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A HISTORY OF *MIRANDA* AND WHY IT REMAINS VITAL TODAY*

Roscoe C. Howard, Jr.[†]
Lisa A. Rich[‡]

Today, anyone with a television can turn it on—at any time of day or night—and find a police officer informing a criminal of his or her *Miranda* rights.¹ And as they sit in their comfortable chairs, beverages in hand, they can probably recite along with the police officer, “*You have the right to remain silent. . . .*”

Custodial interrogations and how they are conducted in light of *Miranda* and its progeny are an integral part of the American criminal justice process and a necessary tool for criminal law enforcement, not merely a source of catchy phrases for today’s popular television shows, for a very simple reason: The warnings set the ground rules for custodial interrogations and ensure that the interrogator and suspect are on a level playing field. A review of the case law surrounding the *Miranda* decision reveals that *Miranda* is a case that has encapsulated the nation’s beliefs and, while subject to the ebbs and flows that come with an elastic and accommodating form of government, remains a vital component of the American criminal justice system.

I. STATE OF THE WORLD BEFORE *MIRANDA*

While *Miranda* has become a fundamental part of criminal justice jurisprudence, the Court was not covering novel ground.² The Supreme Court had considered issues concerning custodial interrogations and, more importantly, confessions for decades leading up to the Court’s

* As part of the Seeger’s Lecture series at the Valparaiso University School of Law, I was asked to set the stage for a panel discussion on *Miranda* and its current role in the criminal justice process. This Article represents an expansion of those remarks.

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¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *Id.* at 442. “We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings.” *Id.*

opinion in *Miranda*. For example, the Federal Bureau of Investigation ("FBI") routinely gave *Miranda*-type warnings before they were required under *Miranda*.³ And it was those warnings upon which the *Miranda* Court based its holdings.⁴ As outlined for the *Miranda* Court, the FBI's warnings preceded custodial interrogation and informed the subject both of his right to remain silent and his right to counsel.⁵

American jurisprudence regarding the admissibility of confessions prior to the mid-1960s was based primarily on establishing the "voluntariness" of the confession.⁶ Over time, the Court recognized two constitutional bases for requiring only voluntary confessions to be admitted as evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.⁷ Some thirty opinions were issued by the Court applying the due process voluntariness test prior to 1964, and those cases refined

³ *Id.* at 483.

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.

Id.

⁴ *Id.* at 484.

"The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F.2d 684 (1965), and *Jackson v. U.S.*, [119 U.S.App.D.C. 100] 337 F.2d 136 (1964), cert. den., 380 U.S. 935, 85 S. Ct. 1353."

Id.

⁵ *Id.* at 483. The FBI noted for the Court that although the timing of the warning had to precede the interview, it could take place in a continuum from as soon as practicable after the arrest up to the commencement of an interview. *Id.* at 485. "The FBI warning is given to a suspect at the very outset of the interview." *Id.*; see *Westover v. United States*, 342 F.2d 684 (1965). "The warning may be given to a person arrested as soon as practicable after the arrest, . . . but in any event it must precede the interview with the person for a confession or admission of his own guilt." *Miranda*, 384 U.S. at 485; see *Jackson v. United States*, 337 F.2d 136 (1964); see also *United States v. Konigsberg*, 336 F.2d 844 (1964), cert. denied, 379 U.S. 933 (1964).

⁶ See *Dickerson v. United States*, 530 U.S. 428, 433-34 (2000) (noting reliance on due process analysis for admission of confessions).

⁷ *Id.* at 433.

the test into an inquiry that examined whether a defendant's will was overborne by the circumstances surrounding the confession.⁸

As the Court later noted, these cases did not offer a "talismanic" definition of "voluntariness" that would be mechanically applicable to the host of situations where the question has arisen.⁹

Rather, "voluntariness" has reflected an accommodation of the complex [set] of values implicated in the police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.¹⁰

Therefore, voluntariness was an examination of the totality of the circumstances surrounding the defendant's confession.¹¹ "The determination 'depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.'"¹²

Throughout the 1960s the Court "changed the focus of much of the inquiry" from the due process "totality of the circumstances" approach to an "inquiry in determining the admissibility of suspects' incriminating statements."¹³ Beginning with its decision in *Malloy v. Hogan*,¹⁴ the Court

⁸ *Id.* at 433-34 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973)); see also *Spano v. New York*, 360 U.S. 315, 321 n.2 (1959) (citing twenty-eight cases decided between *Brown v. Mississippi*, 297 U.S. 278 (1936), and *Escobedo* that dealt with "voluntariness" in confessions).

⁹ *Schneckloth*, 412 U.S. at 224.

¹⁰ *Id.* at 224-25.

¹¹ *Id.* at 225. "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226. The *Schneckloth* Court identified several factors that courts had looked at to determine voluntariness including:

[T]he youth of the accused; his lack of education; his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.

Id. (citations omitted).

¹² *Dickerson*, 530 U.S. at 434 (citing *Stein v. New York*, 346 U.S. 156, 185 (1953)).

¹³ *Id.*

switched to a Fifth Amendment analysis, finding that "the Fifth Amendment's Self Incrimination Clause is incorporated into the Due Process Clause of the Fourteenth Amendment and this applies to the States."¹⁵

Today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897 when, in *Bram v. United States*,¹⁶ the Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"¹⁷

Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was free and voluntary; that is, "[it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ."¹⁸ Two weeks after the *Malloy* decision, the Court outlined the fundamental principles that would become the backbone of its *Miranda* decision. In *Escobedo v. Illinois*,¹⁹ the Court addressed "certain phases" of the "restraints society must observe consistent with the

¹⁴ *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹⁵ *Id.* at 1. In *Malloy*, the Supreme Court was asked to review its decisions in two prior cases in which it had declined to extend Fifth Amendment privilege to the states through the Fourteenth Amendment. *Id.* "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States. Decisions of the Court since *Twining* and *Adamson* have departed from the contrary view expressed in those cases." *Id.* at 6.

¹⁶ *Bram v. United States*, 168 U.S. 532 (1897). The *Bram* Court attempted to set limits for interrogation resulting in confessions:

[I]n order to be admissible, [a confession] must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

Id. at 542-43 (citing 3 RUSSELL ON CRIMES 478 (6th ed. 1896)).

¹⁷ *Bram*, 168 U.S. at 542.

¹⁸ *Malloy*, 378 U.S. at 7 (citing *Bram*, 168 U.S. at 542).

¹⁹ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

Federal Constitution in prosecuting individuals for crime.”²⁰ As would eventually be the case with the defendants in *Miranda*, the defendant in *Escobedo* was taken into custody and interrogated for four hours for the purpose of gaining a confession without the notice of his right to remain silent or his right to have counsel present.²¹ The *Escobedo* Court considered whether, under the circumstances presented:

[T]he refusal by the police to honor petitioner’s request to consult with his lawyer during the course of an interrogation constitutes a denial of “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution as “made obligatory upon the States by the Fourteenth Amendment,” *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 795, 9 L.Ed.2d 799, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.²²

The Court concluded that “when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.”²³ The Court went on to hold that “[t]here is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.”²⁴ Thus, the *Escobedo* Court affirmed a suspect’s Sixth Amendment right to counsel during in-custody interrogations, and that one’s Fifth Amendment privilege against self-incrimination applied to in-custody interrogations.²⁵ The Court also concluded that the law enforcement involved in the *Escobedo* case were unconstitutionally overbearing.²⁶

²⁰ *Miranda v. Arizona*, 384 U.S. 436, 439–40 (1966).

²¹ *Escobedo*, 378 U.S. at 485.

²² *Id.* at 479.

²³ *Id.* at 492.

²⁴ *Id.* at 488.

²⁵ *Id.* at 490–91.

²⁶ *Id.* at 490.

The *Escobedo* ruling sent ripples throughout the state and federal law enforcement communities. In order to address the *Escobedo* holding, law enforcement employed various haphazard methods to indicate that confessions were garnered in accordance with the principles set forth in the case. In Arizona, confessions included a typed statement indicating that a suspect had waived his rights at the time of confessing. It is the bureaucratic rubber-stamp waiver that ultimately would be at issue in *Miranda*. The Court took up four consolidated cases to allow it "to give concrete constitutional guidelines for law enforcement agencies and courts to follow" in the wake of *Escobedo*.²⁷

II. A REVIEW OF *MIRANDA* AND ITS HOLDINGS

*Miranda v. Arizona*²⁸ was a consolidated decision based on four cases, three state cases and one federal, which involved custodial interrogations.²⁹ In all four cases, the questioning elicited oral admissions, and in three of the cases the defendants submitted signed confessions. These confessions were admitted at the defendants' trials resulting in their subsequent convictions. All but one of the verdicts was upheld on appeal.³⁰ Of the four defendants, Ernesto Miranda ("Miranda") has become the most famous, as his case was the one which the Warren majority used to demonstrate why its holding was necessary.

A. *The Facts of Miranda's Case*

Each of the four cases addressed in the Supreme Court's *Miranda* opinion involved confessions obtained from the defendant under circumstances that did not meet constitutional standards for the protection of the Fifth Amendment privilege.³¹ The facts surrounding

²⁷ *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966).

²⁸ See generally *id.*

²⁹ *Miranda* was consolidated with *Vignera v. New York*, on certiorari to the Court of Appeals of New York, and *Westover v. United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued from February 28 to March 1, 1966, as well as *California v. Stewart*, on certiorari to the Supreme Court of California, argued from February 28 to March 2, 1966. *Miranda*, 384 U.S. at 436.

³⁰ *Miranda*, 384 U.S. at 518.

³¹ *Id.* at 491. Each of the four cases consolidated into *Miranda* were reversed. In *Vignera v. New York*, the Court concluded that the defendant's oral admission to a robbery for which he subsequently was convicted was obtained without any warnings as to his rights. Additionally, the trial judge disallowed defense counsel from raising the issue and counseled the jury that failure to give warnings did not invalidate a confession. *Id.* at 493-94. In *Westover v. United States*, the defendant was arrested by local authorities who subsequently learned from the FBI that he was wanted in another state. *Id.* at 494. Local police interrogated him on the night of his arrest and through the next morning. *Id.* at 494-95. Local police terminated their interrogation and turned the defendant over to the FBI.

Miranda's arrest, confession, and subsequent conviction represent the typical case the Court hoped to address with its decision.

In March of 1963, a young woman was kidnapped and raped in the desert outside of Phoenix, Arizona.³² About ten days later, Miranda, an indigent Mexican who had dropped out of school in the ninth grade, was arrested at his home and taken into custody by the Phoenix police.³³ The young woman identified Miranda as her attacker, and afterwards Miranda was taken into an interrogation room and interrogated by police officers for two hours.³⁴ Miranda did not have counsel during this custodial interrogation.³⁵

At the end of the two hours, the two officers emerged with a written confession signed by Miranda.³⁶ At the top of the confession was a typed paragraph "stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'"³⁷ Miranda's confession was admitted at trial over objection of his counsel. After Miranda's conviction, he was sentenced to a term of twenty to thirty years on each count.³⁸

Id. at 495. Nothing in the record indicated that the defendant was warned of his rights by local police. *Id.* The FBI gave their standard warnings, but at that point the defendant had been in custody for over fourteen hours and his confession shortly after the FBI's arrival was deemed by the Court to be a continuation of the local interrogation with warnings coming at the end of the process. *Id.* at 496. The Supreme Court reversed Westover's conviction because the surrounding circumstances did not lead to an assumption that an intelligent waiver of constitutional rights had been given. *Id.* In *California v. Stewart*, the Court affirmed the California Supreme Court's application of *Escobedo* to Stewart's confession that came during the ninth interrogation session in a five-day period. *Id.* at 497. During the previous eight sessions, Stewart had maintained his innocence. *Id.* Nothing in the record indicated that Stewart had ever been advised of his rights. *Id.*

In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record.

Id. at 498-99.

³² *Id.* at 518.

³³ *Id.* at 492, 518. Psychological tests would later determine that Miranda suffered from mental conditions, including sexual fantasies. *Id.* at 518.

³⁴ *Id.* at 491-92.

³⁵ *Id.* at 492.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Upon review, the Supreme Court determined that the testimony of the police officers at Miranda's trial and the government's response brief made clear that Miranda had not been in "any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner."³⁹ "The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."⁴⁰

B. Holding

The *Miranda* Court recognized that its holding may be seen as a departure from the due process analysis that had been the norm in cases leading up to the *Malloy* and *Escobedo* cases:

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.⁴¹

Additionally, although the *Miranda* opinion itself is long, the holding is succinct:

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into

³⁹ *Id.*

⁴⁰ *Id.* at 492-93 (comparing *Haynes v. Washington*, 373 U.S. 503, 512-13 (1963), and *Haley v. Ohio*, 332 U.S. 596, 601 (1948) (Douglas, J.)).

⁴¹ *Miranda*, 384 U.S. at 457.

custody or otherwise deprived of his freedom of action in any significant way.⁴²

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.⁴³

The narrow five-to-four majority holding in *Miranda* set forth the specific warnings that are to be given prior to custodial interrogation and set the parameters for what was meant by "custodial interrogation." In reaffirming *Escobedo*, the *Miranda* majority began with the premise that applying Fifth Amendment protections to in-custody interrogations was "not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."⁴⁴ As evidenced in its opening paragraphs, the *Miranda* majority was concerned with two interrelated concepts that it had addressed initially in *Escobedo*. First, defendants in custodial interrogation, particularly when faced with state law enforcement officials, were unaware of their Fifth Amendment right against self-incrimination.⁴⁵ Second, the Court appeared gravely concerned with the defendants' lack of notice that they were entitled to consult with an attorney during the custodial interrogation process.⁴⁶ Taken together, these two interrelated concerns amounted to what the Court believed to be "pressure on the suspect [that] must be eliminated," even if that pressure is so subtle as to be nothing more than the "influence of the atmosphere and surroundings."⁴⁷

The *Miranda* majority took great pains to trace the history of the Fifth Amendment privilege against self-incrimination and demonstrate that its application to custodial interrogations was rooted in the Constitution. Indeed, it was held that "[i]n this Court, the privilege has consistently been accorded a liberal construction,"⁴⁸ and the application of the Fifth

⁴² *Id.* at 444.

⁴³ *Id.*

⁴⁴ *Id.* at 442.

⁴⁵ *Id.* at 439.

⁴⁶ *Id.* at 440.

⁴⁷ *Id.* at 512 (Clark, J., dissenting).

⁴⁸ *Id.* at 461 (majority opinion).

Amendment to in-custody questioning could be "taken as settled in federal courts" as far back as 1897.⁴⁹ The majority stated:

We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to techniques of persuasion . . . cannot be otherwise than under compulsion to speak.⁵⁰

Having satisfied itself that its procedural pronouncements were governed by the Fifth Amendment, the Court turned to applying its holding to state proceedings. "In *Malloy*, we squarely held the privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings."⁵¹ The implications of that decision "were elaborated in our decision in *Escobedo* . . . decided one week after *Malloy* applied the privilege to the States."⁵² Given these decisions, the Court concluded that it was a natural progression to apply its procedural safeguards to both federal and state law enforcement. Thus, the *Miranda* majority concluded that:

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. . . . [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.⁵³

Although the Court was clear on what the minimum procedural safeguards were to be for individuals taken for in-custody questioning, the *Miranda* majority acknowledged that it could not:

⁴⁹ *Id.* (referring to *Bram v. United States*, U.S. 532, 542 (1897)).

⁵⁰ *Id.*

⁵¹ *Id.* at 463-64.

⁵² *Id.* at 465 (citations omitted).

⁵³ *Id.* at 467.

[S]ay that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.⁵⁴

What the *Miranda* Court sought to recognize, therefore, was that with the changing scope and methods of law enforcement questioning, "reliance on the traditional totality of the circumstances test raised a risk of overlooking an involuntary custodial confession . . . a risk [that is] unacceptably great when the confession is offered in the case in chief to prove guilt."⁵⁵

C. *The Response to Miranda*

After reviewing the legal foundation upon which *Miranda* rests, it is perhaps easier to understand why so many constitutional scholars question the constitutional underpinnings of the *Miranda* warnings. Certainly, following the *Miranda* decision, many across the country believed that the Court had seriously undermined the ability of law enforcement to protect the public from criminals. Many in Congress believed that the Court had created a door through which scores of criminals could avoid prosecution through technicalities, free to prey on the lives of innocent citizens.⁵⁶

The *Miranda* Court welcomed continued action by Congress and the states in the area of confessions so long as the minimal requirements it set forth were met.⁵⁷ In direct response to *Miranda*, and as part of its

⁵⁴ *Id.*

⁵⁵ *Id.* at 457; see *Dickerson v. United States*, 530 U.S. 428, 442 (2000).

⁵⁶ See Omnibus Crime Control And Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S.C.A.N. (82 Stat. 197) 2123 ("[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities.").

⁵⁷ *Miranda*, 384 U.S. at 467. The Court stated:

We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in

omnibus crime control package, Congress passed legislation in 1968 in contravention of the *Miranda* holding.⁵⁸ Section 3501 of Title 18 of the United States Code⁵⁹ was intended to return to the law enforcement

assuring a continuous opportunity to exercise it, the following safeguards must be observed.

Id.

⁵⁸ See Omnibus Crime Control And Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S.C.A.N. (82 Stat. 197) 2137, 2138:

The committee is of the view that the legislation proposed in Section 701 of [T]itle II [18 U.S.C. § 3501] would be an effective way of protecting the rights of the individual and would promote efficient enforcement of our criminal laws. . . . [T]he overwhelming weight of judicial opinion in this country is that the voluntariness test does not offend the Constitution or deprive a defendant of any constitutional right.

Id.

⁵⁹ 18 U.S.C. § 3501 states:

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,

(2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,

(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,

(4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and

(5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay

community the “totality of the circumstances” test, with voluntariness being the deciding factor as to the admissibility of the defendant’s confession at trial.⁶⁰ Whether the defendant received his or her *Miranda* warnings was only one factor to be considered by the court when assessing admissibility of the confession; a direct reversal of the Court’s holding in *Miranda*. According to § 3501, courts were to look at a non-exhaustive list of factors, including whether *Miranda*-type warnings were given, the time elapsed between the arrest and arraignment, and whether the defendant was aware of the charges being leveled against him or her.⁶¹ In the view of Congress, *Miranda* was an aberration of jurisprudence, and its legislative response marked a return to the proper balance between the protection of the rights of the accused and the

in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term “confession” means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (2000).

⁶⁰ See Omnibus Crime Control And Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S.C.C.A.N. (82 Stat. 197) 2123 (stating that “there is a need for legislation to offset the harmful effects of the Court decisions mentioned above,” including *Miranda*); *Dickerson v. United States*, 530 U.S. 428, 436 (2000). In *Dickerson*, the Court stated:

Given § 3501’s express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*.

530 U.S. at 436.

⁶¹ See 18 U.S.C. § 3501(b)(1)–(5) (setting forth factors judges were to consider when weighing admissibility of confession).

promotion of efficient enforcement of criminal law.⁶² “[The totality of the circumstances] approach to the balancing of the rights of society and the rights of the individual served us well over the years,” and it is constitutional.⁶³

Section 3501 remained relatively dormant for thirty years while federal and state law enforcement implemented the warnings required by *Miranda*.⁶⁴ Despite dire warnings that *Miranda*’s requirements would bring law enforcement efforts to a halt, prosecutors simply did not rely on § 3501.⁶⁵ However, in 1999, a panel of the Fourth Circuit applied § 3501 and ruled it permissible to use voluntary confessions taken in violation of *Miranda* requirements in federal court proceedings. In *United States v. Dickerson*,⁶⁶ the Supreme Court examined the question of whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.⁶⁷

Given § 3501’s express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*.⁶⁸

If Congress has such authority, § 3501’s totality of the circumstances approach must prevail over *Miranda*’s requirement of warnings; if not,

⁶² Omnibus Crime Control And Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S.C.A.N. (82 Stat. 197) 2137 (1968).

⁶³ *Id.*

⁶⁴ See Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 511 (2005) (“[Section 3501] was largely ignored by federal prosecutors. Thus, the *Miranda* warnings requirement remained intact simply by default.”); see also Brooke B. Grona, Casenote, *United States v. Dickerson, Leaving Miranda and Finding a Deserted Statute*, 26 AM. J. CRIM. L. 367 (1999) (“[Section 3501] has not been used by the Government to challenge confessions, and it has not been considered by courts as a replacement for the *Miranda* warnings.”).

⁶⁵ Contrary to concerns cited by Congress that *Miranda* would demoralize law enforcement and “lessen their effectiveness in combating crime,” Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 1968 U.S.C.A.N. (82 Stat. 197) 2128 (1968), law enforcement adapted to *Miranda* and its requirements and continued to garner voluntary confessions from criminals.

⁶⁶ 530 U.S. 428 (2000).

⁶⁷ *Id.* at 437.

⁶⁸ *Id.* at 436.

that section must yield to *Miranda's* more specific requirements.⁶⁹ However, the Supreme Court went on to hold that Congress “may not legislatively supersede [the Court’s] decisions interpreting and applying the Constitution”; therefore, the case turned on whether “the *Miranda* court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction.”⁷⁰

Despite the fact that in the intervening years the Supreme Court had created several significant exceptions to *Miranda's* warnings requirement⁷¹ and that it frequently referred to them as merely “prophylactic” and “not themselves rights protected by the Constitution,”⁷² in *Dickerson*, the Court concluded that *Miranda* is a constitutional decision.⁷³ No constitutional rule is immutable, and the sort of refinements made by such cases is merely a normal part of constitutional law.⁷⁴

The *Dickerson* Court based its holding on two factors. First, the Court considered *Miranda's* application to the states, stating that the Court does not hold “supervisory power over the courts of the several States” but “is limited to enforcing the commands of the United States Constitution.”⁷⁵ Thus, *Miranda's* application to the states indicates that it is a constitutional rule, not merely a federal judicial rule of evidence or

⁶⁹ *Id.* at 437.

⁷⁰ *Id.*

⁷¹ See *id.* (citing *New York v. Quarles*, 467 U.S. 649, 653 (1984)). In *Quarles*, the Supreme Court articulated a “public safety” exception to application of *Miranda* warnings. 467 U.S. at 655. Under *Quarles*, the Supreme Court concluded that although the defendant clearly was in custody when questioned about the location of a firearm prior to receiving his *Miranda* warnings, “[w]e conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” *Id.* at 657.

⁷² See *Dickerson*, 530 U.S. at 438 (citing *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

⁷³ *Id.*

⁷⁴ *Id.* at 441 (citing *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)). In *Elstad*, the Court carved one of the many exceptions to *Miranda* by holding that a voluntary confession obtained prior to delivery of *Miranda* warnings did not taint a subsequent confession. *Elstad*, 470 U.S. at 318. The *Seibert* Court stated:

In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Missouri v. Seibert, 542 U.S. 600, 615–16 (2004).

⁷⁵ *Dickerson*, 530 U.S. at 438.

procedure. Second, the Court relied on the principle of *stare decisis* to decline to overrule *Miranda*. Finding no persuasive force that would require departure from precedent, the Court explained: “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”⁷⁶ Also, as Justice Scalia has noted, wide acceptance in the legal culture “is adequate reason not to overrule” a particular holding.⁷⁷ Thus, the Court concluded that *Miranda* announced a constitutional rule that Congress could not supersede legislatively.

III. SEIBERT: ANOTHER ATTEMPT TO CIRCUMVENT *MIRANDA*

Case law since *Miranda* generally has boiled down the rule on custodial interrogations and confessions as such:

[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.⁷⁸

However, *Miranda* continues to be tested by law enforcement in an effort to secure confessions while paying homage to the mere letters of its holding. In 2004, the Supreme Court decided *Missouri v. Seibert*,⁷⁹ which involved a mid-stream application of the *Miranda* warnings after law enforcement had begun questioning the defendant and she had confessed.⁸⁰ The issue before the Court was the constitutionality of what was called the “question-first” method. This law enforcement tactic was being adopted by many as a way to circumvent some of the strictures placed on law enforcement by *Miranda*.

⁷⁶ *Id.* at 443.

⁷⁷ *Id.* at 444 (citing *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999)).

⁷⁸ *Seibert*, 542 U.S. at 608–09 (“[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”) (citing *Berkemer v. McCarty*, 468 U.S. 420, 433, n.20 (1984)).

⁷⁹ 542 U.S. 600 (2004).

⁸⁰ *Id.* at 604–05.

The “question-first” method was an interpretation of *Miranda* that allowed law enforcement to ask questions of the subject, then Mirandize the subject after gaining the information or confession, and immediately resubmit the questions, all in a relatively seamless manner.⁸¹ Therefore, in *Seibert*, the issue for the Court was whether a post-*Miranda* confession was admissible in light of the near continuous interrogation under which it was obtained.⁸² The Court has had little trouble identifying circumstances in which it believed the “important objectives” of law enforcement outweighed and did not “compromise *Miranda*’s central concerns.”⁸³ But “[t]he technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*.”⁸⁴ The object of “question-first” is to render *Miranda* warnings ineffective because officers wait for a particularly opportune time to give the warnings or until after the suspect has already confessed.⁸⁵

Under “question-first” analysis, the issue becomes whether the warnings function effectively as *Miranda* requires and it is a fact-specific analysis in many ways.⁸⁶ The Court determined that question-first, in so far as the facts presented in *Seibert* were concerned, did not fall into the acceptable category of *Miranda* exclusions:

Strategists dedicated to draining the substance out of
Miranda cannot accomplish by training instructions what

⁸¹ See *Seibert*, 542 U.S. at 611. (“The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in conformance with departmental policy.”).

⁸² *Id.* at 606–07.

⁸³ *Id.* at 619 (citing *Harris v. New York*, 401 U.S. 222 (1971)).

⁸⁴ *Seibert*, 542 U.S. at 609.

⁸⁵ *Id.* at 611.

⁸⁶ *Id.* at 616. The Court discussed the differences between the facts in *Seibert* and those that permitted a confession obtained without *Miranda* warnings to come in under *Elstad* and articulated circumstances to be considered when judging the effectiveness of the *Miranda* warnings:

The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.

Id. at 615. It is important to note that the Court was not applying a “fruits test” to the analysis although the “analytical underpinnings of [a fruits approach and that adopted in *Seibert* for *Miranda* considerations] function similarly in practice.” *Id.* at 624 (O’Connor, J., dissenting). The two approaches are “entirely distinct,” as illustrated by the Court in the *Patane* decision. *Id.*

Dickerson held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, *Seibert's* postwarning statements are inadmissible.⁸⁷

IV. WHAT IS THE STATUS OF *MIRANDA* TODAY?

Even with the Court's reaffirmation of *Miranda's* constitutional underpinnings in *Dickerson* and *Seibert*, placing *Miranda* within the rubric of constitutional analysis is difficult. Clearly, the *Miranda* Court expected the warnings it articulated in *Miranda* would safeguard Fifth Amendment protections against self-incrimination, but only by a bare majority. Perhaps it is true that the Court's *Miranda* holding "is neither compelled nor even strongly suggested by the language of the Fifth Amendment," and the decision amounted to judicially-created law and public policy, as suggested by Justice White in his dissent.⁸⁸

It may be that in the post-*Miranda* world in which law enforcement operates today, the true test of the admissibility of a confession is not the administration of *Miranda* warnings, but whether the confession was "voluntarily" given pursuant to due process.⁸⁹ Still others suggest that the true constitutional underpinnings for *Miranda* are found within the Fourth or Sixth Amendments. Perhaps *Miranda* is really nothing more than a "prophylactic rule"⁹⁰ to ensure that the penumbra of rights guaranteed by the Constitution is protected in criminal proceedings and should be limited in its application and scope.⁹¹ The Court certainly will continue to carve out exceptions to *Miranda's* application to custodial interrogations leading to confessions as our community evolves and new situations present themselves to law enforcement.

⁸⁷ *Seibert*, 542 U.S. at 617 (majority opinion).

⁸⁸ *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

⁸⁹ See, e.g., Paul Marcus, *It's Not Just About Miranda, Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. L. REV. 601 (2006) (noting that voluntariness considerations remain a major matter in criminal prosecutions).

⁹⁰ See *United States v. Patane*, 542 U.S. 630, 636 (2004) ("[T]he *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. . . . The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn.").

⁹¹ *Id.* at 636-37.

However, I posit that at the end of the day, it does not matter whether *Miranda* is a Fourth, Fifth, or Sixth Amendment case. It does not matter how one categorizes *Miranda*; what matters is what it accomplishes. The warnings that evolved out of *Miranda* are not “but a ‘form of words’”⁹² to be pigeon-holed into a particular area of jurisprudence, they are the embodiment of the beliefs in this country that everyone has rights that must not be curtailed, no matter how laudable the goal. *Miranda*’s warnings and their effects simply sweep more broadly than any one area of jurisprudence.⁹³

Miranda and its warnings maintain the balance between law enforcement and the public at large. The warnings serve to remind both sides of law enforcement that this country is based on individual rights that cannot be overridden – no matter how noble the cause. Perhaps this is a bit strident, but the fundamental fact remains that *Miranda* warnings are designed to ensure that citizens are both aware of their rights and they are given the opportunity to waive those rights in an informed manner. As the *Miranda* majority stated, the warning that an individual has the right to remain silent and that anything she says may be used as evidence against her serves “to make the individual more acutely aware that he or she is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest.”⁹⁴

As Justice Clark noted in his partial concurrence in *Miranda*, “detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement.”⁹⁵ But the arduousness of the task cannot run roughshod over the rights of the citizenry, and that is what *Miranda* stands for today. Whether it is a Fifth Amendment protection against self-incrimination, or as Justice Clark suggested, a due process issue, the warnings set forth in *Miranda* serve to level the playing field and ensure that law enforcement bears the burden of doing its job and the citizenry is protected against overbearance. *Miranda*’s warnings are not merely “talismanic incantations” that somehow miraculously grant the aura of constitutionality to the fruits of

⁹² *Miranda*, 384 U.S. at 444 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

⁹³ See *Missouri v. Seibert*, 542 U.S. 600, 623 (2004) (O’Connor, J., dissenting) (discussing the body of case law acknowledging that *Miranda* “serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself”).

⁹⁴ *Miranda*, 384 U.S. at 469.

⁹⁵ *Id.* at 502 (Clark, J., concurring in part and dissenting in part).

law enforcement's efforts;⁹⁶ rather, they serve as a shorthand reminder that all of us may play on the same field under the same set of rules and if we choose not to do so, we do so knowingly.

For the most part, when law enforcement officials approach an individual during a criminal inquiry, they rely on two things. First, they count on the human tendency to cooperate and appear willing to succumb to authority. There is a reason why law enforcement personnel, such as state troopers, appear to be such an imposing figure when they approach a civilian during a traffic stop. Their uniforms and badges give an air of authority; an authority that most of society are trained to obey. Second, officers rely upon a civilian's lack of understanding about his or her rights during a criminal inquiry.⁹⁷ While we can all probably cite the *Miranda* warnings in our sleep thanks to popular television and books, law enforcement counts on the fact that a combination of human desire to cooperate and uncertainty about the process as a whole will confuse a suspect and result in an admission beneficial to law enforcement.⁹⁸

The modern day interrogation environment is meant to subject the suspect to the will of the examiner, and thus the potential for compulsion is evident.⁹⁹ In the interrogator's office, "the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."¹⁰⁰ Thus, even in his *Miranda* dissent, Justice Harlan recognized that the "more important premise [at issue in *Miranda*] is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings" in which an individual

⁹⁶ See *Seibert*, 542 U.S. at 612 (citing *California v. Prycock*, 453 U.S. 355, 359 (1981)).

⁹⁷ Police manuals in use at the time *Miranda* was decided emphasized this point by encouraging law enforcement to remove a suspect from his or her home because in the home environment "he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support." *Id.* at 449-50.

⁹⁸ As the *Miranda* majority noted, "the very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals." *Miranda*, 384 U.S. at 455.

⁹⁹ This fact certainly was not lost on the *Miranda* majority. "[C]oercion can be mental as well as physical, and [] the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* at 448 (citing *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)). The Court noted that police manuals of the day stressed that interrogations should take place "in private," noting that "the 'principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation.'" *Id.* at 449 (citing FRED INBAU & JOHN REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 1 (Williams & Wilkins Co. 1962)).

¹⁰⁰ *Miranda*, 384 U.S. at 450.

finds herself being interrogated.¹⁰¹ Unless adequate protective devices are employed, no statement can truly be free of choice.¹⁰² This is why the *Seibert* majority found that question-first, in the circumstances presented, was constitutionally unacceptable. The warnings, when given midstream in a virtually continuous interrogation, did not reasonably convey to the suspect her rights as required by *Miranda*.¹⁰³

What *Miranda* warnings were designed to do, and what this Article suggests the *Seibert* Court emphasized they were intended to accomplish, is to strike a balance between law enforcement and the criminal suspect that gives the suspect, or any ordinary citizen, a moment to consider the rights bestowed upon them by the Constitution and make an informed decision about whether to waive those rights. One can argue that Justice Harlan was incorrect when he stated that the *Miranda* majority “has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every state and county in the land.”¹⁰⁴

Arguably, society demanded at the time of *Miranda*, and continues to demand, the very procedural safeguards set forth in *Miranda* and the breathing room they provide criminal suspects. Our history is replete with evidence of law enforcement’s efforts to press, pressure, and push citizens to gather the confession that can close a case. It is understandable, and to some degree warranted, that police questioning “may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses.”¹⁰⁵ But there must be balance. There must be assurance that the average citizen will not be so intimidated, so threatened that in order to remove oneself from the situation that she signs away her constitutional rights and confesses involuntarily. That is not the bedrock upon which this country is built. As the *Escobedo* Court so eloquently stated:

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their

¹⁰¹ *Id.* at 512.

¹⁰² *Id.* at 458.

¹⁰³ *Missouri v. Seibert*, 542 U.S. 600, 611 (2004) (citing *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

¹⁰⁴ *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting).

¹⁰⁵ *Id.*

constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.¹⁰⁶

Perhaps *Miranda's* warnings "do nothing to contain the policeman who is prepared to lie from the start,"¹⁰⁷ but they do ensure that a suspect's confession is knowingly given. "Society has always paid a stiff price for law and order, and *peaceful interrogations* is not one of the dark moments of the law,"¹⁰⁸ but involuntary confessions coerced from defendants are not peaceful. Right or wrong, *Miranda* "interrogations undertaken pursuant to proper *Miranda* warnings are presumed noncoercive; interrogations without such warnings are presumed coercive."¹⁰⁹ If the public understands the subtle distinction afforded them by the recitation of *Miranda's* warnings, then we are all better off.

"The *Miranda* rule has become an important and accepted element of the criminal justice system."¹¹⁰ Ultimately, *Miranda* did not result in a lack of confessions. The law enforcement community has not crumbled under its weight. Law enforcement retains the ability under *Miranda* and its progeny to conduct investigations, question potential suspects, and even to get them to confess. *Miranda* simply ensures that when an individual is deprived of her liberty in any way or taken into custody for questioning, certain safeguards are in place so that when a confession is obtained, that confession is admissible. *Miranda* and its application have not remained static. The Court continues to allow it to evolve and adapt so that the compelling interests of law enforcement and the individual may remain in balance. *Miranda's* fundamental holding remains sound forty years later, and this Article suggests that it will remain vital for years to come.

¹⁰⁶ *Illinois v. Escobedo*, 378 U.S. 478, 490 (1964).

¹⁰⁷ *Miranda*, 384 U.S. at 516.

¹⁰⁸ *Id.* at 517 (emphasis added).

¹⁰⁹ *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L. REV. 306, 313 (2004).

¹¹⁰ *Missouri v. Seibert*, 542 U.S. 600, 618 (Kennedy, J., concurring).