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Criminal Procedure -- Michigan v. Mosley: A New Constitutional Procedure

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tion. While in *Golden* the rights of religious and racial minorities may well outweigh the Club's associational rights, the case, as the first[71] imposition of fourteenth amendment duties on what would traditionally have been considered a private club, warrants a much fuller discussion of the associational freedoms of the Club.

In sum, *Golden*'s assault on the Club's membership practices was misplaced because the Fifth Circuit refused to base its holding solely on a *Burton-Moose Lodge-Jackson* state involvement analysis. Its reliance on the lease as an adequate basis for finding state action seems to run counter to the latest pronouncements on the issue by the Supreme Court. The court's overly broad construction of state action was partly excusable because the Supreme Court has not articulated the relative importance it attaches to the nature of the constitutional right asserted by plaintiffs and the countervailing interests of private defendants. Unless the high Court dispels the confusion that has arisen from its handling of these cases, state action assaults on private discrimination will continue to be hit-or-miss attacks.

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Criminal Procedure—Michigan v. Mosley: A New Constitutional Procedure

In *Miranda* v. *Arizona*[1] the United States Supreme Court set out specific guidelines, which, if not followed, required that statements obtained through custodial interrogation not be used against the accused.[2]

71. This conclusion depends on which definition of private club is used. Using the definition discussed at note 17 *supra*, *Golden* represents the first decision imposing constitutional restrictions on membership in a private social club. *See* 521 F.2d at 353 (Coleman, J., dissenting). *But cf.* Goodloe v. Davis, 514 F.2d 1274 (5th Cir. 1975).

1. 384 U.S. 436 (1966).

2. Briefly stated *Miranda* held:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to remain silent and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain si-

Miranda embodied a decision[3] that it was better for some guilty persons to go free than to allow the police to engage in improper conduct.[4] The decision produced a strong adverse public reaction that has been partly reflected[5] in a series of decisions since 1971 that have expanded the admissibility of custodially derived evidence.[6] In *Michigan v. Mosley*[7] the Court has again diminished the impact of *Miranda* by sanctioning the renewed questioning of a suspect after an expressed desire to remain silent. In doing so, the Court created a new constitutionally required procedure—that the police must "scrupulously honor" the accused's right to cut off questioning—but defined the procedure so vaguely that it offers little guidance to lower courts or the police.

The defendant, Robert Mosley, was arrested pursuant to an anonymous tip implicating him in two recent robberies as well as a robbery/murder that had occurred three months previously. After receiving his *Miranda* warnings from the arresting officer, Mosley said that he did not want to answer "any questions about the robberies."[8] Accordingly, that officer asked no more questions, and Mosley was charged with the two recent robberies (but not with the robbery/murder) and jailed. More than two hours later a different police officer took Mosley to a different interrogation room and again informed him of his rights. After Mosley waived his rights the officer proceeded to question him about the murder, which had not been discussed at the previous interrogation. Upon being confronted with an incriminating statement of a confederate, Mosley confessed.[9]

The confession was admitted into evidence at Mosley's trial over his objection that the second interrogation violated his constitutional

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lent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id. at 444-45 (footnote omitted).

3. Among those reasons were the danger of false confession resulting from the psychological pressures of custodial interrogation, *id.* at 447-48, and "the respect a government—state or federal—must accord the dignity and integrity of its citizens." *Id.* at 460.

4. *Id.* at 457.

5. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1039 (1974).

6. See text accompanying notes 32-36 *infra*.

7. 96 S. Ct. 321 (1975).

8. *Id.* at 323.

9. *Id.*

right against self-incrimination because his expressed desire to remain silent was not honored.[10] The conviction that resulted from his trial was overturned by the Michigan Court of Appeals,[11] holding that the second interrogation was a per se violation of *Miranda*.[12] The Michigan Supreme Court refused further appeal,[13] but the United States Supreme Court granted certiorari.[14]

Justice Stewart, writing for five members of the Court,[15] declared the issue in the case to be whether the police conduct complained of violated the *Miranda* guidelines so that Mosley's confession was inadmissible at his trial.[16] Answering this question required interpretation of the following passage from *Miranda*:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[17]

The Court rejected a reading of the passage that would result in finding a per se violation of *Miranda*.[18] Instead, the Court adopted a new rule that would exclude the use of custodially obtained statements if the accused's right to cut off questioning, in light of all the circum-

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10. *Id.* at 324.

11. People v. Mosley, 51 Mich. App. 105, 214 N.W.2d 564 (1974).

12. "*Miranda* cannot be circumvented by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and thus justifying subsequent interrogations after an election to remain silent." *Id.* at 566.

13. People v. Mosley, 392 Mich. 764 (1974).

14. Michigan v. Mosley, 419 U.S. 1119 (1975).

15. The other four were Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist. Justice White filed a concurrence, see text accompanying notes 21-22 *infra*. Justice Brennan filed a dissenting opinion in which Justice Marshall joined, see text accompanying notes 23 and 24 *infra*.

16. 96 S. Ct. at 324. The Court's formulation of the issue can be found in text accompanying note 54 *infra*.

17. *Id.* at 325, *quoting* 384 U.S. at 473-74.

18. The Court noted that there were two literal interpretations of the passage that "would lead to absurd and unintended results." The first would read the passage to mean that once a person invoked his right, he could never again be questioned "by any police officer at any time or place on any subject." The second would read it to require only a momentary cessation and "permit a resumption of interrogation after a momentary respite." 96 S. Ct. at 325.

stances of the case, was not "scrupulously honored."[19] Although the Court did not attempt to define what "scrupulously honoring" an accused's right to cut off questioning means, the Court did hold that Mosley's right was so honored, and that his confession was admissible.[20] In reaching this conclusion the Court relied on the following facts of the Mosley case: the amount of time separating the two interrogations, the different subject matter discussed at each session, the absence of discernable police techniques designed to wear down the accused, the different interrogators, and the ambiguous nature of Mosley's statement that he did not wish to answer questions about the "robberies."[21] Thus the Court announced a new procedure to protect the accused's right to remain silent, but declined to define it specifically.

While Justice White, concurring in the result, and Justices Brennen and Marshall, dissenting, agreed with the majority that *Miranda* did not create a per se proscription of renewed questioning for an indefinite period,[22] both the concurrence and the dissent objected to the "scrupulously honored" procedure. Justice White deplored the possibility that some "voluntary" statements could be excluded under the procedure, and would re-adopt the pre-*Miranda* rule of admitting any statement that in view of all the circumstances was found to be voluntary.[23] Justices Brennan and Marshall, on the other hand, faulted the vagueness of the new procedure and suggested instead that the Court adopt

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19. *Id.* at 326. Although a violation of the "scrupulously honored" procedure evidently would prevent the prosecution from using a statement so obtained to prove Mosley's guilt, the State would still be able to use the statement for impeachment purposes. See text accompanying notes 32-34 *infra.*

20. 96 S. Ct. at 326, 328.

21. *Id.* at 326-27. See text accompanying notes 59-62 *infra.*

22. *Id.* at 328-30, 330-34. The Court's unanimous rejection of a per se proscription of renewed questioning is in contrast to section 140.8(2)(d) of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Prop. Official Draft, Apr. 15, 1975), which states: "No waiver shall be sought from an arrested person at any time after he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning." In commenting on section 140.8(2)(d), the Institute said:

> As the investigation in the case develops, it may be quite natural for the police to inquire of an arrested person whether he wished to change his mind and make a statement or submit to questioning, and there may be cases where such a change of mind can occur without any semblance of coercion. On the other hand, even a seemingly voluntary waiver given after a person has once indicated he does not wish to cooperate may be the product of subtle coercion . . . .

Id. at 52.

23. 96 S. Ct. at 328-30. Justice White's test for admissibility would be virtually identical to the pre-*Miranda* "totality of the circumstances" test for voluntariness and admissibility. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954); Bram v. United States, 168 U.S. 532, 561 (1897).

concrete, objective guidelines for the police to follow; if the guidelines were ignored the statement taken upon requestioning would be excluded.[24] The dissent concluded that the "scupulously honored" procedure "signals a rejection of *Miranda*'s basic premise."[25]

The *Miranda* premise was that the combination of modern police interrogation technique and a custodial setting,[26] in which the accused was cut off from familiar surroundings, produced an inherently coercive[27] effect such that the confession, although "voluntary" in traditional terms,[28] could not "truly be the product of his free choice."[29] That premise reflected the Court's judgment that the interest in the protection of "precious Fifth Amendment rights"[30]—not lessened because a confession was ostensibly voluntary—necessitated a *presumption* that a custodial confession was the result of coercion unless the State could prove that the confession resulted from an informed and intelligent waiver of those rights.[31] To determine if those rights had been so waived, the Court established concrete, objective guidelines which, if not followed, required the exclusion of the accused's confession.[32]

The first indication that the Burger Court was inclined to broaden the admissibility of "voluntary" statements taken in violation of *Miranda* came in *Harris v. New York*.[33] In that case the Court interpreted *Miranda* to mean that a statement taken in violation of *Miranda*, if trustworthy, could be used to impeach the accused if he chose to take the stand. However, *Harris* continued to bar "the prosecution from making its case" with a statement taken in violation of *Miranda*.[34]

The *Harris* theme was expanded in *Oregon v. Hass*.[35] In that case the Court allowed the use of a statement for impeachment purposes even though it was taken in the absence of counsel after the accused expressed a desire to see an attorney. Thus, for impeachment purposes at

24. 96 S. Ct. at 332.
25. *Id.* at 333.
26. 384 U.S. at 449-54.
27. *Id.* at 458.
28. *See* note 22 *supra.*
29. 384 U.S. at 458.
30. *Id.* at 457.
31. *Id.* at 479.
32. *See* note 2 *supra.*
33. 401 U.S. 222 (1971).
34. *Id.* at 224. "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Id.* at 225.
35. 95 S. Ct. 1215 (1975).

least, the giving or not giving of *Miranda* warnings will not affect a custodial confession.

The admissibility of custodial confessions was expanded further in *Lego v. Twomey*.[36] In that case the Court set the State's burden of proof on the issue of the voluntariness of the accused's waiver of his rights at the "preponderance of the evidence" level, rather than at the "beyond a reasonable doubt" level.

But the decision that sheds the most light on the Burger Court's attitude toward *Miranda* came in *Michigan v. Tucker*.[37] In *Tucker* the police failed to inform the accused that an attorney could be appointed without cost to handle his case, and subsequently the accused made a statement that led the police to a witness whose testimony implicated Tucker in the crime. In declining to exclude this "fruit" of the statement[38] taken in violation of the *Miranda* guidelines, the Court used a novel analytical framework to decide the case.[39]

Before *Tucker*, the accused's fifth amendment right against compulsory self-incrimination *as such* was considered violated unless the *Miranda* guidelines, or some other set of procedures adequate to protect the right, were followed. If such procedures were not followed, any statement taken was automatically excluded.[40] The procedural rules set out in *Miranda* were never deemed constitutionally protected[41] because their violation was thought to violate the fifth amendment right itself: if adequate procedures were not taken to inform the accused of his constitutional rights, any statement was presumed to be taken in violation of the right against compulsory self-incrimination.[42] However, *Tucker* destroyed this identity by divorcing the right against compulsory self-incrimination, *as such*, from the procedures that were taken to protect

36. 404 U.S. 477 (1972).

37. 417 U.S. 433 (1974).

38. A dog found at the scene of the crime (a rape) led the police to Tucker. The police questioned Tucker about his activities on the night of the rape and he replied that he had been with a man named Henderson. Henderson, however, gave the police information that incriminated Tucker. *Id.* at 436-37.

39. "We will . . . first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded." *Id.* at 439.

40. *See* note 2 *supra*.

41. 384 U.S. at 467.

42. "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Id.* at 476.

that right.[43] If the right itself were violated, then the statement would still be excluded. But if only the procedures were violated, under *Tucker*, the question remained whether that violation should require exclusion of evidence derived from the interrogation.[44]

In applying this analysis to the facts in *Tucker*, the Court found that the accused's right against compulsory self-incrimination was not violated because the police conduct in the case did not include "the historical practices at which the right . . . was aimed."[45] Evidently, such "historical practices" are the crude police techniques used in the past to compel confessions, such as torture,[46] starvation,[47] or lengthy incommunicado interrogation.[48] Since these practices were not found in *Tucker*, the accused's fifth amendment right was held not violated, and the Court's next inquiry was whether to exclude the evidence derived from an interrogation that violated only the *Miranda* guidelines.[49] Because the reliability of the evidence involved in *Tucker* was not at issue, and because the interrogation took place before *Miranda* was decided—so that the primary purpose of the exclusionary rule, the deterrence of improper police conduct, would not be furthered—the Court concluded that the violation of the *Miranda* guidelines in *Tucker* should not trigger the exclusionary rule.[50]

Although the Court held that the police's pre-*Miranda* violation of the *Miranda* procedure in *Tucker* would not trigger the exclusionary rule, there was an implication in the case that a violation of a procedure *could* trigger the exclusionary rule, even in a state proceeding.[51] Exclusion of evidence in a state proceeding, however, can be mandated by the Supreme Court only in cases in which a constitutional right has been

43. *See* note 39 *supra.*
44. *Id.*
45. 417 U.S. at 444.
46. Brown v. Mississippi, 297 U.S. 278 (1936).
47. Payne v. Arkansas, 356 U.S. 560 (1958).
48. Davis v. North Carolina, 384 U.S. 737 (1966).
49. 417 U.S. at 446.
50. *Id.* at 450. As in *Harris v. New York*, note 32 and accompanying text *supra*, the *Tucker* Court discounted or ignored the reasons set forth in *Miranda*, note 3 *supra*, for the exclusionary rule and instead stressed deterrence as the main rationale for the rule. In United States v. Calandra, 414 U.S. 338, 347 (1974), the Court has developed this to the point at which deterrence has become almost the sole justification for the rule. And in *Oregon v. Hass*, note 34 and accompanying text *supra*, the Court refused to apply the exclusionary rule even though without it the Court admitted the police would be encouraged to act improperly. 95 S. Ct. at 1221.
51. "[I]n deciding whether Henderson's testimony must be excluded, there is no controlling . . . precedent to guide us." 417 U.S. at 446. By discussing *whether* violation of the procedure should trigger the exclusionary rule, the Court is implying that the violation *could* trigger the rule.

violated.[52] Thus, if the Supreme Court invokes the exclusionary rule in a state court for the violation of a procedure designed to protect the right against self-incrimination, it follows that the procedure must itself be guaranteed by the Constitution. However, this conclusion is seemingly contradicted by the *Tucker* holding that the *Miranda* guidelines are "not themselves guaranteed by the Constitution."[53] A possible explanation of this apparent contradiction is that although the procedures set forth in *Miranda* are not themselves constitutionally required, there are *some* "constitutional" procedures, which if not followed, require the invocation of the exclusionary rule.

Michigan v. Mosley is the first case to identify such a "constitutional" procedure, although it did not do so explicitly. The elevation of a procedure to a constitutional level in *Mosley* was accomplished through the analysis set out in *Tucker*, although once again, this was not done explicitly.

In *Mosley* the Court simply assumed, without discussion, that the accused's right against compulsory self-incrimination was not violated.[54] Since Mosley did not assert that the police had employed "historical practices" to obtain his confession, the Court evidently did not feel constrained even to deliberate whether Mosley's confession was obtained in violation of his fifth amendment right against compulsory self-incrimination, *as such.*

Instead, the Court immediately launched into the next stage of the *Tucker* analysis, "whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* 'guidelines' so as to render the statement inadmissible against Mosley at his trial."[55] The Court went on to identify the procedure in question to be whether the police "scrupulously honored" the accused's right to cut off questioning.[56]

By formulating the issue in *Mosley* as quoted above, the Court appeared to be answering by negative implication the final stage of the

52. Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting); McNabb v. United States, 318 U.S. 332, 340 (1943); United States v. Navarro, 441 F.2d 409, 411 (5th Cir. 1971); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 201 (1974); Note, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188, 197 (1975).

53. 417 U.S. at 444.

54. This conclusion is based on the total absence of discussion of the issue of voluntariness of Mosley's confession.

55. 96 S. Ct. at 324.

56. *Id.* at 326.

Tucker analysis:[57] that if a violation of the "scrupulously honored" procedure is found, exclusion *will* follow. The validity of this negative implication is reinforced by the Court's holding: "We therefore conclude that the *admissibility* of statements obtained after the person in custody has decided to remain silent *depends* under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' "[58] Since exclusion of evidence in a state court can only be triggered by a constitutional violation,[59] it follows that the Court's new "scrupulously honored" procedure is one guaranteed by the Constitution.

Although *Mosley* went beyond *Miranda* by creating a "constitutional" procedure, it also disposed of the fundamental principle of *Miranda*—that inherent coercion is always present in a custodial atmosphere—by simply stating that the "scrupulously honored" procedure "counteracts the coercive pressures of the custodial setting."[60] As evidence of this "counteraction," the Court cited the more than two-hour delay between interrogations.[61] But under *Miranda*, this delay would be characterized as part of the custodial atmosphere that cannot help but wear down the accused's will to resist.[62] Similarly, the fact that a different police officer conducted each interrogation and that different subjects were discussed at each could also be cited as evidence of inherent coercion rather than police respect for Mosley's rights. Finally, the Court held that the police could "reasonably interpret" Mosley's statement that he did not want to answer "any questions about the robberies" as not applying to subsequent questioning concerning a robbery/murder.[63] Although this interpretation is reasonable, an equally reasonable reading would hold that the statement did apply to the crime for which Mosley confessed.

By relying on circumstances peculiar to *Mosley*, and refusing to define specifically under what circumstances renewed police questioning will be held to "scrupulously honor" an accused's right to cut off

57. The Court was able to avoid making an explicit ruling on the last stage of the Tucker analysis, note 38 *supra*, by simply defining the procedural rule so that the police conduct in question was found permissible.

58. 96 S. Ct. at 326 (emphasis added).

59. *See* note 51 *supra*.

60. 96 S. Ct. at 326.

61. *Id.*

62. [T]he very passage of time, while a person continues to be in police detention will create fears and pressures undermining the will to insist on one's right to silence and right to counsel. . . . The Court's language in *Miranda* seems to be consistent with this view: [citing passage quoted in text accompanying note 16 *supra*].

ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(2)(d), comment at 52 (Prop. Official Draft, Apr. 15, 1975).

63. 96 S. Ct. at 327.

questioning, the Court has clearly rejected the *Miranda* approach of providing concrete, objective guidelines which would enable a quick and easy answer to the question whether the coercive pressures of custodial interrogation had been overcome. Under the *Mosley* Court's vague approach, each federal and state trial court must make a finding, based on the facts unique to each case, whether the accused's right to cut off questioning had been "scrupulously honored." The practical result will be a lessening of appellate review in such cases because findings of fact are difficult to overturn.[64] Consequently, the courts will, in all probability, admit confessions taken under conditions more coercive than those that existed in *Mosley*.[65]

It seems clear that the minority's conclusion that *Mosley* "signals rejection of *Miranda*'s basic premise" is correct.[66] *Mosley*'s holding, that the inherent coercion of the custodial setting is dispelled by the "scrupulous honoring" of the accused's right to cut off questioning, is directly contrary to the principles of *Miranda*, which would hold that "Mosley's failure to exercise the right upon renewed questioning was presumptively the consequence of an overbearing in which detention and that subsequent questioning played a central role."[67] Thus, *Mir-*

64. As a result of pre-*Miranda* ambiguity in the area of fifth amendment rights, "[T]he Supreme Court repeatedly was presented with findings of voluntary confessions in situations where the records made coercion quite likely. Powerless to overturn such findings of fact, the Supreme Court stretched the definition of coercion to include the lower courts' factual determinations." Kaplan, *The Limits of the Exclusionary Rule*, *supra* note 5, at 1039. *See, e.g.*, Greenwald v. Wisconsin, 390 U.S. 519 (1968), in which the court found as a matter of law that the defendant's confession was involuntary.

65. Let there be no mistake about it. To a mind-staggering extent—to an extent that conservatives and liberals alike who are not trial lawyers simply cannot conceive—the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds—the dimly remembered, friendly face of the school crossing guard, their fear of a crowd of "toughs", their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients—and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape, or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.

Amsterdam, *The Supreme Court and Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 792 (1970).

See, e.g., United States v. Collins, 462 F.2d 792 (2d Cir. 1972) (en banc) (confession held admissible even though defendant declined to talk on four separate occasions); United States v. Brady, 421 F.2d 681 (2d Cir. 1970) (confession admitted despite four previous assertions of the right to silence); United States v. Choice, 392 F. Supp. 460 (E.D. Pa. 1975) (confession held admissible even though severely injured defendant declined to talk once, and refused to sign the waiver form at subsequent interrogation).

66. 96 S. Ct. at 333.

67. *Id.* at 332 (Brennan, J., dissenting).

anda has been overruled in effect by *Mosley*. However, the case affirms *Miranda* in name and uses language from *Miranda* to identify the first constitutionally required police procedure for custodial interrogations.

But protecting a procedural right with the Constitution is of little help to the accused if the "constitutional" procedure is defined so vaguely that the police and courts can easily circumvent it. This vagueness, combined with the Court's attitude of expanding the admissibility of custodial confessions and a willingness to read facts to fit the procedural requirement, seems certain to have the effect of freeing the police from the restraint of *truly* honoring the rights of the accused.

PHILIP P.W. YATES

Criminal Procedure—The Right to Proceed Pro Se: Judicial Gymnastics with the Sixth Amendment

Within the past two decades the United States Supreme Court has been zealous in ensuring the right of defendants in state criminal prosecutions to receive the assistance of counsel. The sixth amendment guarantee of assistance of counsel to defendants in federal criminal prosecutions has been extended to state criminal prosecutions under the auspices of the due process clause of the fourteenth amendment.[1] The underlying premise of the "assistance of counsel" cases is that inherent unfairness exists in any criminal proceeding in which the accused has been denied the assistance of counsel to prepare his defense.[2] Arguably, a natural extension of this reasoning might indicate that *any* conviction obtained in a criminal trial absent representation by an attorney for the accused is per se tainted and unfair. However, such an extension clashes with an attempt by a criminal defendant to exercise the right of self representation recognized on either a constitutional or a statutory level by most state and all federal courts. This quandary raises the question whether a state may constitutionally deny a valid request by a

1. Argersinger v. Hamlin, 407 U.S. 25 (1972) (requirement of assistance of counsel before imprisonment for any offense); Gideon v. Wainwright, 372 U.S. 335 (1963) (requirement of assistance of counsel for defendants in state felony prosecutions); *see* Powell v. Alabama, 287 U.S. 45 (1932) (requirement of assistance of counsel for defendants in state capital offense prosecutions).

2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).