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STATE SUPREME COURTS AND THE U.S. SUPREME COURT'S POST-MIRANDA RULINGS

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I. INTRODUCTION

In 1966 the United States Supreme Court under Chief Justice Warren issued the *Miranda v. Arizona*[1] ruling. In 1971 the "new" Supreme Court under Chief Justice Burger issued the first in a series of rulings which chipped away at *Miranda*.[2] Since then many commentators have speculated about the future of *Miranda* and have concluded that the future looks dim.[3] Even the more cautious legal journals have reached similar conclusions.[4] Some have predicted that the Burger Court will continue to undermine the substance of the decision, though perhaps not actually overrule it,[5] while another has predicted that the Court "will assuredly overrule it within the near future."[6]

The purpose of this article is not to analyze the rulings and add another prediction to the list but to examine systematically the reaction of state supreme courts to the rulings in order to determine whether these courts have eroded the *Miranda* principles by failing to require strict adherence to them. It is assumed that the state supreme court judges, like the commentators, saw the apparent handwriting on the

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1 384 U.S. 436 (1966).

2 Harris v. New York, 401 U.S. 222 (1971). Commentators consider the Burger Court to have begun with Burger's appointment, though by the time of this decision President Nixon had made Justice Blackmun's appointment also.

3 *Trimming Miranda*, TIME, June 24, 1974, at 64; Berlow, *Undercutting Miranda: The Burger Court Way With Suspects*, 224 NATION 498 (1976).

4 Ghetti, *Criminal Procedure—Admissibility of Confessions—Dancing on the Grave of Miranda?*, 10 SUFFOLK U.L. REV. 1141 (1976); Pelander, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188 (1975); Stone, *The Miranda Doctrine in the Burger Court*, 1977 THE SUP. CT. REV. 99; Note, *U.S. v. Crocker—Setting the Stage for Miranda's Last Act?*, 47 U. COLO. L. REV. 279 (1976). For a less pessimistic analysis, see Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977).

5 Pelander, *supra* note 4; Stone, *supra* note 4.

6 Ghetti, *supra* note 4, at 1178.

wall and anticipated a continuous chipping away at the *Miranda* principles[7] by the Burger Court. It is hypothesized that these judges took the opportunity to erode the *Miranda* principles and, in fact, eroded them even more than the Burger Court had already done.

Social scientists have used three models to characterize the relationship between the Supreme Court and the lower federal and state courts. The "hierarchical model" analogizes the judicial system to a pyramid, with the Supreme Court at the pinnacle. According to this model, the Court establishes important policy, and the lower courts implement the policy automatically.[8] The "bureaucratic model" also analogizes the judicial system to a pyramid, with the Supreme Court at the pinnacle. But, according to this model, while the Court establishes important policy, the lower courts do not implement the policy automatically. Rather, they impose bureaucratic constraints, such as inefficiency and recalcitrance, upon the Court.[9] The "interaction model" does not analogize the judicial system to a pyramid at all. Instead, according to this model, the Court establishes some important policy. However, since the Court hears relatively few cases, it must allow the lower courts to formulate key policy as well. Furthermore, the Court, by necessity, allows the lower courts to evade some of its rulings.[10]

Social scientists have assessed the usefulness of these three models by engaging in a variety of research. The most popular research has been on the impact of judicial decisions.[11] Initially this research focused on the impact of the Supreme Court's race relations decisions. Prompted by the resistance to the Court's *Brown v. Board of Education*[12]

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[7] A survey of prosecutors found that they saw the apparent handwriting on the wall. Gruhl & Spohn, *The Supreme Court's Post-Miranda Rulings: Impact on Local Prosecutors*, 3 LAW & POLICY Q. 29 (1981). So, presumably, judges did too.

[8] J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 222 (1963).

[9] W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964); J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS (1955); M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES (1968); Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POLITICAL SCIENCE REV. 1017 (1959); Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. OF POL. 453 (1962); Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980).

[10] K. DOLBEARE, TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM (1967); K. VINES AND R. RICHARDSON, THE POLITICS OF FEDERAL COURTS: LOWER COURTS IN THE UNITED STATES (1970); Dolbeare, *The Federal District Courts and Urban Public Policy: An Exploratory Study*, in FRONTIERS OF JUDICIAL RESEARCH 373 (J. Grossman & J. Tanenhaus eds. 1969); Howard, *Litigation Flow in Three United States Courts of Appeals*, 8 LAW & SOC'Y REV. 33 (1973); Vines, *The Role of Circuit Courts of Appeals in the Federal Judicial Process: A Case Study*, 7 MIDWEST J. OF POLITICAL SCIENCE 305 (1963).

[11] THE IMPACT OF SUPREME COURT DECISIONS (T. Becker & M. Feeley eds. 2d ed. 1973); S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970).

[12] 347 U.S. 483 (1954).

decision, social scientists tried to determine the extent to which resistance to the decision resulted in noncompliance with it.[13] Later, researchers focused on the impact of the Court's decisions in other areas. Foremost among these other areas is that of criminal rights. Social scientists tried to determine the extent to which the Court's *Mapp v. Ohio*,[14] *Escobedo v. Illinois*,[15] *Miranda*, and *In re Gault*[16] decisions resulted in noncompliance by the lower state courts.[17] They found that many of the courts were reluctant to relinquish their traditional, conservative policies concerning the exclusionary rule, confessions, and juvenile rights, even in the face of the Supreme Court's demands that the courts adopt its more liberal policies. Consequently, researchers concluded that these decisions resulted in substantial noncompliance.

Nevertheless, *Miranda* eventually resulted in general compliance.[18] Romans[19] compared compliance with *Escobedo* and *Miranda* by state supreme courts. He found little compliance with *Escobedo* but considerable compliance with *Miranda*. He explained this difference by observing that *Escobedo*, though unquestionably liberal in direction, was not particularly clear in specifics, thereby providing lower courts with an opportunity to evade it.[20] In contrast, *Miranda* was clear, and did not provide lower courts with an opportunity to evade the decision.[21] In addition, this difference in compliance could have been explained by noting that *Miranda* was the second major case in this line of decisions involving

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[13] J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. OF POL. 337 (1964).

[14] 367 U.S. 643 (1961).

[15] 378 U.S. 478 (1964).

[16] 387 U.S. 1 (1967).

[17] For *Mapp*—Manwaring, *The Impact of Mapp v. Ohio*, in THE SUPREME COURT AS POLICY-MAKER: THREE STUDIES ON THE IMPACT OF JUDICIAL DECISIONS 1 (D. Everson ed. 1968); Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57 (1977); M. Ban, Local Courts Versus the Supreme Court: the Impact of Mapp v. Ohio (unpublished convention paper, American Political Science Association 1973). For *Escobedo* and *Miranda*—Kramer & Riga, *The New York Court of Appeals and the United States Supreme Court, 1960-76*, 8 PUBLIUS 75 (1978); Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis*, 27 W. POLITICAL Q. 38 (1974). For *Gault*—Lefstein, Stapleton, & Teitelbaum, *In Search of Juvenile Justice: Gault and its Implementation*, 3 LAW & SOC'Y REV. 491 (1969).

[18] Here "noncompliance" is used generally to mean a failure to follow the Supreme Court's doctrine in similar, related cases. In the studies cited the term was operationalized specifically to categorize reactions to whatever doctrine was involved.

[19] Romans, *supra*, note 17.

[20] *Id.* at 42-51.

[21] *Id.* at 51-52, 58. In fact, one researcher interested in the comparative impact of clear and ambiguous decisions called Miranda "exceedingly clear." L. BERKSON, THE SUPREME COURT AND ITS PUBLICS: THE COMMUNICATION OF POLICY DECISIONS 47 (1978).

confessions. As such, it signaled the Court's intention to make policy in this area and, correspondingly, it warned the lower courts not to try to evade it.[22]

From this research on the impact of judicial decisions upon the lower courts, some conclusions and implications emerge. Lower courts often do not faithfully comply with the Supreme Court's doctrine. This has been especially true for its doctrine concerning criminal rights. The Court must establish clear doctrine and indicate its determination to get the lower courts to comply by issuing a series of decisions reinforcing its doctrine. Once the Court no longer indicates its determination to enforce a doctrine, the lower courts will sense less pressure from the Court to comply with it. Further, if the Court not only stops indicating its determination to enforce a doctrine, but actually exhibits an intention to erode it, the lower courts might erode the doctrine faster than the Court does by itself. Hence two hypotheses emerge: the lower courts eroded the *Miranda* doctrine and, in fact, eroded it further than the Burger Court itself already had done.

This article will evaluate these hypotheses by first discussing *Miranda* and the Burger Court's post-*Miranda* rulings and then comparing these rulings with state supreme court holdings in related cases.

II. *MIRANDA* AND THE BURGER COURT'S POST-*MIRANDA* RULINGS

Prior to 1964 courts generally used the "voluntariness" test to determine whether confessions could be admitted as evidence at trial. This test asked, simply, whether the confessions were voluntary, given the totality of the circumstances involved. Obviously, this test was highly subjective.[23] In 1964, the Court moved away from the voluntariness test by proposing objective criteria to determine whether confessions could be admitted. In *Escobedo v. Illinois*, it held that police must inform suspects, before interrogation, that they have the right to remain silent. Also, it held that police must allow suspects to consult with their attorney. Otherwise, the confessions would be presumed to have been coerced.[24] In 1966, the *Miranda* Court reaffirmed *Escobedo* and elaborated upon it. The Court held that police must inform suspects that they have the right to remain silent, that anything they say may be used against them,

[22] Other research found the importance of a line of decisions to achieve compliance. Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POLITICAL Q. 502 (1980).

[23] However, the court did assume that delay between arrest and arraignment constituted coercion, and the Court held resulting confessions involuntary per se. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[24] Foreshadowing *Escobedo*, the Court ruled that statements obtained from an indicted defendant who had counsel, but who did not have counsel with him when he made the statements, were inadmissible. Massiah v. United States, 377 U.S. 201 (1964).

that they have the right to an attorney, and that if they cannot afford an attorney the court will appoint one for them. The Court stipulated that suspects may waive these rights if they do so knowingly, intelligently, and voluntarily, but that they may also reassert these rights at any later time.

In 1971, the Burger Court began to weaken *Miranda*. In *Harris v. New York*, Chief Justice Burger announced that prosecutors could use statements obtained in violation of *Miranda* to impeach defendants' credibility if the defendants testified inconsistently with the earlier statements. *Miranda* explicitly prohibited such use,[25] but Burger declared the prohibition mere dictum.[26] He said *Miranda* should not be used as a shield to commit perjury. Thus, the Court's attack on *Miranda* was evident.[27] As Stone comments, "*Harris* was an exercise of raw judicial power. . . ."[28] In 1974, the Court continued to weaken *Miranda*. In *Michigan v. Tucker*,[29] it decided that a prosecutor could use the fruits of an interrogation which occurred before *Miranda*, and was not in accordance with it, even though the trial actually took place after *Miranda*. A Warren Court precedent had applied the *Miranda* requirements to all trials, rather than interrogations, which occurred after *Miranda*.[30] But Justice Rehnquist said the police acted in good faith, by following the *Escobedo* requirements in effect at the time of the interrogation, and actually followed all but one of the *Miranda* requirements. The police had failed to advise the suspect that if he could not afford an attorney the court would appoint one for him. The Warren Court stressed that this is a critical component of the warnings.[31] But Rehnquist concluded that

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25 "[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . 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." 384 U.S. at 477.

26 "Some 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." Harris v. New York, 401 U.S. at 224.

27 One commentator notes, "[r]ightly or wrongly, *Miranda* was deliberately structured to canvass a wide range of problems, many of which were not directly raised by the cases before the Court. This approach was thought necessary in order to 'give concrete constitutional guidelines for law enforcement agencies and courts to follow.' 384 U.S. at 441-42. Thus, a technical reading of *Miranda*, such as that employed in *Harris*, would enable the Court to label many critical aspects of the decision mere dictum and therefore not 'controlling.'" Stone, *supra* note 4, at 107-08. Nevertheless, the Court has not used this means of undercutting *Miranda* since *Harris*. For other criticism, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

28 Stone, *supra* note 4, at 114.

29 417 U.S. 433 (1974).

30 Johnson v. New Jersey, 384 U.S. 719 (1966).

31 "[I]t is necessary to warn him not only that he has the right to consult with an attorney,

the defendant received a fair trial, if not a perfect one.[32]

In 1975, the Court further weakened *Miranda* in a pair of cases. In *Oregon v. Haas*[33] it reaffirmed *Harris*. And in *Michigan v. Mosley*,[34] the Court decided that a prosecutor could use statements obtained when police resumed interrogation of a suspect two hours after the suspect cut off the interrogation by asking for an attorney. The Warren Court had said that police must stop immediately if suspects ask for an attorney,[35] but did not say whether the police could resume the interrogation at a later time. If *Miranda* is read literally, the police could not resume the interrogation. In *Mosley*, however, Justice Stewart rejected this reading, arguing that it would "lead to absurd and unintended results."[36] He noted that the suspect was given another set of warnings, interrogated by another officer, and interrogated about another crime.[37] The Court concluded that the police were not trying to wear down the suspect's resistance.[38] Justice Brennan, with Justice Marshall, dissenting, maintained that the majority's decision was not merely a refinement of *Miranda* but another attack upon it.[39] Brennan stated that, "[t]oday's distortion of *Miranda*'s constitutional principles can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination."[40] Justice White reinforced this prediction. He said he expected the Court to return to the voluntariness test.[41]

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but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." Miranda v. Arizona, 384 U.S. at 473.

32 Michigan v. Tucker, 417 U.S. at 446.

33 420 U.S. 714 (1975).

34 423 U.S. 96 (1975).

35 Miranda v. Arizona, 384 U.S. at 473-74.

36 Michigan v. Mosley, 423 U.S. at 102.

37 But both interrogations concerned the same robberies. The second interrogation additionally concerned a shooting which occurred during one of the robberies.

38 423 U.S. at 106.

39 Brennan said that "renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect." *Id.* at 114 (Brennan, J., dissenting).

40 *Id.* at 112 (Brennan, J., dissenting).

41 *Id.* at 108 (White, J., concurring). Besides these rulings, the Court issued two rulings concerning the definition of "custodial interrogation." In Oregon v. Mathiason, 429 U.S. 492 (1977), the Court held that a parolee who was not forced to come to the police station and who was not arrested when he did come was not in custody and, consequently, was not entitled to *Miranda* warnings. More recently, in Rhode Island v. Innis, 446 U.S. 291 (1980), the Court held that a suspect who directed police to a weapon in response to one officer's comments to another was not interrogated and, consequently, was not denied the *Miranda* right to maintain silence. These rulings did not necessarily weaken *Miranda*, since the Warren Court never clearly defined "custodial interrogation." Regardless, analysis of cases concerning this definition would be extensive and would require a separate article, so these cases are not covered here.

In addition to these rulings, the Burger Court refused to extend *Miranda* to new situations. In 1976 and 1977, the Court refused to extend the protections to prison disciplinary hearings,[42] civil tax proceedings,[43] and grand jury investigations.[44] The Warren Court might not have extended *Miranda* to these situations either, but the Burger Court's unwillingness to extend the suspects' rights did nothing to dispel the feeling that the Court was gradually dismantling *Miranda*.[45]

On the other hand, the Burger Court passed up other opportunities to erode *Miranda* further. In the aftermath of *Harris*, some prosecutors questioned defendants about their failure to give police an alibi during interrogation. By pointing to the defendants' silence, prosecutors sought to impeach their credibility. This tactic was a logical outgrowth of *Harris*, but the Burger Court disallowed it. In 1975, in *United States v. Hale*,[46] it ruled that federal prosecutors could not utilize the tactic. The Court said defendants' silence could be interpreted in a variety of ways and consequently had little probative value. And in 1976 in *Doyle v. Ohio*,[47] the Court ruled that state prosecutors could not utilize the tactic either. The Court said defendants' silence was protected by the Fifth Amendment.[48]

In conclusion, the Burger Court's rulings primarily served to weaken *Miranda*, though at the same time they exhibited a reluctance to weaken *Miranda* as much as they might have. As Israel observed, "the fact remains that *Miranda* still is the law of the land. Moreover, while its ramifications arguably have been narrowed, the Court has not cast doubt upon its basic premise that the defendant's right against self-incrimination applies to police custodial interrogation . . . ."[49] In short, the Court has become less strict in requiring adherence to its doctrine, but has altered its doctrine in only one respect—allowing prosecutors to

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42 Baxter v. Palmigiano, 425 U.S. 308 (1976).

43 Beckwith v. United States, 425 U.S. 341 (1976).

44 United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977).

45 To underscore this, Stone notes that in the four years before 1978 the Court granted certiorari in only one of the 35 cases on its appellate docket in which defendants sought review due to alleged violations of *Miranda*, while the Court granted certiorari in 13 of the 25 cases in which governments sought review. Stone, *supra* note 4, at 100.

46 422 U.S. 171 (1975).

47 426 U.S. 610 (1976).

48 *Id.* at 617-19.

49 Israel, *supra* note 4, at 1374. In this context another ruling deserves mention. In Brewer v. Williams, 430 U.S. 387 (1977), the Court held that statements obtained after a former mental patient had been arrested and given *Miranda* warnings were inadmissible, because the former patient had been interrogated subtly without his counsel being present. The Court rejected a request from 22 state attorneys general that it overrule *Miranda*; instead, it decided the case on the basis of the sixth amendment.

use illegally obtained statements to impeach defendants' credibility.[50]

III. STATE SUPREME COURTS' RULINGS

State supreme courts readily invalidated blatant violations of *Miranda*.[51] However, the Burger Court's post-*Miranda* rulings concerned less blatant violations of *Miranda*. From these rulings four issues continually arose before the state supreme courts: Could prosecutors use illegally obtained statements to impeach defendants' credibility? Could prosecutors use the fact that defendants were silent during interrogation to impeach their credibility? Could prosecutors use statements made when police gave suspects incorrect warnings? Could prosecutors use statements made when police refused to stop interrogation after suspects asked them to, or statements made when police agreed to stop but later resumed interrogation?

All relevant state supreme court cases decided after *Harris* were included in the study.[52] Cases were deemed not relevant if they revolved around the factual determination of whether suspects voluntarily waived their rights. Of course, purported "factual determinations" can camouflage a tendency to evade the *Miranda* guidelines.[53] Even genuine factual determinations which conclude that suspects' rights were violated also can conclude that the violations were "harmless errors" and not reversible.[54] But without the record, it is impossible to assess the courts' decisions, so these cases cannot be included.

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50 Nevertheless, the Court probably has confused some lower court judges about the continuing validity of its doctrine. Consequently, it seems inappropriate to use "compliance-noncompliance" terminology in evaluating lower court decisions. Such terminology presumes that compliance can be ascertained clearly.

51 *See, e.g.*, Nacoff v. State, 267 N.E.2d 165 (Ind. 1971); State v. Brecht, 485 P.2d 47 (Mont. 1971); State v. Cullison, 227 N.W.2d 121 (Iowa 1975); State v. Callihan, 320 So. 2d 155 (La. 1975).

52 State supreme court cases concerning these issues were culled from Shepard's U.S. Citations, beginning with cases decided the day after *Harris* and continuing through cases reported in the 1976-1979 edition of the citations, published in January 1978. The term "state supreme court" refers to the highest court in each state. The highest court in Kentucky, Maryland, and New York is the court of appeals. The highest court, for criminal cases, in Oklahoma and Texas is the court of criminal appeals.

53 For a discussion of voluntary waiver of rights, see Child, *The Involuntary Confession and the Right to Due Process: Is a Criminal Defendant Better Protected in the Federal Courts than in Ohio?*, 10 AKRON L. REV. 261 (1976). For an early analysis of cases in which "factual determinations" may have camouflaged a tendency to evade the guidelines, see Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413 (1969).

54 Chapman v. California, 386 U.S. 18 (1967). For analysis, see Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976).

USING ILLEGALLY OBTAINED STATEMENTS TO IMPEACH CREDIBILITY

In *Miranda*, the Warren Court asserted that prosecutors should not use illegally obtained statements for any purpose.[55] But in *Harris* the Burger Court ruled that prosecutors could use illegally obtained statements to impeach defendants' credibility.[56] Justice Brennan, dissenting, noted that before the ruling fourteen state appellate courts and six federal appellate courts agreed that prosecutors could not use such statements to impeach defendants' credibility, while only three state appellate courts disagreed.[57] Since *Harris*, however, this tendency has been reversed.

Of the twenty-seven state supreme courts which addressed the issue, twenty-one fully embraced *Harris*.[58] Typical of these was the Arkansas court, which quoted Chief Justice Burger's opinion approvingly: " 'The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense. . . .' "[59] Less typical were the Colorado and Florida courts, which overruled their own precedents in order to conform to *Harris*. Both criticized the ruling. One observed that it contradicted the "plain English" of *Miranda*.[60] The other observed that it allowed jurors to use statements to assess credibility which were forbidden to be used in determining guilt. The court questioned whether jurors could be this discriminating and disciplined.[61]

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55 384 U.S. at 477.

56 401 U.S. at 225-26.

57 *Id.* at 231 n.4 (Brennan, J., dissenting).

58 Campbell v. State, 341 So. 2d 742 (Ala. 1976); State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158 (1972); State v. Johnson, 109 Ariz. 70, 505 P.2d 241 (1973); State v. Mincey, 115 Ariz. 472, 566 P.2d 273 (1977); Rooks v. State, 250 Ark. 561, 466 S.W.2d 478 (1971); Jorgenson v. People, 174 Colo. 144, 482 P.2d 962 (1971); People v. Harris, 191 Colo. 234, 552 P.2d 11 (1976); Hill v. State, 316 A.2d 557 (Del. 1974); State v. Retherford, 270 So. 2d 363 (Fla. 1973); Nowlin v. State, 346 So. 2d 1020 (Fla. 1977); McHan v. State, 232 Ga. 470, 207 S.E.2d 457 (1974); People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972); People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297 (1973); Davis v. State, 256 Ind. 58, 271 N.E.2d 893 (1971); Johnson v. State, 258 Ind. 683, 284 N.E.2d 517 (1972); State v. Greene, 214 Kan. 78, 519 P.2d 651 (1974); State v. Andrews, 218 Kan. 156, 542 P.2d 325 (1975); State v. Marin, 352 A.2d 746 (Me. 1976); Commonwealth v. Harris, 364 Mass. 236, 303 N.E.2d 115 (1973); People v. Brown, 399 Mich. 350, 249 N.W.2d 693 (1976); Booker v. State, 326 So. 2d 791 (Miss. 1976); Murphy v. State, 336 So. 2d 213 (Miss. 1976); State v. Bazis, 190 Neb. 586, 210 N.W.2d 919 (1973); Johnson v. State, 92 Nev. 405, 551 P.2d 241 (1976); State v. Bryant, 280 N.C. 551, 187 S.E.2d 111 (1972); State v. Overman, 284 N.C. 335, 200 S.E.2d 604 (1973); State v. Kassow, 28 Ohio St. 2d 141, 277 N.E.2d 435 (1971); Langdell v. State, 556 P.2d 1076 (Okla. Crim. App. 1976); Riddell v. Rhay, 79 Wash. 2d 248, 484 P.2d 907 (1971); State v. Davis, 82 Wash. 2d 790, 514 P.2d 149 (1973); Ameen v. State, 51 Wis. 2d 175, 186 N.W.2d 206 (1971); Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482 (1973).

59 Rooks v. State, 250 Ark. at 564, 466 S.W.2d at 480 (quoting Harris v. New York, 401 U.S. at 226).

60 Jorgenson v. People, 174 Colo. at 148, 482 P.2d at 964.

61 Nowlin v. State, 346 So. 2d 1020. But whether praising or criticizing *Harris*, some of these courts refined the ruling to require the trial court to conduct a voluntariness hearing

Of the six remaining state supreme courts which addressed the issue, four neither fully embraced *Harris* nor completely rejected it. The New Jersey and Maryland courts accepted it in principle but limited it in practice. The New Jersey court had to confront the sort of abuse which critics of the ruling predicted would flow from it. The court overruled a judge who instructed jurors to feel free to use illegally obtained statements in determining guilt, since they could not separate, in their own minds, using illegally obtained statements to assess credibility from using the statements to determine guilt.[62] The court also admonished a prosecutor who tried to use statements to impeach a defendant's credibility despite the fact that the defendant never testified.[63] The Maryland court held more broadly that prosecutors should not use illegally obtained statements even when defendants do testify unless the defendants themselves raise the subject of their prior statements.[64] The Oregon and Pennsylvania courts, unlike the New Jersey and Maryland courts, did not accept the ruling in principle, but they did not reject it in principle either. They distinguished *Harris* from cases before them.[65]

Of all the state supreme courts which addressed the issue, only two completely rejected *Harris*.[66] The Hawaii court was the first,[67] followed by the California court, which initially adopted *Harris*[68] but two years later rejected it.[69] The switch apparently was prompted by a flagrant violation of *Miranda*.[70] Both courts based their decisions upon state con-

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outside the presence of the jury before allowing prosecutors to use illegally obtained statements. The Burger Court did not consider this, as Harris did not claim that his statements were involuntary. Campbell v. State, 341 So. 2d 742; State v. Jorgenson, 108 Ariz. 476, 502 P.2d 158; Hill v. State, 316 A.2d 557; Booker v. State, 326 So. 2d 791; Wold v. State, 57 Wis. 2d 344, 204 N.W.2d 482.

62 State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975).

63 State v. Davis, 67 N.J. 222, 337 A.2d 33 (1975). But for an earlier decision accepting *Harris* in principle, see State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972).

64 State v. Kidd, 281 Md. 32, 375 A.2d 1105 (1977); State v. Franklin, 281 Md. 51, 375 A.2d 1116 (1977).

65 State v. Haas, 267 Or. 489, 517 P.2d 671 (1973). The court said *Harris* did not apply because Harris was not given proper warnings, while Haas was, but was not provided with an attorney. Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), *cert. denied*, 419 U.S. 880 (1974); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975).

66 The courts were free to reject *Harris*, because the Burger Court has allowed them to impose stricter standards upon police and prosecutors than it has required them to impose. In fact, Justice Brennan encouraged them to impose stricter standards. In *Mosley* he said that "no State is precluded by the decision from adhering to higher standards under state law. Each [s]tate has power to impose higher standards governing police practices under state law than is required by the Federal Constitution." 423 U.S. at 120 (Brennan, J., dissenting).

67 State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

68 People v. Nudd, 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974).

69 People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

70 *Id.* at 116, 545 P.2d at 282, 127 Cal. Rptr. at 370 (Wright, C.J., concurring). In addition to the Hawaii and California courts, the Texas court forbade use of illegally obtained statements to impeach credibility, but it did so on the basis of a state statute rather than on

stitutional provisions similar to the fifth amendment's right against compulsory self-incrimination.

The state supreme court's cases are compiled in Table 1. As can be seen, the courts permitted prosecutors to use illegally obtained statements to impeach defendants' credibility in thirty-five of the forty-three cases they decided.

TABLE 1

USING ILLEGALLY OBTAINED STATEMENTS TO IMPEACH CREDIBILITY

Ruling	Cases	%
Permitted	35	81
Not Permitted	8	19
Total	43	100

USING SILENCE TO IMPEACH CREDIBILITY

In *Miranda* the Warren Court stated that prosecutors should not point to defendants' silence at interrogation.[71] But in *Harris* the Burger Court opened the door, perhaps unwittingly, to use of this tactic. Presumably, the *Harris* ruling applied only when police violated *Miranda* and, as a result, defendants made inculpatory statements. The *Harris* Court held that prosecutors could use these statements to impeach defendants' credibility. But the ruling could have been interpreted more broadly to signal the Court's intention to allow prosecutors greater leeway whenever they sought to impeach defendants' credibility. This interpretation raised the possibility that the Court would decide that prosecutors also could use the fact that defendants were silent at interrogation, in order to impeach their credibility. This tactic might be used if defendants testified and proceeded to give an alibi which they had not given police at arrest or interrogation. Prosecutors could then ask why they were silent when it would have been normal for them to give an alibi if they really had one. This tactic, of course, would penalize defendants for exercising their *Miranda*-guaranteed right to silence. It would discourage them from testifying, or, if they did testify, it would

the basis of *Miranda* or a state constitutional provision, so its decision is not included in the numerical tally. Whiddon v. State, 492 S.W.2d 566 (Tex. Crim. App., 1973).

[71] "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. at 468 n.37.

make them vulnerable. The Warren Court realized the dangers inherent in this tactic and prohibited prosecutors from employing it. Yet after *Harris* some courts seemed to expect the Burger Court to permit it. The Court eventually prohibited this tactic in the federal courts, four years after *Harris*, in *Hale*. One year later, in *Doyle*, the Court prohibited this tactic in the state courts as well.

In the meantime there was considerable confusion in the state supreme courts.[72] Before *Hale* fourteen courts had decided cases involving such prosecutorial conduct. The Kansas and New York courts permitted it.[73] Justifying its decision, the New York court stated that *Harris* "modified" the scope of *Miranda*.[74] The Arizona court, in four cases in 1971 and 1972, also permitted it.[75] The court cited *Harris* and declared, "We are still of the opinion that a defendant who takes the stand waives his Fifth Amendment privilege against self-incrimination . . . ."[76] But the court in 1973 reversed itself.[77] The Alaska and Ohio courts permitted it when the defense first mentioned the defendants' silence, but they indicated they probably would not do so otherwise.[78] The nine remaining state supreme courts prohibited the prosecutorial conduct. The Pennsylvania court asserted sharply that *Harris* did not apply;[79] the rest simply said that such conduct violated *Miranda*.[80]

After *Hale*, but before *Doyle*, five state supreme courts decided cases involving this conduct. Only the Tennessee court allowed prosecutors to use defendants' silence, and then only when the silence was in-

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72 In *Hale*, Chief Justice Burger called the issue "a tempest in a saucer," but some courts did find it troublesome. 422 U.S. at 181 (Burger, C.J., concurring).

73 State v. Bly, 215 Kan. 168, 523 P.2d 397 (1974); People v. Rothschild, 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974).

74 35 N.Y.2d at 359, 320 N.E.2d at 641, 361 N.Y.S.2d at 904-05.

75 State v. Altman, 107 Ariz. 93, 482 P.2d 460 (1971); State v. Peterson, 107 Ariz. 268, 485 P.2d 1158 (1971); State v. O'Dell, 108 Ariz. 53, 492 P.2d 1160 (1972); State v. Belcher, 108 Ariz. 290, 496 P.2d 590 (1972).

76 107 Ariz. at 270, 485 P.2d at 1160.

77 State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973).

78 Davis v. State, 501 P.2d 1026 (Alaska 1972); State v. Young, 27 Ohio St. 2d 310, 272 N.E.2d 353 (1971).

79 Commonwealth v. Dulaney, 449 Pa. 45, 295 A.2d 328 (1972); Commonwealth v. Woods, 455 Pa. 1, 312 A.2d 357 (1973), *cert. denied*, 419 U.S. 880 (1974).

80 Hines v. People, 179 Colo. 4, 497 P.2d 1258 (1972); People v. Wright, 182 Colo. 87, 511 P.2d 460 (1973); People v. Robles, 183 Colo. 4, 514 P.2d 630 (1973); People v. Burress, 183 Colo. 146, 515 P.2d 460 (1973); State v. Haggard, 94 Idaho 249, 486 P.2d 260 (1971); Cessna v. Commonwealth, 465 S.W.2d 283 (Ky. 1971); People v. Graham, 386 Mich. 452, 192 N.W.2d 255 (1971); People v. Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973); Buchanan v. State, 523 P.2d 1134 (Okla. Crim. App. 1974); Miles v. State, 525 P.2d 1249 (Okla. Crim. App. 1974); Reid v. Commonwealth, 213 Va. 790, 195 S.E.2d 866 (1973); State v. Dean, 67 Wis. 2d 513, 227 N.W.2d 712 (1975), *cert. denied*, 423 U.S. 1074 (1976); Gabrielson v. State, 510 P.2d 534 (Wyo. 1973).

consistent with defendants' testimony.[81] The other courts did not allow prosecutors to use defendants' silence.[82] While noting that *Hale* did not apply to the states, these courts stated that the same reasoning would apply. The New Jersey court went further, arguing that *Hale* was not strong enough, because it was based on the weak evidentiary value of defendants' silence rather than on the fifth amendment.[83]

After *Doyle* thirteen state supreme courts decided cases involving this conduct. Though two distinguished *Doyle* rather lamely from their cases,[84] the others followed *Doyle* routinely.[85] Thus, the Burger Court's decisions in *Hale* and, especially, *Doyle* seemed to "settle the question"[86] that the *Harris* decision had raised.[87]

The state supreme courts' cases are tallied in Table 2. For the entire period between *Harris* and *Doyle* the courts permitted prosecutors to use defendants' silence to impeach their credibility in eleven of the forty-four cases they decided, with most of these eleven coming before *Hale*.

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81 Braden v. State, 534 S.W.2d 657 (Tenn. 1976).

82 Niemeyer v. Commonwealth, 533 S.W.2d 218 (Ky. 1976); Vipperman v. State, 92 Nev. 213, 547 P.2d 682 (1976); State v. Deatore, 70 N.J. 100, 358 A.2d 163 (1976); Jerskey v. State, 546 P.2d 173 (Wyo. 1976).

83 State v. Deatore, 70 N.J. at 109, 358 A.2d at 168.

84 State v. Osborne, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977). Actually, the North Carolina court did not mention *Doyle*, but it distinguished its case from *Hale*. *Id.* at 558, 231 S.E.2d at 626.

85 Stork v. State, 559 P.2d 99 (Alaska 1977); State v. Alo, 57 Hawaii 418, 558 P.2d 1012 (1976), *cert. denied*, 431 U.S. 922 (1977); State v. White, 97 Idaho 708, 551 P.2d 1344 (1976); Jones v. State, 265 Ind. 447, 355 N.E.2d 402 (1976); State v. Mims, 220 Kan. 726, 556 P.2d 387 (1976); State v. Heath, 222 Kan. 50, 563 P.2d 418 (1977); State v. Smith, 336 So. 2d 867 (La. 1976); State v. Lyle, 73 N.J. 403, 375 A.2d 629 (1977); State v. Carmody, 253 N.W.2d 415 (N.D. 1977); State v. Boyd, 233 S.E.2d 710 (W. Va. 1977); State v. Thompson, 88 Wash. 2d 518, 564 P.2d 315 (1977); Irvin v. State, 560 P.2d 372 (Wyo. 1977). The Hawaii and Washington courts did permit prosecutors to use defendants' silence to impeach their testimony if the defendants claimed they were not silent. The Burger Court did approve this. In *Doyle* it said, "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest." 426 U.S. at 619-20 n.11. The Michigan court, in its two cases before *Hale*, also permitted this. People v. Graham, 386 Mich. at 456-57, 192 N.W.2d at 257; People v. Bobo, 390 Mich. at 359, 212 N.W.2d at 192.

86 State v. Mims, 220 Kan. at 730, 556 P.2d at 391.

87 Occasionally cases arose in which prosecutors used defendants' silence not merely to impeach their credibility but to infer their guilt. This usually happened when defendants chose not to testify, thereby thwarting prosecutors' efforts to impeach their credibility. The prosecutors elicited testimony about the defendants' silence from police and sometimes added their own comments. State supreme courts nearly always considered this a clear violation of the fifth amendment. *See, e.g.*, Kagebein v. State, 254 Ark. 904, 496 S.W.2d 435 (1973); State v. Ritson, 210 Kan. 760, 504 P.2d 605 (1972); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975). For a contrary decision, see Bennett v. State, 231 Ga. 458, 202 S.E.2d 99 (1973). But the Georgia court reversed itself after *Doyle*. Howard v. State, 237 Ga. 471, 228 S.E.2d 860 (1976).

TABLE 2

USING SILENCE TO IMPEACH CREDIBILITY

Ruling	Cases Before *Hale*	Cases After *Hale*, Before *Doyle*	Cases After *Doyle*	Cases Total	%
Permitted	8	1	2	11	25
Not Permitted	16	5	12	33	75
Total	24	6	14	44	100

GIVING INCORRECT WARNINGS

In *Miranda*, the Warren Court set forth precise warnings for the police to give suspects. Apparently the Court had been dissatisfied with police and lower court compliance with *Escobedo*, and it sought to clarify, as well as elaborate upon, *Escobedo*'s guidelines.[88] It succeeded; its more precise warnings seemed to produce greater compliance.[89] But in *Tucker* the Burger Court showed that it might not require adherence to these precise warnings. It allowed a prosecutor to use statements which police obtained from a suspect after they gave him incorrect warnings. They failed to tell him that if he could not afford an attorney the court would appoint one for him, and the suspect, without benefit of an attorney, made inculpatory statements. The Court said that since the interrogation was before *Miranda* the police could not be expected to have complied with *Miranda*. In addition, the Court said the police nearly complied with *Miranda* anyway. The Court did not stipulate which of these two factors was controlling.[90] If the first was, the ruling would have little application; few cases after *Tucker* would involve interrogations before *Miranda*. But if the second was controlling, the ruling would have considerable application; many cases would involve at least minor errors by police when they gave the warnings. Because the Court did not stipulate, it provided lower courts the opportunity to interpret it as they wished.

In numerous cases state supreme courts were confronted with complaints that police did not give correct warnings. The complaints fell into two categories: (1) police did not inform suspects of all their rights, omitting, usually, the notification that if they were too poor to afford an

88 Romans, *supra* note 17, at 51-52.

89 *Id.* at 58.

90 Justice Rehnquist did say it was "significant" that the interrogation was before *Miranda*, but this was as close as he came to indicating which factor was controlling. Michigan v. Tucker, 417 U.S. at 447.

attorney the court would appoint one for them; and (2) police informed suspects of all their rights but informed them with confusing statements.[91]

When police did not inform suspects of all their rights, state supreme courts usually reversed the convictions. They reversed them in thirteen of the sixteen cases they decided. Before *Tucker* they typically said the warnings were hollow if they did not include the notification that the court would appoint an attorney.[92] Even in three cases in which suspects had been interrogated prior to *Miranda*, as Tucker had been, the courts concluded that the omission was fatal.[93] The only courts which did not reverse the convictions were those presented with unusual facts. In one case the suspect had been given correct warnings three times before the incorrect warning,[94] and in another the suspect could afford an attorney and already had retained one.[95] After *Tucker*, as well, the courts usually reversed the convictions. The Colorado court reversed despite the fact that the suspect had an attorney, though not during interrogation.[96] The Pennsylvania court reversed despite the fact that the suspect had been interrogated prior to *Miranda*.[97] Following an earlier decision in the case, the state appealed, and the Burger Court, in the aftermath of *Tucker*, remanded the decision.[98] But the Pennsylvania high court refused to change it. The court asserted that *Tucker* was irrelevant, because it dealt with the fruits of an admission rather than with the admission itself, as here. Also, to be safe, the court based its decision, in part, on the Pennsylvania Constitution. In contrast, the Florida court did not reverse the conviction appealed to it.[99] The case did not concern an interrogation prior to *Miranda*, so the court easily could have distinguished it from *Tucker*. Yet the court chose not to do so. Ignoring this salient difference between the two cases, the

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91 A few cases were deemed too trivial to consider. *See* Morris v. State, 228 Ga. 39, 184 S.E.2d 82 (1971).

92 Marcus v. State, 291 Ala. 350, 280 So. 2d 793 (1973); People v. Vigil, 175 Colo. 373, 489 P.2d 588 (1971); Perez v. People, 176 Colo. 505, 491 P.2d 969 (1971); Commonwealth v. Bujnowski, 358 Mass. 821, 267 N.E.2d 924 (1971); State v. Williams, 486 S.W.2d 468 (Mo. 1972); Dayton v. State, 484 P.2d 1322 (Okla. Crim. App. 1971); Byers v. Oklahoma City, 497 P.2d 1302 (Okla. Crim. App. 1972); Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353 (1973), *vacated*, 417 U.S. 964 (1974), *aff'd on remand*, 464 Pa. 488, 347 A.2d 460 (1975); Burns v. State, 486 S.W.2d 310 (Tex. Crim. App. 1971); Noble v. State, 478 S.W.2d 83 (Tex. Crim. App. 1972); Jackson v. State, 508 S.W.2d 89 (Tex. Crim. App. 1974).

93 Commonwealth v. Bujnowski, 358 Mass. 821, 267 N.E.2d 924; Commonwealth v. Romberger, 454 Pa. 279, 312 A.2d 353; Burns v. State, 486 S.W.2d 310.

94 Sanders v. State, 259 Ind. 43, 284 N.E.2d 751 (1972).

95 Brown v. State, 470 S.W.2d 543 (Mo. 1971).

96 People v. Costa, 193 Colo. 386, 566 P.2d 366 (1977).

97 Commonwealth v. Romberger, 464 Pa. 488, 347 A.2d 460 (1975).

98 Commonwealth v. Romberger, 417 U.S. 964 (1974).

99 Alvord v. State, 322 So. 2d 533 (Fla. 1975).

court quoted *Tucker*'s remark that *Miranda* was not meant " 'to create a constitutional strait jacket.' "[100] The court said the warnings were correct enough. Thus, the court showed how a lower court can interpret an ambiguous ruling so as to weaken constitutional rights perhaps more than the upper court had intended.

When police informed suspects of all their rights but informed them with confusing statements, state supreme courts were less willing to reverse the convictions. This was true before *Tucker* as well as after. The courts reversed the convictions in just twelve of the thirty-five cases they decided. In some of the cases, the complaints alleged that police did not convey clearly the right to appointed counsel. For example, police gave the following warning: "If you cannot afford to hire a lawyer and want one, we will see that you have a lawyer provided to you before we ask you any questions." Appellants claimed this warning did not indicate that the lawyer would be free, but they could not convince the courts.[101] In other cases the complaints alleged that police did not convey clearly the right to appointed counsel for interrogation, as well as for trial. For example, police gave the following warning: "You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time." While two courts ruled this inadequate,[102] six ruled it sufficiently clear.[103] Police gave similar warnings which appellants claimed did not convey the right to counsel for interrogation, but courts generally were not sympathetic.[104] The Wis-

[100] *Id.* at 537 (citing Michigan v. Tucker, 417 U.S. at 444, quoting Miranda v. Arizona, 384 U.S. at 467).

[101] Commonwealth v. Swint, 450 Pa. 54, 296 A.2d 777 (1972); Commonwealth v. Ponton, 450 Pa. 40, 299 A.2d 634 (1972); Commonwealth v. Jordan, 451 Pa. 275, 301 A.2d 667 (1973).

[102] Moore v. State, 251 Ark. 436, 472 S.W.2d 940 (1971); Reed v. State, 255 Ark. 63, 498 S.W.2d 877 (1973); Schorr v. State, 499 P.2d 450 (Okla. Crim. App. 1972), *overruled in part*, Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975).

[103] Schade v. State, 512 P.2d 907 (Alaska 1973); Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972); State v. Carpenter, 211 Kan. 234, 505 P.2d 753 (1973); Evans v. State, 275 So. 2d 83 (Miss. 1973); Holifield v. State, 275 So. 2d 851 (Miss. 1973), *cert. dismissed*, 414 U.S. 990 (1973); Burge v. State, 282 So. 2d 223 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974); People v. Buckler, 39 N.Y.2d 895, 352 N.E.2d 583, 386 N.Y.S.2d 396 (1976); Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975).

[104] Emler v. State, 259 Ind. 241, 286 N.E.2d 408 (1972); Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973); Sotelo v. State, 264 Ind. 298, 342 N.E.2d 844 (1976); Provo v. State, 565 P.2d 719 (Okla. Crim. App. 1977); Commonwealth v. Scoggins, 451 Pa. 472, 304 A.2d 102 (1973). But some courts were sympathetic. Watson v. State, 255 Ark. 631, 501 S.W.2d 609 (1973); State v. Fossen, 312 Minn. 414, 255 N.W.2d 357 (1977); Biggerstaff v. State, 491 P.2d 345 (Okla. Crim. App. 1971); Byers v. Oklahoma City, 497 P.2d 1302 (Okla. Crim. App. 1972); Gravett v. State, 509 P.2d 914 (Okla. Crim. App. 1973); Anderson v. State, 510 P.2d 998 (Okla. Crim. App. 1973).

consin court epitomized such decisions when it admitted that the warnings were not "a model of clarity" but noted that they did include all the rights.[105] Some courts found support in *Tucker* for their decisions.[106] The Florida court said *Tucker* recognized the difference between "a violation of the defendants' substantive consitutional rights" and "an inadvertent violation of the procedural safeguards designed to protect those rights."[107] In still other cases the complaints alleged that police did not convey clearly the warning that anything the suspects said could be used against them. These complaints arose when some police warned suspects that anything they said could be used "for or against" them. Obviously nothing they said would be used "for" them, so the warning was misleading. One court found that it violated *Miranda*,[108] but three others thought the error was too minor to constitute a violation.[109] Again, the Wisconsin court said this misleading warning was not major enough to invalidate a confession automatically, but that giving it is "a practice that should not be encouraged, and in some circumstances could result in the vitiation of an otherwise antiseptic confession."[110]

The courts' rulings in these cases are displayed in Table 3. As shown, the courts excused the police's errors in twenty-six of the fifty-one cases. Also, as shown, the courts did not rule much differently after *Tucker* than they did before it.

REFUSING TO STOP INTERROGATION, RESUMING INTERROGATION

In *Miranda*, the Warren Court made clear that suspects undergoing interrogation can exercise their rights to silence or an attorney and request police to stop the interrogation at any time.[111] The Court empha-

105 Jones v. State, 69 Wis. 2d 337, 342, 230 N.W.2d 677, 681 (1975).

106 *See, e.g.*, State v. Statewright, 300 So. 2d 674, 677-78 (Fla. 1974); State v. Davis, 336 So. 2d 805, 808 (La. 1976).

107 State v. Statewright, 300 So. 2d at 677.

108 Commonwealth v. Camm, 443 Pa. 253, 277 A.2d 325 (1971), *cert. denied*, 405 U.S. 1046 (1972); Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

109 State v. Melvin, 65 N.J. 1, 319 A.2d 450 (1974); State v. Vidal, 82 Wash. 2d 74, 508 P.2d 158 (1974); Madkins v. State, 50 Wis. 2d 347, 184 N.W.2d 144 (1971); McClellan v. State, 53 Wis. 2d 724, 193 N.W.2d 711 (1972).

110 *Id.* at 730, 193 N.W.2d at 715. Occasionally cases arose in which appellants claimed that police violated *Miranda* by failing to warn them that if they waived their rights and began answering questions, they could assert their rights anytime later and stop answering questions. The Warren Court said, "[o]nce warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." 384 U.S. at 473-74. State supreme courts agreed that these are "guidelines for police conduct, not additional elements of the required warning." Miller v. State, 263 Ind. 595, 597, 335 N.E.2d 206, 208 (1975).

111 "If, however, he indicates in any manner and at any stage that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45.

sized that suspects' requests must be "scrupulously honored."[112] But in *Mosley* the Burger Court permitted a prosecutor to use statements obtained after police acceded to a suspect's request to stop but then resumed the interrogation two hours later. In *Miranda*, the Warren Court did not consider this kind of situation. Therefore, *Mosley* can be viewed as refining *Miranda* or, if that precedent is read more literally, weakening it. The Burger Court insisted that *Mosley* be viewed as the former.[113] Yet there is a fine line between refusing to stop and agreeing to stop but resuming again.

TABLE 3

GIVING INCORRECT WARNINGS

	Not Inform All Rights[a]		Informed Confusingly[b]		Categories Combined[c]			
Ruling	Cases Before *Tucker*	Cases After *Tucker*	Cases Before *Tucker*	Cases After *Tucker*	Cases Before *Tucker*	Cases After *Tucker*	Cases Total	%
Permitted	2	1	16	7	18	8	26	51
Not Permitted	11	2	10	2	21	4	25	49
Total	13	3	26	9	39	12	51	100

[a] When police did not inform suspects of all their rights.
[b] When police informed suspects of all their rights but informed them with confusing statements.
[c] The two categories combined.

In related cases state supreme courts decided whether police must honor suspects' requests to stop. These cases fell into four categories: (1) suspects requested silence, but police refused to stop; (2) suspects requested an attorney, but police refused to stop for them to get one; (3) suspects requested silence, and police agreed to stop but resumed again; and (4) suspects requested an attorney, and police agreed to stop but resumed again before the suspects got one.

When suspects requested silence but police refused to stop, state supreme courts held the resulting statements inadmissible in ten of the twelve cases they heard. They held the statements inadmissible whether police ignored repeated requests to halt[114] or, after the initial request,

[112] *Id.* at 479.
[113] Michigan v. Mosley, 423 U.S. at 101-07.
[114] D.P. v. State, 556 P.2d 1256 (Alaska 1976); Holmes v. State, 300 A.2d 6 (Del. 1972); People v. Henenberg, 55 Ill. 2d 5, 302 N.E.2d 27 (1973); State v. Crow, 486 S.W.2d 248 (Mo. 1972).

subtly prolonged the conversation in hope that suspects would continue talking and answering questions.[115] Even after *Mosley* the courts did not relax their standards. The Arizona and Texas courts declared that *Mosley* "reaffirmed the holding in *Miranda*" that requests to halt must be scrupulously honored.[116] The Arizona court noted that although officers ceased interrogation "their subsequent conduct and statements were made to persuade the defendant to reconsider his position. Any response under such circumstances cannot be considered 'volunteered.' "[117] Only the Louisiana court decided to the contrary. In a pair of cases, it, in effect, brushed *Miranda* aside and used the voluntariness test.[118]

When suspects requested an attorney but police refused to stop for them to get one, state supreme courts did not rule quite as consistently. They held the statements inadmissible in eighteen of the twenty-seven cases they heard. While they held them inadmissible in nearly all cases in which police ignored repeated requests to halt,[119] or even a single clear request,[120] they did not always hold them inadmissible when the requests were not repeated or clear. According to *Miranda*, the clarity or number of requests should not have mattered, for the ruling mandates police to cease immediately if suspects indicate "in any manner" that they want the police to cease.[121] For a few courts these factors did not matter.[122] The California court said the requests did not need to be

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115 People v. Superior Court of Marin County, 13 Cal. 3d 406, 530 P.2d 585, 118 Cal. Rptr. 617 (1975); State v. Smith, 295 Minn. 65, 203 N.W.2d 348 (1972); State v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974).

116 State v. Sauve, 112 Ariz. 576, 579, 544 P.2d 1091, 1094 (1976); State v. Lee, 114 Ariz. 101, 106, 559 P.2d 657, 662 (1976). *See also* Hearne v. State, 534 S.W.2d 703, 706-07 (Tex. Crim. App. 1976).

117 State v. Sauve, 112 Ariz. at 579, 544 P.2d at 1094.

118 State v. Higginbotham, 261 La. 983, 261 So. 2d 638 (1972); State v. Bradford, 263 La. 966, 269 So. 2d 831 (1972).

119 State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974); People v. Enriquez, 19 Cal. 3d 221, 561 P.2d 261, 137 Cal. Rptr. 171 (1977); Brown v. State, 256 Ind. 558, 270 N.E.2d 751 (1971); State v. Hilpipre, 242 N.W.2d 306 (Iowa 1976); Dryden v. State, 535 P.2d 483 (Wyo. 1975). The sole exception was State v. Edgell, 30 Ohio St. 2d 103, 283 N.E.2d 145 (1972).

120 Webb v. State, 258 Ark. 95, 522 S.W.2d 406 (1975); People v. Salazar, 189 Colo. 429, 541 P.2d 676 (1975); People v. Turner, 56 Ill. 2d 201, 306 N.E.2d 27 (1973); Interest of Thompson, 241 N.W.2d 2 (Iowa 1976); Commonwealth v. Murray, 359 Mass. 541, 269 N.E.2d 641 (1971); State v. Hicks, 290 N.C. 767, 228 S.E.2d 252 (1976); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Jones, 37 Ohio St. 2d 21, 306 N.E.2d 409 (1974); Commonwealth v. Bullard, 465 Pa. 341, 350 A.2d 797 (1976); State v. Chapman, 84 Wash. 2d 373, 526 P.2d 64 (1974). The exceptions were Thompson v. State, 328 So. 2d 1 (Fla. 1976); Niehaus v. State, 265 Ind. 655, 359 N.E.2d 513, *cert. denied*, 434 U.S. 902 (1977).

121 384 U.S. at 445.

122 People v. Superior Court of Mono County, 15 Cal. 3d 729, 542 P.2d 1390, 125 Cal. Rptr. 798 (1975); People v. Harris, 191 Colo. 234, 552 P.2d 10 (1976); Micale v. State, 76 Wis. 2d 370, 251 N.W.2d 458 (1977).

unmistakably clear.[123] But for other courts they did matter. Although suspects indicated in at least some manner that they wanted police to cease until they got an attorney, the police either sought to discourage them,[124] or they simply continued to question them,[125] and the courts excused the officers' conduct.

When suspects requested silence and police agreed to stop but resumed again, the courts did not side with the appellants as often as they did when police refused to stop. In fact, they rarely sided with the appellants. They held the statements inadmissible in just two of the eleven cases they heard. In both cases the police resumed shortly after stopping.[126] However, in other cases the police resumed fifteen minutes after stopping[127] or twenty to thirty minutes after stopping,[128] and the courts did not hold the statements inadmissible. The decisions seemed to mock the suspects' requests that interrogation cease, but the courts said that they considered factors besides the length of time between stopping and resuming. These factors included a change in locations, in the officers conducting the interrogation, or in the charges to be filed against the suspect.[129] It is not apparent why a change in locations or in the officers conducting the interrogation would justify renewed questioning, but consideration of these factors meant that the balance almost always weighed against the appellants.[130] In response to an appellant's claim that any resumption narrowed *Miranda*, the Colorado court justified its decision by stating that "a periodic repeating of the procedure until the accused finally makes a statement would not be permitted."[131]

When suspects requested an attorney and police agreed to stop but resumed again before the suspects got one, the courts issued rulings

123 People v. Superior Court of Mono County, 15 Cal. 3d at 736, 542 P.2d at 1395, 125 Cal. Rptr. at 802-03 (quoting People v. Randall, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970)).

124 Riddle v. State, 264 Ind. 587, 348 N.E.2d 635 (1976); Meyer v. Commonwealth, 482 S.W.2d 479 (Ky. 1971), *cert. denied*, 406 U.S. 919 (1972); Shadoan v. Commonwealth, 484 S.W.2d 842 (Ky. 1972); State v. Keesecker, 198 Neb. 426, 253 N.W.2d 169 (1977).

125 People v. White, 61 Ill. 2d 288, 335 N.E.2d 457 (1975), *cert. denied*, 424 U.S. 970 (1976); LaBonte v. Commonwealth, 217 Va. 677, 232 S.E.2d 738 (1977); Clodfelter v. Commonwealth, 218 Va. 98, 235 S.E.2d 340 (1977).

126 State v. Thompson, 256 N.W.2d 706 (N.D. 1977); Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973).

127 State v. Robinson, 87 S.D. 375, 209 N.W.2d 374 (1973).

128 State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

129 *See id.* at 434, 219 S.E.2d at 212.

130 Dyett v. People, 177 Colo. 370, 494 P.2d 94 (1972); Rogers v. State, 262 Ind. 315, 315 N.E.2d 707 (1974); State v. O'Neill, 299 Minn. 60, 216 N.W.2d 822 (1974); People v. Gary, 31 N.Y.2d 68, 286 N.E.2d 263, 334 N.Y.S.2d 883 (1972); Dennis v. State, 561 P.2d 88 (Okla. Crim. App. 1977); Commonwealth v. Grandison, 449 Pa. 231, 296 A.2d 730 (1972); State v. Estrada, 63 Wis. 2d 476, 217 N.W.2d 359, *cert. denied*, 419 U.S. 1093 (1974).

131 Dyett v. People, 177 Colo. at 373, 494 P.2d at 95.

which did not show any pattern. They held the statements inadmissible in six of the thirteen cases they decided. Thus, they did side with the appellants more often than they did when the appellants requested silence and police resumed. Perhaps this was due to the unequivocal sentence in *Miranda*: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[132] Or perhaps this was due to Justice Stewart's comment in *Mosley* that the case would have been different if Mosley had asked for an attorney.[133] For whatever reason, state supreme courts held statements inadmissible not only when police apparently used deception,[134] but also when police subtly thwarted efforts to call an attorney,[135] subtly resumed interrogation,[136] and even innocently questioned a suspect who already had asked another officer for an attorney.[137] Yet other courts did not hold statements obtained in very similar circumstances inadmissible.[138] One court did not hold statements inadmissible even when they were obtained after repeated demands for an attorney.[139] These courts seemed to disregard *Miranda* and substitute the voluntariness test.[140]

The cases are broken down in Table 4. As shown, the courts allowed the police conduct in twenty-eight of the sixty-three cases. Also, as shown, the number of cases in which they allowed the conduct did not increase after *Mosley*.

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132 384 U.S. at 474. *See* State v. Lachapelle, 112 R.I. 105, 308 A.2d 467 (1973).

133 423 U.S. at 101, n.7. *See* State v. Moscone, 171 Conn. 500, 370 A.2d 1030 (1976).

134 State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976).

135 People v. Jackson, 41 N.Y.2d 146, 359 N.E.2d 677, 391 N.Y.S.2d 82 (1976).

136 People v. Richards, 194 Colo. 83, 568 P.2d 1173 (1977).

137 Commonwealth v. Nathan, 445 Pa. 470, 285 A.2d 175 (1971).

138 Apparently used deception and subtly thwarted efforts to call—State v. Krueger, 194 Neb. 304, 231 N.W.2d 364 (1975); subtly resumed interrogation—State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976); innocently questioned suspect who already had asked another officer for an attorney—Looms v. State, 261 Ark. 803, 551 S.W.2d 546 (1977). Cases which did not involve similar circumstances were Commonwealth v. Jefferson, 445 Pa. 1, 281 A.2d 852 (1971); Sweiberg v. State, 511 S.W.2d 50 (Tex. Crim. App. 1974).

139 Ladd v. State, 568 P.2d 960 (Alaska 1977), *cert. denied*, 435 U.S. 928 (1978).

140 *See* French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977). Occasionally cases arose in which police themselves decided to stop interrogation but later resumed again without giving the *Miranda* warnings anew. *See, e.g.*, State v. Gholson, 112 Ariz. 545, 544 P.2d 654 (1976). State supreme courts considered a variety of factors when they judged the police conduct. For discussion, see Commonwealth v. Wideman, 460 Pa. 699, 706-07, 334 A.2d 594, 598 (1975). Generally, the courts permitted the conduct on the grounds that the police were engaged in a single, continuous interrogation. *See* Watson v. State, 227 Ga. 698, 182 S.E.2d 446 (1971).

TABLE 4

REFUSING TO STOP INTERROGATION, RESUMING INTERROGATION

	Refused Stop When Requested Silence[a]		Refused Stop When Requested Attorney[b]		Resumed After Requested Silence[c]		Resumed After Requested Attorney[d]		Categories Combined[e]			
Ruling	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Before *Mosley*	Cases After *Mosley*	Cases Total	%
Permitted	2	4	4	5	8	1	3	4	17	10	27	43
Not Permitted	6	4	10	8	1	1	2	4	19	17	36	57
Total	8	4	14	13	9	2	5	8	36	27	63	100

[a] When suspects requested silence, but police refused to stop.
[b] When suspects requested an attorney, but police refused to stop.
[c] When suspects requested silence, and police agreed to stop but resumed again.
[d] When suspects requested an attorney, and police agreed to stop but resumed again.
[e] The four categories combined.

IV. CONCLUSION

It was hypothesized that the state supreme courts eroded the *Miranda* principles first enunciated by the Warren Court. Unquestionably, this hypothesis was upheld. Most courts permitted prosecutors to use illegally obtained statements to impeach defendants' credibility, to use statements made when police gave confusing warnings, and to use statements made when police resumed interrogation after suspects had cut off interrogation by demanding silence.

It was also hypothesized that the state supreme courts eroded the *Miranda* principles more than the Burger Court had. Generally, this hypothesis was not supported. Though some courts read *Harris* as a cue to relax enforcement of the *Miranda* principles and to allow prosecutors to use defendants' silence to impeach their credibility, most did not. Also most courts did not allow prosecutors to use statements made when police gave incomplete warnings or to use statements made when police refused to cease interrogation after suspects had asked them to cease.

Of course, not all state supreme courts exhibited similar decision-making. Differences between them were described throughout the article and can be seen in Table 5. With the large number of cases potentially relevant to this research, it was hoped that each state court could be classified according to the degree to which it eroded the *Miranda* principles. Unfortunately, the number of cases was not large enough. Some courts did not decide any cases which were relevant, and other decided only a handful. Consequently, most courts could not be classified. Nevertheless, it is worth noting that some courts, such as the Florida, Indiana, and Mississippi courts, were prone to erode the principles, while others, such as the Colorado and Wyoming courts, were not.

TABLE 5

ACCEPTANCE OF ALL POLICE AND PROSECUTORIAL PRACTICES, BY STATE[a]

State	Permitted[b]	Not Permitted[c]	State	Permitted[b]	Not Permitted[c]
Alabama	1	1	Montana	0	0
Alaska	3	2	Nebraska	3	0
Arizona	7	4	Nevada	1	1
Arkansas	2	4	New Hampshire	0	0
California	1	4	New Jersey	2	5
Colorado	3	10	New Mexico	0	0
Connecticut	0	1	New York	3	1
Delaware	1	1	North Carolina	5	2
Florida	5	0	North Dakota	0	2
Georgia	1	0	Ohio	4	2
Hawaii	0	2	Oklahoma	4	9
Idaho	0	2	Oregon	0	1
Illinois	3	2	Pennsylvania	6	11
Indiana	11	2	Rhode Island	0	2
Iowa	0	2	South Carolina	0	0
Kansas	4	2	South Dakota	1	0
Kentucky	1	2	Tennessee	1	0
Louisiana	3	1	Texas	1	4
Maine	1	0	Utah	0	0
Maryland	1	1	Vermont	0	0
Massachusetts	1	2	Virginia	2	1
Michigan	1	2	Washington	3	2
Minnesota	1	2	West Virginia	0	1
Mississippi	5	0	Wisconsin	6	2
Missouri	1	2	Wyoming	0	5
			Total	99	102

[a] All of the practices covered in this article.

[b] Number of cases in which the courts permitted the police and prosecutorial practices at issue.

[c] Number of cases in which the courts did not permit the practices at issue.

However, there were enough cases to show regional differences. Overall, the courts decided to allow the police and prosecutorial practices at issue in about fifty percent of their cases, but, as Table 6 shows, this figure is misleading. It masks sharp regional differences.[141] The southern and midwestern courts were most prone to erode *Miranda*,

[141] Even if the courts with a disproportionate number of cases, such as the Indiana court, are excluded, the figures show substantial regional differences.

while the western and eastern courts were least prone to do so. Presumably, the greater political conservatism of the South and Midwest extended to judicial acceptance of the *Miranda* principles.[142]

TABLE 6

ACCEPTANCE OF ALL POLICE AND PROSECUTORIAL PRACTICES, BY REGION[a]

Region	Permitted[b]	Not Permitted[c]	% Permitted
East[d]	15	25	37.5
Midwest[e]	39	29	57.35
South[f]	27	15	64.29
West[g]	18	33	35.29
Total	99	102	49.25

[a] All of the practices covered in this article.
[b] Number of cases in which the courts permitted the police and prosecutorial practices at issue.
[c] Number of cases in which the courts did not permit the practices at issue.
[d] Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, West Virginia.
[e] Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Wisconsin.
[f] Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia.
[g] Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming.

Of the three models used to characterize the relationship between the Supreme Court and the lower courts, the bureaucratic model, where the Supreme Court establishes policy and the lower courts impose bureaucratic restraints, is the most useful in explaining the relationship as

[142] Dolbeare and Hammond found remarkably similar regional differences in their study of school district compliance with the Court's school prayer decisions. The southern and midwestern school districts complied least, while the eastern and western districts complied most. K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 29-32 (1971). Consequently, Charles Johnson suggested that region might be the system-level variable most consistently related to lower court reaction to Supreme Court decisions. Johnson, *The Implementation and Impact of Judicial Policies: A Heuristic Model*, in PUBLIC LAW AND PUBLIC POLICY 107, 118 (J. Gardiner ed. 1977). Kagan, Cartwright, Friedman, and Wheeler suggested that the extent of case-selecting discretion might be a variable related to state supreme court reaction to Supreme Court criminal decisions. Kagan, Cartwright, Friedman, & Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 994-97 (1978); Kagan, Cartwright, Friedman, & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977). Though this variable is intriguing as an explanation for differences in state supreme court decision-making, it does not explain the differences in this research. This could be due to the small number of cases individual courts decided, or it could be due to other, unknown factors.

it affects the *Miranda* policy. The Supreme Court under Chief Justice Warren established the policy, and the Court under Chief Justice Burger maintained the policy, with one significant exception.[143] Moreover, the Court persuaded the state supreme courts to implement the policy. Previous research found that the state supreme courts generally enforced the *Miranda* requirements as early as 1968,[144] and this research found that the state supreme courts generally enforced the requirements throughout the 1970s.[145] Nevertheless, the courts did not implement the policy automatically. They eroded it in certain types of cases. Naturally, they eroded it in cases in which prosecutors used illegally obtained statements to impeach defendants' credibility, but they eroded it here in response to the Burger Court's single change in the *Miranda* policy. However, they eroded it in other cases as well.

In addition, the bureaucratic model is the most useful in explaining the relationship between the Supreme Court and state supreme courts because the model suggests that Court policy which is clear is more likely to be implemented than policy which is not clear. While *Miranda* was clear, the Burger Court's rulings which weakened *Miranda*, with one exception, were not particularly clear. Consequently, they did not result in as much erosion of the *Miranda* principles by state supreme courts as observers seemed to expect. Instead, these courts often refused to alter their liberal policies regarding confessions, even though the Burger Court's rulings were unquestionably conservative in direction. Correspondingly, the Burger Court's ruling that was the one exception and was clear—*Harris*—did result in considerable erosion. Thus, the role of clarity, as seen in the relationship between *Escobedo* and *Miranda*, also can be seen in the relationship between *Miranda* and the Burger Court's rulings.

The role of clarity can be illustrated more specifically by noting a pair of distinctions drawn by many of the courts. The courts did not excuse police when they gave incomplete warnings but did excuse police when they gave confusing warnings; and the courts did not excuse police when they refused to cease interrogation after suspects had asked them to cease but did excuse police when they resumed interrogation after they agreed to cease. The first practice of each of these distinctions is explicitly prohibited by *Miranda*, while the second of each is prohibited

143 The exception is permitting prosecutors to use illegally obtained statements to impeach defendants' credibility.

144 Romans, *supra* note 17, at 52-53.

145 It is worth noting that the courts' opinions seem to reflect the expectation that *Miranda* will continue to remain in effect. The opinions do not predict the ruling's demise, unlike the commentators' remarks. Further, the opinions do not criticize the ruling often. In fact, they criticize the ruling less often than they do the Burger Court's decisions which chipped away at it.

only implicitly. Because the second of each is prohibited only implicitly, the courts could claim that the policy regarding these practices is ambiguous. Their claim might reflect genuine confusion, or it might reflect a desire to exploit the situation for their own preferred ends. Either way, the policy regarding these practices was not implemented due to the bureaucratic inefficiency or recalcitrance provoked by the ambiguity.

The role of clarity, as seen in the relationship between *Miranda* and the Burger Court's rulings, would also suggest the validity of the "Neustadt theory" to explain lower court reaction to Supreme Court rulings. This theory is derived from Neustadt's analysis of presidential power to obtain compliance with directives.[146] Applied to judicial power, this theory maintains that rulings which are clearly written, persuasively argued, and apparently final are more likely to produce compliance than those which are not.[147] *Miranda* was clearly written and, at the same time, probably perceived as persuasively argued and apparently final.[148]

In conclusion, the state supreme courts eroded the *Miranda* principles, but they did not erode them as much as they might have been expected to do. They did not erode them more than the Burger Court itself did. Nevertheless, if the Court does continue to weaken *Miranda*, prosecutors undoubtedly would ask the state supreme courts to follow. The courts would not have to do so, however, since they could effectively insulate liberal decisions from Supreme Court review by basing these decisions upon their state constitution or statutes. In fact, some

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146 *See* R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP WITH REFLECTIONS ON JOHNSON AND NIXON (1976 ed.).

147 For a fuller explanation of this theory, see G. TARR, JUDICIAL IMPACT AND STATE SUPREME COURTS 85-103 (1977).

148 A ruling that is clear is more likely to be perceived as persuasive and final, rather than as a reflection of some inchoate doctrine. But in other respects, as well, *Miranda*, in comparison with *Escobedo* and other previous rulings, probably was perceived as persuasive and final. Romans, *supra* note 17, at 51-52. With the issuance of the Burger Court's rulings, of course, *Miranda*, in comparison with them, might not have been perceived as so final. But these rulings came five and more years after *Miranda*, and, as such, after *Miranda* produced compliance with the warning requirements. Had the rulings come right on the heels of *Miranda*, presumably they would have undermined the perception of finality of the ruling, and presumably they would have resulted in more erosion by the state supreme courts.

An alternative to the Neustadt theory is the "state impact theory." This theory maintains that rulings which require disruption of long-standing state policies in order to produce compliance are less likely to produce compliance than rulings which do not require such disruption. For a fuller discussion of this theory, see G. TARR, *supra* note 147, at 105-20. This theory is not as applicable to the present research as the Neustadt theory. While it could be argued that state supreme courts were reluctant to reverse their long-standing (five and more years) policy of complying with *Miranda* in favor of eroding *Miranda* in response to the Burger Court's rulngs, "their" policy was a federally imposed policy initially and, because of the opportunity for appellate and habeas corpus review, a federally monitored policy continually. Further, state supreme courts were not reluctant to reverse "their" policy in response to the Burger Court's one clear ruling in *Harris*. Thus, the crucial factor seems to be clarity rather than disruption of long-standing state policies.

commentators have urged the courts not to follow the Supreme Court.[149] Still, if the Court does continue to weaken *Miranda*, many of the state supreme courts probably will follow,[150] especially if their response to *Harris* is taken to be indicative. It would be ironic if, after the battle to implement the *Miranda* principles had been largely won, the Burger Court sacrificed the victory.

149 Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

150 Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). But although Neuborne is not optimistic that state supreme courts would issue liberal decisions in this kind of situation, others have noted such decisions already. Brennan, *supra* note 149, at 498-502. *See also* Porter, *State Supreme Courts and the Legacy of the Warren Court: Some Old Inquiries for a New Situation*, 8 PUBLIUS 55 (1978), and other articles cited therein.