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NORTH CAROLINA LAW REVIEW

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Volume 68 | Number 1

Article 10

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11-1-1989

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## Recommended Citation

Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989).

Available at: <http://scholarship.law.unc.edu/nclr/vol68/iss1/10>

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# A MODEST PROPOSAL FOR THE ABOLITION OF CUSTODIAL CONFESSIONS

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*More than twenty years ago, the United States Supreme Court held in *Miranda v. Arizona* that confessions would be per se inadmissible if obtained by police who had failed to inform a criminal suspect of his constitutional rights and the consequences of waiving them. Miranda's rule aimed at dissipating the inherent coerciveness of custodial interrogation. Supreme Court cases subsequent to *Miranda*, however, gradually have eviscerated the landmark decision. In this Article Professors Irene Merker Rosenberg and Yale L. Rosenberg criticize *Miranda* as originally fashioned, examine its decline, and propose a new per se rule that deems all custodial statements inadmissible. The authors note that by disingenuously blurring the rule of *Miranda*, the Supreme Court has made the law difficult to follow and has allowed—perhaps implicitly encouraged—lower courts, prosecutors, and police to ignore the rights of criminal defendants in the same disingenuous manner. The authors conclude that their proposal is necessary to restore the rights that the crippled rule of *Miranda* no longer protects.*

## INTRODUCTION

In a recent episode, Spider-man, the superhero of the newspaper comic strip,<sup>1</sup> crashed through a store window, rescued a robbery hostage from a vicious gunman in full view of police officers and television cameras, and then

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The authors wish to thank Rudy England, University of Houston Law Center, class of 1989, for his excellent research assistance.

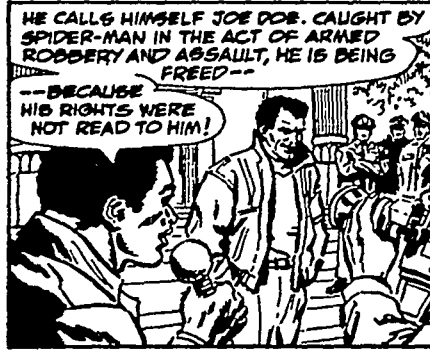
1. In reality, Spider-man is Peter Parker, a young newspaper photographer and sometime graduate student, who was bitten by a radioactive spider, thereby becoming endowed with super spider powers. Using his web fluid, Spider-man is able to swing from building to building and to capture bad guys in his nets. Consequently, he is sometimes referred to as the "web slinger." His ability to adhere to walls and ceilings also has earned him the sobriquet "wall crawler."

The Spider-man comic strip is syndicated in 500 newspapers. It has an estimated 60,000,000 readers in the United States and 75,000,000 in the world. Telephone interviews with Sara Rogers, Permissions Editor of King Features (March 21, 1989), and Ted Hannah, Director of Advertising and Public Relations of King Features (May 11, 1989).

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turned the web-tied perpetrator over to the authorities.<sup>2</sup> But it was all for naught:

### Amazing Spider-Man



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And to add insult to injury:



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The misadventure culminates in a philosophical dialogue between Peter Parker, the web-slinger's alter ego, and Robbie Robertson, his editor at *The Daily Bugle*:

2. Houston Chron., Jan. 12, 1989, at D10; *id.*, Jan. 13, 1989, at E8; *id.* Jan. 14, 1989, at E5; *id.*, Jan. 16, 1989, at D8; *id.*, Jan. 17, 1989, at D8.

3. *Id.*, Feb. 3, 1989, at E8.

4. *Id.*



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Although no mention is made of a confession, the allusion to police failure to read Joe Doe his rights plainly refers to the warnings required by *Miranda v. Arizona*.<sup>6</sup> Never mind that the specifics of the cartoon are wrong—Joe Doe never would have been released because conviction of a crime witnessed by scores of persons will not turn on admissibility of the culprit's confession.<sup>7</sup> In a broader sense, the author is right on the button; he has conveyed the popular perception of our criminal justice system accurately. Robbie Robertson's civil libertarian plea is tentative and conclusory,<sup>8</sup> while the fiery and idealistic young

5. *Id.*, Feb. 5, 1989, Comics Section.

6. 384 U.S. 436 (1966). The *Miranda* Court mandated a set of specific warnings as a condition of admissibility of a suspect's confession taken during custodial interrogation. The police must advise the suspect that she has a right to remain silent, that anything she says can be and will be used against her in court, that she has a right to consult with counsel and have counsel present during interrogation, and that if she is indigent an attorney will be appointed to represent her. In addition, police must obtain a valid waiver of these rights before a confession can be used against a suspect. *Id.* at 467-76.

7. Given such overwhelming extrinsic evidence of guilt, no prosecutor would seek to introduce Joe Doe's confession. If he did, it is quite likely that as long as the confession was not coerced under traditional due process analysis, its introduction would be considered harmless error. Compare *Milton v. Wainwright*, 407 U.S. 371, 372-73 (1972) (even if confession were excludable on sixth amendment grounds under *Massiah v. United States*, 377 U.S. 201 (1964), any error was harmless) and *Satterwhite v. Texas*, 108 S. Ct. 1792, 1797 (1988) (harmless error doctrine applies to sixth amendment violations under *Estelle v. Smith*, 451 U.S. 454 (1981) with *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (harmless error rule does not apply to involuntary confessions). See also *Miranda*, 384 U.S. at 481 (noting that in many cases confessions were unnecessary because the police had obtained evidence of guilt through other standard investigatory procedures).

8. In the world of Spider-man, his beautiful bride Mary Jane, his timorous Aunt May, and Jonah Jameson, the wily and ill-tempered publisher of *The Daily Bugle*, Robbie Robertson may be the authentic hero, i.e., the voice of wisdom, decency and sensitivity in an otherwise turbulent and erratic world. At the same time, that Robbie is black and is speaking in favor of "technicalities"

Parker gives a rather fulsome (for the cartoon world anyway) recitation of the prevailing law and order perspective. It is the latter perspective that appears to be the dominant social view in late twentieth century America.<sup>9</sup> The public apparently believes that, if it ever existed, police coercion is now a thing of the past and that *Miranda*, which permits criminals to get off scot-free, is the star in a national theater of the absurd.

The popular drumbeat against *Miranda*, which now is echoed by the United States Supreme Court,<sup>10</sup> tends to obscure the factual and legal circumstances that led the Court to render *Miranda*'s per se ruling—widespread and unmonitored coercive police practices, uncontrolled by an ad hoc voluntariness test that gave no guidance to police or courts and resulted in lawlessness in the nation's police stations.<sup>11</sup> *Miranda*'s solution was a warning and waiver requirement to be administered by the very individuals whose tactics had given rise to the problem of coerced confessions.<sup>12</sup> Little wonder that some have viewed *Miranda* simply as *legerdemain*, offering the appearance but not the real-

may amount to subliminal reinforcement of the notion that minorities are the primary beneficiaries of the exclusionary rules.

9. The 1988 presidential campaign is a paradigm. Then-Vice President George Bush, a lifetime member of the National Rifle Association, was tall in the saddle. Michael Dukakis—American Civil Liberties Union member, opponent of the death penalty, and, most importantly, liberator of Willie Horton—was soft on crime and short on votes. See Shapiro, *Why It Was So Sour*, TIME, Nov. 14, 1988, at 18; see also Weinberg, *A Democratic Retreat*, THE NATION, July 5/12, 1986, at 12-13 (describing provisions of Comprehensive Crime Control Act of 1984 that "turn[ed] back the clock on protections of defendants' rights"); Dionne, *A.C.L.U. Examines Its Image and Pronounces It Unharmed*, N.Y. Times, May 14, 1989, at 23, col. 1 (A.C.L.U. poll "found that 78 percent agreed with the statement, 'Protecting the constitutional rights of criminals makes law enforcement more difficult,' and 62 percent said they thought the country 'had gone too far in protecting the rights of persons accused of committing crimes.'").

10. Indeed, it seems clear that a majority of the Court views *Miranda* as an unwarranted hindrance to effective law enforcement. For example, in *Moran v. Burbine*, 475 U.S. 412 (1986), the Court observed:

[A] rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt.

*Id.* at 427.

Similarly, in *New York v. Quarles*, 467 U.S. 649 (1984), the Court noted that "[I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding." *Id.* at 657. For further elaboration on the Court's current view of *Miranda*, see *infra* notes 63-153 and accompanying text.

11. See Y. KAMISAR, *What Is An Involuntary Confession?* reprinted in Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 1-25 (1980); *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, reprinted in Y. KAMISAR, *supra*, at 27-49; *A Dissent from the Miranda Dissents*, reprinted in Y. KAMISAR, *supra*, at 69-76. The voluntariness test was ambiguous and ad hoc, examining a broad array of factors, including the police techniques employed and the characteristics of the suspect. As Professor Grano has noted, this test "seemingly made everything relevant but nothing determinative." Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1987).

12. See, e.g., Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1460-61 (1985) ("Like requiring a convict to build his own place of confinement, there was something mischievous about making the police the harbingers of good tidings to those they had just arrested."); cf. *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.").

ity of an effective mechanism against police overreaching.<sup>13</sup> According to this view, the decision's failing is not that it impedes the police, but that it does not impede them enough: *Miranda* is unable to protect suspects from improper police practices and the overwhelming pressures of custody. Instead, contrary to the popular belief, more rigorous safeguards, such as requiring counsel at interrogations, are essential to deter official misconduct and facilitate the knowledgeable exercise of free will.<sup>14</sup>

Such voices favoring a stronger remedy are far less audible now, however, and it is not hard to discern why. The Supreme Court's general shift to the right on *Miranda* questions,<sup>15</sup> as well as on other criminal procedure issues,<sup>16</sup> almost necessarily has pulled the bounds of reasonable dialogue in the same direction. Furthermore, the executive department's most recent assault on *Miranda*,<sup>17</sup>

13. See, e.g., Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1827 (1987) ("Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of the police interrogation room they are woefully ineffective."). One author who supports the decision has nonetheless observed: "*Miranda* does precious little to break the wall of isolation surrounding the target of a custodial interrogation." Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U.L.Q. 1, 15 (1988). Indeed, even some *Miranda* critics concede its inefficacy, albeit as part of an argument for overruling the decision. See, e.g., Caplan, *supra* note 12, at 1463 ("[S]tudies conclude that *Miranda* has done little to promote the exercise of the right to silence or the right to have counsel at the police station." (footnote omitted)).

14. See, e.g., O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973) ("Probably nothing short of a blanket requirement that no suspect be questioned except in the presence of his attorney could be expected to remove the elements of psychological coercion to which the Court has so long objected."); L. WEINREB, *DENIAL OF JUSTICE* 128-31 (1977) (recommending that police be required to bring suspects immediately before a magistrate who will advise accused of the right to remain silent and who will conduct interrogation in the presence of the suspect's lawyer). One commentator states the position as follows:

[I]n my view, the *Miranda* rules do not go far enough in protecting the due process and fifth amendment values that underlie the decision. I would propose the adoption, either judicially or legislatively, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney.

Ogletree, *supra* note 13, at 1830 (footnote omitted).

15. See *infra* notes 63-153 and accompanying text.

16. Compare *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States."), *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."), and *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and . . . therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.") with *Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("[because] the Sixth Amendment does not require jury sentencing, . . . the demands of fairness and reliability in capital cases do not require it, and . . . neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to . . . sentence in a capital case is unconstitutional."), *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) ("We . . . hold that the Sixth and Fourteenth Amendments . . . require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense."), and *Stone v. Powell*, 428 U.S. 465, 493 (1976) ("There is no reason to believe . . . that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions." (footnote omitted)).

17. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986) [hereinafter ATTORNEY GENERAL'S INTERROGATION REPORT] (discussing *Miranda*'s deficiencies and urging that it be overruled).

combined with escalating drug-related crimes, political calls for more stringent law enforcement, and a flurry of scholarly activity from those critical of the decision's per se approach,<sup>18</sup> all appear to have helped create an atmosphere in which simply holding the line on *Miranda* would be a victory for the advocates of effective restraints on police.<sup>19</sup> The question, though, is whether there is anything left to hold. While not overruled, *Miranda* has been so diluted that its main value today may be merely symbolic.<sup>20</sup>

In the present political climate, it may appear quixotic to ask for something beyond an admittedly positive symbol—akin to ordering filet mignon during a famine. Nonetheless, the present Court's treatment of *Miranda* has so many negative aspects that the ruling itself basically has outlived its usefulness.<sup>21</sup> The Justices' recent attempts to contain *Miranda* have led to mendacious jurisprudence in the confession area,<sup>22</sup> which in turn has enabled the Court to avoid addressing the very real problem of involuntary and compelled confessions.<sup>23</sup> Consequently, although *Miranda*'s underlying premise that per se rules are the most effective means of overcoming the inherently coercive effects of custody is correct, its specific holding requiring police warnings fails to accomplish that result and should be abandoned.<sup>24</sup>

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18. See, e.g., Caplan, *supra* note 12; Grano, *supra* note 11; Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938 (1987); cf. Dripps, *Against Police Interrogation - And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988). Although he views *Miranda* as "a valiant judicial effort to reconcile" individual autonomy and law enforcement needs, Professor Dripps concludes that "as long as obtaining confessions is seen as legitimate and even necessary, any serious restriction on police interrogation is socially unacceptable." *Id.* at 734. He recommends disincorporation of the fifth amendment privilege, which would enable the states to develop systems of in-court interrogation, and, as a corollary, he suggests "a per se exclusionary rule for any statement obtained by the police from an arrested person." *Id.* at 702.

19. This is not to suggest that there is any shortage of articulate proponents on behalf of *Miranda*. See, e.g., Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L. J. 1 (1986); Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986).

20. See Schulhofer, *supra* note 19, at 460 ("For those concerned only with the 'bottom line,' *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedural guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.") One commentator describes the symbolic role of *Miranda* and kindred cases as follows:

I do not mean to suggest that Supreme Court decisions respecting suspects' and defendants' rights are unimportant. Like the Pythia's cries, they have vast mystical significance. They state our aspirations. They give a few good priests something to work with. They give some of the faithful the courage to carry on and reason to improve the priesthood instead of tearing down the temple.

Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970).

21. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring) ("In truth, the *Betts* [*v. Brady*] rule is no longer a reality. . . . To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.")

22. See *infra* notes 82-101 and accompanying text.

23. For a discussion of the distinctions between involuntariness under the fourteenth amendment and compulsion under the fifth amendment, see *infra* notes 219-34 and accompanying text.

24. We could frame the proposal advanced in this Article either in terms of overruling the *Miranda* warning requirement or "redrawing [its] bright line." See Ogletree, *supra* note 13, at 1829. Either way, this proposal reflects dissatisfaction both with the original holding requiring police

In other words, *Miranda*'s recognition that a per se remedy, rather than an ad hoc totality-of-the-circumstances test, is the best method of preserving the privilege against self-incrimination remains valid. Given the realities of police detention and human nature, however, it is not possible for custodial admissions to be the product of a suspect's free will. This Article, therefore, proposes a different per se rule—namely, that out-of-court statements made by defendants while in custody, whether or not the result of interrogation, cannot be used to establish guilt in criminal trials. Although appearing to be radical, this position is not too far removed from *Miranda*'s original message.<sup>25</sup>

Part I of this Article explores the underlying premise of the *Miranda* decision. Part II analyzes the means that the Court has devised to prevent the ruling from accomplishing its goals, while Part III considers the institutional damage wrought by these interpretations. Finally, Part IV examines various remedies, including our own, for assuring that confessions are not compelled, and articulates the values that a ruling prohibiting custodial admissions would promote.

### I. THE MEANING OF *Miranda*

As the linchpin of our accusatorial system of justice, "the privilege [against self-incrimination] reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state."<sup>26</sup> As Chief Justice Warren explained in *Miranda*, "The constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens."<sup>27</sup> Yet, in explicitly applying the privilege for the first time in the rough-and-tumble context of state custodial interrogation,<sup>28</sup> the *Miranda* Court sought to effectuate the lofty content of this

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warnings and the Court's miniaturization of even that rule as well as its underlying values. See *infra* notes 63-153 and accompanying text.

25. See *infra* notes 46-62 and accompanying text.

26. *In re Gault*, 387 U.S. 1, 47 (1967).

27. 384 U.S. at 460.

28. Although *Bram v. United States*, 168 U.S. 532 (1897), first held that the fifth amendment privilege against self-incrimination controlled the admissibility of confessions elicited by law enforcement officials, *id.* at 542, and although the *Miranda* majority relied on *Bram* in rendering its decision, *Miranda*, 384 U.S. at 461-62, Justice Harlan, in dissent, contended that *Bram*'s vitality was questionable. *Id.* at 506 n.2 (Harlan, J., dissenting). Furthermore, Justice White's dissent argued that although *Bram* had extended the privilege to prohibit coerced confessions, it did not preclude the use of *all* confessions obtained through custodial interrogation of suspects. *Id.* at 527-30 (White, J., dissenting).

Indeed, from a historical perspective,

[i]t may be conceded that in time of origin the confession-rule and the self-incrimination rule were widely separated, and certainly Chief Justice White's language in *Bram v. United States* to the effect that the fifth amendment guaranteeing the privilege "was but a crystallization of the doctrine as to confessions" is an historical blunder. Nevertheless, the kinship of the two rules is too apparent for denial.

McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 453 (1938) (footnotes omitted). Notwithstanding *Bram*'s precedent, prior to *Miranda* compulsion under the fifth amendment generally was viewed as referring only to legal compulsion. Because the police had no legal authority to compel suspects to answer questions, the fifth amendment was considered inapplicable in the context of custodial interrogation. See Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 29 (1949). But see Saltzburg, *supra* note 19, at 8-14 (arguing that post-*Bram* case law was not inconsistent with *Bram*; that both *Bram* and *Miranda* were correct decisions,



Bill of Rights guarantee by requiring an almost pedantic recitation of warnings administered by the very officials whose job it was to secure evidence of crime and whose conduct over the years hardly could have inspired judicial confidence.<sup>29</sup> It was clear, however, that the *Miranda* majority's overarching concern was no less than the broad policy of protecting "the inviolability of the human personality."<sup>30</sup> The question, then, is how to reconcile *Miranda*'s grand design with the meek mechanism established for its effectuation.

Not only were the majority and dissenting opinions in *Miranda*<sup>31</sup> based on widely disparate views of what actually happens during custodial interrogation,<sup>32</sup> but the opinions also espoused broadly differing value choices that reflect

and posing the question whether the framers of the fifth amendment could have intended to allow police officers to interrogate suspects in secret while denying that right to magistrates in open court).

Early cases excluding confessions generally did not rely upon the self-incrimination privilege. Courts excluded confessions, instead, on reliability grounds, using the due process clause. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 147, at 313 (E. Cleary 2d ed. 1972); 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822, at 329-30 (1970). By the time of the decision in *Watts v. Indiana*, 338 U.S. 49 (1949), however, it was clear that the reliability of confessions was no longer the sole basis for their exclusion. As Justice Frankfurter stated, "[I]n many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed." *Rogers v. Richmond*, 365 U.S. 534, 541 (1961).

Thus, prevailing precedent when *Miranda* was decided clearly held that due process precluded the admissibility of all confessions secured through impermissible police conduct, whether the self-inculpatory statement was reliable or unreliable. After *Malloy v. Hogan*, 387 U.S. 1 (1964), made the fifth amendment privilege applicable to the states, *Miranda* effectively transferred the custodial interrogation voluntariness analysis from the due process clause to the self-incrimination privilege. The Court still uses the due process analysis, however, in certain circumstances to determine the admissibility or use of confessions. See *infra* note 199.

29. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 635 (1961) (reversing conviction of illiterate, mentally deficient defendant who confessed after 10 days' interrogation and after being denied counsel whom he had requested); *Reck v. Pate*, 367 U.S. 433, 444 (1961) (vacating 1936 conviction of ill and inadequately fed 19-year-old mentally retarded defendant who was denied counsel, a hearing, and access to family and friends for almost four days); *Payne v. Arkansas*, 356 U.S. 560, 567 (1958) (reversing death sentence of fifth-grade-educated, mentally deficient 19-year-old who was held incommunicado for three days, then gave a self-inculpatory statement after being told that he would be protected from a mob only if he confessed); *Harris v. South Carolina*, 338 U.S. 68, 70-71 (1949) (reversing death sentence of illiterate man who was not informed of his rights, not given access to counsel or relatives, confined in a small, hot room, and subjected to day-and-night relay interrogation, and who confessed after threats to have his mother arrested); *White v. Texas*, 310 U.S. 530, 532-33 (1940) (reversing death sentence of defendant whose confession was obtained during repeated questioning and alleged beatings on nightly "trips to the woods" from the jail); *Chambers v. Florida*, 309 U.S. 227, 239-41 (1940) (reversing death sentence of defendant subjected to five days of protracted, all-night questioning during which there was pervasive mob violence).

30. *Miranda*, 384 U.S. at 460.

31. Justices Black, Douglas, Brennan, and Fortas joined the *Miranda* majority opinion, written by Chief Justice Warren. *Id.* at 439-99. Justice Clark concurred in the result of one companion case, but dissented in three others. *Id.* at 499-504 (Clark, J., concurring in part, dissenting in part). Justices Stewart and White joined Justice Harlan's dissenting opinion. *Id.* at 504-26 (Harlan, J., dissenting). Justice White's dissent was joined by Justices Harlan and Stewart. *Id.* at 526-45 (White, J., dissenting).

32. Referring to several manuals that guide police in custodial interrogation, the majority noted that "the manuals instruct the police to display an air of confidence in the suspect's guilt," that "[t]he interrogator should direct his comments toward the reasons why the subject committed the act," and that "[t]hese tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty." *Id.* at 450. The majority noted further, "When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems . . . [to] persuade, trick, or cajole [the accused] out of exercising his

the ages-old tension between preservation of human dignity and solution of crimes.<sup>33</sup> The secrecy cloaking police questioning permitted the Justices to draw contrary conclusions regarding its nature.<sup>34</sup> The majority's extensive recitation of common police practices used to elicit confessions from suspects revealed a reality consisting of hidden trials taking place in stationhouse interiors, in which skillful and intimidating police tactics inevitably overcame the will of the individual who was held alone and incommunicado.<sup>35</sup> Moreover, in the majority's view, any compulsion, no matter how subtly exercised, was improper because it did not comport with human dignity.<sup>36</sup> The dissenters, on the other hand, if not subscribing to a genteel view of life at police headquarters, at the least considered Chief Justice Warren's depiction as extremely skewed.<sup>37</sup> Far from being inappropriate, the mild encouragement being given was, in the dissenters' view, a reasonable if not laudable means to protect society.<sup>38</sup>

constitutional rights." *Id.* at 455. "It is important to keep the subject off balance . . . by trading on his insecurity about himself or his surroundings." *Id.*

Justice Harlan, however, referred to police tactics generally as "minor pressures and disadvantages," adding that "the Court portrays the evils of normal police questioning in terms which . . . are exaggerated." *Id.* at 516-17 (Harlan, J., dissenting). According to Justice Harlan, "peaceful interrogation is not, one of the dark moments of the law." *Id.* at 517 (Harlan, J., dissenting). Justice White agreed: "In fact, the type of sustained interrogation described by the [majority] appears to be the exception rather than the rule." *Id.* at 533 n.2 (White, J., dissenting).

33. Chief Justice Warren wrote, "[T]o respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.* at 460. "Even without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual libert[ies]." *Id.* at 455.

Justice Harlan disagreed: "What the [majority] largely ignores is that [the *Miranda* warnings] impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it." *Id.* at 516 (Harlan, J., dissenting). Justice White's remarks were more graphic: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets. . . . As a consequence, there will not be a gain, but a loss, in human dignity." *Id.* at 542 (White, J., dissenting).

34. Because the majority opinion of Chief Justice Warren relied upon police interrogation manuals to describe the practices used by police during custodial interrogation, it might appear that the Court was apprised sufficiently as to its nature. *See id.* at 448-55. Notwithstanding the existence of such documentation, the majority noted that "[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Id.* at 448.

35. *Id.* at 446-55. For example, one police interrogation manual exhorted, "'Where emotional appeals and tricks are employed to no avail, [the investigator] must rely on an oppressive atmosphere of dogged persistence . . . [and] interrogate steadily and without relent, leaving the subject no prospect of surcease.'" *Id.* at 451 (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)). A specific example cited by the *Miranda* majority took place in *Malinski v. New York*, 324 U.S. 401 (1945). The prosecuting attorney in *Malinski* described the police action:

Of course, [the police] had a right to undress him . . . and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.

*Id.* at 407 (cited in *Miranda*, 384 U.S. at 452-53 n.17).

36. *See Miranda*, 384 U.S. at 457, 466. Chief Justice Warren stated, "[A]n interrogation environment . . . carries its own badge of intimidation . . . [that] is not physical intimidation, but [that] is equally destructive of human dignity." *Id.* at 457.

37. *See supra* note 32.

38. *Miranda*, 384 U.S. at 516-17; *see supra* notes 32-33 (quoting statements of Justice Harlan). Justice White stated,

This is the not so subtle overtone of the opinion—that it is inherently wrong for the police

These differing factual and philosophical underpinnings are, of course, intimately related. Had the dissenters been convinced that, as a general rule, police interrogation practices were not merely unpleasant but unmistakably brutal, their philosophical bent in favor of effective law enforcement and the concomitant reliance on ad hoc reversal under the due process clause might have yielded to a different approach. If oppressive custodial interrogation is thought to be commonplace rather than aberrational, an institutional response, in the form of a per se rule, is more likely to be viewed as imperative. Conversely, had the majority considered police overreaching to be exceptional, it might not have been willing to impose *Miranda's* per se approach.

These divergent views of reality may help to explain, at least in part, why the dissenters believed that the real effect of the decision was to outlaw all custodial interrogation,<sup>39</sup> and why the majority, on the other hand, was willing to settle for the limited expedient of police warnings.<sup>40</sup> According to the dissenters, if the majority's depiction of a chamber of horrors were accurate, the bland set of admonitions that it had laid down in such detail was worthless; police would lie about having given them, or would give the warnings in rote fashion and then proceed to extract a waiver and a confession.<sup>41</sup> A nationwide epidemic of ruthless police interrogation hardly could be eradicated by distributing small printed cards to the alleged culprits and instructing that the contents be read to apprehensive suspects. If, however, the dissenters' view of the stationhouse were the correct one, the result of conscientious police adherence to the new rules would be an end to all effective interrogation.

At the same time, inasmuch as the majority could not have viewed its ruling as fatally flawed from the outset,<sup>42</sup> it must have accepted, to at least some extent, the dissenters' conclusion that the warnings would effect a sweeping change and would preclude most interrogation. Realistic or not, the Court's presupposition seems to have been that defendants, when actually put on notice, would assert their rights.<sup>43</sup> While we have the benefit of hindsight concerning the utility of the warnings, the *Miranda* Court did not.<sup>44</sup> Faced with evidence of

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to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife. . . .

*Miranda*, 384 U.S. at 538 (White, J., dissenting).

39. *Miranda* 384 U.S. at 532, 535-36 (White, J., dissenting).

40. *Id.* at 478-79.

41. *Id.* at 505, 516 (Harlan, J., dissenting).

42. See Caplan, *supra* note 12, at 1449 ("the *Miranda* Court did not intend to create an ineffective prophylactic"). But see Saltzburg, *supra* note 19, at 3 ("although *Miranda* was theoretically and legally sound, it was destined to be an incomplete protective device, something that the Supreme Court must have known when it handed down the decision").

Although *Miranda* was a compromise, in fashioning its ruling the majority presumably selected a compromise that it deemed efficacious. See Schulhofer, *supra* note 19, at 460.

43. According to one commentator: "No one can be sure whether it was the Court's intent to eliminate all, or nearly all, custodial interrogation. . . . Most likely, as naive as it now appears, the Court expected the presence of counsel at the station house to be routine and the waiver of rights extraordinary." Caplan, *supra* note 12, at 1448.

44. The *Miranda* majority did engage in an examination of the laws and procedures governing the informing of criminal suspects of their rights in Scotland, in England, and by the Federal Bureau

prevalent and overt police intimidation, the majority apparently believed that advising suspects of their rights would create a markedly different stationhouse atmosphere—one in which the accused would feel free to exercise constitutional guarantees.<sup>45</sup>

Indeed, at various points in the opinion, the majority indicated its view that duly advised defendants would not waive their rights, but instead would request counsel, thereby significantly reducing the number of confessions. For example, the majority's discussion of waiver of *Miranda* rights, capped off by its application of the *Johnson v. Zerbst*<sup>46</sup> standard—intentional relinquishment of a known right—<sup>47</sup>made it clear that *Miranda* waivers were not to be inferred lightly. Summing up, the Court admonished that “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.”<sup>48</sup>

Enforcement of the stringent waiver standard clearly was related to the likelihood of assertion of the right to an attorney. In fact, the majority appears to take for granted that rather than making a waiver, the typical suspect would invoke the right to counsel under the new system, and that lawyers representing such suspects at the police station would be commonplace. Thus, the Chief Justice asserted that “[t]he presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police

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of Investigation (F.B.I.) in the United States, an examination that arguably should have disclosed the strengths and weaknesses of warnings. See *Miranda*, 384 U.S. at 483-90. The Court's reference to these “similar” systems, however, was to make the point that apprising suspects of their rights would not result in a breakdown in criminal law enforcement. *Id.* at 489. The majority's analysis did not concern itself with whether suspects in the counterpart systems actually invoked their rights. Moreover, if it considered that warnings administered to suspects by the F.B.I. and by officials in England and Scotland resulted in assertion of rights, the Court may have entertained similar notions with respect to state police officers in this country, even though their interrogation procedures may be somewhat less genteel than those of their European and federal counterparts.

On the other hand, in their amicus briefs both the American Civil Liberties Union and the National District Attorneys Association cautioned the Court against police administration of a warning system. See Brief for the American Civil Liberties Union as Amicus Curiae at 25-27, *Miranda* (No. 759) and Brief for the National District Attorneys Association as Amicus Curiae at 13-14, *Miranda* (No. 759).

45. This does not suggest that the *Miranda* majority's assessment of the efficacy of its remedy was naive or foolish. At least intuitively, there is an incongruity between officials transmitting information about the constitutional rights of defendants and at the same time coercing confessions from them. Therefore it was not unreasonable for the Court to hypothesize that the warning system would lessen police brutality and increase the assertiveness of suspects. See Saltzburg, *supra* note 19, at 21-22 n.123 (arguing that the *Miranda* Court's failure to require warnings by a magistrate was “evidence that it did not intend to wipe out the use of confessions, but only to see that suspects had some fair chance to choose whether or not to speak when interrogated.”); see also *infra* note 259 and accompanying text (citing authorities who maintain that *Miranda* did not impede the police in obtaining confessions from suspects).

46. 304 U.S. 458, 464 (1938) (test for effective waiver of sixth amendment right to counsel is intentional relinquishment of a known right).

47. This test is generally used for in-court waivers. Compare *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) and *Von Moltke v. Gillies*, 332 U.S. 708, 723-25 (1948) (plurality opinion) (applying *Johnson v. Zerbst* test to waiver of right to counsel, coupled with plea of guilty in *Von Moltke*) with *Schnecko v. Bustamonte*, 412 U.S. 218, 235 (1973) (rejecting *Johnson v. Zerbst* standard with respect to waiver of fourth amendment rights, on the ground that that standard applies only to in-court waivers and those pretrial guarantees that are designed to protect the fairness of the trial).

48. *Miranda*, 384 U.S. at 476.

interrogation conform to the dictates of the privilege."<sup>49</sup> Nor was the impact of the presence of defense attorneys at the police station lost on the majority, which specifically noted that attorneys might wish to be present during interrogation or might advise their clients to remain silent. The Court took pains to insulate defense counsel from attack for thus exercising "good professional judgment" and thereby protecting their clients' rights.<sup>50</sup> Moreover, while emphasizing the "traditional function of police officers in investigating crime,"<sup>51</sup> the majority downplayed the importance of confessions in securing convictions.<sup>52</sup> The Court foresaw no significant impediment to crime control, pointing to the experiences of the Federal Bureau of Investigation and of several foreign countries that limited the use of confessions, to buttress its conclusion that *Miranda's* procedural safeguards would not stymie law enforcement.<sup>53</sup> In sum, the Court's description of the roles of both defense counsel and police in the post-*Miranda* framework, as well as its denigration of confessions, all suggest that the *Miranda* majority anticipated and intended that there would be a dearth of confessions.

The dissenters in effect corroborated this view of the majority's expectations. According to Justice Harlan, the aim was "to discourage any confession at all,"<sup>54</sup> and for Justice White the ruling was "a deliberate calculus to prevent interrogations, [and] to reduce the incidence of confessions and pleas of guilty."<sup>55</sup> On the other hand, neither dissenter shared the Chief Justice's sanguine assessment with regard to law enforcement, predicting instead a "corrosive effect."<sup>56</sup>

The disagreement was philosophical as well as pragmatic. Justice White correctly pinpointed a major bone of contention between the two sides: "The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions."<sup>57</sup> He, on the other hand, saw "nothing wrong or immoral"<sup>58</sup> in police questioning suspects whom they had probable cause to arrest. For the dissenters, confessions, at least voluntary confessions and those corroborated by other evidence, were highly reliable and provided certainty of guilt.<sup>59</sup>

Justice White was at least partially correct about the majority's wariness concerning confessions. Although acknowledging that not all inculpatory statements were inadmissible and that confessions would "remain a proper element in law enforcement,"<sup>60</sup> the Chief Justice made these concessions in the context

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49. *Id.* at 466. The Court did not, however, require that "a 'stationhouse lawyer' [be] present at all times to advise prisoners." *Id.* at 474. The Rehnquist Court emphasized this point in its recent decision in *Duckworth v. Eagan*, 109 S. Ct. 2875, 2879-80 (1989), discussed *supra* notes 109-16 and accompanying text.

50. *Miranda*, 384 U.S. at 480-81.

51. *Id.* at 477.

52. *Id.*

53. *Id.* at 483-89.

54. *Id.* at 505 (Harlan, J., dissenting).

55. *Id.* at 541 (White, J., dissenting).

56. *Id.* at 543 (White, J., dissenting).

57. *Id.* at 537 (White, J., dissenting).

58. *Id.* at 538 (White, J., dissenting) (quoted more fully *supra* note 38).

59. *Id.* at 516-17 (Harlan, J., dissenting); *id.* at 538 (White, J., dissenting).

60. *Id.* at 478.

of examples of volunteered statements such as sua sponte declarations by persons telephoning or dropping into the police station.<sup>61</sup> As to custodial interrogation, however, the Court's attitude was quite different:

Even without employing brutality, the "third degree" or the specific stratagems described [in police manuals], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.<sup>62</sup>

Since it is these confessions elicited during custodial interrogation that are generally contested, the Court's declaration that admissions would continue to play a role in law enforcement appears to have been confined to a rather small universe.

On the whole, therefore, it is fair to say that although the *Miranda* majority and dissent disagreed sharply concerning the value of confessions and their utility in the criminal justice process, both sides concurred in the view that a sweeping change was in the offing—if not a world devoid of confessions, at least one in which confessions were far less central in enforcement of the criminal law. What actually occurred was not change, however, but merely the illusion of change.

## II. WHAT EVER HAPPENED TO *Miranda*?

Despite calls to overrule *Miranda*,<sup>63</sup> the Justices have declined to do so.<sup>64</sup> Instead, the Burger and Rehnquist Courts have settled on a policy of chilling containment of the controversial ruling.<sup>65</sup> In a variety of ways, the Court has undercut the decision, hollowing out its core while maintaining a pretext of via-

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61. *Id.* Such cases do occur. For example, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the defendant came up to a police officer on the street and confessed to a murder. *Id.* at 160. In Texas, a man recently telephoned the police to tell them that he had killed his grandparents and to advise them of his whereabouts. See McKay, *Man Held After 911 Confession*, *Houston Chron.*, July 4, 1989, at A15.

62. *Miranda*, 384 U.S. at 455.

63. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 438 (1977) (Blackmun, J., dissenting) ("The State of Iowa, and 21 States . . . strongly urge that . . . *Miranda v. Arizona* . . . be re-examined and overruled.")

64. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291, 304 (1978) (Burger, C.J., concurring) ("I would neither overrule *Miranda*, disparage it, nor extend it at this late date.")

65. Thus far, however, the Court has resisted at least one major means of curtailing *Miranda*, namely, precluding its assertion as a basis for relief in federal habeas corpus proceedings in the same way that it has banned fourth amendment exclusionary rule claims under *Stone v. Powell*, 428 U.S. 465 (1976). Justice Powell alluded to this possibility in his *Brewer v. Williams* concurrence. 430 U.S. 387, 413-14 (1977) (Powell, J., concurring). Justice O'Connor, concurring in *Duckworth v. Eagan*, 109 S. Ct. 2875 (1989), emphatically reiterated Justice Powell's position. *Id.* at 2881-85 (O'Connor, J., concurring). If *Miranda* were made subject to the *Stone v. Powell* rule, such claims could not be brought in federal habeas cases provided that the state had afforded the opportunity for full and fair consideration of the claims, and that the attorney's failure to object to the illegal evidence in state court did not amount to ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 375-78 (1986). Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), however, along with other constitutional claims, *Miranda* assertions cannot be raised in federal habeas cases if defendant has failed to raise them properly in state court and cannot meet the "cause" and "prejudice" requirements of *Sykes*. See *id.* at 90-91. See generally Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597, 598-627 (1985) (analyzing *Stone*, *Wainwright*, and progeny).

bility. In particular, the Justices have diluted *Miranda* by denying its constitutional base,<sup>66</sup> by allowing statements obtained in violation of *Miranda* to be used derivatively and for impeachment,<sup>67</sup> by making the requirements for invocation of *Miranda* rights stricter and the requirements for waiver more lenient;<sup>68</sup> by interpreting terms such as custody, interrogation and criminal proceeding in a narrow manner;<sup>69</sup> by carving a gaping hole in the decision in the form of an ill-defined public safety exception;<sup>70</sup> and by validating police deception and trading on the ignorance of suspects.<sup>71</sup>

In one line of cases, the Court has focused on custody as a prerequisite for the application of *Miranda*. In interpreting "custody," the new majority harkens back to Chief Justice Warren's description of the inherent coerciveness of police station interrogation and seems to be concerned primarily with the situs of the interrogation rather than with a suspect's ability to choose freely. Thus, while the Warren Court ruled that interrogation in the defendant's own bedroom by several police officers at 4 a.m. was custodial,<sup>72</sup> the Burger Court held that Internal Revenue Service (I.R.S.) agents interviewing an unarrested suspected tax evader in a private home was not.<sup>73</sup> At the same time, under the Burger Court, an I.R.S. interview of a defendant in jail on unrelated charges is deemed custodial for *Miranda* purposes,<sup>74</sup> while a police interview of a parolee who has come to the station "voluntarily" at the officer's invitation is not.<sup>75</sup> The new majority has found a court-ordered pretrial psychiatric examination in a jail, used as a basis for testimony by the psychiatrist concerning the defendant's future dangerousness in a capital sentencing hearing, to be custodial.<sup>76</sup> By contrast, however, the Court also has ruled that a putative defendant subpoenaed to appear before a grand jury,<sup>77</sup> a motorist stopped on the highway for a traffic infraction,<sup>78</sup> and a probationer reporting to his probation officer are not in custody.<sup>79</sup>

In these cases, the Court has, for the most part, not so much followed *Miranda* as it has applied *Miranda*'s terms literally. While it is clear that the *Miranda* majority was most interested in dissipating inherently coercive incommunicado police station interrogation, the Court's concerns extended to preventing any compulsion. *Miranda* sought to assure the defendant's right "to

66. See *infra* notes 98, 101, 111 and accompanying texts.

67. See *infra* notes 87-101 and accompanying text.

68. See *infra* notes 102-129 and accompanying text.

69. See *infra* notes 72-86, 130-31 and accompanying texts.

70. See *infra* notes 137-45 and accompanying text.

71. See *infra* notes 146-53 and accompanying text.

72. *Orozco v. Texas*, 394 U.S. 324, 327 (1969).

73. *Beckwith v. United States*, 425 U.S. 341, 348 (1976).

74. *Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

75. *Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (per curiam); see also *California v. Beheler*, 463 U.S. 1121, 1124-26 (1983) (per curiam) (nonparolee suspect who voluntarily accompanied police to station held not to be in custody).

76. *Estelle v. Smith*, 451 U.S. 454, 466-69 (1981).

77. *United States v. Mandujano*, 425 U.S. 564, 580-84 (1976).

78. *Berkemer v. McCarty*, 468 U.S. 420, 435-42 (1984).

79. *Minnesota v. Murphy*, 465 U.S. 420, 440 (1984).

exercise the privilege . . . to remain silent if he chose or to speak without any intimidation, blatant or subtle."<sup>80</sup> Moreover, some passages in the Chief Justice's opinion in *Miranda* can be read broadly to require warnings "to protect persons in all settings in which . . . freedom of action is curtailed in any significant way."<sup>81</sup> The post-*Miranda* decisions, however, generally insist on comparing the whereabouts of the particular interrogation with the police station settings described by the Chief Justice, rather than realistically focusing on how reasonable suspects would perceive their situations. Because few environments can compete with the stationhouse in terms of inherent coerciveness, an apprehensive suspect overwhelmed prior to arrival there is likely to lose the protection of *Miranda*.

Using a kindred literalistic technique, in *Allen v. Illinois*<sup>82</sup> the Court managed to constrict the definition of a criminal case to make *Miranda* inapplicable to a proceeding to declare a person sexually dangerous. Such actions could not be initiated absent commission of a crime and bore all the indicia of a criminal prosecution. Although the Court previously had invalidated labeling as a governmental technique for avoiding constitutional safeguards,<sup>83</sup> in *Allen* the Justices relied heavily on the state's "intent that these commitment proceedings be civil in nature."<sup>84</sup> As the dissent noted, the Court's approach had the potential for "evisceration of criminal law and its accompanying protections."<sup>85</sup>

Thus, the Court has adhered to a stringent, literal definition of custody that generally precludes applicability of *Miranda* outside the stationhouse and sometimes even within, and, in like fashion, has defined criminal cases narrowly to exclude proceedings plainly penal in nature.<sup>86</sup> In other contexts, however, the Court has achieved the very same goal of constricting *Miranda* by using virtually the opposite technique, not only eschewing literalism but distorting the plain meaning of the *Miranda* opinion. Cases permitting the use of statements elicited in violation of *Miranda* for impeachment purposes illustrate how the Court has been able to ignore both *Miranda*'s words and its intent. The *Miranda* majority stated broadly that, absent proper warnings, "no evidence obtained as a result of interrogation can be used against" the defendant.<sup>87</sup> Furthermore, the Court made no distinction between confessions and admissions because "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distin-

80. *Miranda*, 384 U.S. at 466.

81. *Id.* at 467.

82. 478 U.S. 364 (1988).

83. *In re Gault*, 387 U.S. 1, 50 (1967); *In re Winship*, 397 U.S. 358, 365 (1970) (civil labels do not obviate need for certain criminal due process safeguards).

84. *Allen*, 478 U.S. at 372.

85. *Id.* at 380 (Stevens, J., dissenting). The Court's holding in *Allen* also appears to run counter to the dictum in *Humphrey v. Cady*, 405 U.S. 504 (1972), that an "equal protection claim would seem to be especially persuasive if [a defendant] was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." *Id.* at 512.

86. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court, however, did hold *Miranda* applicable to misdemeanor traffic offenses. *Id.* at 428-29.

87. *Miranda*, 384 U.S. at 479.



guish degrees of incrimination."<sup>88</sup> In that same vein, the Court refused to differentiate inculpatory and exculpatory statements, noting that if declarations were actually exculpatory, they would not be used by the state. The majority then proceeded to make explicit its concern that allegedly exculpatory statements not be available for impeachment:

In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.<sup>89</sup>

Yet the Court in *Harris v. New York*<sup>90</sup> held that statements made by a suspect regarding the crime for which he stood charged, under circumstances that rendered them inadmissible under *Miranda* as part of the case in chief, nonetheless could be used by the prosecutor to impeach the defendant's testimony at trial. Chief Justice Burger acknowledged that "[s]ome comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling."<sup>91</sup>

The *Harris* majority was preoccupied with the possibility of perjury, unperturbed with the obstacle to free testimony by the defendant that its ruling created, and unconcerned that its holding might provide an incentive for unlawful police conduct. To achieve its result, the majority embraced a pre-*Miranda* fourth amendment decision permitting the use of unlawful evidence to impeach a defendant with regard to collateral matters.<sup>92</sup>

The *Harris* line of cases has been extended almost beyond its logical limits, permitting, in one decision, the use of a statement taken from a suspect after invocation of his *Miranda* rights,<sup>93</sup> and in another stopping short only when the

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88. *Id.* at 476.

89. *Id.* at 477.

90. 401 U.S. 222 (1971).

91. *Id.* at 224.

92. *Walder v. United States*, 347 U.S. 62, 66 (1954) (allowing state to cross-examine defendant about unrelated unconstitutional seizure of drugs from his home to rebut defendant's assertion in direct testimony that he never had possessed or sold narcotics). As Justice Brennan noted in his *Harris* dissent, there is a significant difference between using a defendant's statement to impeach him about the crime with which he is charged and impeaching him with respect to a collateral matter. *Harris*, 401 U.S. at 227-28 (Brennan, J., dissenting). The former does not permit the defendant to make an unfettered decision regarding the right to testify in her own behalf. *See id.* at 229-30 (Brennan, J., dissenting).

93. *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that inculpatory information provided by a defendant after he states that he wants an attorney is admissible for impeachment purposes when the defendant subsequently testifies in conflict with the information previously provided. Given this ruling, once the suspect asserts his rights, the police have no incentive to comply with *Miranda*). In *New Jersey v. Portash*, 440 U.S. 450 (1979), however, the Court made it clear that *Harris* did not apply to coerced or involuntary statements and held that testimony given by the defendant under a grant of immunity could not be used to impeach him at his trial for extortion. Similarly, in *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court held that "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law." *Id.* at 398.

prosecution attempted to impeach defendant with his postwarning silence.<sup>94</sup> Indeed, in a third case, this time a summary disposition, the Court allowed use of an *unwarned* suspect's silence for impeachment, since the state had not induced his refusal to speak by complying with *Miranda*.<sup>95</sup> Apparently lost in the shuffle was the meaning of the fifth amendment right to remain silent.<sup>96</sup>

Closely allied to the impeachment issue is the question whether the state may use any evidence obtained as a result of a confession secured contrary to *Miranda*. Again, despite *Miranda*'s assertion that "no evidence" secured in violation of its dictates could be used against the defendant,<sup>97</sup> the Burger Court has allowed such derivative use. The Court has achieved this result primarily by refusing to view the *Miranda* warnings as of constitutional dimension. Arguing that the Constitution prohibits only coerced or compelled confessions and that *Miranda* is a far broader prophylactic rule, the Justices have suggested that although *Miranda* will preclude admission of the confession itself, it will not do so with respect to the fruits of an unwarned but uncoerced statement by the accused.<sup>98</sup> Using this rationale, a majority has permitted the testimony of a

94. *Doyle v. Ohio*, 426 U.S. 610 (1976) (postarrest silence after *Miranda* warnings cannot be used to impeach defendant's exculpatory direct testimony). In *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam), however, the Court distinguished *Doyle*, holding that cross-examination as to why the defendant had not told the same story to police when he was arrested, in conjunction with cross-examination as to why he had told police another version, was permissible. *Id.* at 408-09. The Court further undercut *Doyle* in *Greer v. Miller*, 483 U.S. 756 (1987), holding that there was no error where a prosecutor attempted to violate *Doyle* by asking about defendant's postarrest silence, but the trial court upheld defense counsel's objection and gave the jury curative instructions. *Id.* at 763-65.

In *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court ruled that a police officer's failure to advise the suspect that refusal to take a blood alcohol test could be used against him in court did not violate *Miranda*, because the right to refuse the test was a matter of legislative grace and not of constitutional proportions. *Id.* at 562-64. The *Neville* Court noted, however, that other warnings given to the suspect made it clear that refusal to take the test would result in adverse consequences. *Id.* at 565-66.

95. *Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam); see also *Jenkins v. Anderson*, 447 U.S. 231 (1980) (holding that a defendant's prearrest silence may be used for impeachment, relying on *Raffel v. United States*, 271 U.S. 494 (1926), which allowed impeachment on the basis of the defendant's failure to testify at his first trial).

96. *Cf. Griffin v. California*, 380 U.S. 609, 614 (1965) (holding unconstitutional both prosecutor's and trial court's comment on defendant's failure to testify because such commentary "cuts down on the privilege by making its assertion costly"). The privilege is likewise diminished if the prosecutor can impeach the defendant with her silence even absent warning. The defendant is penalized for failing to speak—something that, in theory in least, defendant is permitted to do.

According to one commentator,

If a person is constitutionally protected from being forced to give testimony which may be used against him in a prosecution for crime, such protection would be illusory if the very act of asserting the privilege constituted an admission of incriminating facts which could be used as evidence against him in a criminal case.

Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 473 (1957) (footnote omitted).

97. *Miranda*, 384 U.S. at 479.

98. See *Michigan v. Tucker*, 417 U.S. 433, 449-50 (1974). The *Tucker* majority fastened on the *Miranda* discussion that warnings were not the only permissible method to safeguard the privilege and that states were free to find equally effective means of doing so. 417 U.S. at 443-44 (citing *Miranda*, 384 U.S. at 467). *Miranda* was quite emphatic, however, in its assertion that until such other means were effectuated the warnings remained a prerequisite to the admissibility of confessions. See *Miranda*, 384 U.S. at 467, 490-91. Interestingly, the Court has not attempted to explain the basis of its authority to impose these nonconstitutional prophylactic safeguards on the states. See

witness identified by a defendant given incomplete warnings.<sup>99</sup> The Court also has allowed the use of a consecutive statement secured after an initial confession made in the absence of *Miranda* warnings even though the police did not tell the accused, when giving him warnings prior to securing the second confession, that they could not use his original statement.<sup>100</sup>

These cases effectively deny *Miranda*'s basic premise that custodial confessions obtained without warnings are per se coerced. Moreover, from a conceptual standpoint, by dissociating *Miranda* from its constitutional moorings, they permit the Court the greatest leeway in narrowing the decision's applicability. Along with the *Harris* line of cases, these rulings have been among the Court's most dishonest opinions, for they strike at the heart of *Miranda* while purporting to be faithful to it.<sup>101</sup>

A linchpin of *Miranda* was its strict requirements for waiver, for without such restrictions the warning process easily could be subverted. Yet even though *Miranda* mandated the *Johnson v. Zerbst*<sup>102</sup> test, with its heavy burden

Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 119-20 ("[I]t might be noted that the conclusion that the *Miranda* safeguards are not constitutionally based poses an interesting puzzle. If these safeguards are not derived from the Constitution, whence do they spring?"); see also Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U.L. REV. 100, 162-63 (1985) ("Arguably, therefore, the prophylactic rules of *Miranda* . . . might be defended as rules actually required by the Constitution. In all likelihood, however, any attempt to provide a constitutional foundation for these rules would be strained and ultimately unconvincing.").

99. *Tucker*, 417 U.S. at 449-50. *Tucker* involved police interrogation that took place prior to *Miranda*. Since the trial in *Tucker* was conducted after the *Miranda* decision, *Miranda*'s warning requirements applied. *Tucker*, 417 U.S. at 435 (citing *Johnson v. New Jersey*, 384 U.S. 719 (1966)). But see *id.* at 453-54 (Brennan, J., concurring) (suggesting that rules of retroactivity could be different for a derivative evidence case such as *Tucker*, thus questioning the Court's decision of *Miranda*'s applicability to *Tucker*). It also should be noted that in *Tucker* the Court found that the police had acted in complete good faith. *Id.* at 447.

The *Tucker* Court did not decide whether to exclude evidence obtained as a result of a violation during a post-*Miranda* interrogation, but suggested that it would not do so when the testimony was that of a live witness. *Id.* at 447, 449-50; cf. *United States v. Ceccolini*, 435 U.S. 268, 279-80 (1978) (holding admissible the testimony of a witness whose identity was obtained as a result of an unlawful search and seizure).

Justice O'Connor has argued that physical, nontestimonial evidence obtained as a result of a defendant's confession does not violate the fifth amendment. *New York v. Quarles*, 467 U.S. 649, 665-74 (1984) (O'Connor, J., concurring in part and dissenting in part); see also *Schmerber v. California*, 384 U.S. 757 (1966) (Brennan, J.) (upholding the admissibility of a blood sample taken from an injured defendant over his objection, on the ground that such evidence was not testimonial).

Another possible basis for using evidence obtained without giving *Miranda* warnings is the inevitable discovery rule articulated in *Nix v. Williams*, 467 U.S. 431 (1984), which permits the use of evidence obtained in violation of the sixth amendment rights of the accused, if it is proved that such evidence ultimately would have been found even in the absence of a confession disclosing its whereabouts. *Id.* at 440-50.

100. *Oregon v. Elstad*, 470 U.S. 298 (1985) (discussed *infra* text accompanying note 164). The Court distinguished prior decisions excluding the fruit of the poisonous tree unless the primary illegality had been purged on the ground that in such cases it was a constitutional violation rather than violation of a mere prophylactic rule that had produced the confession. *Id.* at 308 (distinguishing *Wong Sun v. United States*, 371 U.S. 471 (1963)).

101. See, e.g., *Elstad*, 470 U.S. at 359 (Brennan, J., dissenting) ("[T]he Court today encourages practices that threaten to reduce *Miranda* to a mere 'form of words,' . . . and it is shocking that the Court nevertheless disingenuously purports that it 'in no way retreats from the *Miranda* safeguards.'" (citations omitted)).

102. See *supra* notes 46-47 and accompanying text.

of proof on the government,<sup>103</sup> the Court instead settled ultimately for a preponderance standard in determining whether defendant effected a waiver.<sup>104</sup> Similarly, although *Miranda* stated clearly that a valid waiver could not be presumed from a suspect's silence or from the fact that a confession ultimately was elicited,<sup>105</sup> rather than requiring explicit relinquishment of *Miranda* rights, the Burger Court has permitted waiver by inference. The Court reached this conclusion in a case in which the defendant refused to sign a waiver and, when told that the police wished to speak to him, said he would do so but that he would not sign the form.<sup>106</sup> The majority stated that an express waiver, whether oral or written, while substantial proof of its occurrence, was not "either necessary or sufficient."<sup>107</sup>

Unsophisticated defendants who purportedly waive their rights in these sorts of situations in effect are making mistakes of law, for they surely believe that their oral statements cannot be used against them, and they are not told otherwise.<sup>108</sup> Thus, while *Miranda* was concerned with protecting the ignorant and disfavored in our society, decisions such as this disclose a tacit willingness to exploit such vulnerability.

In the warning and waiver context, *Duckworth v. Eagan*<sup>109</sup> is the Court's most recent and one of its most effective invitations to the police to take advantage of untutored suspects. In *Duckworth*, the Court upheld a warning advising the suspect that a lawyer would be appointed "if and when you go to court."<sup>110</sup> The majority determined that, because the prophylactic warnings were not themselves rights guaranteed by the Constitution,<sup>111</sup> they need not be given in the precise form specified in *Miranda*.<sup>112</sup> The Court concluded that, in their totality, the warnings given the suspect sufficiently conveyed the protections af-

103. *Miranda*, 384 U.S. at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (emphasis added) (citation omitted)).

104. *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986); cf. *Lego v. Twomey*, 404 U.S. 358 (1970) (voluntariness of confession under fourteenth amendment due process analysis can be established by preponderance of the evidence).

105. *Miranda*, 384 U.S. at 475-76.

106. *North Carolina v. Butler*, 441 U.S. 369 (1979); see also *Connecticut v. Barrett*, 479 U.S. 523 (1987) (confession admissible when defendant said that he would not make a written statement in absence of counsel and then orally admitted his guilt).

107. *Butler*, 441 U.S. at 373. But cf. *Miranda*, 384 U.S. at 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." (emphasis added)).

108. See Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 15 (1970) (a study of post-*Miranda* defendants showed that 45% thought oral statements could not be used as evidence).

109. 109 S. Ct. 2875 (1989).

110. *Id.* at 2877.

111. *Id.* at 2880.

112. *Id.* at 2879-80. The Court's decision in *California v. Prysock*, 453 U.S. 355 (1981), did not require a precise talismanic formulation of the *Miranda* warnings. *Id.* at 359. In *Prysock*, however, the Court suggested that a warning with regard to the right to counsel made conditional upon initial police interrogation would be invalid. See *id.* at 360. Chief Justice Rehnquist concluded that, in their totality, the warnings administered in *Duckworth* did not suffer from this vice. *Duckworth*, 109 S. Ct. at 2880.

forded by *Miranda*.<sup>113</sup> Justice Marshall noted in dissent, however:

[T]he recipients of police warnings are often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting legal or semantic nuance. Such suspects can hardly be expected to interpret, in as facile a manner as the Chief Justice, "the pretzel-like warnings here—intertwining, contradictory, and ambiguous as they are."<sup>114</sup>

The "if and when" caveat approved in *Duckworth* undermines the prior warning given a suspect that an attorney can be present during interrogation and makes it appear either that interrogation will be delayed or that the defendant will be entitled to an attorney only at trial.<sup>115</sup> A defendant's misunderstanding of his right to counsel acts as an incentive to discuss the matter with police immediately, despite the absence of counsel, to extricate himself from the confines of the stationhouse.<sup>116</sup> Thus, after *Duckworth*, the warnings designed to advise defendants of their rights may instead be used to mislead them and to induce ignorant waivers.

Of almost equal importance to *Miranda*'s warning and waiver doctrine is its insistence that any invocation of *Miranda* rights must be honored scrupulously. The Court was most emphatic, saying that a suspect has invoked his right to remain silent if he "indicates in any manner, at any time" such a desire.<sup>117</sup> The Justices nonetheless have held that, unlike waiver, invocation of this right must be explicit and that a sixteen-year-old suspect's request to see his probation officer was not a per se invocation of either the right to remain silent or to an attorney.<sup>118</sup> The majority looked to "the unique role the lawyer plays in the adversarial system of criminal justice,"<sup>119</sup> thereby presumably precluding requests for any trusted lay person as a per se basis for asserting *Miranda* rights.<sup>120</sup> The Supreme Court held that whether there has been a valid waiver was to be determined by a totality of the circumstances test.<sup>121</sup> In insisting on an ad hoc standard for determining invocation of *Miranda* in such situations, the Court is once again penalizing ignorance.

To prevent coercive overbearing of the suspect's will, the *Miranda* Court ruled that invocation of the fifth amendment privilege would terminate interrogation and that the suspect's request for an attorney would likewise preclude further questioning at least until the lawyer appeared.<sup>122</sup> Subsequent cases have, however, treated these two prongs somewhat differently. Invocation of the right

113. *Duckworth*, 109 S. Ct. at 2881.

114. *Id.* at 2887 (Marshall, J., dissenting) (quoting *Commonwealth v. Johnson*, 484 Pa. 349, 356, 399 A.2d 111, 115 (1979)).

115. *Id.* (Marshall, J., dissenting).

116. *Id.* (Marshall, J., dissenting).

117. *Miranda*, 384 U.S. at 473-74.

118. *Fare v. Michael C.*, 442 U.S. 707 (1979).

119. *Id.* at 719.

120. See Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 687-88 (1980).

121. *Fare*, 442 U.S. at 725.

122. *Miranda*, 384 U.S. at 474.

to silence has not resulted in either a per se prohibition of further interrogation or any other measures designed to overcome the effects of continued detention and resumption of questioning.<sup>123</sup> All that appears to be necessary, at least when the resumed questioning relates to another crime, is a renewed warning after a relatively brief respite.<sup>124</sup> When, however, the defendant asks for an attorney, the police cannot initiate further interrogation as to either that offense or an unrelated crime.<sup>125</sup> Although it is true that the Court perhaps has been too eager to find suspect-initiated interrogation,<sup>126</sup> it also has ruled that once a suspect requests counsel, her subsequent responses cannot be used to show that the initial request for counsel was ambiguous.<sup>127</sup> The difference in treatment of these two facets of the *Miranda* warnings may reflect that the *Miranda* Court itself was more explicit about the effect to be given a suspect's request for a lawyer,<sup>128</sup> or that the Court traditionally has been more protective of the right to counsel than of the right to remain silent.<sup>129</sup>

Notwithstanding this seeming solicitude for the right to counsel, the Court has been able to curtail applicability of that right as well by its interpretation of the *Miranda* requirement of interrogation. Focusing on the police techniques and practices discussed in *Miranda*, the Burger Court concluded that *Miranda*'s requisite prophylactic warnings apply either to "express questioning or its functional equivalent"—to any police conduct that is likely to elicit responses from a

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123. Justice Brennan suggested examples of such measures in *Michigan v. Mosley*, 423 U.S. 96, 116 (1975) (Brennan, J., dissenting). His suggestions included requiring that the suspect be taken before a magistrate "without unnecessary delay," and requiring that police await appointment and arrival of counsel prior to resuming questioning. *Id.* at 116 & n.2 (Brennan, J., dissenting) (quoting Michigan statutory provisions).

124. *Id.* at 104. The Court noted that the police immediately stopped the interrogation when the defendant asserted his right to remain silent and resumed questioning two hours later. *Id.* at 104-05.

125. *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that a defendant's incriminating statement made prior to having access to counsel, but after first requesting counsel and then hearing a taped statement by an alleged accomplice, was inadmissible); see also *Arizona v. Roberson*, 108 S. Ct. 2093 (1988) (applying the *Edwards* rule to statements made about unrelated offenses and holding that a defendant is not subject to interrogation about separate investigations prior to having counsel available once he has invoked his right); *Michigan v. Jackson*, 475 U.S. 625 (1986) (extending the *Edwards* rule to the sixth amendment context, and holding that statements made during an interrogation following an asserted right to counsel at an arraignment are inadmissible).

126. See *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In *Bradshaw*, the defendant, after first invoking his right to counsel, asked "Well, what is going to happen to me now?" *Id.* at 1042. The Court found that, although ambiguous, defendant's question had initiated a conversation regarding the criminal charges rather than merely asking an incidental question concerning custody. *Id.* at 1045-46.

127. *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) (noting, however, that such statements are relevant to the distinct question of waiver).

128. In *Miranda*, the Court's statement that interrogation must cease until an attorney was present was made only in connection with assertion of the right to counsel. *Miranda*, 384 U.S. at 474. The majority fastened on this disparate treatment of the right to remain silent and the right to counsel in *Mosley*, 423 U.S. at 104 n.10 (discussed *supra* notes 123-24 and accompanying text).

129. In *Patterson v. Illinois*, 108 S. Ct. 2389 (1988), however, the Court stated,

We . . . reject petitioner's argument, which has some acceptance from courts and commentators, that since 'the sixth amendment right [to counsel] is far superior to that of the fifth amendment right' and since '[t]he greater the right the greater the loss from a waiver of that right,' waiver of an accused's Sixth Amendment right to counsel should be 'more difficult' to effectuate than waiver of a suspect's Fifth Amendment rights.

*Id.* at 2397 (footnote omitted).

defendant.<sup>130</sup> Yet in the very same case in which the Justices announced this seemingly broad definition, they applied it narrowly to admit a confession made in response to a conversation between police officers intimating that a missing gun might be found by handicapped children.<sup>131</sup> Such a decision does little more than encourage loud and provocative police dialogues in the presence of the accused—the better to entice a “voluntary” statement.

Moreover, as a further inroad on the right to counsel, this time under the sixth amendment, the Court now uses *Miranda* to facilitate incommunicado interrogation of *indicted* defendants. In a series of decisions, the Court has stated emphatically that the sixth amendment right to counsel does not attach until the initiation of formal adversary proceedings and has used that factor as the basis for denying such benefits to unindicted suspects.<sup>132</sup> Conversely, until recently it appeared that indicted defendants did secure the benefits of an almost all-embracing mantle of protection that prohibited the government from using statements from the defendant obtained by the police, either directly or through cooperating codefendants or informants.<sup>133</sup> Yet, in *Patterson v. Illinois*<sup>134</sup> the Court held that an indicted accused who had not yet retained or been appointed counsel and who made statements after receiving his *Miranda* warnings had, by virtue of those warnings and his failure to request an attorney, waived his fifth and sixth amendment rights to counsel. At least for defendants not yet represented,<sup>135</sup> this decision gives parity at the lower level to indicted and unindicted

130. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

131. *See id.* at 303. Defendant Innis asserted his right to counsel after he was advised of his *Miranda* rights. *Id.* at 294. He was placed in a police vehicle with three officers. One of the officers began a conversation with another policeman about the missing shotgun, expressing fears about its proximity to a school for handicapped children. *Id.* at 294-95. The Court found that there was no reason for the officers to believe that the defendant would make an incriminating remark as a result of their conversation. *Id.* at 303. Yet in *Brewer v. Williams*, 430 U.S. 387 (1977), the Justices held inadmissible on sixth amendment grounds a statement by the defendant elicited after an officer referred to the necessity of finding the victim's body so that she could obtain a “Christian burial,” a speech that all parties in the case acknowledged to be tantamount to interrogation. *Id.* at 399-400. The *Brewer* Court stated, “There can be no serious doubt . . . that [the detective] deliberately and designedly set out to elicit information . . . just as surely as—and perhaps more effectively than—if he had formally interrogated [the defendant].” *Id.* at 399; *see also* *Arizona v. Mauro*, 481 U.S. 520, 527-30 (1987) (holding that it was not interrogation when authorities allowed defendant to speak with his wife in presence of police officer).

132. *E.g.*, *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (“Because, as respondent acknowledges, the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings, we reject the contention that the conduct of the police violated his rights under the Sixth Amendment.”); *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (“We conclude that the Court of Appeals was wrong in holding that respondents were constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them.”); *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (“We decline to . . . impos[e] a per se exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.”).

133. *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 180 (1985); *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981); *United States v. Henry*, 447 U.S. 264, 269-75 (1980); *Brewer v. Williams*, 430 U.S. 387, 399-401 (1977); *Massiah v. United States*, 377 U.S. 201, 202-07 (1964).

134. 108 S. Ct. 2389 (1988).

135. Justice White stated quite explicitly in *Patterson*,

We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.

suspects.<sup>136</sup> Thus, *Miranda*, designed as a shield for the accused, has, with respect to the sixth amendment right to an attorney, been transformed into a sword effectively limiting constitutional protection.

No matter how crabbed or limited these decisions interpreting *Miranda* have been, it always seemed clear that if the conditions requiring application of *Miranda* were met—criminal proceeding, custody, interrogation—the warnings were mandatory and failure to administer them rendered any statement inadmissible. Then, almost two decades after *Miranda*, in *New York v. Quarles*,<sup>137</sup> the Court created a “public safety” exception to *Miranda*, again emphasizing that the prophylactic procedural safeguards were not constitutionally mandated.<sup>138</sup> The *Quarles* majority assumed that application of *Miranda* would deter suspects from responding and that the ensuing cost of fewer convictions might be permissible to protect the fifth amendment privilege, but it deemed any additional cost in terms of public safety to be intolerable.<sup>139</sup> In return for the assurance of public safety, the Court was willing to blur the original clarity of *Miranda*’s bright line<sup>140</sup>—a major impetus for the *Miranda* decision.<sup>141</sup> Although the *Miranda* Court itself conceded that some confessions, while voluntary under traditional due process standards, would be inadmissible if secured without the prescribed warnings,<sup>142</sup> the challenged admission in *Quarles* was not of that kind. The defendant was captured in the middle of the night in a deserted supermarket, handcuffed, and surrounded by four armed police officers. Aside from the negligible danger to public safety presented by these facts,<sup>143</sup> what is most striking is that the defendant’s confession bore all the indicia of coercion and, therefore, may well have been inadmissible even under pre-*Miranda* standards.<sup>144</sup>

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*Id.* at 2393 n.3. It is unclear why this distinction is significant. In prior decisions the Court merely had stressed the initiation of adversary judicial proceedings as the triggering event for sixth amendment purposes. See cases cited *supra* note 132.

136. The *Patterson* Court stated, however, that just because a challenged practice would be constitutional under *Miranda* it is not necessarily valid under the sixth amendment. The Court suggested that the police behavior in *Moran v. Burbine*, 475 U.S. 412 (1986) (police advised counsel that her client would not be questioned and failed to inform client that counsel had attempted to communicate with him), might not pass muster for an indicted defendant. *Patterson*, 108 S. Ct. at 2397 n.9; see *infra* notes 146-53 and accompanying text (discussing *Moran v. Burbine*). See generally Note, *Sixth Amendment—Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation*, 79 J. CRIM. L. & CRIMINOLOGY 795 (1988) (critical analysis of the *Patterson* decision).

137. 467 U.S. 649 (1984).

138. *Id.* at 655-57 (holding that immediately after apprehension officers could question unwarned defendant regarding the whereabouts of a gun).

139. *Id.* at 657-58. The Court’s discussion, however, indicates a rationale that turns not so much on public safety as it does on who will bear the cost of constitutional protection. See *id.*

140. *Id.* at 658.

141. The purpose of *Miranda*’s prophylactic rule “was . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Arizona v. Roberson*, 108 S. Ct. 2093, 2097 (1988); see also Y. KAMISAR, *A Dissent from the Miranda Dissents*, *supra* note 11, at 69-76 (analyzing the ineffectiveness of the voluntariness test).

142. *Miranda*, 384 U.S. at 457.

143. See *Quarles*, 467 U.S. at 674-76 (Marshall, J. dissenting) (noting that the New York Court of Appeals had anticipated the majority’s clever ploy by stating, “there is no evidence . . . that there were exigent circumstances posing a risk to the public safety” (citations omitted)).

144. For example, *Haynes v. Washington*, 373 U.S. 503 (1963), reversed the conviction of a skilled worker of average intelligence with a prior criminal record, who was interrogated briefly on



Although *Quarles* is ostensibly limited to the public safety context, it of course opens the door to other exceptions that may end up swallowing the rule.<sup>145</sup> Presumably, if that occurs, *Miranda*, encrusted with exceptions, will fall of its own weight. For now, however, the hollowness of *Miranda* is perhaps best demonstrated by the Court's decision in *Moran v. Burbine*.<sup>146</sup> That case upheld a defendant's waiver of *Miranda* rights notwithstanding serious police misconduct in advising defendant's attorney that they would not question her client and failing to inform the suspect that defense counsel had attempted to communicate with him.<sup>147</sup> Speaking for the Court, Justice O'Connor rejected each of Burbine's constitutional claims. First, the police failure to inform him of his attorney's attempted contact had "no bearing on the capacity to comprehend and knowingly relinquish [his fifth amendment] right," and requiring police so to inform a suspect would be too great a cost given "society's . . . interest in securing admissions of guilt."<sup>148</sup> Burbine's sixth amendment right to counsel had not attached because formal adversarial proceedings had not yet commenced.<sup>149</sup> Finally, Justice O'Connor said the police did not violate Burbine's fourteenth amendment rights because their conduct would not "shock . . . the sensibilities of civilized society."<sup>150</sup>

The *Burbine* scenario is reminiscent of the practices delineated in the police manuals quoted by the *Miranda* majority in justification of the need for an absolute prophylactic rule.<sup>151</sup> That these same practices still take place more than two decades later and that they are in effect condoned by the Court strongly suggests that *Miranda* has become nothing more than a talisman permitting police officers to engage in dirty tricks or worse as long as they recite the magic

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the street and released. Shortly thereafter, the suspect admitted his guilt to police officers. At the police station he again confessed after a half-hour interrogation. The next day he made additional confessions, one of which he signed after being held for about 16 hours and being told that when he signed it, he would be allowed to call his wife.

Quarles had apparently not raised a coercion claim, and the majority stated that it was a "question for the trial court on remand." *Quarles*, 467 U.S. at 672 n.5.

145. See *infra* note 176 and accompanying text. In *Baltimore v. Bouknight*, 109 S. Ct. 571 (1988), Chief Justice Rehnquist stayed a lower court order holding that it violated the fifth amendment privilege to cite a mother for civil contempt for refusing to produce her allegedly abused child. In his opinion the Chief Justice analogized the case to *Quarles*, because its primary aim was not essentially criminal, but to secure the safety of the child. *Id.* at 573.

146. 475 U.S. 412 (1986).

147. *Id.* at 421-24.

148. *Id.* at 422, 427. "Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid." *Id.* at 424.

149. *Id.* at 428-32. "Because . . . the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings, we reject the contention that the conduct of the police violated his rights under the Sixth Amendment." *Id.* at 432; see *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 132 (1986) [hereinafter *Harvard—1985 Term*] (criticizing, inter alia, the Court's sixth amendment analysis, because it looked to initiation of adversary proceedings as the triggering event for appointment of counsel, whereas defendant was making an independent sixth amendment claim that the police misconduct interfered with the attorney-client relationship).

150. *Burbine*, 475 U.S. at 433-34.

151. For example, the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." *Miranda*, 384 U.S. at 449 (quoting F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)).

formula—or a misleading variant—<sup>152</sup> beforehand.<sup>153</sup>

### III. THE INSTITUTIONAL DAMAGE

Retention of a devitalized *Miranda* has many undesirable effects. The Supreme Court's post-*Miranda* decisions have impaired *Miranda*'s original clarity, making it difficult for police and lower courts to determine the circumstances under which confessions may be obtained and admitted into evidence.<sup>154</sup> The result is not merely confusion, but a tacit encouragement of police overreaching and judicial circumvention.<sup>155</sup> Moreover, *Miranda*'s seeming vitality

152. See *supra* notes 109-16 and accompanying text (discussing *Duckworth v. Egan*, 109 S. Ct. 875 (1989)).

153. See, e.g., *Harvard—1985 Term*, *supra* note 149, at 125-35 (stating that the Supreme Court, in *Moran v. Burbine*, 475 U.S. 412 (1986), "has afforded deception 'the cloak of law'").

Justice Stevens' dissent argued that the government had failed to meet its burden of proving that Burbine had waived his rights. *Moran*, 475 U.S. at 450-51 (Stevens, J., dissenting). He attacked the majority's balancing approach to the fifth amendment, stating that it had the effect of trivializing constitutional protections. *Id.* at 459-60 (Stevens, J., dissenting). Justice Stevens also rejected the "shock the conscience" approach taken by the majority with respect to the fourteenth amendment, contending that "fairness, integrity and honor" should be the standard. *Id.* at 466-67; see also *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that police need not advise a suspect of the subject matter of the investigation before obtaining a waiver of *Miranda* rights).

154. Compare *People v. Ferro*, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984) (conduct of police in placing stolen furs in front of defendant's cell held functional equivalent of interrogation) with *State v. Cunningham*, 144 Wis. 2d 272, 423 N.W.2d 862 (1988) (officer's showing defendant revolver recovered from defendant's bedroom held not functional equivalent of interrogation); compare *United States v. McKinney*, 758 F.2d 1036 (5th Cir. 1985) (holding that defendant waived right to remain silent and rejecting claim "that his refusal to sign a waiver form automatically rendered further questioning illegal") with *United States v. Heldt*, 745 F.2d 1275 (9th Cir. 1984) (holding defendant's refusal to sign a waiver form did not waive his *Miranda* rights and subsequent police exhortation to answer questions was improper); compare *Martin v. Wainwright*, 770 F.2d 918, 928 (11th Cir. 1985), cert. denied, 479 U.S. 959 (1986) with *Bryant v. Vose*, 785 F.2d 364 (1st Cir. 1986) (divergent views regarding admissibility of derivative confessions under Oregon v. Elstad, 470 U.S. 298 (1985)). See also *State v. Garcia*, 233 Kan. 589, 664 P.2d 1343 (1983) (discussing cases with conflicting views regarding whether police solicitation of "background information" constitutes interrogation); Note, *The Public Safety Exception to Miranda Careening Through the Lower Courts*, 40 U. FLA. L. REV. 989 (1988) (analyzing inconsistent lower court decisions interpreting *Quarles*); Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 MICH. L. REV. 1073 (1989) (discussing lower court disagreement on applying the *Innis* standard for interrogation). See generally *supra* notes 63-153 and accompanying text (discussing the various exceptions and qualifications engrafted on the *Miranda* decision).

155. Even when the Supreme Court issues rulings favorable to defendants, in practice very little of the newly created rights may filter down to the intended beneficiaries, because these decisions must be applied by lower courts and police officials who are often psychologically antagonistic to suspects and inclined to interpret expansive rulings in the most grudging manner. See *Amsterdam*, *supra* note 20, at 792 ("appellate judges[,] . . . [t]rial 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"). A fortiori, Supreme Court rulings limiting suspects' rights may resonate more harshly than the Justices may have intended. See *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring) ("If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here."); see also *infra* note 167 (discussing police misconduct resulting from judicial relaxation of *Miranda*).

In addition to this institutional bias, *Miranda* is undermined by the Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970), holding that a defendant who claims that a prior coerced confession induced her guilty plea is not, without more, entitled to a federal habeas corpus hearing, *id.* at 721-24. In such a situation, the defendant can attack voluntariness of her plea only by showing

effectively permits the Justices themselves to avoid devising meaningful remedies to deal with coercive police interrogation.

Even *Miranda*'s detractors on the Court ultimately acknowledged that the decision had at least one virtue—the ruling created a bright line that made it relatively easy to separate admissible from inadmissible confessions.<sup>156</sup> It was a line that gave fairly explicit guidance to both police and the lower courts.<sup>157</sup> Law enforcement officers knew that unless they gave the warnings and secured a valid waiver, a suspect's statement could not be used to establish guilt. Even lower courts hostile to *Miranda* had little choice other than to abide by its clear-cut directives.<sup>158</sup> As in the case of laws governing commercial transactions,<sup>159</sup> there is a virtue in having a rule of criminal procedure that is well known and readily understood,<sup>160</sup> even if its application in particular circumstances—such as when a confession concededly voluntary under traditional due process stan-

that defense counsel failed to give reasonably competent advice in this regard. The *McMann* ruling, coupled with the extraordinarily high guilty plea rate in this country, means that the police incentive for adhering to *Miranda* may be quite low. See, e.g., D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966) ("Roughly 90 percent of all criminal convictions are by pleas of guilty."). The chances that any given defendant will proceed to trial are relatively slim. See generally Tigar, *The Supreme Court, 1969 Term-Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970) (noting Supreme Court's implicit encouragement of the plea bargain system through opinions like *McMann*).

156. See *New York v. Quarles*, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring in part in the judgment and dissenting in part) ("In my view, a 'public safety' exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand."). But see *Miranda*, 384 U.S. at 544-45 (White, J., dissenting) ("[T]he Court's *per se* approach may not be justified on the ground that it provides a 'bright line.' . . . Today's decision leaves open critical questions . . . all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution.").

157. Cf. *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers, granting application for stay) (According to *Miranda*'s supporters, "the rigidity of the prophylactic rules . . . afforded police and courts clear guidance on the manner in which to conduct a custodial investigation. . . . [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by . . . courts under the guise of 'interpreting' *Miranda*").

158. See, e.g., *Commonwealth v. Myers*, 431 Pa. 628, 637, 246 A.2d 371, 375-76 (1968) (Bell, C.J., dissenting) ("in the last few years [this court has] invalidated guilty pleas, guilty verdicts, and voluntary confessions of *dangerous and undoubtedly guilty criminals* on some recently invented, unrealistic and farfetched interpretations of the United States Constitution"); *State v. Largo*, 24 Utah 2d 430, 432-33, 473 P.2d 895, 897 (1970) (Ellett, J., concurring and dissenting) ("The so-called *Miranda* . . . rules opened Pandora's box[,] are not based upon logic, reason or common sense[,] should never have been pronounced in the first place and except for the power behind them should not now be followed.").

159. As Justice Douglas noted in a speech delivered in 1949:

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired . . . *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society.

Address by Justice William Douglas, entitled *Stare Decisis*, delivered before The Association of the Bar of the City of New York (April 12, 1949), reprinted in 1 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BENJAMIN N. CARDOZO MEMORIAL LECTURES 283, 284 (1970); see also Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 443 (1979) (describing post-Civil War jurisprudence as a sharp break from its antebellum counterpart, in which the judges "had approached the process of adjudication with a light-hearted disregard for precedent").

160. See *Patterson v. Illinois*, 108 S. Ct. 2389, 2405 (1988) (Stevens, J., dissenting) ("Such clarity in definition of constitutional rules that govern criminal proceedings is important to the law enforcement profession as well as to the private citizen." (citation omitted)).

dards is excluded because of a defect in the police warning—may seem unfair or unreasonable.<sup>161</sup>

Twenty years later, however, certainty and predictability are going, if not gone.<sup>162</sup> Other than in cases of outright coercion, officers no longer can know what limits there are in securing confessions. At best, they realize that there is now considerable play in the joints. At worst, they believe that a skillful prosecutor can argue away successfully any deficiencies in eliciting a suspect's statement. Similarly, lower courts are asked to divine on a case-by-case basis whether *Miranda* governs a particular matter or if the matter instead falls within any of the numerous exceptions, conditions and qualifications that have been engrafted over the years.<sup>163</sup>

Indeed, it is no longer true that police need even administer the *Miranda* warnings initially to assure admissibility of subsequent statements. *Oregon v. Elstad*<sup>164</sup> held that, unlike traditional coercion, mere failure to give *Miranda* warnings was not by itself a violation of the fifth amendment and that, therefore, the defendant's second statement made after *Miranda* warnings were given was admissible. The decision gives officers a blueprint for obtaining inculpatory statements that will withstand judicial scrutiny despite circumvention of the spirit if not the letter of *Miranda*. Under *Elstad*, after securing a confession without giving the required warnings, the police need only follow up with the prescribed admonitions without advising the suspect of the first confession's inadmissibility. This should invariably prompt another statement from unwary defendants who make the plausible assumption that they already have incriminated themselves.<sup>165</sup> Had the Court explicitly advised police that this decision provided a means to avoid the strictures of *Miranda*, the object lesson hardly would have been any clearer.<sup>166</sup> Law enforcement officials also understand winks. The danger of winks, however, is that they may be interpreted more broadly than the Justices themselves intended and that they may prompt more overt police misconduct.<sup>167</sup> At a minimum, decisions such as *Elstad* convey the

161. Cf. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 23 (1921) (“[t]he attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible”).

162. See, e.g., *New York v. Quarles*, 467 U.S. 649, 679 (1984) (Marshall, J., dissenting) (“This case is illustrative of the chaos the ‘public-safety’ exception will unleash.”).

163. See *supra* notes 63-153 and accompanying text.

164. 470 U.S. 298 (1985) (also discussed *supra* note 100 and accompanying text).

165. Justice Brennan has described this process:

The experience of lower courts demonstrates that the police frequently have refused to comply with *Miranda* precisely in order to obtain incriminating statements that will undermine the voluntariness of the accused's decision to speak again once he has received the usual warnings; in such circumstances, subsequent confessions often follow as a “silver platter.”

*Id.* at 356-57 (Brennan, J. dissenting).

166. Dissenting in *Elstad*, Justice Brennan asked, “How can the Court possibly expect the authorities to obey *Miranda* when they have every incentive now to interrogate suspects without warnings or an effective waiver . . . ?” *Id.* at 358 (Brennan, J., dissenting).

167. See *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (“We must remember that the extent of any [police] privilege we sustain, the officers interpret and apply themselves and will push to the limit.”); see also *supra* note 155 (discussing various ways in which Supreme Court decisions expanding constitutional protection are diluted by officials responsible for

message that police should not take *Miranda* too seriously and that the Court will stretch to uphold admissibility of confessions. From there, it is a short distance to the conclusion that it is the interrogator's job to get confessions one way or the other, and that of the lawyers and courts to work out the niceties of any resulting technicalities.<sup>168</sup>

The police deception of defendant and his attorney in *Moran v. Burbine*<sup>169</sup> and the Court's refusal to invalidate such conduct constitute clear evidence that police understand this message and that the Court itself is apparently intent on reinforcing it. In fact, the wink in *Moran* is even broader than the one in *Elstad*. It suggests that, as long as the warnings are uttered (in line with the Court's sporadic penchant for literalism), almost any accompanying subterfuge will be tolerated—not only under *Miranda*, but also under the due process clause.<sup>170</sup> If the deceit in *Moran* was insufficiently egregious to violate due process, the police necessarily must ask themselves what techniques short of the rubber hose the courts will find constitutionally impermissible.<sup>171</sup> Once such questions have been invited, it is almost a foregone conclusion that answers will be sought.<sup>172</sup>

The wedge created by *Quarles* will have a similar effect. Unlike the preceding cases, however, this ruling eliminates the necessity of even giving any *Miranda* warnings. To the extent that warnings act as an inhibitor of confessions or that police perceive them as such, this loophole may prove irresistible.<sup>173</sup> The factual circumstances of *Quarles* suggest danger to public safety will be easily established in a host of situations.<sup>174</sup> At least where weapons are or may be involved, the ruling invites law enforcement officials to commence interrogation immediately after apprehending a suspect and to do so without administering warnings.<sup>175</sup> Furthermore, the elasticity of the public safety concept allows it to

enforcing them). In an analogous context, Gold, *Dead Officer, Dropped Charges: A Scandal in Boston*, N.Y. Times, March 20, 1989, at 9, describes how a police officer lied with respect to the identity of an informer in an affidavit in support of an application for a warrant to search a suspect's premises. Subsequently the trial judge refused to reinstate charges against the suspect because the state's conduct was "egregious." According to the district attorney, "[T]he lie doesn't reach the level of egregiousness the judge believes it does." *Charge Dismissed in Boston Officer's Slaying*, N. Y. Times, March 30, 1989, at 8. Query whether the decision in *McCray v. Illinois*, 386 U.S. 300 (1967), holding that defendant has no per se constitutional right to require disclosure of informant's identity on a motion to suppress unlawful evidence, encouraged, at least in part, such perjury.

168. Cf. Amsterdam, *supra* note 20, at 792 ("To a mind-staggering extent . . . the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. . . . The result is about what one would expect. Even when the cases go to court, a suspect's rights as announced by the Supreme Court are something he has, not something he gets.").

169. 475 U.S. 412 (1986) (discussed *supra* notes 146-53 and accompanying text).

170. The *Moran* court held that "on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Id.* at 433-34.

171. Justice Stevens' dissenting opinion reflected concern with the scope of the ruling: "The possible reach of the Court's opinion is stunning. For the majority seems to suggest that police may deny counsel all access to a client who is being held." *Id.* at 465 (Stevens, J., dissenting).

172. *Id.* at 432 ("We do not suggest that on facts more egregious than those presented here police deception might rise to the level of a due process violation.")

173. See *infra* note 176.

174. See *supra* note 143 and accompanying text.

175. In *Orozco v. Texas*, 394 U.S. 324 (1969), police questioned defendant in his bedroom about the whereabouts of a weapon at 4 a.m., four hours after the crime. Finding that he had been in

be enlarged to include not only interrogation of a suspect concerning the location of a weapon but also perhaps questioning with respect to the whereabouts of victims or armed coconspirators.<sup>176</sup>

To be sure, cases such as *Elstad*, *Moran*, and *Quarles* may be more subtle and more complex than the police perceive.<sup>177</sup> But that perception is important.

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custody, the Court held defendant's statement inadmissible. The *Quarles* majority distinguished *Orozco*, asserting that,

the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short, there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime.

*Quarles*, 467 U.S. at 659 n.8 (1984). Thus, the Court may be suggesting that apprehensions immediately after the crime, as in *Quarles*, implicate public safety, whereas a delay of several hours, as in *Orozco*, means that the ensuing interrogation implicates only investigatory concerns.

176. See, e.g., *People v. Willis*, 104 Cal. App. 3d 433, 163 Cal. Rptr. 718 (police effort to determine whereabouts of kidnap victim justified interrogation of defendant despite his invocation of rights), *cert. denied*, 449 U.S. 877 (1980); *State v. Kunkel*, 137 Wis. 2d 172, 404 N.W.2d 69 (Wis. Ct. App. 1987) (holding rescue exception to *Miranda* justified by *Quarles* and ruling police interrogation of defendant who had invoked rights was valid, due to possibility that victim still might be alive); see also *Leon v. State*, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982) (although police violence and threats thereof were directed at kidnapper at time of arrest to determine location of victim, the court found his subsequent confessions not tainted thereby and consequently admissible), *rev. denied*, 417 So. 2d 329 (Fla. 1982). But see *State v. Hazley*, 428 N.W.2d 406 (Minn. Ct. App. 1988) (holding question as to identity of accomplice not within *Quarles* exception, but that error was harmless); *People v. Krom*, 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139 (1984) (under state constitution, once suspect invokes counsel, he cannot waive right to counsel without attorney, but this right does not extend to case in which life or safety of victim is at stake).

177. For example, the majority in *Elstad* did not view the police behavior as improper in the traditional due process sense, because although the defendant was in custody, he was in his own home where his mother also was present. Further, the police did not tell him that he was under arrest, and their questions were apparently neither sustained nor intensive. The police also did not specifically exploit defendant's first confession to obtain the second one. See *Elstad*, 470 U.S. 298, 300-01, 315-16 (1985). The Court also emphasized that its ruling was inapplicable to situations in which the police did use coercive techniques. *Id.* at 308, 315-18; see also *id.* at 312 n.3 (distinguishing some 50 cases cited by the dissent, on the ground that, for the most part, they involved improper police practices). In addition, it is unclear whether *Elstad* applies to derivative evidence other than a subsequent confession. *Id.* at 319 n.2, 346-47 & n.29 (Brennan, J., dissenting). Although conceding that the *Elstad* decision marked a sharp break from the Court's traditional approach, Justice Brennan felt constrained to warn police that the ruling did not amount to *carte blanche* authorization of misconduct in the elicitation of confessions:

Nevertheless, prudent law enforcement officials must not now believe that they are wholly at liberty to refuse to give timely warnings and obtain effective waivers, confident that evidence derived from *Miranda* violations will be entirely immune from judicial scrutiny. I believe that most state and federal courts will continue to exercise the "learning, good sense, fairness and courage" they have displayed in administering the derivative-evidence rules prior to today's decision.

*Id.* at 344 (Brennan, J., dissenting) (citation omitted) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

Similarly, in *Moran*, the Court intimated that the police deception consisted of acts of omission rather than commission, such as failing to tell defendant that his attorney was trying to reach him, rather than giving defendant false information, *Moran*, 475 U.S. at 423-24; that the case did not involve trickery of a sort that would vitiate the validity of a waiver, *id.* at 423; that defendant had not requested an attorney, thereby triggering the protection of *Edwards v. Arizona*, 451 U.S. 477 (1981), *Moran*, 475 U.S. at 423 n.1; and that, because this was a precharging situation, the sixth amendment was inapplicable, *id.* at 428. Further, the Court conceded that "facts more egregious" might give rise to a due process violation. *Id.* at 432.

Finally, although clearly dimming *Miranda*'s bright line, the *Quarles* Court's broad articulation of a public safety exception ostensibly was balanced by its invocation of the time-honored phrase "we hold that on these facts" to narrow the ruling. *Quarles*, 467 U.S. at 655. Moreover, the majority stressed the absence of compulsion in the traditional due process sense. *Id.* at 654-55 & n.5. In

Even if officials do not understand all the ramifications and nuances of the post-*Miranda* determinations, what they do realize is that the Court does not like *Miranda* and that in most cases it upholds police conduct and permits the use of confessions.<sup>178</sup> The Court's message is not subliminal. It has been given clearly and repeatedly: *Miranda* hinders effective law enforcement and will be disregarded whenever possible.<sup>179</sup>

The Court's insistence, on the one hand, that *Miranda* is still good law and its willingness on the other, to render decisions that reduce *Miranda* to insignificance, is a dishonest approach that can breed only disrespect for the law.<sup>180</sup> Such disrespect can reach beyond the confession area and can manifest itself in police misconduct, including perjury.<sup>181</sup> If the courts can debilitate a crucial decision while denying that they are doing so,<sup>182</sup> it is reasonable to assume that the officer on the beat will not be held to a higher standard. After all, both institutions seem to be after the same thing—convicting criminals.

The loss of *Miranda*'s bright line also will have an adverse effect on lower court adjudication. Judges antagonistic to *Miranda* have been given numerous mechanisms for evading its reach. Even those who conscientiously attempt to apply the Supreme Court's decisions in this area must face a welter of rulings whose overall effect is to make it unclear under what circumstances a confession

addition, the Court utilized an objective test to make the required determination. *Id.* at 656. Justice Marshall was not impressed: "Disagreements of the scope of the 'public safety' exception and mistakes in its application are inevitable." *Id.* at 680 (Marshall, J., dissenting) (footnote omitted).

178. See *infra* note 187 and accompanying text.

179. As noted by Justice Stevens in *Moran*,

The Court's balancing approach is profoundly misguided. The cost of suppressing evidence of guilt will always make the value of a procedural safeguard appear "minimal," "marginal," or "incremental." Indeed, the value of any trial at all seems like a "procedural technicality" when balanced against the interest in administering prompt justice to a murderer or a rapist caught redhanded.

*Moran*, 475 U.S. at 457 (Stevens, J., dissenting).

180. Responding to the *Elstad* majority's conclusion that the police officer's original failure to give the defendant warnings did not constitute coercion, Justice Stevens observed, "The Court appears ambivalent on the question whether there was any constitutional violation. This ambivalence is either disingenuous or completely lawless." *Elstad*, 470 U.S. at 370 (Stevens, J., dissenting). Justice Brennan noted further,

The Court's decision says much about the way the Court goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning.

*Id.* at 320 (Brennan, J., dissenting).

181. Cf. *People v. Berrios*, 28 N.Y.2d 361, 371, 270 N.E.2d 709, 714, 321 N.Y.S.2d 884, 891 (1971) (Fuld, C.J., dissenting) (quoting and agreeing with New York County District Attorney Frank Hogan that "'in some substantial but indeterminable percentage of dropsey cases [narcotics and gambling prosecutions in which police officers allege suspects dropped the unlawful items in officers' presence], the testimony [of the officers] is tailored to meet the requirements of search-and-seizure rulings.'"); *People v. McMurty*, 64 Misc. 2d 63, 64, 314 N.Y.S.2d 194, 196 (N.Y. City Ct. 1970) ("It . . . becomes apparent that policemen are committing perjury at least in some of [the dropsey cases], and perhaps in nearly all of them."); Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551, 551 (1967) ("Every lawyer who practices in the criminal courts knows that police perjury is commonplace.").

182. See *Elstad*, 470 U.S. at 319 (Brennan, J. dissenting) ("Even while purporting to reaffirm these constitutional guarantees, the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure.").

is admissible. This is not the usual Cardozian ebb and flow of the common law, with its inherent ambiguity and change that are the lifeblood of the judicial process.<sup>183</sup> Rather, in many instances the *Miranda* progeny effectively obfuscate the operative principles governing the admissibility of confessions.

These post-*Miranda* rulings make it almost as difficult to determine the admissibility issue today as it was under the due process voluntariness test. Under that standard, lower court judges weighed and balanced a host of factors to determine admissibility, without any meaningful guidelines to assure that their assessments were correct.<sup>184</sup> That same problem now exists to some extent in the *Miranda* context, for while the inferior courts are assured that, by and large, *Miranda* lives, they are also advised that its health is impaired in a variety of open-ended ways that must be taken into account. Reconciliation of these conflicting claims is at best problematic and is not unlike the ad hoc decisionmaking required prior to *Miranda*, except perhaps in one significant way. In the bad old days of the ad hoc voluntariness test, at least by the 1960s, Supreme Court reviews of coerced confession cases more often than not resulted in reversals of convictions.<sup>185</sup> Thus, the Court was telling inferior tribunals that if they erred in determining what process was due, it was preferable to resolve mistakes in favor of the accused.<sup>186</sup> Now, however, with the Court giving a different set of signals,<sup>187</sup> mistakes are more likely to be made in a manner enhancing state power and constricting constitutional safeguards.

The Court's treatment of *Miranda* virtually has created a double bind, a mixed message that adversely affects not only police investigatory methods and

183. See B. CARDOZO, *supra* note 161, at 25 ("This work of modification [of legal doctrines] is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier."); *accord*, *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring).

184. See Y. KAMISAR, *A Dissent From the Miranda Dissents*, in Y. KAMISAR, *supra* note 11, at 69-76 (discussing unfair results under the voluntariness test).

185. See *Miranda*, 384 U.S. at 507-08 (Harlan, J., dissenting). After tracing the voluntariness due process test over the past three decades, Justice Harlan asserted that this standard had been so refined that it had enabled the Court to develop a "sensitive approach to admissibility of confessions." *Id.* at 508. He concluded from his survey of the cases that "the overall gauge has been steadily changing, usually in the direction of restricting admissibility." *Id.*; see also, Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 754 (1987) ("[I]n a period of thirty years or so [before *Miranda*], the Supreme Court granted review in over thirty-five cases in which confessions had been held voluntary. Small wonder . . . that the Court reversed the conviction in most of these cases." (footnotes omitted)).

186. Of course, the lower courts often failed to take the hint. See, for example, the discussion of *Davis v. North Carolina*, 384 U.S. 737 (1966), in Kamisar, *A Dissent From the Miranda Dissents*, in Y. KAMISAR, *supra* note 11, at 73-76 (discussing the need for a more workable approach and the Court's response). Indeed, a primary defect of the ambiguous voluntariness test was that it gave lower courts broad discretion in assessing the totality of circumstances, effectively permitting them to admit highly questionable confessions—which they often did. See Stone, *supra* note 98, at 102-03.

187. For example, looking at the statistics concerning the 1981 through 1987 Terms compiled by the *Harvard Law Review* in its annual Supreme Court issues, the Court decided 21 self-incrimination cases in full opinions during this period; 18 of the holdings favored the government. See *The Supreme Court, 1987 Term*, 102 HARV. L. REV. 4, 357-58 (1988); *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 10, 369-70 (1987); *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 4, 310-11 (1986); *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 4, 328-29 (1985); *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 4, 313-14 (1984); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 302 (1983); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 4, 310-11 (1982).



lower court adjudicatory processes, but also the jurisprudence of the Supreme Court itself. As long as the Court insists that *Miranda* is viable precedent, it need not and does not grapple in a meaningful way with the problem of involuntary and coerced confessions. Having created a straw remedy against compulsion, the Justices apparently feel no obligation to fashion a more efficacious mechanism for assuring voluntariness. In this sense at least, *Miranda* does more harm than good.

If *Miranda* were not such a convenient backstop, the Court might be more willing to flesh out due process constraints on police elicitation of statements from suspects.<sup>188</sup> As it is, however, the majority seems to have partially collapsed a two-tier system for evaluating the validity of confessions. *Miranda* is the upper level, supposedly designed to treat violations of the more sophisticated prophylactic rules. Due process is the lower level, generally utilized to remedy more overt police misconduct. Although the two tests are analytically severable, the Court appears to have merged them to the extent that if the Justices find no *Miranda* violation, it follows almost a fortiori that there has been no due process violation either. The majority's discussion and rejection of the due process contention in *Moran v. Burbine*, after denying defendant's fifth and sixth amendment claims, suggests that the Court will find due process violations only in cases of blatant and egregious police misconduct.<sup>189</sup> Thus, the Court's mindset appears to be that if police behavior passes muster under *Miranda*, it probably does not violate due process. The difficulty, of course, is that rather than testing official action under *Miranda*'s original formulation, the Court assesses it under the modern debilitated version of *Miranda*, which provides precious little protection. Had the Court engaged in a vigorous due process analysis, it might have invalidated the *Moran* confession,<sup>190</sup> and, indeed, even under pre-*Miranda* traditional due process scrutiny, it might not have condoned the challenged fraud, trickery and deceit.<sup>191</sup> The Court apparently is able to avoid such a conclusion,

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188. See Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 878 (1981) ("Careful attention to the voluntariness issue remains an imperative, though sometimes overlooked, obligation of court and counsel . . ." (footnote omitted)). The Court itself observed in *Miller v. Fenton*, 474 U.S. 104 (1985), "Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, . . . the Court has continued to measure confessions against the requirements of due process." *Id.* at 110.

189. See *Moran v. Burbine*, 475 U.S. 412, 432-34 (discussed *supra* notes 146-50, 169-72 and accompanying texts).

190. See White, *Police Trickery In Inducing Confessions*, 127 U. PA. L. REV. 581 (1979). Arguing for per se rules prohibiting certain interrogation tactics, Professor White asserts:

The Court's disapproval of the police tactics employed in *Spano* [v. New York, 360 U.S. 315 (1959)] and a number of other cases indicates that in deciding when the police are "obeying the law," the Court will measure the police conduct against certain basic standards of fairness that are fundamental to our system of justice. Consequently, even reliable confessions should be inadmissible when they are induced by modes of police trickery that are inconsistent with basic notions of fairness.

*Id.* at 584 (footnotes omitted).

191. See, e.g., *Lynnum v. Illinois*, 372 U.S. 528 (1963) (invalidating confession where police told defendant that her children would be taken from her custody to persuade her to make statement); *Spano v. New York*, 360 U.S. 315 (1959) (rookie officer who was childhood friend of accused feigned fear of losing job unless defendant cooperated); *Leyra v. Denno*, 347 U.S. 556 (1956) (police agreed to provide physician to sick defendant, then substituted psychiatrist skilled in hypnosis, who induced

however, by first sustaining the confession pursuant to a soft *Miranda* analysis, and then using underdeveloped due process scrutiny to yield the same result.<sup>192</sup>

Even when the Court does find a due process violation, the nature of its inquiry suggests that the governing standard is rather primitive. For example, in *Mincey v. Arizona*<sup>193</sup> the Court ruled that defendant's confession was involuntary and thus could not be used even for impeachment purposes.<sup>194</sup> The circumstances surrounding elicitation of the confession were as follows: The defendant, who was shot, was brought to a hospital intensive care unit; tubes were inserted into his throat to help him breathe and into his stomach to prevent vomiting, and a catheter was inserted in his bladder; he had received various drugs and had an intravenous unit attached to his arm; he could only respond to questions by writing answers on a sheet of paper, and some of these answers were not coherent; the defendant repeatedly asked for the interrogation to stop until he could secure counsel; and the officer continued to question him from 8 p.m. to midnight.<sup>195</sup> Notwithstanding these clearly oppressive tactics, the majority stated that "[t]here were not present in this case some of the gross abuses that have led the Court in other cases to find the confessions involuntary, such as beatings . . . or 'truth serums.'"<sup>196</sup> While the Court did go on to acknowledge that physical brutality and administration of drugs were not the exclusive bases for invalidating confessions,<sup>197</sup> its extensive recitation of the facts and its labored conclusions stemming from those facts, indicate that, for defendants seeking to establish involuntariness, less gruesome scenarios may prove problematic.<sup>198</sup>

In addition to preventing the Court from revitalizing due process as a means of assuring voluntariness, the continued use of the *Miranda* system of warnings enables the Justices to refrain from developing other per se mechanisms to prevent compelled confessions under the fifth amendment privilege. As for a substitute, it seems clear that the old ad hoc, totality-of-the-circumstances test for determining voluntariness would be no more suitable today as the primary means for preventing coercive police interrogation than it was in 1966

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confession). The *Moran* Court, however, implied that police deception consisted of acts of omission rather than commission. *Moran*, 475 U.S. at 423-24; *id.* at 453 (Stevens, J., dissenting).

192. Even if the pre-*Miranda* case law fails to establish that the *Moran* confession was inadmissible under due process analysis, see *supra* note 191 and accompanying text, the refinement process with respect to the voluntariness doctrine that was taking place in the pre-*Miranda* era might well have proceeded by now to cover the police deception by omission in *Moran*. See *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting) (discussed *supra* note 185). The *Miranda* decision, however, effectively aborted this evolutionary process. Cf. Schulhofer, *supra* note 188, at 877-78 (noting the impression "that *Miranda* marked the death of the due process test and that, at least for the time being, it remains buried" (footnote omitted)). Professor Schulhofer argues that due process is instead very much alive, and that courts, counsel, and commentators should give further attention to "how that test ideally should be interpreted." *Id.* at 877.

193. 437 U.S. 385 (1978).

194. *Id.* at 388, 401-02.

195. *Id.* at 396-401.

196. *Id.* at 401 (citations omitted).

197. *Id.*

198. Cf. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (holding that to find defendant's statement involuntary there must be police misconduct causally relating to the confession and admitting the "volunteered" confession of a chronic schizophrenic suffering from auditory hallucinations).

when the Court decided *Miranda*.<sup>199</sup> The amorphous voluntariness standard provided no meaningful guidelines for either law enforcement officials or the lower courts, and the Supreme Court's limited review power virtually assured that confusion would persist.<sup>200</sup> Thus, unless we wish to resurrect a test that we know to be unworkable, a per se remedy appears to be essential. The *Miranda* majority itself intimated as much when it said that any alternative procedures adopted by Congress or the states would have to be "at least as effective [as the *Miranda* warnings] in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."<sup>201</sup>

Indeed, the 1986 *Report to the Attorney General on Pre-Trial Interrogation*, which was a full-scale attack on both *Miranda*'s philosophy and its holding,<sup>202</sup> also criticized the warning system because it precluded "the possibility of developing and implementing alternatives that would be of greater effectiveness."<sup>203</sup> The Report then went on to suggest various interim administrative rules to be applied pending the overruling of *Miranda* as an inducement for the Court to do so.<sup>204</sup> While these proposals fall far short of what is necessary,<sup>205</sup> their sponsor-

199. See Kamisar, *What Is An "Involuntary" Confession?* in Y. KAMISAR, *supra* note 11, at 1-25. The old voluntariness test, of course, remains as the due process standard for determining the admissibility or use of confessions in situations in which *Miranda* is inapplicable, e.g., confessions sought to be used for impeachment purposes. See *Harris v. New York*, 401 U.S. 222 (1971). See generally Schulhofer, *supra* note 188, at 877 (discussing circumstances in which the old due process standard would be the primary basis for ascertaining admissibility). That such a test may be of value in this interstitial context does not, however, establish its efficacy as the sole or primary basis for determining voluntariness in garden variety confession cases.

200. See Schulhofer, *supra* note 188, at 869-72 (reviewing KAMISAR, *supra* note 11). Professor Schulhofer adumbrates the six defects in the due process voluntariness test culled from the works of Kamisar and others. The primary difficulties were that the term "voluntary" was ambiguous and failed to focus clearly on the underlying values implicated by coerced confessions; that the elusive nature of the determination permitted interrogation practice to vary, depending on the type of suspect involved, thus making it difficult to provide meaningful guidelines to the police; that the vagueness of the test also left trial and appellate judges without any objective standards; that there were problems of proof, particularly with respect to psychological coercion; that the standard pitted defendant's credibility against that of the police in an inherently unequal swearing match, which local judges almost inevitably resolved against the defendant; and that the Court's workload precluded it from providing effective federal review of confession issues. *Id.* A proponent of the voluntariness test has argued, however, that its very amorphousness was its strength, allowing the Court to make its decisions "without fear of prematurely constitutionalizing interrogation practices." Caplan, *supra* note 12, at 1433-34.

201. *Miranda*, 384 U.S. at 467. Although the Court made this statement to acknowledge that the warnings were not the only constitutionally permissible method for protecting the privilege, see *id.*, the Justices seized upon it in *Michigan v. Tucker*, 417 U.S. 433 (1974), as a concession allowing the Court to deconstitutionalize the warnings and turn them into prophylactic safeguards. *Id.* at 443-44. If deconstitutionalization is simply a prelude to obliteration then "[t]hose who do not like *Miranda*'s code-like rules and would strip them from the opinion will be left with the much more stringent principle that the isolated suspect in custody cannot be questioned at all." Schulhofer, *supra* note 19, at 461.

202. ATTORNEY GENERAL'S INTERROGATION REPORT, *supra* note 17, at 39-60, 93-100. The Report concluded that *Miranda* "was a decision without a past. . . . [and] a decision without a future." *Id.* at 118.

203. *Id.* at 99.

204. *Id.* at 105-07.

205. The *Attorney General's Interrogation Report* suggested the following possibilities: that, "where feasible," interrogations be videotaped or recorded; that rules concerning the duration and frequency of interrogation be established; and that rules be promulgated that would prohibit or restrict certain deceptive police practices that the *Miranda* Court viewed as abusive. *Id.* at 105.

A videotaping or recording requirement is too easily subject to circumvention, permitting offi-

ship by officials of the Reagan administration amounted to a tacit recognition by that end of the political spectrum that even the Supreme Court of the 1980s would not abandon *Miranda* unless another per se rule was already in place.<sup>206</sup> Therefore, the only question is which per se rule or rules?

#### IV. THE MODEST PROPOSAL

The *Miranda* decision itself recognized that warnings could be dispensed with if other equally effective remedies were used<sup>207</sup>—remedies as effective as the *Miranda* majority apparently expected the warnings to be. The Court has not advanced any other such per se rules,<sup>208</sup> and the few state proposals made in this area,<sup>209</sup> as well as those of the Justice Department, are either unduly vague or are easily subject to circumvention.<sup>210</sup>

Some of the more radical recommendations advanced over the years are

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cial to coerce the suspect before capturing an ostensibly voluntary account on film or tape. Even if recording is continuous, it does not preclude coercion in another room of the stationhouse or elsewhere. Moreover, to the extent that such equipment simply becomes part of the furniture whose presence is forgotten by an interrogator, it does not serve its function as an inhibitor of coercion, although the result in individual cases may be an inadmissible confession.

Like the *Miranda* warnings themselves, rules limiting the duration and frequency of questioning do not take into account idiosyncratic weaknesses of particular suspects and fail to afford sufficient protection in such cases. Finally, the report seeks to prohibit only those "specific deceptive or manipulative practices that were characterized as abusive in the *Miranda* decision." *Id.* at 102. This leaves the implication that there are some practices of this sort that would be permissible. Indeed, in describing the post-*Miranda* revolution, the report noted, "[W]e see no reason why a reasonable effort should not be made to persuade an uncooperative suspect to make a statement or answer questions." *Id.* at 113.

Conspicuous by their absence from the recommendations are proposals for police training programs in interrogation, disciplinary measures against officers found to engage in abusive tactics, and development of programs designed to provide expertise in investigatory techniques that do not rely on confessions.

206. The report states:

The courts are now accustomed to setting the rules for custodial interrogations, and to enforcing the rules that they have created in particular cases. It should be easier for them to relinquish this role if they know that in doing so they are acceding to a responsible alternative system, rather than writing a blank check for individual officers or agencies.

*Id.* at 106.

207. *Miranda*, 384 U.S. at 467; see *supra* note 201 and accompanying text.

208. Even prior to *Miranda*, however, the Court had established an exclusionary rule for confessions obtained from suspects during periods of illegal detention under its supervisory authority. See *Mallory v. United States*, 354 U.S. 449, 451-56 (1957); *McNabb v. United States*, 318 U.S. 332, 344-45 (1943). In addition, as a general rule, under the sixth amendment police officials and their agents cannot question indicted defendants. See, e.g., *Massiah v. United States*, 377 U.S. 201, 205-07 (1964) (incriminating statements recorded by radio installed in defendant's automobile by government narcotics agents inadmissible at trial on sixth amendment grounds). But see *Patterson v. Illinois*, 108 S. Ct. 2389, 2394-96 (1988) (*Miranda* warnings given to indicted defendant in custody who was not yet represented by counsel sufficient to apprise him of sixth amendment rights); *Kuhlmann v. Wilson*, 477 U.S. 436, 456-61 (1986) (holding admissible indicted defendant's incriminating statement made to informant who was placed in his cell but did not initiate conversation about crime).

209. See, e.g., *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (analysis of Alaska Supreme Court rule requiring recording of interrogation conducted in detention as a means of implementing due process under state law); TEX. CRIM. PROC. CODE ANN. art. 38.22, § 1(c) (Vernon 1989) (requiring corroboration of oral confessions either by evidence found as a result thereof or by videotaping). A few states have adopted versions of the *McNabb-Mallory* rule, discussed *supra* note 208. See, e.g., *State v. Benbo*, 174 Mont. 252, 261-62, 570 P.2d 894, 899-900 (1977); *Commonwealth v. Davenport*, 471 Pa. 278, 284, 370 A.2d 301, 306 (1977).

210. See *supra* note 205 (critique of the Justice Department suggestions). To the extent that

meritorious. For example, having an attorney present at custodial interrogation certainly helps assure that any resulting confession will be a product of the defendant's free will.<sup>211</sup> The presence of counsel is often considered an ironclad guarantee against police elicitation of *any* confession, voluntary or coerced.<sup>212</sup> Yet, like other warranties, it is only as good as its maker. To put not too fine a point on the matter, the question of ineffective assistance of counsel, even in the interrogation context, cannot be easily dismissed.<sup>213</sup> While it may be true that

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state proposals overlap with those of the Justice Department—such as videotaping of interrogation—they are, of course, subject to the same criticisms.

While state incorporation of the *McNabb-Mallory* rule, *see supra* note 209, would prevent many police abuses, it, too, is subject to manipulation. For instance, what constitutes an "unnecessary" delay in bringing the suspect before a magistrate? Where the statute in effect sets a time limit for presenting the defendant to the magistrate, *see, e.g.*, 18 U.S.C. § 3501(c) (1982) (six hours), custody during this time period necessarily takes its toll. In addition, statutes of this sort often permit the authorities to establish that delay beyond the specified time was reasonable. *Id.* Moreover, such proposals presume that the magistrate's warnings would be sufficient to dissipate any coercive effects, even though the defendant would be returned to police custody. Finally, even if defendant asserted her rights, the Court still would face questions of whether the police had honored defendant's invocation. *See, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981); *Michigan v. Mosley*, 423 U.S. 96 (1975).

211. According to Professor Ogletree,

A new bright-line procedural rule is needed to preserve the constitutional values the *Miranda* Court sought to protect. All suspects in custody should have a nonwaivable right to consult with a lawyer before being interrogated by the police. Any statements obtained by police *before* a suspect consults her attorney would automatically be inadmissible as evidence.

Ogletree, *supra* note 13, at 1842; *see O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973); Leiken, *supra* note 108, at 49-51.

212. The *Attorney General's Interrogation Report* stated:

[A]ny value of a right to counsel in establishing voluntariness must be weighed against the costs of recognizing such a right. These costs are substantial and obvious. If a lawyer appears, he will usually tell his client to say nothing to law enforcement officers, and there will be little point in attempting further questioning. Even if questioning does subsequently take place, prior consultation with counsel and the delay associated with it eliminates the possibility of obtaining an untainted story and increases the likelihood of successful fabrication.

ATTORNEY GENERAL'S INTERROGATION REPORT, *supra* note 17, at 111; *see Inbau & Manak, Miranda v. Arizona—Is It Worth the Cost?*, 21 THE PROSECUTOR 31, 35 (No. 4 1988) ("Once a lawyer enters upon an interrogation scene, he will very rarely do anything more than instruct his client to keep his mouth shut.").

213. Presumably, although distinctions can be drawn between performance in the courtroom and in the interrogation room, there is little reason to believe that attorneys who do poorly in the former will do substantially better in the latter. Unfortunately, in the courtroom context there is ample evidence that many lawyers provide inadequate representation. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("What I have seen in 23 years on the bench leads me to believe that a great many if not most indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment. . ."); Weaver, *Bar to Confront Burger Over His Criticism*, N.Y. Times, Feb. 11, 1978, at 1, col. 3 (American Bar Association President disputed Chief Justice Burger's assertion that half of American lawyers were unqualified for courtroom work and estimated instead that "only about 20 percent of current lawyers were not qualified for such service"). These circumstances notwithstanding, the Court ruled in *Strickland v. Washington*, 466 U.S. 668 (1984), that to establish ineffective assistance it is necessary to show that (1) counsel's error was so serious that it establishes that the attorney "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that (2) the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The *Strickland* opinion also refers continually to the deference that reviewing courts must show to counsel's performance and the dangers of second-guessing an attorney's strategic decisions. *Id.* at 689-91. The end result is that while incompetence may be widespread, judicial relief for it is not.

Moreover, it is unlikely that an attorney's erroneous advice to a client under interrogation (such

"any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances,"<sup>214</sup> the problem is that some lawyers are not. Indeed, given the stress and time pressures of stationhouse questioning, mistakes in judgment, such as erroneous advice to give an exonerating statement, are more likely to occur.<sup>215</sup> Affording the right to counsel also would not obviate inquiries with respect to waiver once counsel has left the stationhouse. Thus, such a proposal, while extremely helpful, does not assure that only voluntary confessions will be used at trial. It also does not eliminate litigation of issues, such as ineffective assistance of counsel, that may be peripheral to the question of coercion.

Similarly, proposals requiring police to bring suspects before magistrates without unnecessary delay and to advise them of their constitutional rights help encourage voluntariness, but do not guarantee it.<sup>216</sup> Coercive tactics still can take place prior to presentation of the suspect to the magistrate. Moreover, this temporary respite from exclusive police custody ends when the suspect leaves the courtroom. Even if the defendant asserted his rights, the court still would face the question whether the police had honored defendant's invocation. Indeed, should the Court deem confessions admissible only when made to magistrates,<sup>217</sup> voluntariness still would not be assured. In this context as well, the accused is in custody and in the presence of an authority who may appear to be soliciting if not demanding an admission of one sort or another.

In short, neither defense attorneys nor magistrates can assure the voluntariness of confessions. Whether suspects render self-inculpatory statements in the stationhouse, the courtroom, or any other custodial context, the circumstances surrounding their elicitation are so intimidating that the exercise of free will is at best problematic.<sup>218</sup> The voluntariness of admissions in such cases always will

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as a mistaken suggestion to give an exculpatory statement that turns out otherwise) can be attacked if it is based on information furnished by the client, *see id.* at 691, and in the stressful atmosphere and time constraints of police interrogation, a defendant is more likely to be less than candid to a newly appointed attorney. Furthermore, assuming that there is a right to effective assistance of counsel in the interrogation context at all, *see Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam) (in circumstances in which there is no federal constitutional right to counsel, such as discretionary state appeals, there is also no right to effective assistance of counsel), it is nonetheless unclear whether a confession obtained as a result of incompetent legal advice, if otherwise reliable, is subject to attack on sixth amendment grounds. *Cf. Kimmelman v. Morrison*, 477 U.S. 365, 391 (1986) (Powell, J. concurring in the judgment) ("The more difficult question is whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*. There is a strong argument that it cannot.").

214. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part).

215. *See supra* note 213.

216. *See supra* note 210.

217. Similarly, Professor Dripps urges a per se exclusionary rule with respect to statements obtained through police questioning, conditioned on disincorporation of the fifth amendment privilege and authorization of compulsory magisterial interrogation. Dripps, *supra* note 18, at 701-02. Professor Dripps' proposal is based on the assumption that society is unwilling to forgo valuable evidence and that the concept of voluntariness is subordinated to that overriding principle. He views his recommendation as a means of accommodating this societal need without acceding to either police brutality or repeal of the fifth amendment. *See id.*

218. *See infra* notes 235-41 and accompanying text (discussing the intimidating nature of custody).

Even though pleas of guilty often suffer from similar infirmities such as ineffective counsel ad-

be debatable. Thus, to the extent that these proposals are meant to curb improper police questioning, they seem to finesse the real issue—whether *any* confession given by a suspect while in custody can be considered either voluntary within the meaning of due process or noncompelled under the fifth amendment. Our answers to those questions are maybe and no. The confession may or may not be voluntary, depending on various factors including the quality and quantity of police pressure, but it is, in any event, compelled. The fifth amendment prohibition against compulsion provides a separate and independent basis for assessing the admissibility of confessions,<sup>219</sup> one that goes beyond preclusion of unreliable statements and of unlawful police overreaching, manipulation, deception and the like, all of which are prohibited under the voluntariness standard of the due process clause—at least if the misconduct is sufficiently egregious.<sup>220</sup> Professor Schulhofer has argued that the self-incrimination clause covers “more civilized but nonetheless compelling pressures.”<sup>221</sup> While accepting his view that less blatant official pressure violates the self-incrimination privilege, one may also, at the same time, see compulsion as primarily situational in nature, at least if there is government involvement in creating the situation. Such a situational concept of compulsion would allow the courts to reject confessions when individuals are, as a result of state-created circumstances (such as being in custody), not fully able to exercise free will in determining whether to assist the state in securing their own convictions.

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vising frightened and uncomprehending defendants, see Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278-1313 (1975), we are not suggesting the abolition of such convictions without trial in this Article. Pleas are distinguishable, since they are generally rendered at a later stage of the proceeding, after counsel has had the opportunity to prepare the case adequately and to make a more accurate assessment of the probability of conviction and length of sentence.

219. See Schulhofer, *supra* note 19, at 440-46. Professor Schulhofer urges that “compulsion for self-incrimination purposes and involuntariness for due process purposes cannot mean the same thing.” *Id.* at 443. Professor Grano has attacked both this distinction between the concepts of compulsion and voluntariness and the conclusion that statements can be compelled even if no pressure has been exerted on the defendant. His attack asserted that Professor Schulhofer's failure to criticize *Miranda's* limitation to custodial interrogation is an implicit concession that compulsion, like voluntariness, is concerned with degrees of pressure. See Grano, *supra* note 18, at 182-87. Since Professor Schulhofer insisted that custodial interrogation without the *Miranda* warnings nevertheless would yield a compelled statement in violation of the fifth amendment, Professor Grano contended that “this implausible view, taken seriously, ultimately would require the abolition of police interrogation, in that *Miranda's* procedural litany cannot eliminate the mild pressure of which he complains.” *Id.* at 186. Inasmuch as we view custody in and of itself as inherently coercive and thus go beyond even “this implausible view,” our proposal would not permit the use of any statements made during custody, no matter whether the result of interrogation. See *infra* notes 235-42 and accompanying text.

220. See, e.g., *Moran*, 475 U.S. at 432 (“We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation.”).

221. Schulhofer, *supra* note 19, at 444. Professor Schulhofer uses the law of waiver as a paradigm for distinguishing between involuntariness under the due process clause and compulsion under the fifth amendment. He posits the example of a witness freely choosing to testify at trial, thereby waiving the prohibition against compulsion but not the prohibition against involuntariness. Thus, the state may compel such a witness to undergo cross-examination during reasonable business hours in the presence of defense counsel, but cannot subject the witness to 36 hours of continuous interrogation by relays of attorneys. *But see* *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986) (“There is obviously no reason to require more in the way of a ‘voluntariness’ inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context”); *Moran*, 475 U.S. at 432 (quoted at *supra* note 220).

This situational concept of compulsion is not inconsistent with the Court's decision in *Colorado v. Connelly*,<sup>222</sup> in which defendant, a schizophrenic suffering from auditory hallucinations, came sua sponte to the police station, volunteered the information that he had killed someone, and asked to discuss the matter.<sup>223</sup> The *Connelly* Court rejected a free will rationale and required that government coercion be present to establish involuntariness or to invalidate a waiver of the fifth amendment privilege. The Court's rejection of free will as a necessary ingredient of waiver in *Connelly* may have stemmed in part from the circumstances of that case. The police presence was, in a sense, incidental to the confession; the state had not created an atmosphere that compelled the defendant to speak; whatever compulsion he felt came from his tormented mind. The situational view of compulsion is at least one step removed from *Connelly* in that the police, by arresting the suspect and placing him in custody, have created an atmosphere that is inherently coercive. In that sense there is a causal connection between official action and the ensuing confession.

The Supreme Court's ruling in *Carter v. Kentucky*<sup>224</sup> that even in the absence of prosecutorial comment, a trial court must instruct the jury not to draw adverse inferences from defendant's failure to testify<sup>225</sup> offers support for the situational definition of compulsion. Professor Schulhofer thought *Carter* was evidence that, rather than being merely formal and legal, " 'compulsion' also arises from the state's failure to take reasonable steps to eliminate pressure that is wholly informal and psychological."<sup>226</sup> We agree, but also think that *Carter* is an example of situational compulsion. The state simply has put the defendant on trial, which it has a right to do. No one is explicitly asking the accused to testify or otherwise assist the prosecution; yet the state-created circumstances are "instinct with obligation" and pressure. The remedy of curative instructions indicates that the fifth amendment requires a mechanism for dissipating even such forms of compulsion.

The Bill of Rights incorporation process also lends credence to this concept of situational compulsion. Due process can be seen as a baseline, a lowest common denominator for determining constitutionally permissible governmental behavior.<sup>227</sup> The criminal safeguards of the Bill of Rights, on the other hand, have

222. 479 U.S. 157 (1986) (discussed *supra* note 198).

223. *Id.* at 167-71.

224. 450 U.S. 288 (1981).

225. *Id.* at 303.

226. Schulhofer, *supra* note 19, at 439. In this connection, Professor Schulhofer also relied on a line of cases holding that the state may not fire employees who refuse to waive their fifth amendment privileges. This line of cases included *Lefkowitz v. Newsome*, 431 U.S. 801 (1977), in which the Court specifically noted that economic coercion by the government was relevant in determining what constituted compulsion. See Schulhofer, *supra* note 19, at 439.

227. One example is *Rochin v. California*, 342 U.S. 165 (1952), a preincorporation case holding that police conduct that "shocks the conscience" violates due process. *Id.* at 172 (police forcibly pumped defendant's stomach for evidence to be used against him). Justice Black's concurrence asserted that the fifth amendment was the appropriate focus for the Court's decision and that "faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous [due process] standards stated by the majority." *Id.* at 175 (Black, J., concurring).



their own individual and particular values.<sup>228</sup> The entire painstaking process of incorporation assured that these concerns also would be relevant in assessing alleged state misconduct. Indeed, the Court has acknowledged that the assimilated provisions embody distinctive values by separately addressing particular Bill of Rights guarantees, on the one hand, and due process-fundamental fairness questions on the other.<sup>229</sup> Thus, it seems unlikely that the long struggle

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228. Reduced to its barest minimum, due process would require that the defendant receive notice of the charges and a hearing thereon, for without these baseline safeguards, government action may be totally arbitrary and unreliable. *Holden v. Hardy*, 169 U.S. 366, 389-90 (1898). Clearly, the Bill of Rights goes considerably further. For example, when the Court originally held that due process included a right to counsel in capital cases, its rationale was tied to the due process right of notice and hearing. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (reasoning that the right to a hearing would be illusory "if it did not comprehend the right to be heard by counsel"). The incorporated right to counsel articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), however, stems from the sixth amendment right to assistance of counsel, whose contours are substantially broader, including, for example, the automatic right to an attorney in all felonies and in those misdemeanors for which the defendant is actually confined. See *Scott v. Illinois*, 440 U.S. 367 (1979). Where the sixth amendment is not applicable, as, for example, in probation and parole revocation proceedings, the right to counsel based on due process alone is far more circumscribed and is determined on a case-by-case basis. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The depth as well as the breadth of the guarantee may depend on whether it is protected merely by due process or is specifically incorporated. For instance, when the right to counsel was only an aspect of due process fundamental fairness, the standard for establishing ineffective assistance of counsel was extremely stringent, namely, that the trial was a farce and mockery. Following incorporation of the right, however, courts took the position that ineffective assistance could be established under the lesser standard of lack of reasonably competent representation. See, e.g., *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The Court thereafter held that the standard for ineffective assistance is deficient performance that prejudices the defense. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

229. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court upheld the taking of a blood sample from an injured person by a doctor at the direction of police and affirmed defendant's conviction for driving while intoxicated, based in part on the blood sample. In the course of its opinion, the Court separately addressed the fourth and fifth amendment as well as the due process issues. Although the Court rejected each of these constitutional claims, it did so by looking to the particular concerns of each constitutional guarantee. Thus, the Supreme Court directed its fourth amendment inquiry to the probable cause and warrant requirements of that safeguard and its fifth amendment discussion concerned the meaning of the phrase "compelled to testify" in the amendment. On the other hand, the Court decided the due process claim by asking whether the state conduct offended the sense of justice required under *Rochin v. California*, 342 U.S. 165 (1952) (discussed *supra* note 227); see *supra* note 228 (discussion of the Court's separate treatment of due process and sixth amendment claims); see also *Moran v. Burbine*, 475 U.S. 412 (1986) (the Court individually addressed defendant's fifth and sixth amendment and due process claims) (discussed *supra* notes 146-50 and accompanying text).

The Court requires a showing of egregious police misconduct to establish a due process violation. See, e.g., *Moran*, 475 U.S. at 433-34 ("On these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society" as to deprive defendant of the fundamental fairness required by due process.). It is thus more likely the courts will find that a particular government action violates a specific Bill of Rights guarantee rather than due process. It also may be that alleged official misconduct violates neither due process nor the strictures of a specific guarantee. In addition, due process and a particular safeguard may provide almost coterminous protection, because the implicated values of each are similar. See *Whitely v. Albers*, 475 U.S. 312 (1986) (holding that prison authorities who shot inmate during the course of efforts to subdue a prison riot did not violate either the inmate's eighth amendment or due process rights). In *Whitely* the Court observed,

It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" [and, therefore, violates due process] . . . were not also punishment "inconsistent with contemporary standards of decency" . . . in violation of the Eighth . . . In these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishment Clause.

*Id.* at 327 (quoting *Rochin v. California*, 342 U.S. 165, 172-73 (1952) and *Estelle v. Gamble*, 429

culminating in incorporation of the fifth amendment prohibition against compelled testimony could have been simply an heroic effort to provide an official synonym for involuntariness. Nor was incorporation likely intended only to cover slightly less egregious police misconduct than that already prohibited under the due process clause. Due process was and is an evolving concept, the scope of which has been broadened substantially over the decades to bring within its ambit progressively less blatant forms of official misbehavior.<sup>230</sup> Rather, it seems more probable that application of the fifth amendment privilege was meant to deal with something other than or in addition to active forms of police misconduct.

Just as the voluntariness concept has evolved, moving gradually from the prohibition against physical brutality and concern with reliability announced in *Brown v. Mississippi*<sup>231</sup> to the prohibition against deception and concern with police misconduct declared in *Spano v. New York*,<sup>232</sup> the compulsion doctrine is likewise susceptible of growth. The Court may have intended *Miranda* to be the equivalent of *Brown v. Mississippi*<sup>233</sup> in this evolutionary process. Thus, *Miranda* required the conjunction of interrogation and custody as its baseline establishing compulsion. In time, had the Court permitted *Miranda* to be true to its teaching, the subsequent case law might have produced a more refined definition of compulsion and a more refined mechanism for its dissipation—from a system of warnings to a total bar against statements made in all circumstances viewed as compulsive. Thus, the Court might have viewed either custody or interrogation standing alone as sufficient to establish compulsion, and it might have reached even beyond to other circumstances that compel persons to incriminate themselves.<sup>234</sup>

We would not go so far, at least at this time. It is our view, however, that suspects who are in custody cannot make truly voluntary or noncompelled confessions and that, therefore, any statements made by them, whether to police or to police agents,<sup>235</sup> and whether the product of interrogation, should be inad-

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U.S. 97, 103 (1976)); see also *United States v. Salerno*, 481 U.S. 739 (1987) (upholding Bail Reform Act authorization of pretrial detention against successive substantive due process and eighth amendment excessive bail challenges). But see *Davidson v. Cannon*, 474 U.S. 344, 358 (1986) (Blackmun, J., dissenting) ("The Due Process Clause provides broader protection than does the Eighth Amendment.").

230. For instance, in *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court refused to hold the fifth amendment applicable to the states, and therefore affirmed defendant's conviction for first-degree murder obtained on retrial after the state had appealed his initial conviction for murder in the second-degree. The Justices' due process inquiry was whether this form of double jeopardy created "a hardship so acute and shocking that our polity will not endure it." *Id.* at 328. Their answer was no. By 1969, however, the Court stated: "The validity of petitioner's larceny conviction must be judged, not by the watered-down standards enunciated in *Palko*, but under this Court's interpretations of the Fifth Amendment's double jeopardy provision." *Benton v. Maryland*, 395 U.S. 784, 796 (1969). The Court then went on to reverse a conviction and sentence on facts far less egregious than in *Palko*: the defendant was acquitted of larceny and convicted of burglary; he was retried and convicted on both counts, receiving a concurrent sentence on the larceny charge. *Id.* at 785-86.

231. 297 U.S. 278 (1936).

232. 360 U.S. 315 (1959) (discussed *supra* note 191).

233. 297 U.S. 278 (1936).

234. See *infra* notes 247-52 and accompanying text.

235. The sixth amendment prohibits the use of confessions obtained from indicted defendants by

missible in evidence. We do recognize that everyone ultimately has free choice—of sorts. As the saying goes, even the condemned person awaiting execution can opt either to curse the hangman or pray to God.<sup>236</sup> Admittedly, in the mundane, everyday world, there are also constraints on the exercise of free will that are simply endemic to the human condition—everyone's decisions are influenced by unconscious desires, time pressures, economic demands, cost-benefit analyses, and the like.<sup>237</sup> In a very real sense, however, custody presents a difference in kind. Its circumstances are *sui generis*. The suspect is stripped of power, control, and dignity, and is subject, by and large, to the whims of jailers.<sup>238</sup> If a purpose of the privilege is to create a parity of sorts between the individual and the state, it must be recognized that, in the confines of the stationhouse or its functional equivalent, there is no equality, gross or otherwise.

Although *Miranda* focused on the inherent coerciveness of custodial *interrogation*, it is custody in and of itself that is coercive. Concededly, official interrogation heightens the tension, but even without questioning, custody tends to deprive persons of free choice.<sup>239</sup> The lack of freedom simpliciter, therefore, requires a broader prophylactic rule than that set forth in *Miranda*. Given the nature of custody, advising suspects of their rights is unlikely to dissipate its oppressive effects,<sup>240</sup> and waivers in such situations cannot be viewed realistically as noncompelled. Moreover, the case law interpreting the interrogation

surreptitious police agents. *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964). Under the proposal set forth in this Article, this prohibition also would be applicable under the fifth amendment to unindicted defendants in custody. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), however, permits the admission of confessions made to government informants placed in an indicted defendant's cell if the informant is acting merely as a "listening post." *Id.* at 456 n.19. Under our proposal such confessions would be inadmissible because of their custodial context.

236. A. WHEELIS, *HOW PEOPLE CHANGE* 115-16 (1973) ("With the noose around our necks there still are options—to curse God or to pray, to weep or to slap the executioner in the face.").

237. Professor Dripps similarly states:

The vast majority of confessions do not result from the suspect's "free will and rational intellect" any more than they result from old-fashioned and brutal third-degree tactics. Instead, the bulk of confessions results from irrationality, mistake, and manipulation. Any expectation that truly voluntary confessions are available on a systemic basis depends either on insupportable factual assumptions or on an interpretation of voluntariness that reduces that word to signifying no more than the absence of third-degree methods.

Dripps, *supra* note 18, at 700.

238. *Cf. Bell v. Wolfish*, 441 U.S. 520 (1979) (pretrial detainees have diminished expectation of privacy and therefore strip searches and body cavity inspections are not unreasonable); T. WOLFE, *THE BONFIRE OF THE VANITIES* 579 (1987) ("A liberal is a conservative who has been arrested.").

239. *See Schulhofer, supra* note 19, at 447-48.

240. By its nature, custody is intimidating, and the resulting fear and loss of control often effectively prevent suspects from understanding or even hearing warnings concerning their rights and the waiver thereof. *See Olgetree, supra* note 13, at 1827-29; *see also Autry v. Estelle*, 706 F.2d 1394, 1404 (5th Cir. 1983) ("Of course custody itself has an inherently coercive dimension."), *cert. denied*, 465 U.S. 1085 (1984); *People v. Smith*, 34 Cal. 3d 251, 268-69, 667 P.2d 149, 159, 193 Cal. Rptr. 692, 702 (1983) ("It is the fact of *custody* with its inherent coercive ambience inducing a psychological compulsion to confess that underlies . . . the court's rule on continued police interrogation . . ."). Indeed the Supreme Court implicitly recognized the inherent coerciveness of custody in *Innis*, 446 U.S. at 300 ("Interrogation" . . . must reflect a measure of compulsion above and beyond that inherent in custody itself."). *See generally Driver, Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 46 (1968) (discussing such factors as the "ambiguity and unpredictability of the setting," the "threat implied therein," and the consequent effect on confessions).

requirement suggests that drawing the line of protection at this point invites circumvention of the privilege. The police apparently have become adept at creating circumstances short of interrogation that nonetheless effectively compel a suspect to make ostensibly spontaneous utterances.<sup>241</sup>

There may of course be certain special persons of steel will who can insulate themselves from the effects of custody and who, for various reasons, are able to reach a dispassionate and unfettered decision to confess. The problem is that there are few such individuals and it is extremely difficult to determine who they are.<sup>242</sup> It simply does not make sense to expend the resources necessary to make such a finding, assuming an inquiry along these lines could be fruitful at all.<sup>243</sup> Just as *Miranda* established its per se warning rules even though the effect would be to exclude some confessions that would be deemed voluntary under the traditional due process test, this proposal would prohibit admission of all custodial statements even though a few may have been the products of free will, at least as defined here.

Drawing the line at custody does deny protection in the atypical case of a confession by a previously unsuspected person who voluntarily appears at the police station, either with or without an attorney. Because this is not a state-initiated appearance, custody has not attached and under our proposal such a defendant's confession is presumptively voluntary. In the more typical case, however, the police arrest a suspect or the suspect surrenders, with or without counsel, in response to a warrant or other coercive mechanism and custody attaches. Under the proposal advanced in this Article the statement of such an individual would be excluded. It may appear anomalous to make the confession of the nonvolunteer suspect inadmissible even when he is accompanied by counsel, while at the same time presumptively admitting the statement of a previously unsuspected person who voluntarily appears at the stationhouse even if she is without an attorney.<sup>244</sup> The latter individuals, however, have had the opportunity while free of state coercion to make an unfettered decision to give themselves over to the police. The choice to do so, with or without the advice of an attorney, was theirs. Concededly, ignorance, fear and economic constraints may act as deterrents to seeking counsel prior to a voluntary appearance, and thus the choice may not be completely free. For now, however, because such cases are rare and because the state has not created any compulsive context impinging on decisions of this sort, it seems appropriate not to view these statements as

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241. See *Innis*, 446 U.S. 291, 294-95 (discussed *supra* notes 130-31 and accompanying text).

242. Cf. S. MILGRAM, OBEDIENCE TO AUTHORITY 5 (1974) (finding that a "substantial proportion" of subjects inflicted what they thought were painful shocks to another person because they had agreed to participate in an experiment and were yielding to the authority of the person directing the project).

243. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) ("procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions").

244. This is not to signal agreement with the Court's decision in *Colorado v. Connelly*. See *supra* notes 198, 222-25, and *infra* notes 248-50 and accompanying texts (discussing *Connelly*). Free will surely should be deemed an underlying requirement for voluntariness, and it is entirely unclear how an insane person can effect a valid waiver.

compelled under the fifth amendment.<sup>245</sup>

This Article also does not advocate the arguably more radical position that *all* statements made by suspects to state officials or their agents during interrogation be inadmissible in evidence. As the *Miranda* majority acknowledged, custody is an appropriate dividing line, although that term should be defined in a considerably less grudging manner than the Burger and Rehnquist Courts have.<sup>246</sup> At the same time, there is much merit in this more protective view, because the line between custodial and noncustodial interrogation may prove inadequate to deal with police questioning in noncustodial contexts, such as ostensibly nonthreatening but nonetheless inherently intimidating interrogation in the suspect's home.<sup>247</sup> Indeed, if it became clear that our proposal was subject to circumvention through such techniques, we would not hesitate to propose a broader prophylactic rule.

A still more extreme position would prohibit even volunteered statements made outside custody without preceding interrogation. While we do not advocate it, there is merit to this position. We are simply uncertain whether any statements to government officials can be deemed noncompelled. In the previously discussed circumstances, where the focus is on whether the defendant is in custody or is being interrogated, it is official action or governmentally-created context that impinges on the exercise of free will. That is not the case with respect to volunteered noncustodial statements made in the absence of interrogation when extraneous forces may reduce the actor's ability to choose freely whether to incriminate herself. The demarcation based on state causation, however, may not be that critical. The more appropriate question may be simply whether the resulting confession is freely given or compelled. The issue raised is analogous to that presented in *Colorado v. Connelly*,<sup>248</sup> in which the Court held that, notwithstanding *Miranda* and the due process clause, the volunteered statement of a concededly psychotic person was admissible evidence because there was no "police conduct causally related to the confession."<sup>249</sup> For the dissent, however, official misconduct was irrelevant in determining whether defendant's admission was an act of free will, since "due process derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily."<sup>250</sup>

Indeed, there is an even more drastic proposal that could be made—

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245. Under our proposal, however, if defendant is thereafter held by the police, custody has attached and any statements made subsequently would be viewed as compelled. Moreover, even prior to that point, if police exert pressure on the suspect, the resulting statement likewise would be excluded.

246. See *supra* notes 72-79 and accompanying text.

247. See Grano, *supra* note 18, at 186 n.68. Even Professor Grano, who rejects the view that custodial interrogation is inherently coercive, notes that "[a]s a factual matter, many non-custodial interrogations exceed in pressure many custodial ones." *Id.*

Of course, even our present proposal excludes a statement such as the one described in the text if the circumstances constituted custody.

248. 479 U.S. 157 (1986) (discussed *supra* notes 198, 222-23 & 244 and accompanying texts).

249. *Id.* at 164.

250. *Id.* at 176 (Brennan, J., dissenting).

namely, that all confessions, whether voluntary or compelled, reliable or spontaneous, and whether made in custody, in court, or to government officials, be deemed inadmissible in evidence in criminal proceedings—that is, that confessions be considered of no evidentiary value. We have a philosophical predilection for such a position,<sup>251</sup> which reflects the ancient Talmudic rule.<sup>252</sup> We recognize, however, that this position may be considered in tension with the fifth amendment prohibition, which is directed solely to compelled self-incriminating testimony.<sup>253</sup>

Viewed in contrast to the foregoing alternatives, our proposition has much to recommend it, but is not such a sharp departure from the original understanding of *Miranda*. The proposal would not preclude admissibility of voluntary statements made in noncustodial situations, whether elicited or sua sponte, although we would define custody broadly. This compromise, however, at least would prevent the most abusive forms of police misconduct, for it is custody that permits the police to play havoc with the defendant's free will, and it is custody that invites the sort of official trickery effectively condoned by the Court in *Moran v. Burbine*.<sup>254</sup> At the same time, the proposal would respect the individual's decision to make incriminating statements in the noncustodial context. Furthermore, by generally precluding reliance on confessions, it would provide an incentive for improved police investigation. The proposal surely would discourage placement of suspects in custody absent sufficient evidence of guilt.<sup>255</sup> It also would provide a brighter line to guide police, prosecutors, and judges with respect to the admissibility of confessions, and it would eliminate the need to liti-

251. See Rosenberg & Rosenberg, *In The Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 1048 (1988) ("The Talmudic rule [prohibiting the use of confessions in criminal cases] is simple; it is absolute; it is profound. We could do worse than to look to it for guidance.").

252. See A. KIRSCHENBAUM, *SELF-INCRIMINATION IN JEWISH LAW* 17 (1970) (According to the Talmudic rule, "Not only may a man not be compelled to be a witness against himself, but even were he voluntarily to testify against himself and confess wholly or partially to a crime, his testimony is rejected completely and has no status in court.").

253. But see Glaser, *A New/Old Look at the Fifth Amendment—Some Help from the Past*, 1 JEWISH L. ASSOC. STUDIES 29, 38 (1985) (suggesting that the term "compelled" in the fifth amendment may be interpreted to preclude an admission of guilt).

254. 475 U.S. 412 (1986) (discussed *supra* notes 146-50, 169-72 and accompanying texts).

255. While *Dunaway v. New York*, 442 U.S. 200 (1979) (holding that confession obtained from defendant arrested without probable cause is inadmissible unless purged of taint of illegal arrest), would generally preclude the use of confessions taken from defendants arrested without probable cause, it would not apply to situations in which there is probable cause but arguably insufficient evidence to convict. Our proposal would tend to encourage, but not require, the police to delay arrest until they had sufficient evidence to convict, either in the form of extrinsic proof or an uncoerced confession obtained from the accused while not in custody. Such police restraint should be encouraged. For example, in Japan police hold approximately 100,000 people in pretrial detention cells each year. Chira, *Tokyo Journal—Secrets of Police Cell: Woman's Grim Story*, N.Y. Times, Sept. 20, 1988, at A4, col. 3. Critics argue that police use this detention system to coerce confessions, a process facilitated by a prohibition against the presence of lawyers during interrogation. *Id.* Opponents of a bill to continue this system contend that police investigations rely on confessions, and that, as a result, police arrest suspects on insufficient proof, with arrest marking the commencement rather than the conclusion of the investigative process. *Id.* Compare the Japanese system with the following commentary on *Moran*: "By emphasizing the state's substantial interest in incommunicado custodial interrogation and failing to condemn official deception, the opinion suggests that, absent egregious misconduct, the police can isolate a suspect and deny an attorney all access." *Harvard—1985 Term, supra* note 149, at 134.

gate collateral issues other than the question of custody. Moreover, the proposal allows the Court to create a parity of sorts between indicted and unindicted defendants with respect to custodial confessions, without extending the sixth amendment right to counsel to the latter category of suspects, a step that the Court refuses to take.<sup>256</sup> Finally, in comparison to the proposals requiring appearance before a magistrate or the presence of counsel during interrogation, this recommendation gives greater expression to a core value of the fifth amendment, namely, the protection of human dignity. To allow the state to prove a person's guilt based on a confession made in a government-created situation that by its very nature psychologically induces people to disclose incriminating information, denigrates the concept of man as separate and apart from the state and entitled to the exercise of free will.

Stated another way, this alternative does no more than go beyond *Miranda* by substituting for its warning and waiver system a per se rule of inadmissibility that extends to ostensibly volunteered statements made in custody. In short, this is a modest but helpful proposal.

#### V. CONCLUSION

This proposal to eliminate the use of custodial confessions is not a Swiftian gesture. It is only the nature of the contemporary national debate concerning *Miranda* that may make it appear so. In the criminal law area at least, jurisprudence seems to be backing into the future. It is disheartening that, at this late date, serious scholars still contend that the appropriate means for resolution of the tension between state security and individual dignity is disincorporation of the fifth amendment to allow interrogation of suspects by magistrates,<sup>257</sup> or a return to a variant of the ad hoc, totality-of-the-circumstances test for determining the voluntariness of confessions.<sup>258</sup> The former turns the accusatorial system on its head, even though it is designed to prevent de facto inquisitorial examinations by the police. The latter is a time-tested prescription for failure. While we do not denigrate government's need to deal effectively with criminal conduct, there is scant evidence that *Miranda* is either an impediment to effective law enforcement or, more specifically, a significant obstacle to conviction.<sup>259</sup>

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256. Granting suspects the unwaivable right to consult with counsel prior to custodial interrogation, however, does not necessarily require extension of the sixth amendment right to counsel to this stage of the proceedings. Such a right could instead be based, as *Miranda* is, on a limited right to counsel to protect fifth amendment interests.

257. See Dripps, *supra* note 18, at 701-02 (described *supra* notes 18 and 217). Professor Dripps' proposal is not the first in this vein. See, e.g., Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); see also Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, in Y. KAMISAR, *supra* note 11, at 77-94 (discussing the relative merits of the Kauper and *Miranda* models, including revisions of the Kauper proposal by Judges Friendly and Schaefer).

258. See Caplan, *supra* note 12, at 1473-76 (discussing alternatives to *Miranda*); see also *supra* notes 199-200 and accompanying text (discussing the limitations of the voluntariness standard).

259. Although the *Attorney General's Interrogation Report* stated that "before-and-after studies . . . indicate[] that the implementation of *Miranda's* system had a major adverse effect on the willingness of suspects to respond to police questions," ATTORNEY GENERAL'S PRETRIAL INVESTIGATION REPORT, *supra* note 17, at 57, it seems reasonably clear that "[t]he great weight of empirical evidence supports the conclusion that *Miranda's* impact on the police's ability to obtain confessions has

Even so, *Miranda* apparently has become a scapegoat for all the intractable criminal law problems facing this country. Crime abounds, and we do not know what to do about it. Why people commit crimes, how to stop them, how to sentence them, and how to control the scourge of drugs are all unanswered questions. On a gut level at least, the problem of crime appears insoluble. Yet the public demands action. In the absence of meaningful solutions, critics seem to say, let us be rid of legal technicalities such as exclusionary rules that ostensibly allow criminals to evade justice. Let *Miranda*, not crack, serve as public enemy number one. Better still, tie them together causally. There is more crack because of *Miranda*; therefore, *Miranda* must go. But if, after *Miranda* is gone, the same problems still persist, what constitutional guarantee will have to be sacrificed next?<sup>260</sup>

If nothing else, we hope that this proposal can help to move the debate to a slightly more reasonable position on the ideological spectrum. After all, the evolving content of the due process clause in no small measure reflects this country's maturation as a civilized society. Surely the movement from the early decisions prohibiting physical brutality in the extraction of confessions to *Miranda*'s prophylactic rules bespeaks that truth. The trend has been to give more not less, to go forward not back, to refine rights rather than coarsen them. In this sense, the Warren Court was mainstream, and the Burger and Rehnquist Courts are aberrational. History dictates that we should examine how to strengthen fifth amendment protection rather than eviscerate it.

And that, Peter Parker, *is* supporting the law, not the lawless.

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not been significant." White, *supra* note 19, at 19 n.99. See, e.g., Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); *Special Project, Interrogation in New Haven, The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

260. In *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), the Court upheld a drug testing program for certain Customs Service employees without warrant or reasonable suspicion, despite the lack of a narcotics problem among such employees. In his dissent, Justice Scalia called the challenged rules "a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 1398 (Scalia, J., dissenting). The only perceived basis that Justice Scalia found for these rules was as a symbol of the government's "war on drugs," to which he responded: "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 1401 (Scalia, J., dissenting).



