and Wade decisions.\textsuperscript{85}

Other amendments were offered to make confessions admissible in the federal courts in instances where a trial judge had affirmatively determined their voluntariness, to prohibit the exclusion of confessions solely on the basis of a delay in arraignment,\textsuperscript{86} and finally one which would have denied the prerogative of review to the federal courts on any issue of voluntariness.


\textsuperscript{82} See 1967 House Hearings, supra note 73, at 1488-92.

\textsuperscript{83} Id. at 1491.

\textsuperscript{84} Hearings, Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) [hereinafter cited as the 1967 Senate Hearings].

\textsuperscript{85} United States v. Wade, 388 U.S. 316 (1967) (making identification based on a police lineup when no attorney was present inadmissible at trial).

\textsuperscript{86} S. 674, 90th Cong., 1st Sess. (1967).
if the highest court in a state had deemed a confession to be voluntary. Although considerable testimony ensued concerning these contentious amendments, there was no dialogue relating directly to police interrogation practices. Most of the testimony focused upon the fruits of improper police interrogation procedures, i.e., confessions.

Germane to this analysis, however, is the testimony of several jurists and other officials bearing upon the question of police misfeasance. The following are representative samples of these spokesmen's comments: Judge Lawrence Wren, Superior Court, Flagstaff, Arizona, who later became the trial judge in the Miranda retrial:

In the 6 years I spent in the county attorney's office, and in the many more hours that I spent discussing these questions and problems [allegations of police brutality] with other prosecutors in Arizona, I have never come across a single case of police coercion on a confession . . . .

Judge Oliver Schulingkamp, District Court, New Orleans, Louisiana:

The proponents of the [Miranda] exclusionary rule argue there is much police abuse and brutality . . . , and I feel this has been much exaggerated. Of course there are some rotten apples in any barrel . . . . But this does not mean that the vast majority of police officers do those things.

Quinn Tamm, Executive Director, International Association of Chiefs of Police:

It has been my experience and my very strong feeling, . . . that the accusations and charges of police brutality are extremely exaggerated, overemphasized, . . . . Thirty years ago yes, but we are living in the present time, and if we have to go back 30 years to look for faulty police practice, then I question our thinking . . . . I can tell you without equivocation that this practice [police brutality] is not in existence to any degree in the law enforcement agencies of our countries today.

Aaron Kootz, District Attorney of Kings County, New York:

88. See 1967 Senate Hearings, supra note 84, at 533.
89. Id. at 851.
90. Id. at 336.
I, in this 17 years I have been in office, have never seen those pamphlets [the Inbau work on interrogation quoted in the majority *Miranda* opinion]. They have no place, they have never made an appearance at any station house in the city of New York.91

During the subcommittee hearings there were a few contravening remarks by witnesses or liberal committee members. The following statement by Senator Philip Hart epitomizes the general feelings of the dissenters:

I know that we have, if any, very few police departments where they beat up suspects any more, thanks in part to court decisions. But now we have improved psychological techniques which leave no blood, but can be perhaps just as influential in operating on a person held in custody.92

After changing the name of the bill to the Omnibus Crime Control and Safe Streets Act, the Senate Judiciary Committee reported out the measure to the Senate for full debate. A group of Senate liberals, led by Joseph Tydings and Hiram Fong, spearheaded an effort to extirpate, or at least weaken, Title II of the Act during floor debate in the Senate.

In his debate with proponents of the bill, Senator Tydings cited, among other things, "the Spanish Inquisition," the "excesses of the Stuart Kings," *Brown v. Mississippi*,93 the Wickersham Report, the 1961 Commission on Civil Rights Report, and cases involving alleged police brutality listed in the *Miranda* decision as evidence for removing Title II from S.917.94 Senator Tydings appeared to sum up his feelings when he stated:

These Court cases involving police brutality are exceptions. I am hopeful that these shocking cases will become more and more infrequent. But procedural protections must exist to ensure that brutality does not again rear its ugly head.95

After a heated floor debate and seven roll call votes, Title II was passed in a revised form. In its final make-up, the law

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91. *Id.* at 227.
92. *Id.* at 137. Also see the minority views of the liberal block of Senators on Title II of S. 917 in S. Rept. 1097, 90th Cong., 2d Sess., at 147-60.
93. 297 U.S. 278 (1936).
94. 114 *Cong. Rec.* at 5887, 5888, 6006, and 6007 (1968) (remarks of Senator Tydings).
95. *Id.* at 5888.
provided in part for the admission of confessions into evidence provided they were voluntary, even though a confessor had not been apprised of his or her constitutional rights. Again, as with previous hearings and commission inquiries, no legitimate empirical evidence was offered to establish that police interrogation practices were inherently brutal or being utilized to the general detriment of the public.

IV. Conclusion

There are numerous practical arguments for judicial self-restraint. This article has attempted to examine one of those considerations, i.e., the Court's lack of the fact-finding resources adequate for "informed policy choice." In Miranda the arguments offered to substantiate the Court's decision were rooted in logical analysis. In order to be valid, such an approach must emanate from empirically authenticated facts. As the above analysis shows, this apparently was not the case in Miranda. One could hypothesize, therefore, that Supreme Court decisions are not the product of detailed and objective judgments, but are more aptly manifestations of the Justices' sentiments on basic issues of American democracy.

Although there are some indications that the Burger Court is cognizant of the institutional boundaries of the American judiciary, the lower courts appear to be all too willing to assume the role of "Philosopher King." When we have judges utilizing our courts as investigatory bodies, actively administering school systems, and authorizing the jamming of citizen's band stations, the time has come to consider a stabilization of our system of checks and balances.


98. One great American jurist perceived the Supreme Court in similar terms when he said:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.


Several decades ago one of our more renowned jurists, the late Justice Louis Brandeis, heeded our courts' limited means for fact-finding and offered the famous Brandeis Brief as a solution.\textsuperscript{100} Brandeis believed that our courts' decision-making processes would be enhanced if they were provided with social and economic facts. The author believes that the concept of judicial decisions engendered from factual data is not outmoded. It is almost certain that the adoption of such an approach by our activist jurists would lead to a more restrained form of judicial decision-making. In the ultimate it would promote a process of judicial determination that is more compatible with the tenets of representative democracy.

\textsuperscript{100} Muller v. Oregon, 208 U.S. 412 (1908).