Statutory Replacement for the Miranda Doctrine,
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Phillip E. Johnson
Berkeley Law

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A STATUTORY REPLACEMENT FOR THE MIRANDA DOCTRINE

By Phillip E. Johnson*

The following hypothetical statute is offered to illustrate the justifications that might be offered for a statutory replacement for the Miranda doctrine, and the form such a statute might take. The specific provisions are drafted to illustrate the issues that should be addressed. Readers are invited to propose amendments.**

PREAMBLE

Whereas, the Supreme Court in Miranda v. Arizona¹ imposed detailed regulations on the interrogation of criminal suspects in both state and federal criminal investigations; and

Whereas, the constitutional basis of the Miranda decision has been eroded by subsequent decisions of the Court; and

Whereas, the majority opinion in Miranda invited a legislative solution to the problem of protection of Fifth Amendment rights in the police interrogation process; and

Whereas, the Miranda majority opinion was internally inconsistent in describing custodial interrogation as inherently coercive while permitting uncounseled defendants to waive their rights in this setting; and

Whereas, the initial incoherence in the Miranda opinion has led to a body of case law which does not either satisfactorily curb abuse in the interrogation process or recognize the legitimate role of custodial interrogation in identifying the perpetrators of criminal acts;

Now therefore, the Congress of the United States makes the following Findings, and enacts the following statutory provisions:

FINDINGS

1. Police interrogation of suspected persons is a necessary and legitimate practice in solving crimes and assuring that guilty persons are brought to justice.

2. Law enforcement officers have no authority to require any person, whether suspected of a crime or not, to answer their questions. The fact that persons may not be compelled to answer does not mean, however, that they may not be encouraged to do so. "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."²

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** I have already benefitted from critical comments offered by readers of an earlier draft, specifically Professors Yale Kamiser, Stephen Schulhofer, Joseph Grano, Welsh White, Jerome Skolnick, and Albert Alschuler.


3. The sixth amendment right to the assistance of counsel, applicable to the states through the fourteenth amendment, attaches at the initiation of adversary judicial proceedings, when the accused is in court for arraignment on a criminal charge. Prior to that time, a suspect in custody is protected by the fifth amendment prohibition of compulsory self-incrimination, and by the Due Process Clause, but not by the right to counsel. No warning of a right to counsel is necessary or appropriate before that right attaches at the initiation of adversary judicial proceedings.

4. There is an inherent potential for coercion and inhumane treatment during the police interrogation process, particularly when the crime under investigation is one which arouses strong public revulsion. The law should prohibit interrogation techniques that are inhumane or likely to induce unreliable statements, while permitting reasonable methods of persuasion aimed at encouraging truthful admissions of guilt.

5. It is highly desirable for interrogation sessions to be recorded, so that reviewing courts and other agencies can have complete and accurate information regarding the content of any statements and the circumstances under which statements were obtained.

6. Constitutional principles require that coerced admissions not be used as evidence against the accused. However, excessive reliance on exclusion of evidence as the remedy for improper police conduct is costly to the public interest in accurate factual determinations in judicial proceedings. Excluding evidence is also often ineffective as a means of affecting police behavior. There is a need for clearer standards of conduct to guide police in questioning suspects. There is also a need to employ remedies other than (or in addition to) exclusion of evidence.

7. Federal legislation on this subject, governing both state and federal investigations and judicial investigations, is constitutionally appropriate. Congress has plenary power to legislate rules of investigative and judicial procedure for the federal system and power to ensure, by appropriate legislation, that no person shall be deprived of life, liberty or property without due process of law.\(^3\) In the Miranda opinion itself, the Supreme Court specifically invited legislatures to address the problem of custodial interrogation.\(^4\) Legislative action is even more appropriate now that we have the benefit of more than twenty years of experience under the rules promulgated in Miranda.

**Statutory Provisions**

On the basis of these Findings, the Congress of the United States enacts this legislation, which shall be called the Interrogation and Confession Act of 19??.

Section 1. Subject to constitutional principles and the provisions of this Act, officers may question persons, whether in custody or not, while investigating crimes and for the purpose of obtaining evidence.

Section 2. (a) Before questioning a suspect in custody, an officer shall advise the suspect that he (she) is not required to answer questions, and that any answers given may be used in evidence.

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(b) An officer is not required to cease questioning merely because a suspect has initially refused to answer. When the suspect has communicated a firm and considered refusal to answer, however, the officers should respect that refusal and cease questioning.

Section 3. (a) In the custodial interrogation of a suspect, an officer shall not:

1. Employ force or threats;
2. Make any statement which is intended to imply or may reasonably be understood as implying that the suspect will not be prosecuted or punished;
3. Intentionally misrepresent the amount of evidence available against the suspect, or the nature or seriousness of the anticipated charges; or
4. Intentionally misrepresent his identity or employ any other deceptive stratagem not authorized by this Act which, in the circumstances, is fundamentally unfair; or
5. Deny the suspect reasonable opportunity for food and rest.

(b) It does not violate this Act for an officer to:

1. Express sympathy of compassion for the offender, whether real or feigned;
2. Suggest that the crime may be morally understandable or excusable, whether or not the suggestion is sincere;
3. Appeal to the suspect's conscience or values, religious or otherwise;
4. Appeal to the suspect's sympathy for the victim or other affected persons;
5. Inform the suspect honestly about the state of the evidence; or
6. Inform the suspect that a voluntary admission of guilt and sincere repentance may be given favorable consideration at the time of sentence.

Section 4. (a) A suspect in custody shall be taken without unreasonable delay before a magistrate for arraignment, appointment of counsel, and consideration of pretrial release.

(b) Any period of delay shall be presumed to be reasonable if the suspect is brought before a magistrate on the next court day following arrest.

Section 5. When a suspect has appeared for arraignment in a court in the locality in which charges are to be filed, the adversary stage of the process commences and the sixth amendment right to counsel attaches. Thereafter, statements obtained in violation of the right to counsel are not admissible against the interrogated defendant on the pending charges.

Section 6. (a) A confession, admission, or other statement shall be excluded from evidence on motion of the defendant if it was coerced by an officer, or if there is substantial doubt as to its reliability.

(b) A statement is presumed to have been coerced if it was obtained as a result of a violation of this Act.

(c) If any evidence of a violation of this Act is produced, the prosecution has the burden of establishing by clear and convincing evidence that the statement in question was not coerced.

(d) Evidence other than statements of the defendant shall be excluded only as required by the Constitution, or to the extent necessary to effectuate the purposes of this Act.

(e) Nothing in this Act prevents a State from enacting or maintaining additional grounds for excluding statements or other evidence from proceedings in its own courts.
Section 7. When a judicial officer excludes a statement pursuant to Section 6 on the ground that it was coerced by a substantial and willful violation of this Act, or admits a statement into evidence despite a substantial and willful violation of this Act, the judicial officer shall cause a report of the proceedings and the identities of the offending officer(s) to be transmitted to the appropriate United States Attorney for review for possible prosecution under 18 U.S.C. §§ 242, or any other applicable provision of law.

Section 8. It is the intent of the Congress that, to the greatest extent feasible, interrogations of suspects in custody shall be recorded so as to provide a complete and accurate record of the content of any statements and the circumstances under which statements were obtained. The Attorney General is directed to prepare regulations implementing this Section and to report to Congress on or before June 30, 19??.

Section 9. It is the intent of Congress that the provisions of this Act shall be widely circulated to judicial officers and law enforcement officers throughout the nation, in order to obtain full compliance. Officers conducting interrogations should be trained or retrained in compliance with this Act. The Attorney General is directed to prepare regulations implementing this Section and to report to Congress on or before June 30, 19??.

Section 10. Definitions. As used in this Act:

(a) "Officer" means a federal, state or local law enforcement officer, or a person acting under the direction of such an officer;

(b) "Judicial Officer" means a judge or magistrate of a federal or state court or record;

(c) "Interrogation" and "Questioning" means saying or doing anything which is intended to elicit or reasonably calculated to elicit an incriminating statement from a suspect where the primary purpose is to obtain evidence for prosecution;

(d) "Custody" exists when a suspect is under the physical control of an officer under circumstances which objectively indicate that the suspect is not free to leave.

Committee Report

This report was prepared by the Joint Congressional Committee on Truth and Justice in order to explain the intent and purpose of the attached Act. Explaining the statute we have drafted may be a pointless activity. If we have drafted the statute competently, then its intent and purpose should be clear without the need

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5. 18 U.S.C. § 242 (1982) provides:

Whoever, under color of any law, statute, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results he shall be subject to imprisonment for any term of year or for life.
for further explanation. If we have been unable to make ourselves clear in the statute, then probably we will only add to the confusion by attempting further explication. Nonetheless, it may be useful to provide some explanation of why we made the choices which we did make, in a manner more informal than would be suitable in the statute itself.6

By enacting this statute we do not mean to create a constitutional confrontation, to express disrespect for the Supreme Court, or even to show disapproval for the Miranda opinion itself. We are confident that Chief Justice Warren and the other Justices in the majority would have agreed that the particular set of rules that they prescribed ought to be reexamined periodically, and that comprehensive legislation on the subject would be in many respects superior to a solution dictated by a narrow majority of the Supreme Court acting within the limitations of the judicial process. The Miranda opinion itself invited a legislative solution, with the reservation that the legislation must be “fully as effective as [the Miranda rules] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”7

We believe that the legislation here provided meets that standard.8 Although this Act rejects a number of the specific protections prescribed by the Miranda opinion, it provides others not found there, including a specification of interrogation techniques that may and may not be employed, a prompt arraignment provision, provisions for training and disciplining officers, and a provision for recording interrogations which should be invaluable in resolving factual disputes. We respect the Miranda decision as a milestone in the long struggle to reconcile the reality of police interrogation with the constitutional principles that protect suspects in the courtroom. We believe that a comprehensive statute can address the problem in a more satisfactory manner, and that a legislative solution is more likely to be respected by law enforcement officers and the general public, especially in view of the training programs which will be instituted pursuant to Section 9.

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6. It is of some importance that we have been able to obtain unanimous endorsement for this Report from the members of the Joint Committee. We felt that unanimity was important to demonstrate to the law enforcement community, as well as to the judiciary, that we mean business. Compare Brown v. Board of Education, 347 U.S. 483 (1954) (unanimous opinion) and Cooper v. Aaron, 358 U.S. 1 (1958) (opinion signed by all nine justices) with Miranda v. Arizona, 384 U.S. 436 (1966) (5-4 opinion).


8. It is for Congress rather than the Court to determine if the legislation is “fully as effective” as the Miranda protections. The Supreme Court has characterized the Miranda requirements as a set of “prophylactic rules” which are not themselves rights protected by the Constitution but are instead measures to ensure that the right against compulsory self-incrimination is protected. See Oregon v. Elstad, 105 S. Ct. 1285, 1291 (1985) (quoting earlier post-Miranda decisions). Although we concede that the Supreme Court has authority to overturn an Act of Congress on the ground that it does not comply with the Constitution itself, we think it reasonably clear that the Court has no authority to overturn a statute on the ground that it is not in strict compliance with certain “prophylactic rules” enacted by the Court. See generally Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U. L. REV. 100 (1985); Monaghan, Constitutional Common Law, 89 HARV. L. REV. 1 (1975); Schrock, Welsh, & Collins, Interrogation Rights: Reflections on Miranda v. Arizona, 52 S. CAL. L. REV. 1 (1978).
Our first task in drafting legislation was to resolve the contradiction inherent in the original *Miranda* opinion, a contradiction perceived by the dissenting Justices at the time and by numerous commentators thereafter. The majority opinion described police interrogation as inherently coercive in the absence of counsel, but then permitted the uncounseled suspect to waive his rights to counsel and to silence in this inherently coercive atmosphere. Underlying this contradiction was a basic uncertainty about whether the evil to be remedied was police interrogation itself, or a certain set of abuses in a basically legitimate interrogation process. If the interrogation room was to resemble the courtroom, with officers scrupulously respecting the suspect’s right not even to be asked questions unless he chose to do so with the guidance of counsel, then interrogation was an impossibility. If the officers were to have full license to take advantage of the vulnerability of any suspect who was foolish enough to waive his rights, then it is difficult to understand what the *Miranda* rules were meant to accomplish.

We reject the view, frequently implied in the legal literature but seldom forthrightly stated, which holds that it is improper for investigating officers to seek to obtain confessions, or which identifies interrogation itself, rather than specific abuses, as the evil to be prevented. Like the majority in *Miranda* itself, we have looked to the experience of other countries (especially England) for guidance, but the considerably more complete evidence available to us suggests that other countries regard questioning of accused persons as a legitimate means of obtaining evidence for conviction. We see nothing in our Constitution to the contrary.

We also reject the argument, that some principle of fairness or equal treatment requires that we not take advantage of the ignorance or vulnerability of particular criminal suspects. If rich, crafty, and strong-willed persons are able to get away with murder, then we should remedy that situation and not compound the evil by extending similar advantages to everyone else. To deny this principle is to treat criminal investigation as a game.

One explanation for the internal contradiction in the *Miranda* opinion is that the Court was tempted by the notion of extending the sixth amendment right to counsel to the moment of arrest. We accept the principle that, once the sixth

9. See Y. Kamisar, *Police Interrogation and Confessions* 47-49, & n.11 (1980). Significantly, Professor Kamisar points out that the amicus brief of the American Civil Liberties Union, which the *Miranda* majority appeared to use as the basis for its own opinion, argued repeatedly that protection of the privilege requires the presence of counsel, not merely advice as to the immediate availability of counsel. Professor Kamisar considers it “surprising” that the court failed to deal explicitly with the ACLU conception even if only to reject it. We consider the omission as a tacit admission that the majority could not resolve the contradiction inherent in its own approach.

10. “I was introduced for my accomplishments primarily as being of counsel in *Miranda,* and consistently I must disabuse everyone of the accomplishment* * *. When certiorari was granted and we were asked by the ACLU to prepare and file the brief, we had a meeting in our law office in which we agreed that the briefs should be written with the entire focus on the Sixth Amendment [right to counsel] because that is where the Court was headed after *Escobedo,* and, as you are all aware, in the very first paragraph [of the *Miranda* opinion] Chief Justice Warren said, ‘It is the Fifth Amendment to the Constitution that is at issue today.’ That was *Miranda*’s effective use of counsel.” Flynn, *Panel Discussion on the Exclusionary Rule,* 61 F.R.D. 259, 278 (1972) (quoted in Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* 541 (6th ed. 1986).
amendment right has attached at the initiation of adversary judicial proceedings, the police may not attempt to circumvent that right. We do not believe that the investigatory stage terminates until the police have had a reasonable opportunity to complete their investigation, however, including a reasonable opportunity to interrogate the suspect. Our formulation of this principle in Section 5 is designed to make this point clear, and to question the assumption made by the Supreme Court in Brewer v. Williams, that the sixth amendment right attached when a defendant was briefly arraigned in a distant court on an arrest warrant. In our view, the initiation of adversary judicial proceedings in that case occurred at a later point, when the defendant appeared in court in the district having jurisdiction over the murder charge.

On the other hand, the police should not have an unlimited opportunity to postpone the initiation of judicial proceedings. The period of permissible interrogation should be measured in hours rather than days. Section 4 reflects this consideration by requiring reasonably prompt arraignment. The length of permissible interrogation is also limited by Section 3 (5), which requires that the suspect be allowed reasonable opportunities for food and rest.

From what has been said, it should be clear why we have omitted any warning of a right to counsel from Section 2. Any such warning would be untrue, because the suspect has no right to counsel at this stage. What the suspect has is a right not to be compelled to answer questions, which in our opinion is very different from a right not to be encouraged or persuaded. To put the point another way, we do not agree with those who argue that the protections a defendant has at trial must necessarily be extended to custodial interrogation. On the contrary, we would support stricter restrictions on police interrogation only if it were possible to question the defendant under judicial supervision in the manner recommended by many distinguished jurists and legal scholars.

11. See, e.g., United States v. Henry, 447 U.S. 264, 274-75 (1980) (government violated respondent's sixth amendment right to counsel by intentionally creating situation likely to induce incriminating statements in absence of counsel); Kirby v. Illinois, 406 U.S. 682, 688 (1972) (show up after arrest, but before initiation of adversary criminal proceeding, is not critical stage at which accused is entitled to counsel); Massiah v. United States, 377 U.S. 201, 206 (1964) (incriminating statements elicited from petitioner in absence of attorney deprived him of right to counsel). By saying that we "accept the principle" of the Massiah-Henry doctrine, we do not mean to imply approval or disapproval. We mean only that the doctrine is firmly established in the case law as a constitutional principle (unlike the Miranda rules).


13. Id. at 399.

14. On this basis, we support the result in Moran v. Burbine, 106 S. Ct. 1135 (1986).

15. See Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 1006-11 (1983); Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, 73 Mich. L. Rev. 15, 33-34 (1974), reprinted in Y. Kamisar, POLICE INTERROGATION AND CONFESSIONS (1980). These writers discuss proposals for judicially supervised interrogation that have received the endorsement of such giants of the legal profession as Wigmore, Pound, Friendly and Schaefer. We considered recommending a judicial interrogation or deposition procedure as an alternative to police interrogation, with the defendant to be told that either his answers or his refusals to answer would be disclosed to the jury and considered on the issue of guilt. We reluctantly abandoned this alternative because it seems likely that a constitutional amendment would be required to legitimate the use as evidence of the defendant's refusal to answer questions. See Griffith v. California, 380 U.S. 609, 615 (1965) (fifth amendment forbids prosecutor's comments or court's instructions implying that defendant's silence is evidence of guilt); Carter v. Kentucky, 450 U.S. 288, 297 (1981) (same).
Section 2(b) attempts to retain something of the spirit of the Supreme Court's decision in *Edwards v. Arizona*, without erecting an arbitrary technical barrier to legitimate interrogation. The police are not required to cease interrogating merely because the suspect has expressed an initial reluctance to answer their questions. They may "make a pitch" aimed at encouraging him to cooperate. However, once the suspect has heard what they have to say and expressed a considered and definite refusal to speak, he should not have to endure a prolonged campaign of wheedling, coaxing, and nagging aimed at overcoming his resistance. Naturally, there will be borderline cases, as with any line-drawing rule, but we are confident that the police and the courts can understand the distinction we have expressed in Section 2(b).

Section 3 specifies what officers may and may not do in the course of interrogating suspects who have not made a firm and considered refusal to answer. Everyone agrees that the use of force, or threat of force, is an improper means of obtaining a confession, and other threats may also leave the suspect with no alternative but to comply with any demands that the officers make. For example, the officers in *Lynnum v. Illinois*, told a woman suspected of drug dealing that her welfare payments would be suspended and her children taken from her upon arrest, so that her only hope was to obtain favorable action from the police by confessing. We endorse the Supreme Court's holding that the confession in *Lynnum* was coerced. Similarly, "relay" questioning, or any other tactic which takes advantage of the exhaustion or hunger of the accused, is inhumane in itself and likely to induce unreliable statements.

Statements that promise leniency or imply that the suspect may not be prosecuted are similarly impermissible. Offers of leniency can be made later, in the plea bargaining process, where the accused is represented by counsel and can properly evaluate what is being offered. Promises of leniency from the police during interrogation are too likely to be deceptive, and too likely to give even an innocent suspect the impression that confession is the only way to escape conviction or mitigate the punishment. Section 3 also states a limit on these principles. Officers may make the suspect aware of his situation by honestly explaining the state of the evidence, and by pointing out that confession and sincere repentance may be given favorable consideration at sentencing. We believe that this last statement is true, and unlikely to overbear the will of a suspect or induce an unreliable confession.

Promises of leniency are forbidden, but expressions of sympathy and compassion are approved. A pose of sympathy is not overbearing or coercive, nor is it likely by itself to encourage an innocent person to provide a confession. A difficulty in this area is that the difference between expressions of compassionate under-

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17. The precise holding in *Edwards* has no place within our statutory scheme in any case, because it is based on the premise that the accused has a "right to counsel" at pre-indictment interrogation, and we have rejected that premise.
19. *Id.* at 531-34.
20. *Id.* at 534.
standing on the one hand, and implied promises of leniency on the other, is at the margin sometimes a matter of emphasis and nuance. As an example of the distinction we have in mind, we think that the interrogating officer in *Miller v. Fenton*,\(^{21}\) crossed the line from the permissible to the impermissible at several points, particularly when he emphasized that it is appropriate for mentally disturbed murderers to receive "good medical help" rather than punishment.\(^{22}\) That statement seemed to imply that, upon confession, the suspect would receive only a civil commitment. We do not mean to condemn the officer, because at that time there was no authoritative guidance from the courts or the legislatures to help a conscientious officer decide what to do and what not to do. Our aim is to provide that guidance, with the assistance of the administrators who will provide the training regulations specified in Section 9.

We do not regard it as an abuse for an officer to encourage a confession by appealing to the suspect's sense of moral guilt or feelings of sympathy for the victim and other injured persons. On the contrary, a sense of guilt is the most appropriate reason for confessing. Thus, we approve as a proper interrogation device, the "Christian Burial Speech" employed in *Brewer v. Williams*, assuming that the sixth amendment right to counsel had not yet attached.\(^{23}\) We concede that reasonable persons differ on this question, and that there are those who think it unfair for the state to "take advantage of" a person's religious beliefs or guilt feelings. On balance, we conclude that it is desirable that such considerations be brought forcibly to the mind of a person who has committed a serious crime, and that doing so is unlikely to induce an untrue statement from an innocent person. It is conceivable, of course, that a mentally disturbed individual might imagine himself guilty out of a desire to be punished or some similar motive, but we do not believe that general rules should be crafted to deal with such extraordinary exceptions. If the confession in the circumstances of the individual case is unreliable, a court should exclude it under Section 6.

Although there is no requirement that the police in from the suspect of all the information that might effect his decision to confess, we do not allow the police to practice outright deception as to the crime under investigation or the amount of evidence that they have. For example, the police may not put the accused in a staged line-up and have a "witness" pretend to identify him. Under Section 3(a)(4) it would also be forbidden for an officer to say, pose as a priest and invite the suspect to make confession, or to employ the outrageous "false friend" tactic condemned in *Spano v. New York*.\(^{24}\)

A few members of the Committee with backgrounds in law enforcement were inclined at first to defend the practice of leading a suspect to believe that the police have more evidence than they really do, because this technique has often been useful in inducing guilty persons to confess. On balance, however, the view prevailed that this type of misrepresentation might cause an innocent suspect to


\(^{22}\) Id. at 602.

\(^{23}\) 430 U.S. at 392.

\(^{24}\) 360 U.S. 315 (1958).
believe that the case was hopeless, or even that the police were prepared to "frame" him. Unanimity on Section 3 in its present form was eventually achieved when other members of the Committee, with backgrounds as criminal defense attorneys or law professors, threatened to withdraw their reluctant agreement to endorsement of the "sympathy ploy."

Section 6 provides a carefully limited exclusionary rule to enforce the provisions of this Act, and also to protect the possibly innocent suspect from conviction on the basis of an unreliable confession. Subsection (a) provides two independent bases for exclusion: that the confession was coerced, or that there is substantial doubt as to its reliability. For example, the confession by an insane person in Colorado v. Connelly, was not coerced (as we use the term). It may have been unreliable, however, if the dissenting opinion of Justice Brennan is correct in stating that it was not corroborated by any physical evidence. A confession by a severely mentally ill person, who may be fantasizing events which never occurred, should not be admitted if there is substantial doubt as to its reliability.

Subsection (b) states a presumption which is intended to discourage police from violating the provisions of this Act. The presumption does not apply unless there was a causal relationship between the violation and the statement, and it may be rebutted by clear and convincing evidence. Our goal in these provisions is to avoid excluding reliable evidence needlessly, while also avoiding giving any encouragement to an officer who is tempted to cheat on the legal requirements in the hopes that the courts will be forgiving. Our purpose is further served by Section 7, which contemplates criminal prosecution of officers who substantially violate this Act, if the officer has had ample opportunity to learn to understand the statutory requirements and if the violation was wilful.

Section 6(d) deals with the vexing problem of whether to exclude the "fruits" of an unlawfully obtained confession, or rather declines to deal with it. For the time being, we believe that this problem should be left in the hands of the courts. A majority of the members of the Committee initially took the view that exclusion should stop with the statements themselves, and not extend to derivative evidence such as weapons, corpses, and witnesses. They were persuaded by a minority, however, who argued that, at least for the time being, we should retain the possibility of a wider exclusionary rule until we are satisfied that police evasion of the Act is not a serious problem. If federal, state and local law enforcement officers observe the provisions of this Act, as we expect that they will, then exclusionary orders of any type should be rare.

Subsection 6(e) makes clear that we are not "preempting the field." The states remain free to retain the Miranda rules, or even to exclude confessions altogether in state prosecutions. We are confident that our solution is a better one, however, and that the states will eventually come to agree with us.

Section 7 directs judicial officers to bring substantial and wilful violations of this Act to the attention of the appropriate prosecuting officers, whether or not the violation results in exclusion of evidence under Section 6. The requirement

26. Id. at 530 (Brennan, J., dissenting).
that the violation be both substantial and wilful adequately protects officers from the possibility of criminal prosecution in borderline situations where they acted in good faith, and we believe that prosecution is appropriate in cases of flagrant disregard of the protective provisions of this Act.

Section 8 expresses our conclusion that interrogations should be recorded by the means best suited to providing a complete and accurate record. Presumably, this requirement might be met by audio or video recording in some cases, and by stenographic transcript in others. We concluded that it would be premature to legislate a flat requirement of recording at this time, without further input from law enforcement agencies and other interested parties about the details. We also contemplate that recording requirements will be a major part of the training programs established pursuant to Section 9. Once there has been an adequate time for consideration of the details and for training programs, then it may be appropriate to amend Section 8 to state more definite requirements, and to provide explicitly for sanctions for willful non-recording.

Finally, the definition of "interrogation" and "questioning" in Section 10 makes clear that this Act governs questioning that occurs for the purpose of obtaining confessions or admissions. Its provisions do not necessarily apply to questioning which is primarily motivated by other concerns, as in New York v. Quarles,27 or United States v. Mesa.28 We can also imagine cases where, for example, officers question a kidnap suspect to determine the location of a child who is in mortal danger. In all these circumstances departures from what otherwise might be the requirements of this Act may be justified, and the resulting statements are admissible unless there is a substantial doubt as to their reliability. Lacking the ability to imagine all the circumstances which may arise, we leave the question of application to the courts.

28. 638 F.2d 582 (3d Cir. 1980).