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Police Interrogation: Michigan v. Tucker

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those to whom they are addressed; but when used to express his manifest intention to control or direct, they are mandatory and will be so construed in saying what effect is to be given to them. . . .[53]

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Police Interrogation: Michigan v. Tucker

In the dramatic case of *Michigan v. Tucker*,[1] the Supreme Court decided that during an in-custody interrogation of a suspect all the warnings as outlined in the *Miranda*[2] decision need not be given. Even though the interrogation took place prior to *Miranda*, the Court mandated that an accused be given certain warnings before he is interrogated.

Tucker had been arrested on a charge of rape, and before the interrogation the police advised him that any statement he made could be used against him at trial. Furthermore, he was advised that he had a right to remain silent and a right to counsel. However, the police did not inform him that if he were indigent that counsel would be furnished for him. Respondent told police that he did not want an attorney and that he understood his constitutional rights. Nevertheless, during the course of the interrogation, Tucker informed the authorities that he was with a friend and divulged the identity of his alibi [Henderson]. The later statements of Henderson tended to incriminate Tucker and Henderson stated that respondent was not with him at the time of the crime. It is to be remembered that these events preceded *Miranda*.

Before his trial following the Supreme Court decision in *Miranda*, the respondent moved to suppress the expected incriminating testimony of Henderson; the reason being that the respondent had disclosed Henderson's identity without having received the full warnings required by *Miranda*.[3] The state court denied the motion and permitted Henderson to testify and respondent was convicted at the trial. Respondent

53. *In re* Estate of Corbett, 430 Pa. 54, at 57-58, 241 A.2d 524 at 525 (1968); *see also*, Canal National Bank v. United States, 258 F. Supp. 629 (D.C. Me., 1966); Good Samaritan Hospital and Medical Center v. United States National Bank of Oregon, 246 Ore. 478, 425 P.2d 541 (1967); Frederick v. Frederick, 355 Mass. 662, 247 N.E.2d 361 (1969).

1. 42 U.S.L.W. 4887 (June 10, 1974).
2. Miranda v. Arizona, 384 U.S. 436 (1964).
3. Miranda was decided by the Supreme Court after the interrogation of Tucker, but before his trial.

then appealed and his conviction was affirmed by both the Michigan Court of Appeals[4] and by the Michigan Supreme Court.[5]

After having his conviction affirmed by the state court, respondent then sought *habeas corpus* relief in Federal District Court.[6] In the district court proceedings, the *habeas corpus* relief was granted on the grounds that Henderson's testimony was inadmissible since it was in violation of *Miranda*. The district court went on to say that the application of the Exclusionary Rule was necessary in this instance to protect the defendant's Fifth Amendment right against compulsory self-incrimination. The Court of Appeals for the Sixth Circuit affirmed the lower courts' decision without an opinion.[7] On writ of *certiorari*, the United States Supreme Court reversed.[8]

In speaking for the majority of the Court, Justice Rehnquist said

> The police conduct in this case, though failing to afford respondent the full measure of procedural safeguards later set forth in *Miranda*, did not deprive respondent of his privilege against self-incrimination. The record clearly shows that respondent's statements during the police interrogation were not involuntary or the result of potential legal sanctions.[9]

The *Tucker* case provided the opportunity for the Court to implement safeguards of suspects during police interrogation. Yet the Court failed to seize such an opportunity to render justice to those accused of crimes and stated that

> . . . the use of the testimony of a witness discovered by the police as a result of the accused's statements under these circumstances does not violate any requirement under the Fifth, Sixth, and Fourteenth Amendments, relating to the adversary system.[10]

Tucker's far-reaching implications in the realm of Fifth Amendment protections are clear. One could easily assume that the self-incrimination clause of the Fifth Amendment and *Miranda* go hand in hand. But after reading the *Tucker* case, one may easily get the impression that the case is severing the connection between the self-incrimination clause and *Miranda*.

The roots of the privilege against compulsory self-incrimination can be traced back to England and the days of the ecclesiastical courts. In the proceedings of the ecclesiastical courts, a person appearing before it was required to take an oath, "ex officio." The offensive characteristic

4. 19 Mich. App. 320, 172 N.W.2d 712 (1969).
5. 385 Mich. 594, 189 N.W.2d 290 (1971).
6. 352 F. Supp. 266 (1972).
7. 480 F.2d 927 (1973).
8. 414 U.S. 1062 (1974).
9. 94 S. Ct. at 2359.
10. *Id.* at 2361-2366.

of this procedure in which the oath was a part, was its requirement that a person who had not been charged by a formal presentment or accusation answer under oath all questions put to him by the proper ecclesiastical official.[11]

This "ex officio" oath had widespread use throughout the country. The purpose in most cases of the oath was "to discover suspected violations of church law or custom, or to establish the truth of either vague or definite charges not disclosed to the personal question."[12]

The introduction of the oath into the ecclesiastical trials was what gave birth to the privilege of the accused not being compelled to testify against himself. The Bishops of the ecclesiastical courts used the oath to inquire into the conduct of men who were respected in the community. The use of the oath caused a great deal of serious injury to the reputations of these men when they were compelled to testify. This then brought complaints from the common people to the king. It was the complaints of the people which led King Henry III to issue an official proclamation to one Bishop, which forbade him to use the oath. This proclamation was perhaps the origin of the privilege against compulsory self-incrimination as we know it today.

The practice of compelling an accused man to testify against himself was also prevalent in criminal trials before the King's Councils. The accused in a criminal trial had to appear and answer all questions that were put to him. However, in the 25th year of Edward III, a statute was enacted that demanded that this practice be abolished and no man should "be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the law of the land."[13]

As heretofore mentioned, it appears that the origin of the privilege against self-incrimination was hastened by the discontent of the people with the violation of their fundamental rights. "Thus it seems that beginning with 1641, the common law courts were at least occasionally applying to their own procedure at trial the prohibition which they had previously placed upon the procedure of the church courts before formal accusations."[14] Furthermore, "it seems fair to conclude that by the middle of the eighteenth century they were giving full recognition to the privilege."[15]

Moreover, with the arrival of the American colonists in the New World, also came the privilege against being compelled to testify

11. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).
12. *Id.*
13. LAWFUL PRESENTMENT ACT, 25 EDW. 3, c. 5 (1351-2).
14. *Supra* note 11, at 10.
15. *Id.* at 11.

against oneself. It would be strange if not totally absurd for the colonists to have instituted in America the very thing that they had despised in England. Coupled with that, it appears that before the adoption of the Federal Constitution at least six colonies had provisions which prohibited self-incrimination in their fundamental laws.[16]

Subsequently, with the adoption and ratification of the United States Constitution, the framers of this instrument saw fit to include the Fifth Amendment. That amendment which in part provides "that no person shall be compelled in any criminal case to be a witness against himself,"[17] provided the American citizens with their first solid protection of not being compelled to testify against themselves. Needless to say the privilege had now become the "law of the land."

Despite the fact that the Fifth Amendment was in effect and was the "law of the land," physical force was still being used to coerce and secure in-custody confessions by the police. There have been several very extensive studies that were made during the early 1930's which provide an abundance of documented instances to support this allegation.[18]

There have also been a great many cases where physical brutality and coercion were used to induce or persuade the accused to render in-custody confessions.[19] In many instances, the detained person was neither granted neither a preliminary hearing nor other due process protections.[20]

The case that ushered in the Miranda Era was the case of *Escobedo v. Illinois*.[21] In this historic case, the accused had been picked up as a suspect in connection with a murder. His attorney, after receiving word of his apprehension, immediately went to the police station and demanded to see his client. However, his attorney was not allowed to see him even though Escobedo had repeatedly asked to see his attorney. The attorney made every effort possible to see his client but he was consistently refused permission to do so.

Nonetheless, the Court in *Escobedo* took the position that the accused by not being permitted to see counsel, after having requested to see counsel, had been denied "the assistance of counsel"; and this

16. The six colonies were Virginia, Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire, *see* 2 POORE, UNITED STATES CHARTERS AND CONSTITUTIONS 1909, 1541-1542, 1409, 1806, 1 *id.* at 958, 2 *id.* at 1282 (2d ed. 1878).

17. U.S. CONST. AMEND. V.

18. Booth, *Confessions and Methods Employed in Procuring Them*, 4 So. CALIF. L. REV. 83 (1930); Kauper, *Judicial Examinations of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

19. *See* People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965).

20. Harris v. State of S.C., 338 U.S. 68 (1949).

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

was a violation of the Sixth and Fourteenth Amendments.[22] The Court went on to say "that no statement elicited by the police during the interrogation may be used against him at a criminal trial."[23] It was the *Escobedo* decision that restored the accused's right to counsel which had in the past been denied to him at many state trials.

Miranda delineated the rights of an accused who was being interrogated while in police custody. In *Miranda*, the defendants, while being interrogated by the authorities, were held in a room and cut off from the outside world. None of the defendants at any time were given a full warning of their rights prior to the interrogation. In *Miranda* and its companion cases, the questioning elicited oral admissions. In three of the cases, there were signed statements of guilt which were subsequently admitted at trial. The Court's subsequent ruling that the defendant's Fifth Amendment privilege against compulsory self-incrimination had been violated has since become an essential part of our adversary system.

In the opinion written by Chief Justice Warren, the court forged ahead and mandated the famous *Miranda* warnings. Before stating the warnings, the court went on to say that

> . . . unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it the following measures are required.[24]

The Court here seemed to require that these warnings be given until some new method of securing the accused's constitutional rights could be developed. The Court then proceeded to give the warnings as they are being given today.

> Prior to any questioning, the person must be warned that he has a right to remain silent, 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.[25]

Looking at the birth and growth of the privilege against self-incrimination in retrospect, one can safely say that it has been a right that had a long and hard fight to reach the point where it is today.

In *Tucker*, the Court was quick to come to the conclusion that *Miranda* was applicable to *Tucker*. Yet, in dealing with the issue of whether the police in *Tucker* violated the accused's Fifth Amendment privilege against self-incrimination, the Court took even less time in answering in the negative. Justice Rehnquist was under the impression that the police interrogation which the accused faced here bore no relationship

22. Gideon v. Wainwright, 372 U.S. at 342 (1963).
23. *Id.* at 491.
24. 384 U.S. at 444.
25. *Id.*

to the historical evils against which the privilege of compulsory self-incrimination was directed.

It seems very evident that the Supreme Court relied very heavily upon the fact that the respondent spoke voluntarily during the interrogation. The court seized upon this fact and decided that the respondent was not subjected to self-incrimination, and for this reason, his rights were not violated. The respondent's voluntary confession and refusal of an attorney were circumstances which were implicit in the court's reaching its decision.

Yet, Justice Rehnquist after reaching the determination that there was no compulsory self-incrimination involved in this case, felt compelled to recognize that there might have been an inadvertent disregard or a slight omission of one of the *Miranda* warnings.

Although there may have been an omission of one of the *Miranda* warnings, the police at that particular time were guided by *Escobedo*. *Escobedo* required only that investigating or interrogating officers inform the accused of his right to counsel and his right to remain silent, which is exactly what the police officers did in *Tucker*.

It must be remembered that the statements Tucker made while in custody were omitted at trial. Nonetheless, the trial court denied respondents' motion to exclude Henderson's testimony. Furthermore, the police acknowledged the fact that they became aware of Henderson's identity by statements respondent made while in custody. This raises the question whether or not the use of respondent's statement constitutes the use of the "fruits of the poisonous tree" and as such should be suppressed. The Court answered in the negative. Rehnquist pointed out that in *Wong Sun v. United States*[26] the fruits of police conduct which infringed upon the defendant's Fourth Amendment rights must be suppressed and may not be used later to make the prosecution's case. The factual situation in *Wong Sun* was that the accused had been arrested and subsequently the police discovered damaging evidence through in-custody statements made by the defendant. On appeal the Supreme Court found the arrest invalid. The Court held the arrest had been made without probable cause and that the evidence obtained through the illegal arrest could not be used at the trial against the defendant.

Yet, it was the opinion of Rehnquist and other justices that police conduct in the *Tucker* case "did not abridge respondents constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this court in

26. Wong Sun v. United States, 371 U.S. 471 (1963).

Miranda to safeguard that privilege."[27] It is Rehnquist's belief that *Wong Sun* does not apply in this instance. Only if Tucker's constitutional rights had been infringed, would the testimony of Henderson have been excluded. However, Rehnquist's distinguishing between rights and privileges in the Fourth Amendment setting is at best myopic and at least moronic.

Looking realistically at the *Tucker* decision and at its historical background, there appear to be grave inconsistencies present. The Court in *Tucker* seems to be saying that the Miranda warnings need not be given as they were outlined in *Miranda*. The Court in *Miranda* clearly stated that the warnings they outlined must be followed, "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence . . ."[28] The *Miranda* Court further intimated that these warnings were in no way a straitjacket and left the avenue open for Congress and states to provide other means of protection for the accused's rights. However, such other protective mechanisms were not evident from the facts in this decision. Absolutely no effort was made to develop a new method of protecting the accused's rights. Yet, the *Miranda* warnings were narrowed considerably. Such circumstances clearly contravene the language of *Miranda*. The warnings must be given until viable alternatives are put into effect.

The conclusion reached in *Tucker* was quite illogical in the sense that the court ruled *Miranda* was applicable to the case but its safeguards were not applied. Furthermore, the decision represented an attitude level of a law and order stance by the majority—a void once filled with clear and cogent reasoning. To apply *Miranda* on one hand and on the other hand, not to follow its command is in effect to rewrite the *Miranda* opinion to conform to the *Tucker* opinion. The Court could have overruled *Miranda*, but what would have been its replacement?

The resolution of *Tucker* raises more problems than it solves. One such problem being, how many of the *Miranda* warnings must the police give? If the Court has limited the warnings it should have written new warnings to safeguard the accused's rights while in-custody interrogation is going on. Yet the court failed to respond to such problems.

In what may be best characterized as a collusion between the law and order majority of the Supreme Court and the police,[29] *Tucker* represents a subtle attempt to usher the American people back into the era

27. 94 S. Ct. at 2364.
28. 94 S. Ct. at 467.
29. NOTE, *The Impending Scope of the Exclusionary Rule—Will the Supreme Court Vandalize the Constitution*, 5 N.C.C.L.J. 91 (1973).

of the ecclesiastical courts from which our society has long since transcended. To allow the police to "inadvertently" omit one of the *Miranda* warnings, in effect, is to strip the Fifth and Sixth Amendments of all meaning.

Further, *Tucker* cannot be reconciled with the Court's ruling in *Wong Sun*. The use of Tucker's statement to learn the identity of Henderson is clearly a part of "the fruits of the poisonous tree" as was the evidence derived from the illegal arrest in *Wong Sun*. To allow the police to use Henderson as a witness against Tucker is to allow Tucker to incriminate himself through his own statements and to help make the prosecution's case a clear violation of the accused's rights under the Fifth Amendment.

Clearly, the *Tucker* decision represents a blotch on the theory that the courts are the ultimate protectors of the rights of an accused person. The majority speaking through Rehnquist felt that by allowing the respondent an opportunity to attack Henderson's credibility by confrontation and cross-examination was to keep Tucker's Fifth Amendment rights secure and safe. Thus the court either inadvertently or knowingly overlooked the fact that confrontation and cross-examination come at a later stage in the criminal process. Henderson's testimony should have been suppressed *ab initio*. Obviously, an accused's Fifth Amendment rights need protecting before trial during in-custody interrogation if *Miranda* is to be regarded as no more than vacuous dicta.

If police are continually allowed to omit one or more of the *Miranda* guidelines, the effect would be constitutionally debilitating.

The Court's reasoning in *Tucker* was not only unsound but if followed in future decisions, will prove to be erosive of an accused's Fifth and Sixth Amendment rights as guaranteed by the Constitution.

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Class Actions and the Amount In Controversy

The question raised by *Zahn v. International Paper Company*[1] has important effects upon the future of class actions under the Federal Rules of Civil Procedure, specifically those grounded upon diversity jurisdiction. The central issue in the case is whether or not every person represented as plaintiffs in a Rule 23(b)(3) class action must meet

1. Zahn v. International Paper Company, 404 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 505 (1973).