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FIFTH AND SIXTH AMENDMENTS—CHANGING THE BALANCE OF *MIRANDA*

Moran v. Burbine, 106 S. Ct. 1135 (1986).

I. INTRODUCTION

In *Moran v. Burbine*,[1] the United States Supreme Court refused to expand the scope of what constitutes a knowing and intelligent waiver of an accused's fifth amendment[2] right to remain silent and right to the presence of counsel as originally prescribed in *Miranda v. Arizona*.[3] In *Moran*, the Court held that the United States Court of Appeals for the First Circuit misconstrued the fifth amendment and that under the dictates of *Miranda* the "respondent validly waived his right to remain silent and to the presence of counsel."[4] The validity of the respondent's waiver was upheld even though the police misinformed his attorney concerning interrogation of the respondent and neglected to inform the respondent of his attorney's request to meet with him.[5] In short, the *Moran* Court sought to avoid obscuring *Miranda's* "bright line" test[6] by refusing to apply a fact-based analysis.[7]

Reasoning that the waiver of one's constitutional rights is an individual's choice, the *Moran* Court held that an attorney's request to see the defendant does not affect the validity of the defendant's waiver of the right to counsel.[8] This Note examines the *Moran* opin-

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[1] 106 S. Ct. 1135 (1986).

[2] The fifth amendment to the Constitution provides in part that no person shall "be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V.

[3] 384 U.S. 436 (1966). The *Miranda* Court held, in part, that the fifth amendment of the Constitution of the United States "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." *Id.* at 467.

[4] *Moran*, 106 S. Ct. at 1141.

[5] *Id.*

[6] The "bright line" test refers to the *Miranda* decision which imposed a set of rules upon every police officer seeking to interrogate a person suspected of a crime who is in custody or whose freedom has been infringed upon. *See Miranda*, 384 U.S. at 467-70.

[7] A fact based analysis examines the totality of the circumstances surrounding the interrogation in order to determine whether the confession was coerced or the result of the suspect's free will. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE 384 (3d ed. 1984).

[8] *Moran*, 106 S. Ct. at 1141.

ions and concludes that the Court's decision adheres to the basic underpinnings of *Miranda* mandating exclusion of a suspect's confession absent the requisite warnings. This Note will argue, however, that the *Moran* court failed in its effort to maintain the "balance" between the individual's rights and the government's rights under *Miranda*. The *Moran* Court, by allowing deliberate deception of an accused's attorney by the police has shifted the "balance" of *Miranda* in favor of the police and against the accused. This Note concludes that such a shift will unduly add compelling pressures upon suspects to confess in custodial interrogation in violation of constitutional traditions.

II. History

Prior to 1966, the Supreme Court became increasingly disenchanted with the use of the voluntariness test in determining the validity of a suspect's confession.[9] The voluntariness test is a subjective analysis of all the circumstances under which police obtain incriminating statements to determine whether the statements are uncoerced and the result of the suspect's free will.[10] In *Miranda*, the Court expressed its exasperation with the voluntariness test and relieved the courts from considering the totality of circumstances under which confessions were procured.[11]

The *Miranda* Court declared that custodial interrogation by the

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9 The common law requirement that a suspect's confession must be voluntary and not the result of compulsion was first adopted by the Supreme Court in Hopt v. Utah, 110 U.S. 574 (1884). In *Hopt* the Court explained that a confession must be held inadmissible

> when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. at 585.

10 *See, e.g.*, Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966)(outlining the history of voluntariness test). For examples of the application of the voluntariness test by the Supreme Court, see Hayness v. Washington, 373 U.S. 503 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

11 *Miranda*, 384 U.S. 436, 468. *See Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 983-84 (1966)(illustrating how "formidable" a task it is to determine whether a suspect made a "rational" choice to answer questions given the many factors a suspect confronts in interrogation). *See also* Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, Wash. U.L.Q. 275, 293 (1975); Kamisar, *What Is an "involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 Rutgers L. Rev. 728, 742 (1963); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 Stan L. Rev. 411, 430-31 (1954).

police was inherently coercive and that statements elicited from an accused without a set of prescribed warnings would be inadmissible.[12] In its decision, the Court relied on the fifth amendment's assertion that a person is protected from being compelled to be a witness against himself.[13] Given the *Miranda* Court's presumption of compulsion, the prosecution must prove that a suspect "knowingly and intelligently"[14] waived his *Miranda* rights before the suspect's confession will be admitted into evidence.[15]

III. FACTS

Several months after the murder of Mary Jo Hickey,[16] police officers from Cranston, Rhode Island arrested Brian Burbine and two others in connection with an alleged breaking and entering.[17] After Burbine refused to execute a written waiver of his *Miranda* rights, Detective Ferranti questioned the other two suspects and obtained statements implicating Burbine for the death of Ms. Hickey.[18] Shortly thereafter, at approximately 6:00 p.m., Detective Ferranti called the Providence Police to inform them of the information he had discovered.[19] One hour later, three officers arrived from Provi-

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[12] *Miranda*, 384 U.S. at 467. The warnings that must be conveyed to a suspect are: the right to have counsel present during custodial interrogation; the right to remain silent; and the right, under certain circumstances, to terminate the interrogation. *Id.* at 479.

[13] *Id.* at 439. *See supra* note 2.

[14] *Miranda*, 384 U.S. at 475, 479. The Court adopted the "knowing and intelligent" standard from Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a case often cited for the standard of determining when a constitutional right has been waived. *See* Barker v. Wingo, 407 U.S. 514 (1972)(waiver of right to a speedy trial); Boyd v. Dutton, 405 U.S. 1 (1972)(waiver of right to counsel before entering plea of guilty); Barber v. Page, 390 U.S. 719 (1968)(waiver of the right to confrontation); Carnley v. Cochran, 369 U.S. 506 (1962)(waiver of right to counsel at trial); Green v. United States, 355 U.S. 184 (1957)(waiver of right to be free from double jeopardy).

[15] *Miranda*, 384 U.S. at 475, 479. The Court asserted that the prosecution faced a "heavy burden" in proving an effective waiver of a suspect's fifth amendment right against self-incrimination. *Id.* at 475.

[16] Ms. Hickey died three weeks after being found in a factory parking lot in Providence Rhode Island with severe injuries to her skull. *Moran*, 106 S. Ct. at 1138.

[17] *Id.* Shortly before the arrest, a confidential informant had informed Detective Ferranti, a member of the Cranston Police, that the man who murdered Ms. Hickey resided at a certain address and answered to the name of "Butch." *Id.* After arresting Burbine, Detective Ferranti discovered that Burbine lived at the designated address. *Id.*

[18] *Id.* In dissent, Justice Stevens noted that the three suspects were placed in separate rooms for questioning. *Id.* at 1154 (Stevens, J., dissenting).

[19] *Id.* at 1138. Justice Stevens stated that after discovering evidence incriminating Burbine in Hickey's death, Ferranti returned to Burbine's room at 4:30 and asked him " 'if there was anybody that he knew by the name of Butch on the street, and he said he was the only Butch.' " *Id.* at 1154 (Stevens, J., dissenting)(quoting State v. Burbine, 451 A.2d 22, 23 (R.I. 1982)). After a brief period of questioning, Justice Stevens added that

dence for the express purpose of interrogating Burbine about the murder of Ms. Hickey.[20]

While these events unfolded, Burbine's sister called the Public Defenders Office to seek legal assistance for her brother.[21] At the time of her call, Burbine's sister was concerned solely with the breaking and entering charge because she was unaware that Burbine was a murder suspect.[22] She requested to speak with Richard Casparian, who had been scheduled, earlier that afternoon, to discuss with Burbine another unrelated criminal matter.[23] The attorney who took the call was unable to reach Casparian.[24] Another public defender assistant, Allegra Munson, was informed of Burbine's situation and of his sister's request that the office represent him.[25]

At 8:15 p.m., Munson called the Cranston police station and requested "that her call be transfered to the detective division."[26] The conversation was as follows:

> A male voice reponded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder.[27]

Burbine never received information of his sister's effort to retain counsel or Munson's conversation with the Police department.[28]

At approximately 9:00 p.m., Burbine was brought into the interrogation room where five officers were present and the first of a

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Burbine was left alone "where he remained until 9:00 p.m." *Id.* (Stevens, J. dissenting)(footnote omitted).

[20] *Id.* at 1138-39. Justice Stevens added that one of the Providence officers

> testified that, as he drove to the Cranston police station, he knew that he might not be able to question Burbine "[i]f for some reason he didn't want to give me a statement, if for some reason he chose to get an attorney and the attorney informed us that he didn't want him to give a statement."

Id. at 1154 (Stevens, J., dissenting)(quoting Record at 407).

[21] *Id.* at 1139.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1139 (quoting State v. Burbine, 451 A.2d 22, 23-24 (R.I. 1982)).

[28] *Id.* at 1139.

series of interviews were conducted.[29] The detectives then read Burbine his *Miranda* rights.[30] They further ascertained that he understood his right to have an attorney present.[31] At about 9:30 p.m. the police obtained his signature on a waiver of rights form.[32] Burbine then acknowledged his responsibility for the death of Hickey, and recited his version of the events of her death.[33] During this interrogation session, Burbine " '[did] not want an attorney called or appointed for [him]' before he gave a statement."[34] Evidence also revealed that Burbine had access to a phone on two separate occasions which he did not attempt to use.[35] Burbine eventually signed three written statements attesting to his responsibility for Hickey's death.[36]

Prior to trial, Burbine moved to suppress the three incriminating statements.[37] At the hearing on the motion to surpress, the court found that Burbine had received the *Miranda* warnings.[38] The court found further that Burbine was not coerced, threatened, nor promised any benefit in return for his statements.[39] The trial judge concluded, therefore, that Burbine "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel."[40] The trial court also found that Munson did make the phone call[41] but concluded "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* Justice Stevens pointed out, however, that Ferranti later testified that Burbine was "coherent" and "incoherent" during the interrogation. *Id.* at 1155 (Stevens, J., dissenting).

[35] *Id.* at 1139. Justice Stevens attacked the majority for this factual finding. *Id.* at 1154 n.25 (Stevens, J., dissenting). He stated that:

> The Court makes its own findings about Burbine's access to a telephone during this period. [citation omitted] No state court made such a finding, and the record contains no evidence indicating whether Burbine was told he could use the phone, whether an outside line was available without use of the police switchboard, or any number of other possibly relevant factors.

Id. (Stevens, J., dissenting).

[36] *Id.* at 1139.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* (quoting State v. Burbine, 451 A.2d 22, 24 (R.I. 1982)).

[41] State v. Burbine, 451 A.2d 22, 24 (R.I. 1982). The Superior Court also found that Burbine had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." *Moran*, 106 S. Ct. at 1139. With these findings, the court denied Burbine's motion to supress and held that the right to counsel is for the defendant to assert and may not be requested by his lawyer. *Id.*

attorney.' "[42] In accordance with these findings, the trial court denied Burbine's motion to surpress, holding that "the constitutional right to request the presence of an attorney belongs solely to the defendant and may not be asserted by his lawyer."[43] The trial court reasoned that because Burbine never requested the services of an attorney, Munson's telephone call had no relevancy to the validity of Burbine's waiver.[44]

Burbine was subsequently convicted of first degree murder and he appealed to the Supreme Court of Rhode Island.[45] A divided court affirmed the lower court's decision and rejected Burbine's argument that the fifth and fourteenth amendments necessitated the suppression of the inculpatory statements.[46] In support of its conclusion, the Supreme Court of Rhode Island stated: "It hardly seems conceivable that the additional information that an attorney whom [Burbine] did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver."[47] Irrespective of the value this information may have had to Burbine, the court held that "the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties. . . ."[48] In addition, the court affirmed the trial court's finding that the record did not indicate conspiracy or collusion because the two different police departments were operating in the Cranston station at the time of Munson's phone call.[49]

After the United States District Court of Rhode Island denied Burbine's writ of habeas corpus,[50] Burbine filed an appeal to the United States Court of Appeals for the First Circuit.[51] The appeal alleged that his fifth, sixth and fourteenth amendment rights were violated.[52] The court of appeals did not reach Burbine's sixth and fourteenth amendment claims. The appellate court, however, reversed the district court's denial of the petition for the writ of habeas corpus on two grounds.[53] The appellate court stated that the police's failure to tell Burbine that an attorney had called offer-

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42 *Id.* (quoting *Burbine*, 451 A.2d at 24).
43 *Id.* (quoting *Burbine*, 451 A.2d at 28).
44 *Id.* at 1139-40 (quoting *Burbine*, 451 A.2d at 28).
45 *Id.* at 1140 (quoting *Burbine*, 451 A.2d at 22).
46 *Id.* (quoting *Burbine*, 451 A.2d at 29).
47 *Burbine*, 451 A.2d at 29.
48 *Id.* at 28.
49 *Id.* at 29 n.5.
50 Burbine v. Moran, 589 F. Supp. 1245, 1246 (D. R.I. 1984).
51 Burbine v. Moran, 753 F.2d 178, 179 (1st Cir. 1985).
52 *Id.*
53 *Id.*

ing assistance, along with the misleading advice given to the attorney, "vitiates any claim that a waiver of counsel was knowing and voluntary" and violated Burbine's fifth amendment right to counsel and his privilege against self-incrimination.[54] The court of appeals concluded that the record revealed that it was Burbine, and not the police, who spontaneously initiated the conversation that led to the first and most damaging confession.[55] The court of appeals also found that the record supported a finding that the police's refusal to tell Burbine of Munson's call was "deliberate or reckless irresponsibility."[56] The United States Supreme Court granted certiorari[57] "to decide whether a pre-arraignment confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him."[58]

IV. Supreme Court Opinions

A. Majority Opinion

In *Moran v. Burbine*,[59] a divided United States Supreme Court reversed the appellate court holding that the court of appeals erred in concluding that Burbine's fifth amendment rights had been violated.[60] Justice O'Connor delivered the majority opinion. She stressed that the constitutional right to request an attorney lies exclusively with the defendant[61] and added that the right to counsel should not be asserted by an attorney whose presence was never requested by the suspect.[62] Justice O'Connor relied heavily on her interpretation of the underpinnings of *Miranda*.[63] She reasoned, furthermore, that the facts of *Moran* did not warrant an expansion of police duties to include advising a suspect of an attorney's communication, thereby blemishing the clarity of *Miranda*.[64]

Justice O'Connor began by briefly examining how *Miranda* protects an individual's fifth amendment rights.[65] Recognizing the

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54 *Id.* at 187.
55 *Id.* at 180.
56 *Id.* at 185.
57 Moran v. Burbine, 105 S. Ct. 2319.
58 *Moran*, 106 S. Ct. at 1140.
59 106 S. Ct. 1135.
60 *Id.* at 1145.
61 *Id.* at 1142.
62 *Id.*
63 *See Id.* at 1141.
64 *Id.* at 1143.
65 *Id.* at 1140-41.

"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,"[66] Justice O'Connor stated that *Miranda* imposed the duty on those questioning a suspect to "inform [a suspect] of his rights to remain silent and to 'have counsel present . . . if [he] so desires.' "[67] In addition, Justice O'Connor stated that "*Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings."[68]

The standard for determining the validity of a waiver, asserted Justice O'Connor, was first stated in *Johnson v. Zerbst*[69] and later adopted in *Miranda*.[70] This standard incorporates the proposition that a " 'defendant may waive effectuation' of the rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.' "[71] Justice O'Connor stated that only if this standard is met given the " 'totality of the circumstances surrounding the interrogation' " may a court properly conclude that the waiver was valid.[72] The record, according to Justice O'Connor, clearly revealed the validity of Burbine's waiver of his rights to remain silent and of the presence of counsel.[73]

Justice O'Connor agreed with the court of appeals' finding that the waiver was voluntary.[74] She rejected, however, the court of appeals' conclusion that the failure of the police to inform Burbine of

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66 *Id.* at 1140 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

67 *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 468-70 (1966)). Justice O'Connor added that *Miranda* required that the police, before questioning a suspect, "must fully apprise the suspect of the state's intention to use [the suspect's] statements to secure a conviction." *Id.*

68 *Id.* at 1141.

69 304 U.S. 458, 464, (1938)(waiver must be intelligent, and whether there was such a waiver must depend upon the particular facts and circumstances, including background, experience, and conduct of the accused).

70 *Moran*, 106 S. Ct. at 1141.

71 *Id.* at 1141 (citation omitted). Justice O'Connor added that the inquiry as to the validity of a waiver requires an examination of two factors:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

Id. (citation omitted).

72 *Id.* (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)).

73 *Id.*

74 *Id.* Referring to the court of appeals, Justice O'Connor stated that "the record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit the statements." *Id.* (citing Burbine v. Moran, 753 F.2d 178, 184 (1st Cir. 1985)). Indeed, Justice O'Connor asserted, it was not the police, but rather Burbine who spontaneously began the conversation which illicited the most damaging testimony. *Id.* Justice O'Connor added that the record revealed that Burbine fully understood his

Munson's phone call was "deliberate or reckless" conduct which would invalidate an otherwise proper waiver.[75] In support of the majority's reversal, Justice O'Connor reasoned that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."[76] While conceding that it may be true that information that a lawyer had contacted the police may have affected Burbine's decision to confess, Justice O'Connor stated that the Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights."[77] The proper analysis, according to Justice O'Connor, is that

> [o]nce it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.[78]

Justice O'Connor also rejected the court of appeals' conclusion that the failure of the police to inform Burbine of the attorney's telephone call rose to a level of culpability that should have affected whether a waiver of Burbine's *Miranda* rights was properly obtained.[79] Justice O'Connor emphasized, moreover, that "even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least

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rights provided in the *Miranda* warnings and the consequences he would face if he chose to waive them. *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 1142. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 316 (1985)(information about the nature and quality of the evidence and consequences of a suspect's decision need not be told); United States v. Washington, 431 U.S. 181, 188 (1977)(no requirement of warning about "target" status as prerequisite to noncustodial interrogation preceding a grand jury). *Cf.* Hill v. Lockhart, 106 S. Ct. 366, 367 (1985)(no requirement to inform suspect of his parole eligibility date); McMann v. Richardson, 397 U.S. 759, 769 (1970)(an intelligent waiver does not depend on whether all advice given by the suspect's attorney was correct when examined *post-hoc*). In a footnote, Justice O'Connor sharply rejected the dissent's argument that the fifth amendment "right to counsel" requires the police to inform a suspect of any other matters that may help him make his decision of whether to speak or to remain silent. *Moran*, 106 S. Ct. at 1142 n.1. The fifth amendment, asserted Justice O'Connor, requires only "that the police inform the suspect of his right to representation and honor his request that the interrogation cease until his attorney is present. *Id. See* Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975).

[78] *Moran*, 106 S. Ct. at 1142 (footnote omitted).

[79] *Id.* Justice O'Connor further questioned whether the court of appeals was free to make a conclusion that the police's conduct was " 'deliberate or reckless irresponsibility.' " *Id.* (quoting Burbine v. Moran, 753 F.2d 178, 185 (1st Cir. 1985)).

aware of the incident."[80] Justice O'Connor added that absent conspiracy or collusion, the failure of the police to inform Burbine of the phone call from his attorney, while objectionable as a matter of ethics, has no relevancy to the constitutional validity of a waiver unless "it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[81] Justice O'Connor asserted that Burbine comprehended all of the information the police were required to convey under the dictates of *Miranda*.[82]

Justice O'Connor then rejected Burbine's argument that the conduct of the Providence Police was so adverse to the fifth amendment underpinnings of *Miranda* that the conviction should be reversed so as to condemn the police's behavior.[83] Justice O'Connor stated that Burbine's contention "ignores the underlying purpose of the *Miranda* rules," because *Miranda* already "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights."[84] Justice O'Connor asserted, in addition, that interpreting *Miranda* as forbidding police deception of a lawyer " 'would cut [the decision] completely loose from its own explicitly stated rationale.' "[85] The purpose of *Miranda* warnings, Justice O'Connor argued,

> is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.[86]

Justice O'Connor next stressed the clarity and ease of applying the *Miranda* standard.[87] If police are required to inform a suspect of

80 *Moran*, 106 S. Ct. at 1142. *Compare* Escobedo v. Illinois, 378 U.S. 478, 481 (1964)(incriminating statements excluded where the suspect was told, incorrectly, that his attorney " 'didn't want to see' him").

81 *Moran*, 106 S. Ct. at 1142.

82 *Id.*

83 *Id.* at 1143.

84 *Id.*

85 *Id.* (quoting Beckwith v. United States, 425 U.S. 341, 345 (1976)). Justice O'Connor noted that it is well established that "[t]he . . . *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.' " *Id.* (quoting New York v. Quarles, 467 U.S. 649, 654 (1984) and Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

86 *Id.* at 1143.

87 *Id.* at 1143. One of the advantages of the *Miranda* doctrine is the clarity of the rule that suspects must be given warnings before being interrogated while in custody. *Id. See also* New York v. Quarles, 467 U.S. 649, 660 (1984)(O'Connor, J., concurring in part and

an attorney's efforts to contact him, Justice O'Connor reasoned, then the simplicity of applying *Miranda* would diminish without greatly reducing the compulsion suspects confront in custodial interrogations.[88] A limitless panoply of questions would arise, Justice O'Connor continued, when a court examines the validity of a suspect's waiver.[89] Furthermore, the police would have difficulty knowing how to conduct a custodial interrogation.[90] Such a "Pandora's box," according to Justice O'Connor, should be avoided.[91]

Justice O'Connor concluded that while an individual may benefit if the police inform him of an attorney's attempt to contact him, such a benefit would be minimal.[92] Justice O'Connor reasoned that the benefit was outweighed by the possible shift in the balance *Miranda* sought between effective law enforcement and an individual's ability to overcome the inherently coercive atmosphere of an interrogation.[93] *Miranda*, Justice O'Connor added, requires that a suspect fully comprehend his rights to remain silent and his rights to an attorney.[94] Justice O'Connor stressed that demanding the police to inform a suspect of an attorney's inquiry puts an unwarranted "handicap" on the police in their investigatory efforts.[95]

Acknowledging that her reluctance to expand *Miranda* was con-

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dissenting in part)(admission of evidence secured without the benefit of *Miranda* warnings lessens the clarity of *Miranda*); Fare v. Michael C., 442 U.S. 707, 718 (1979)("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation. . . .").

[88] *See Moran*, 106 S. Ct. at 1143.

[89] *Id.* Among those questions Justice O'Connor believed would act as legions on the clarity of *Miranda* are the following:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows or must the interrogating officer himself know of counsel's effort to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

Id.

[90] *Id.* at 1143, 1144 (citing Fare v. Michael C., 442 U.S. 707, 718 (1979).

[91] *See Id.*

[92] *Id.* at 1144.

[93] *Id.* at 1144 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 255 (1973)). Citing United States v. Washington, 431 U.S. 181 (1977), Justice O'Connor stressed the importance of obtaining confessions. *Id.* at 186. She also noted that New York v. Quarles, 467 U.S. 649, 654 (1984) reaffirmed *Miranda*'s recognition that custodial interrogation is "inherently coercive." *Moran*, 106 S. Ct. at 1144. Justice O'Connor reasoned that "*Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation. . . ." *Id.* (emphasis original).

[94] *Moran*, 106 S. Ct. at 1144.

[95] *Id.*

trary to other authorities,[96] Justice O'Connor asserted that "our interpretive duties go well beyond deferring to the numerical preponderance of lower court decisions or to the subconstitutional recommendations of even so esteemed a body as the American Bar Association."[97] In addition, Justice O'Connor qualified her holding, stating that "[n]othing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."[98]

Following her discussion of Burbine's fifth amendment argument, Justice O'Connor addressed Burbine's sixth amendment contentions concerning exclusion of his three confessions.[99] Justice O'Connor conceded that, absent a waiver, a suspect has a sixth amendment right to counsel after being formally charged[100] and that the police may not obstruct the efforts of a suspect's attorney to act as a "medium" between the state and the suspect.[101] Justice O'Connor noted, however, that the interrogation of Burbine took place before formal judicial proceedings commenced.[102] Moreover, Justice O'Connor was not persuaded that decisions subsequent to *Escobedo* and *Miranda* stand "for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings."[103] *Escobedo*, Justice O'Connor stated, was originally decided as a sixth amendment case.[104] In retrospect, however, the Supreme Court has consistently viewed *Escobedo* not as a constitutional right to counsel case but as a

96 *See infra* note 125 and accompanying text.

97 *Moran*, 106 S. Ct. at 1144.

98 *Id.* at 1145.

99 *Id.*

100 *Id. See* United States v. Gouveia, 467 U.S. 180, 183 (1984)(A suspect is not constitutionally entitled to the appointment of counsel while he is in administrative segregation and before any adversary judicial proceedings had been initiated against him.); Kirby v. Illinois, 406 U.S. 682, 687 (1972)("Showup after arrest, but before the initiation of any adversary criminal proceeding[,] whether by way of formal charge, preliminary hearing, indictment, information, or arraignment[,] . . . is not a criminal prosecution at which the accused, as a matter of absolute right, is entitled to counsel."); Brewer v. Williams, 430 U.S. 387, 390 (1972)(right to counsel is triggered at or after the time that judicial proceedings have been initiated).

101 *Moran*, 106 S. Ct. at 1145. *See* Maine v. Moulton, 106 S.Ct. 477, 485 (1985)(sixth amendment imposes affirmative obligation on police to respect and preserve accused's right to counsel); Brewer v. Williams, 430 U.S. 387, 401 (1972).

102 *Moran*, 106 S. Ct. at 1145.

103 *Id.* Justice O'Connor also noted that the Rhode Island Supreme Court found that no attorney-client relationship existed between the respondent and Ms. Munson. *Id.* at 1145 n.3. Furthermore, even if the Court accepted the existence of the attorney-client relationship, Justice O'Connor stated that the Court would reject the assertion that the attorney-client relationship "triggers" the sixth amendment right to an attorney. *Id.*

104 *Id.* at 1145-46.

guarantee against self-incrimination case.[105]

Justice O'Connor criticized Burbine's understanding of the sixth amendment.[106] According to Justice O'Connor, the sixth amendment does not wrap "a protective cloak around the attorney-client relationship."[107] In addition, Justice O'Connor concluded that "it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation."[108] Justice O'Connor asserted that the purpose of the sixth amendment "is to assure that in any 'criminal prosecutio[n],' the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.' "[109]

Justice O'Connor then reasserted "that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges."[110] Thus, Justice O'Connor reasoned that despite the fact that the presence of counsel would help a suspect during interrogation or other "critical" stages before formal judicial proceedings,[111] the interrogation, standing alone, does not invoke a constitutional right to counsel.[112]

Finally, Justice O'Connor focused on Burbine's claim that he was deprived of his rights under the due process clause of the fourteenth amendment.[113] While asserting that the Court does not approve all forms of police misconduct,[114] Justice O'Connor

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[105] *Id.* at 1146. Supporting this interpretation of *Escobedo*, Justice O'Connor cited Johnson v. New Jersey, 384 U.S. 719 (1966). The Court in *Johnson* declared that since "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." *Johnson*, 384 U.S. at 730. *See also* United States v. Gouveia, 467 U.S. 180, 188 n.5 (1984); Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 217-18 n.94 (1980).

[106] *Moran*, 106 S. Ct. at 1146. Burbine claimed that the police obstructed his sixth amendment attorney-client relationship. *Id.* at 1145.

[107] *Id.* at 1146.

[108] *Id.*

[109] *Id.* (citations omitted).

[110] *Id.*

[111] *Id.* at 1147. Justice O'Connor referred to a pre-indictment lineup as one of these critical events. *See Id.* She noted, however, that representation by an attorney during a pre-trial line up was at issue in *Kirby*. *Id.* In *Kirby*, the Court rejected the argument that such an event triggers the sixth amendment right to counsel. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[112] *Moran*, 106 S. Ct. at 1147.

[113] *Id.* Burbine argued that the conveying of false information to his attorney should be considered violative of the due process standard articulated in Synder v. Massachusetts, 291 U.S. 97, 105 (1934)(Police behavior should be condemned if it violates the "tradition and conscience of our people"). *Id.*

[114] *See Moran*, 106 S. Ct. at 1147. Justice O'Connor castigated Justice Stevens for

concluded that the facts of *Moran* demonstrate that "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."[115] Accordingly, the Court reversed the court of appeals and held that Burbine's three inculpatory statements were improperly excluded.[116]

B. DISSENTING OPINION

Justice Stevens dissented from the Court's opinion.[117] He carefully outlined the facts of the case and concluded that Burbine's waiver of his constitutional rights was invalid. In addition, he attacked the majority's assumption that affirming the appellate court's decision would blur the clarity of *Miranda*.

Justice Stevens first chastised the majority's departure from the Supreme Court's previous holding that our justice system is "an accusatorial and not an inquisitorial system."[118] Justice Stevens then outlined the consequences of the majority's opinion. Noting that a lawyer contacted by the suspect's family may act on behalf of the suspect,[119] Justice Stevens concluded that the majority opinion

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asserting that the Court has approved of all forms of police conduct. *Id.* Justice O'Connor argued that Oregon v. Elstad, 470 U.S. 298 (1985) effectively foreclosed the dissent's major premise that *Miranda* necessitates that the police provide the suspect with all the relevant information he may need to decide to speak or invoke his constitutional right to remain silent. *Moran*, 106 S. Ct. at 1147 n.4. Justice O'Connor also cited United States v. Washington, 431 U.S. 181 (1977)(The fifth amendment privilege against self-incrimination applies to grand jury proceedings but "the Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions"). *Moran*, 106 S. Ct. at 1147 n.4. Justice O'Connor also condemned Justice Stevens for his "agency" theory, which postulates that the deception of an attorney can be equated with a deception of his client. *Id.* Justice Steven's agency theory, asserted Justice O'Connor, "entirely disregards the elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled." *Id.* Justice O'Connor also strongly criticized the dissent's interpretation of *Miranda*. *Id.* As stated in Michigan v. Mosley, 423 U.S. 96 (1975), "the interrogation must cease until an attorney is present only '[i]f the individual states that he wants an attorney.' " *Mosley*, 423 U.S. at 104 n.10 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)). Therefore, Justice O'Connor stated, the dissent was mistaken when it claimed the suspect's right to an attorney began at the initiation of the interrogation. *Moran*, 106 S. Ct. at 1147 n.4. Finally, Justice O'Connor claimed that the dissent was mistaken when it suggested that the majority supported police deception. *Id.* Justice O'Connor asserted, it is "simply wrong" to claim that *Miranda* as written mandates the exclusion of Burbine's confession. *Id.*

[115] *Id.* at 1148.

[116] *Id.*

[117] Justice Stevens was joined by Justices Brennan and Marshall in dissent.

[118] *Moran*, 106 S. Ct. at 1148 (Stevens, J., dissenting)(quoting Miller v. Fenton, 106 S. Ct. 445, 449 (1985)).

[119] *Id.* at 1148 n.2 (Stevens, J., dissenting).

sanctions the deception of a suspect.[120] Withholding information from the suspect, according to Justice Stevens, is justified by the majority because:

> Although the information would affect the client's assertion of his rights, the client's actions in ignorance of the availability of his attorney are voluntary, knowing, and intelligent; additionally, society's interest in apprehending, prosecuting, and punishing criminals outweighs the suspect's interest in information regarding his attorney's efforts to communicate with him.[121]

Justice Stevens asserted that the majority's emphasis on the states' need to interrogate suspects is gained at the expense of losing "those liberties and rights" this nation gives to suspects "that distinguishes this society from most others."[122]

Justice Stevens then stated that the majority's conclusion ignored the Court's repeated concern about incommunicado custodial interrogation.[123] Justice Stevens contended, furthermore, that the police deception violated the American Bar Association's Standards for Criminal Justice[124] and "completely rejects an entire body of law on the subject."[125] These cases,[126] Justice Stevens asserted, stand for the proposition that the "police may not interfere with communicatons between an attorney and the client whom they are questioning."[127] In the case at bar, Justice Stevens asserted that the majority "flatly rejects" this proposition.[128]

Justice Stevens then reiterated and added to the factual record concerning the respondent's incriminating statements[129] and concluded that "the failure to inform Burbine of the call from his attorney makes the subsequent waiver of his constitutional rights invalid."[130] Justice Stevens reasoned that there is a presumption against the validity of waivers and that the heavy burden of proving a valid waiver of one's *Miranda* rights rests with the government.[131]

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[120] *See Id.* at 1148 (Stevens, J., dissenting).

[121] *Id.* at 1148-49 (Stevens, J., dissenting).

[122] *Id.* at 1149 (Stevens, J., dissenting).

[123] *Id.* at 1150 (Stevens, J., dissenting). *See also id.* at 1150 n.9 (Stevens, J., dissenting).

[124] *Id.* at 1151. *See* STANDARDS FOR CRIMINAL JUSTICE § 5-5.1 (2d Ed. 1980).

[125] *Moran*, 106 S. Ct. at 1151 (Stevens, J., dissenting). *See Id.* at 1151 n.10 (Stevens, J., dissenting).

[126] *See supra* note 125 and accompanying text.

[127] *Moran*, 106 S. Ct. at 1152 (Stevens, J., dissenting).

[128] *Id.* at 1152-53 (Stevens, J., dissenting).

[129] *See supra* notes 18, 19, 20, 34, 35 and accompanying text.

[130] *Moran*, 106 S. Ct. at 1157 (Stevens, J., dissenting).

[131] *Id.* (Stevens, J., dissenting). Justice Stevens summarized the following cases to support the presumption that since interrogations are inherently coercive, the burden of proof is a heavy one: Brewer v. Williams, 430 U.S. 387, 404 (1977)("courts indulge in every reasonable presumption against waiver"); Miranda v. Arizona, 384 U.S. 436, 475

This heavy burden of proof, Justice Stevens maintained, should be measured on a case-by-case examination of the totality of the circumstances surrounding the waiver[132] with a strict presumption against the validity of a suspect's waiver.[133] Thus, according to the dissent, there should be a strict presumption against the validity of a statement such as Burbine's if the police "threatened, tricked, or cajoled" the suspect.[134] Justice Stevens asserted that the mistatements made by the police and the concealment of the fact that Burbine's sister had retained an attorney were indistinguishable from the "threats"or "trickery" referred to in *Miranda*.[135]

Justice Stevens admonished the majority for making a false comparison.[136] The majority compared a suspect faced with the same circumstances as Burbine with "the same defendant . . . had a lawyer not telephoned the police station."[137] Justice Stevens asserted that *Miranda* requires an assessment of police conduct and of the weight the suspect gave to that conduct in making his decision to waive his constitutional rights.[138] The appropriate comparison, stated Justice Stevens, "is between a suspect in Burbine's position and a suspect who is otherwise tricked and deceived into a waiver of his rights."[139]

(1966)("Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders");Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(" 'courts indulge every reasonable presumption against waiver' of fundamental constituitonal rights and . . . we 'do not presume acquiescence in the loss of fundamental rights' ")(footnotes omitted). *Id.* at 1157 n.32 (Stevens, J., dissenting).

[132] *Id.* at 1157 (Stevens, J., dissenting). Justice Stevens referred to Fare v. Michael C., 442 U.S. 707, 724-25 (1979); North Carolina v. Butler, 441 U.S. 369, 374-75 (1978)(per se rule is not acceptable; the question of waiver requires an examination of the particular facts and circumstances surrounding the case); Faretta v. California, 422 U.S. 806, 835 (1975)(must recognize that accused managed his own defense when determining whether his waiver was made "knowingly and intelligently").

[133] *Moran*, 106 S. Ct. at 1157 (Stevens, J., dissenting). Justice Stevens stated that *Miranda* and Edwards v. Arizona, 451 U.S. 477 (1981), established that if a suspect is not given certain warnings or:

> if police initiate questioning after the defendant has invoked his right to counsel . . . the waiver is invalid as a matter of law even if evidence overwhelmingly establishes, as a matter of fact, that "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew that he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statement to secure a conviction.

Moran, 106 S. Ct. at 1157 (Stevens, J., dissenting).

[134] *Id.* at 1158 (Stevens, J., dissenting)(quoting Miranda v. Arizona, 384 U.S. 436, 476 (1966)).

[135] *Id.* (Stevens, J., dissenting).

[136] *See id.* at 1158 n.39 (Stevens, J., dissenting).

[137] *Id.* (Stevens, J., dissenting)(citation omitted).

[138] *Id.* at 1158 n.39 (Stevens, J., dissenting).

[139] *Id.* (Stevens, J., dissenting).

Before concluding that Burbine's waiver was invalid, Justice Stevens questioned the majority's refusal to address the numerous state court decisions confronting similar types of police deception.[140] Justice Stevens suggested that the state courts, unlike the majority, "realized that attorney communication to the police about the client is an event that has a direct 'bearing' on the knowing and intelligent waiver of constitutional rights."[141] Indeed, Justice Stevens reasoned, the police's action was "not simply a failure to provide 'useful' information; rather, it [was an] affirmative police interference in a communication between an attorney and a suspect."[142] Such "affirmative" police behavior violated "settled principles about construing waivers of constitutional rights and about the need for strict presumptions in custodial interrogations, as well as a plain reading of the *Miranda* opinion itself."[143]

Justice Stevens then addressed the majority's alternative argument claiming that the careful "balance" of *Miranda* would be jeopardized by requiring the police to inform a suspect of his attorney's efforts to communicate with him.[144] Justice Stevens concluded that the majority's balancing approach was "misguided."[145] Justice Stevens conceded, however, that requiring the police to inform suspects of an attorney's communication would decrease the frequency of confessions.[146] The cost society incurs by decreasing the frequency of confessions is "the same cost that this Court has repeatedly found necessary to preserve the character of our free society and our rejection of an inquisitorial system."[147]

Justice Stevens maintained that "the assumed right of the police to interrogate a suspect is no right at all; at best, it is a mere privilege terminable at the will of the suspect."[148] Justice Stevens suggested that when the majority referred to "costs" its apprehensions

[140] *See id.* at 1159 (Stevens, J., dissenting).
[141] *Id.* (Stevens, J., dissenting).
[142] *Id.* at 1160 n.42 (Stevens, J., dissenting).
[143] *Id.* at 1160 (Stevens, J., dissenting).
[144] *See id.* (Stevens, J., dissenting).
[145] *Id.* (Stevens, J., dissenting).
[146] *Id.* (Stevens, J., dissenting).
[147] *Id.* (Stevens, J., dissenting).
[148] *Id.* at 1161 (Stevens, J., dissenting). *See* Escobedo v. Illinois, 378 U.S. 478 (1964)(defendant's confession excluded when he was not permitted to meet and consult with his attorney, and his attorney was similarly not permitted to see him); Miranda v. Arizona, 384 U.S. 436, 480-81 (1966)("An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising . . . good professional judgment . . . ."); Dunaway v. New York, 442 U.S. 200 (1979)(confession obtained after arrest without probable cause was inadmissible; the police do not have a "right" to take a suspect into custody and question him).

were misplaced.[149] "Cost," according to Justice Stevens, is simply an assertion of "the rights that are afforded by our system of criminal justice."[150] The majority's conclusion, Justice Stevens argued, was simply a failure "to appreciate the value of the liberty that an accusatorial system seeks to protect."[151]

Justice Stevens then focused on the majority's argument that the "clarity" of *Miranda* would be undermined if the police were required to advise a suspect of an attorney's attempt to reach him.[152] According to Justice Stevens, the additional questions[153] that may result from requiring the police to inform a suspect of an attorney's request to communicate with him are easily answered.[154] Justice Stevens added, furthermore, that the clarity of *Miranda* is not exclusively intended to serve the police but rather is "intended to provide adequate guidance to the person in custody who is being asked to waive the protections afforded by the Constitution."[155]

According to Justice Stevens, attorney Munson was acting as Burbine's counsel at the time she telephoned the Cranston Police Station.[156] Based on principles of agency law, Justice Stevens concluded that "the police deception of Munson was tantamount to de-

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149 *See Moran*, 106 S. Ct. at 1161 (Stevens, J., dissenting).

150 *Id.* (Stevens, J., dissenting).

151 *Id.* at 1162 (Stevens, J., dissenting).

152 *Id.* (Stevens, J., dissenting).

153 Justice Stevens outlined the questions and his responses as follows:

> (1) "To what extent should the police be held accountable for knowing that the accused has counsel?" The simple answer is that police should be held accountable to the extent that the attorney or the suspect informs the police of the representation.
>
> (2) "Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect?" Obviously, police should be held responsible for getting a message of this importance from one officer to another.
>
> (3) "Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?" As the facts of this case forcefully demonstrate, the answer is "yes."

Id. at 1162 n.46 (Stevens, J., dissenting)(citations omitted).

154 *Id.* (Stevens, J., dissenting).

155 *Id.* at 1162 (Stevens, J., dissenting). Justice Stevens illustrated how the majority's interpretation of clarity in *Miranda* is one-sided by citing Pfeil v. Rogers, 106 S. Ct. 53 (1985) and Barrett v. United States Customs Service, 106 S. Ct. 393 (1985) as examples of the difficulty the Court has had in determining whether a suspect's resources are adequate to afford an attorney. *Moran*, 106 S. Ct. at 1162 n.47 (Stevens, J., dissenting). Additionally, Justice Stevens referred to Wainwright v. Greenfield, 106 S. Ct. 634 (1986); Doyle v. Ohio, 426 U.S. 610 (1976); and Griffin v. California, 380 U.S. 609 (1965), to demonstrate the difficulty suspects have in convincing themselves that their silence will not be construed as an admission of guilt. *Moran*, 106 S. Ct. at 1162 n.47 (Stevens, J., dissenting).

156 *Moran*, 106 S. Ct. at 1163 (Stevens, J., dissenting).

ception of Burbine himself."[157] Misleading attorney Munson and failing to inform Burbine of the attorney's communication, Justice Stevens maintained, was relevant in determining whether Burbine validly waived his *Miranda* rights, because these actions limited the protection to which Burbine was entitled.[158] Justice Stevens stated that such a conclusion is not inconsistent with *Escobedo v. Illinois*[159] where the Court held that the police cannot deny attorneys access to their incarcerated clients.[160]

Finally, Justice Stevens ridiculed the majority for its cursory analysis of whether the facts exhibited a violation of Burbine's right to due process.[161] He asserted that the Supreme Court has consistently held that under certain circumstances interrogation techniques will be condemned as offensive to the due process clause of the fourteenth amendment.[162] Justice Stevens concluded that the majority's analysis of due process was faulty because they applied a "shock the conscience" test[163] rather than focusing on whether the criminal justice system operated with fairness, integrity, and honesty.[164] These three elements of fairness, integrity and honesty, concluded Justice Stevens, were tarnished by the police's interference with communication between Burbine and his attorney and consequently revealed a violation of Burbine's right to due process.[165]

VI. Discussion and Analysis

Moran v. Burbine exemplifies the Supreme Court's recent efforts

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157 *Id.* (Stevens, J., dissenting). Such a conclusion, declared Justice Stevens, is derived from the courts decision in Brewer v. Williams, 430 U.S. 387, 405 (1977)(the Court concluded that the suspect "had effectively asserted his right to counsel by having secured attorneys at both ends of an automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey"). *Moran*, 106 S. Ct. at 1163 n.49 (Stevens, J., dissenting).

158 *See Moran*, 106 S. Ct. at 1163 (Stevens, J., dissenting).

159 378 U.S. 478 (1964).

160 *Moran*, 106 S. Ct. at 1164 (Stevens, J., dissenting).

161 *See Id.* (Stevens, J., dissenting).

162 *Moran*, 106 S. Ct. at 1165 n.62 (Stevens, J., dissenting). *See* Miller v. Fenton, 106 S. Ct. 445 (1985)(due process clause of fourteenth amendment bars the admission of a confession coerced by a detective pretending to be sympathetic to the accused's plight); Mincey v. Arizona, 437 U.S. 385 (1978)(warrantless search of suspect's apartment violated fourteenth amendment due process clause and was not permissible simply because a homicide had occured there); Beecher v. Alabama, 389 U.S. 35 (1967)(per curiam)(violation of due process clause of fourteenth amendment to admit confession into evidence obtained when suspect was still in pain in a prison hospital and under the influence of drugs).

163 *Moran*, 106 S. Ct. at 1165 (Stevens, J., dissenting).

164 *Id.*

165 *See id.* at 1166.

to contain the expansion of a suspect's *Miranda* rights which occurred during the early years of the Burger Court.[166] In deciding fifth amendment self-incrimination questions, courts must balance the interests of protecting society from crime against preserving individual constitutional liberties.[167] In *Moran*, the Court adhered to the basic holding of *Miranda* which mandates the exclusion of a suspect's confession absent the requisite warnings. The Court, however, departed from the underlying values of *Miranda* and the fifth amendment in an apparent attempt to ease the burden on police in their efforts to obtain voluntary confessions.

Miranda and the fifth amendment values underlying it represent the Court's efforts to preserve the accusatorial nature of the criminal justice system while simultaneously limiting the compelling pressures an individual faces to confess.[168] *Miranda* seeks to insure that a suspect makes a rational and unfettered choice.[169] The *Miranda* Court ruled that custodial interrogation is "inherently coercive" and that an absolute right of counsel is "indispensable" to the protection of the fifth amendment privilege against self-incrimination.[170] The *Miranda* Court further reasoned that an attorney's presence emphasizes a suspect's right to remain silent in a manner that formalistic warnings by an adversarial party cannot.[171] The presence of counsel, according to *Miranda*, not only assures a suspect of informed advice, but also reduces the likelihood that a confession will be involuntary, untrustworthy, or inaccurately reported at trial.[172]

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166 *See* Moran v. Burbine, 72 A.B.A.J. 58, 61 (Jan. 1986). For a discussion of the Court's recent trend regarding the *Miranda* doctrine, see Note, *Fifth Amendment—Fifth Amendment Exclusionary Rule: The assertion and Subsequent Waiver of the Right to Counsel*, 74 J. CRIM. L. & CRIMINOLOGY 1315 (1983). *See also* Grossman and Lane, Miranda: *The Erosion of a Doctrine*, 62 CHI. B. REC. 250 (1981); Sonenshein, Miranda *and The Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99 (1977).

167 *See* Miranda v. Arizona, 384 U.S. 436, 469-70 (1966).

168 *See Miranda*, 384 U.S. at 469-70. "Our aim is to assure that the individuals' right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights." *Id. See also* Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429, 453 ("requiring the police to inform suspects of their right to remain silent, the *Miranda* Court sought to guarantee that the accusatorial safeguards were not rendered meaningless by police interrogation practices").

169 *See Miranda*, 384 U.S. at 469-70.

170 *Id.* at 468-69.

171 *Id.*

172 *Id.*

Miranda, therefore, developed a prophylactic rule[173] requiring an effective means of ensuring a suspect's right of access to counsel. While a prescribed set of warnings are a required prerequisite to a "voluntary," "knowing," and "intelligent" waiver, the *Miranda* Court noted that the examination of the validity of a waiver does not conclude there.[174] The final test, according to the *Miranda* Court, is whether "*any* evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show the defendant did not voluntarily waive his privilege."[175]

Justice O'Connor was incorrect for several reasons in concluding that attorney Munson's attempt to contact Burbine and the failure of the Cranston Police to inform Burbine of the attorney's attempt were unimportant in the consideration of whether Burbine knowingly relinquished his constitutional right.[176] As the American Bar Association stated in its *amicus curiae* brief:

> [i]t will often be highly important to the arrested individual to know not only that he has a theoretical right to have some lawyer present at an indefinite time in the future but that a specific lawyer has already been retained for him by his family and is attempting to contact him.[177]

Knowledge that an attorney has advised the police not to question the suspect without his attorney present would better illustrate to a suspect the potential ramifications of an uncounseled waiver of his rights. Indeed, it is persuasive that the majority of states have declared that under facts similar to *Moran*, the information witheld by the police is considered "vital" and consequently the suspect's waiver of his right to counsel is not "voluntary," "knowing," and "intelligent."[178]

Justice O'Connor admitted that knowing an attorney had contacted the police station on Burbine's behalf would have been useful to the respondent.[179] She concluded, however, that the Constitu-

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[173] *See* Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U.L. Rev. 100, 106-11 (1985).

[174] *See Miranda*, 384 U.S. at 476.

[175] *Id.* (emphasis added).

[176] *See Moran*, 106 S. Ct. at 1142.

[177] Brief Amicus Curiae (American Bar Association) for Respondent at 10, Moran v. Burbine, 106 S. Ct. 1135 (1986)(No. 84-1485).

[178] *See* Weber v. State, 457 A.2d 674, 685-87 (1983); People v. Smith, 93 Ill. 2d 179, 188, 442 N.E.2d 1325, 1329 (1982); State v. Matthews, 408 So. 2d 1274, 1278 (La. 1982); State v. Haynes, 288 Or. 59, 72, 602 P.2d 272, 278 (1979); State v. Jones, 19 Wash. App. 850, 853, 578 P.2d 71, 73 (1978)("To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually able to provide at least initial assistance and advise . . . . A suspect indifferent to the first offer may well react quite differently to the second.").

[179] *Moran*, 106 S. Ct. at 1142.

tion does not require the police to provide a suspect with all of the useful information available for him to make a decision to waive his rights.[180]

While Justice O'Connor may have been justified in concluding that a suspect is not entitled to all information, Burbine merely wanted to avoid reckless misleading by the police.[181] The police admittedly should not be required to provide all relevant information to an accused, but the police should not be permitted, as *Moran* allows, to withold, in a deceptive manner, crucial information. Such police created deception was a subtle method of compelling Burbine to act with an erroneous comprehension of the actual situation.[182] As Justice Stevens urged, "trickery" or "cajolery" vitiates the requirements of a "voluntary," "knowing," and "intelligent" waiver.[183] Consequently, there is no reason to distinguish between police deception and police omission given that both bear on the wisdom of a suspect's choice to waive counsel.[184]

In addition, it is equally unpersuasive to argue, as Justice O'Connor did, that events that occur outside the interrogation are irrelevant. It may appear logical to conclude that the test of validity of a waiver is to examine whether an individual who waives his right to counsel without a friend or family member ever retaining counsel is any different from a suspect waiving his right to counsel without being told counsel has been retained. Both defendants have the same amount of information and both have the same right to exercise their right to counsel. Providing equal information, however, does not authorize discriminatory treatment by the police. Indeed, the Supreme Court of California recently refused to follow *Moran*, noting that "[t]he doctrine of equal protection is society's shield against discriminatory treatment by the authorities. It is not a sword with which the authorities may deprive the accused of his counsel's

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180 *Id.*

181 *Id.* The ruling of the First Circuit stated:

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary.

Burbine v. Moran, 753 F.2d 178, 187 (1st Cir. 1985).

182 *See* Brief Amicus Curiae (National Association of Trial Lawyers) for Respondent at 10-12, Moran v. Burbine, 106 S. Ct. 1135 (1966)(No. 84-1485)(outlining further support for the contention that the information witheld from Burbine was material as to the validity of his constitutional waiver).

183 *Moran*, 106 S. Ct. at 1157-60 (Stevens, J., dissenting).

184 *See Id.* (Stevens, J., dissenting).

assistance."[185]

Justice O'Connor's concern with vitiating the "ease" and "clarity" of *Miranda's* application is not a sufficient justification for her holding.[186] Furthermore, Justice O'Connor provided little justification for her conclusion that requiring the police to inform an arrestee of an attorney's efforts to communicate with him "would work a substantial and . . . inappropriate shift in the subtle balance struck in [the *Miranda*] decision."[187]

Clearly, a requirement that the suspect be informed of his attorney's communication would add some additional burden to the police. Justice O'Connor, however, feared that such a requirement would tarnish the "clarity" of *Miranda* or greatly off-set the balance provided by *Miranda* so as to make the burden on the police unwarranted.[188] Such a fear is unfounded for several reasons.

First, the appellate court ruling was very narrow. The appellate court held that when an attorney-client relationship exists, the attorney and his client must not be affirmatively misled by the police.[189] Thus, under the rationale of the appellate court, the police would simply be required to act honestly and responsibly toward the attorney and his accused client. Such a burden is not substantial. Many state courts have ruled in accordance with the appellate court.[190]

In addition, the "clarity" of *Miranda* which Justice O'Connor referred to was misdirected. The clarity of *Miranda* is found in the set of warnings that must be given to suspects. As Justice Stevens stated, *Miranda* clarified a suspect's minimum rights in police custody.[191] When a suspect challenges the validity of a waiver, however, courts typically make a post hoc inquiry into the totality of the circumstances of the suspect's waiver to determine whether the waiver was "voluntary," "knowing," and "intelligent."[192] An exam-

185 People v. Houston, 42 Cal. 3d 595, —, 724 P.2d 1166, 1176, 230 Cal. Rptr. 141, 151 (1986)(holding the police could not deny suspect opportunity to meet with his retained or appointed counsel who has taken steps to come to his aid before questioning begins or resumes, and defendant's confession was inadmissible where police thwarted his constitutional right of access to his lawyer by rebuffing retained counsel's efforts to see him and by failing to inform him that attorney was at police station seeking to consult with him).

186 *See Moran*, 106 S. Ct. at 1143.

187 *Id.* at 1144.

188 *Id.*

189 *See supra* note 54 and accompanying text.

190 *See supra* note 125 and accompanying text. *See also Houston*, 42 Cal. 3d at —, 724 P.2d at 1175, 230 Cal. Rptr. at 150 ("A member of the State Bar is issued a card which identifies him as such, and any misrepresentation by an attorney is subject to discipline.").

191 *Moran*, 106 S. Ct. at 1161-63 (Stevens, J., dissenting).

192 *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (stating that the

ination into whether an attorney was deceived either actively or negligently should be a relevant consideration.

Finally, Justice O'Connor's desire to avoid frustrating society's interest in securing confessions has upset the balance between protecting society from crime and preserving individual constitutional liberties. The majority's decision clears the way for "the police to emasculate *Miranda* and the constitutional right to counsel."[193] Justice O'Connor granted

> that the "deliberate or reckless" witholding of information is objectionable as a matter of ethics, [but] such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.[194]

Given that Justice O'Connor believes that what occurs outside the presence of the suspect and unknown to him has no bearing on his waiver,[195] the potential for abuse by the police is great even though the suspect is read his *Miranda* rights.[196] Justice O'Connor is sanc-

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trial judge must examine circumstances and facts in their totality to determine whether a valid waiver has occurred); Fare v. Michael C., 442 U.S. 707, 724-25 (1979) (stating that the determination of whether an accused has knowingly and voluntarily waived his rights depends on all the facts of each particular case).

193 *Houston*, 42 Cal. 3d at —, 724 P.2d at 1176, 230 Cal. Rptr. at 151. *See also* Brief for Respondent at 12, Moran v. Burbine, 106 S. Ct. 1135 (1986)(No. 84-1485). The Brief for Respondent Burbine states:

> If the police can misrepresent whether or not there will be interrogation, then they can misrepresent when there will be interrogation. The police could tell a defense lawyer that questioning will commence in two hours, and then start the interrogation immediately. The police could also lie about where the interrogation will take place. They could tell an attorney that interrogation will take place at the station, and, just as the attorney arrives, they could whisk the defendant out the back door and interrogate him or her in another location. The police could lie about whether the defendant was in custody, telling an attorney that the client had made bail when, in fact, the client was still being held. The police could lie about the charges against the client, and about the court in which the defendant was to be arraigned. In short, the police could do anything they wanted to make sure that the attorney did not intercede prior to interrogation and, according to petitioner's argument, any deceptive tactics employed by the police would be forgiven by the simple expediency of *Miranda* warnings.

Id.

194 *Moran*, 106 S. Ct. at 1142.

195 *See Id.* at 1141.

196 The First Circuit recognized the potential for police abuse by stating: "If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel." Burbine v. Moran, 753 F.2d 178, 187 (1st Cir. 1984). *See also* State v. Lohman, 707 S.W.2d 478, 479 (Mo. Ct. App. 1986)(Prosecuting attorney called suspect's attorney asking for permission to speak with the suspect regarding a woman's murder. The suspect's attorney requested that nobody should speak to his client until he talked to him. Without expressly indicating that he would or would not honor the request, although the custom had been to honor an attorney's request, the prosecutor and police interrogated the suspect.).

tioning police abuse. The police should not be permitted to behave in an unethical manner with impunity.

Indeed, simply limiting an inquiry of the validity of a waiver to whether the *Miranda* warnings were given was rejected by the Supreme Court in *Brown v. Illinois*.[197] In *Brown*, the Court refused to adopt the notion that the *Miranda* warnings were a "cure all" for any unconstitutional police misconduct.[198] In *Moran*, the majority was overly concerned with the potential difficulties that the police would confront in obtaining confessions. Justice O'Connor, unfortunately, has rebalanced the *Miranda* doctrine and provided the police with opportunities to abuse the interrogation process.

Justice O'Connor overemphasized the value of obtaining confessions at the expense of a suspect's rights. Justice Steven's dissent succinctly outlined Justice O'Connor's conclusion when he stated:

> [i]f a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.[199]

IV. CONCLUSION

In *Moran v. Burbine*, the United States Supreme Court refused to require that the police abstain from active or reckless deception and inform a suspect of his counsel's request to communicate with him. According to the Court, such a requirement is neither constitutionally validated nor wise given the adverse effect it would have on society's interest in obtaining voluntary admissions of guilt.

The majority emphasized the value of obtaining convictions and placed a lesser value upon preserving the accusatory system and constitutional liberties under the fifth amendment. Refusing to require the police to inform a suspect of his attorney's communication, while justified within a narrow interpretation of *Miranda*, thwarts its spirit by limiting the protection an arrestee may be pro-

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197 422 U.S. 590 (1975).

198 *Id.* at 602.

> If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words."

Id. at 602-03 (citations omitted).

199 *Moran*, 106 S. Ct. at 1166 (Stevens, J., dissenting).

vided to counterbalance the compelling pressures of self-incrimination while in custodial interrogation.

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