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OVER-REACTION—THE MISCHIEF OF *MIRANDA v. ARIZONA*[*]

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Immediately after the attempted assassination of President Ronald Reagan in Washington, D.C. on the early afternoon of March 30, 1981, Secret Service agents and the District of Columbia police arrested John W. Hinckley, Jr. and took him to the local police headquarters, arriving there at 2:40 p.m. They wanted to question Hinckley not only as to his motive but also about the possible involvement of accomplices. Before doing so, however, they dutifully read to him the warnings of constitutional rights that the Supreme Court in 1966 mandated in its five to four decision in *Miranda v. Arizona*.[1] The warnings given to Hinckley, as we shall see, contained embellishments of the ones specified in *Miranda*, and they were read to him on *three separate occasions* within a *two hour period*. After receiving the third set of warnings Hinckley was presented with a "waiver of rights" form on which he responded "yes" to the questions whether he had read his rights and understood them. Then he was asked whether he "wished to answer any questions." At this point Hinckley answered, "I don't know. I'm not sure; I think I ought to talk to Joe Bates [his father's lawyer in Dallas]." Hinckley added: "I want to talk to you, but first I want to talk to Joe Bates."[2]

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[*] Originally printed in 73 J. CRIM. L. & CRIMINOLOGY 797 (1982).

[1] 384 U.S. 436 (1966). The basic warnings required before any interrogation may be conducted of a custodial suspect are: (1) he has a right to remain silent; (2) anything he says may be used against him; (3) he has a right to consult with a lawyer before or during the questioning of him; and (4) if he cannot afford to hire a lawyer one will be provided for him without cost. The Court's own general phraseology of the warnings will be subsequently discussed.

[2] The above quotations, and the ones which follow, as well as all the case facts reported in this commentary, are from the published opinion of the court of Appeals for the District of Columbia Circuit, which affirmed the District Court's decision suppressing all the statements made by Hinckley during the interrogation subsequent to his expression of interest in talking to his father's lawyer. United States v. Hinckley, 672 F.2d 115 (1982) (per curiam), *aff'g* 525 F. Supp. 1342 (1981).

Following the D.C. police "booking procedure" (identification data and fingerprints), and while the police were attempting to contact Joe Bates, two FBI agents arrived and arrested Hinckley for violation of the Presidential Assassination Statute.[3] They were informed of all that had transpired and then took Hinckley to the FBI field office at approximately 5:15 p.m. He received the *Miranda* warnings for the fourth time, at the field office. He was also presented with another waiver form, supplied by the FBI. Hinckley signed his name to it; however, "it was clearly understood that he did not waive his right not to answer questions before consulting counsel." Nevertheless, he did answer various "background" questions asked by FBI agents.

The "background" information was suppressed by the D.C. District Court. It reasoned that the information was elicited from Hinckley in violation of *Miranda*, which prohibits the interrogation of a custodial suspect after he announces or indicates he wants to have a lawyer present.[4] As already quoted, Hinckley had said he wanted one, although he did so rather hesitatingly.

The district court ruling was affirmed by the Court of Appeals for the D.C. Circuit.[5] Both courts rejected the government's contention that the questioning of Hinckley at the FBI office was merely "standard processing procedure" of an "essentially administrative nature." The courts concluded that Hinckley had, in fact, been interrogated and that the purpose of the questioning was to obtain personal background information from Hinckley which would negate an anticipated insanity plea at the time of trial. It was obvious that Hinckley could not deny he did the shooting, so the only conceivable defense would be that of insanity. That was, in fact, the plea at his trial, which began on April 26, 1982.[6]

In view of the court rulings declaring the "background information" inadmissible at trial, whatever value that information may have been to the prosecution was irretrievably lost. The government decided not to seek Supreme Court review of the

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[3] Presidential Assassination Statute, 18 U.S.C. § 1751 (1970).

[4] United States v. Hinckley, 525 F. Supp. 1342 (1981).

[5] United States v. Hinckley, 672 F.2d 115 (1982) (per curiam).

[6] For initial newspaper coverage of the insanity issue, see N.Y. Times Apr. 28, 1982, § 1, at 12, col. 3.

appellate court's decision. Reliance had to be placed, therefore, upon independent evidence of Hinckley's sanity.

Before proceeding to discuss several other cases to illustrate the mischief occasioned by *Miranda*, the writer reiterates that Hinckley had received the prescribed warnings *three* times within a two-hour interval, and that a *signed* waiver was sought from him at the D.C. police station when he was asked if he *wished* to answer any questions. Nowhere in the *Miranda* opinion is there anything requiring such a repetition of the warnings, or the need for a signed statement, or the ascertainment of any other kind of waiver than an indicated willingness to be questioned. Why, then, the mischief?

The mischief in the *Hinckley* case resulted from a concern on the part of law enforcement officers—and an understandable concern—that whatever they say to a suspect by way of *Miranda* requirements might later be considered inadequate by a judge or appellate court. Hence, they over-react; they embellish the warnings or add new ones. Each time someone wants to talk to the suspect, or the same interrogator wants to resume his interrogation, the warnings are repeated. The repetitive warnings are followed by a request to sign a legalistically shrouded waiver form. As a consequence of all of this, suspects who might otherwise have been willing to talk are far less apt to do so.

Another illustration of over-reaction to *Miranda* appears in an appellate court case within the District of Columbia that was decided only one month prior to the interrogation of Hinckley. In that case, *United States v. Alexander*,[7] a suspected murderer received the following warnings, as prescribed in a D.C. police department regulation:

> You are under arrest. Before we ask any questions, you must understand what your rights are.
>
> You have the right to remain silent. You are not required to say anything to us at any time or to answer questions. Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer for advice before we question you and to have him with you during questioning.
>
> If you cannot afford a lawyer and want one, a lawyer will be provided for you.
>
> If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

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[7] 428 A.2d 42 (D.C. 1981).

Following a reading of the warnings to the suspect, she was presented with a printed waiver form, on which the first three questions were:

1. Have you read or had read to you the warnings as to your rights?
2. Do you understand these rights?
3. Do you wish to answer any questions?

Alongside each of the foregoing questions the suspect wrote "Yes." The next question was:

4. Are you willing to answer questions without having an attorney present?

To this fourth question the suspect wrote "No." The next item on the form was:

5. Signature of defendant on line below.

After the suspect's signature, the remaining portions of the waiver document contained space for the time, date, and lines for the signatures of two witnesses.

Following completion of the printed waiver form, a police officer told the suspect, "[w]e know you are responsible for the stabbing," whereupon she confessed and agreed to give a written statement. At this point, the officer issued "fresh *Miranda* warnings."

The trial court in *Alexander* suppressed the resulting confession, for the same reason stated in the *Hinckley* case—the questioning of a custodial suspect after an indication of an interest in having a lawyer present. The suppression order was affirmed by the appellate court. Consequently, the confession could not be used as evidence at trial.

The warnings that were used in the *Alexander* case presumably were the same ones that were given by the D.C. police department to Hinckley. In those warnings and in the waiver forms, the police went far beyond what the Supreme Court mandated in *Miranda*, or in any of its subsequent decisions prior to (or since) the interrogations of Alexander and Hinckley. What the Court stated in *Miranda* was that before a custodial suspect could be interrogated

> [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[8]

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[8] 384 U.S. at 479. The formulation of the *Miranda* warnings in language which seems adequate was suggested in the first footnote to this comment.

Following this specification of the *required warnings*, the Court proceeded to advise interrogators that the suspect's "[o]pportunity to exercise these rights must be afforded to him throughout the interrogation," meaning that if he changed his mind and decided to remain silent or wanted an attorney present he should be accorded that privilege.[9] But this was only a warning to interrogators, not something for incorporation into the required warnings to the suspects themselves. The Court also stated that after the issuance of the warnings, "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." Finally, the Court added the mandate that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."[10]

The embellishments of the *Miranda* warnings and the ritualization of the written waiver, as exemplified in the foregoing *Hinckley* and *Alexander* cases, unquestionably have a tendency to dissuade many guilty suspects from submitting to police questioning.

The practice of police resort to written waiver is another illustration of over-reaction to *Miranda*. The Court in *Miranda* made no mention of written waivers, and in one of its own subsequent decisions, *North Carolina v. Butler*,[11] the Court specifically held that written waivers are not required. In that case the defendant, as a custodial suspect, orally waived his rights to silence and to have an attorney present, but refused when he was asked to sign a written waiver. The Supreme Court ruled that despite the refusal to sign the written waiver, the oral waiver was sufficient.

The message in *Butler* has not "trickled down" to some police departments, and even where it has, over-caution still prevails. Written warnings are still sought, and in some instances they will contain all the embellishments exemplified by the following form currently being used by a large state department of law enforcement:

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[9] *Id.*

[10] *Id.*

[11] 441 U.S. 369 (1979).

CONSTITUTIONAL RIGHTS AND WARNINGS

Date_____Place_____Time_____
Name_____Date of Birth_____

1. THAT I HAVE THE RIGHT TO REMAIN SILENT AND NOT MAKE ANY STATEMENT AT ALL.

   I understand this segment (initial)_____

2. THAT ANYTHING I SAY CAN AND WILL BE USED AGAINST ME IN A COURT OR COURTS OF LAW FOR THE OFFENSE OR OFFENSES BY WHICH THIS WARNING IS EXECUTED.

   I understand this segment (initial)_____

3. THAT I CAN HIRE A LAWYER OF MY OWN CHOICE TO BE PRESENT AND ADVISE ME BEFORE AND DURING ANY STATEMENT.

   I understand this segment (initial)_____

4. THAT IF I AM UNABLE TO HIRE A LAWYER I CAN REQUEST AND RECEIVE APPOINTMENT OF A LAWYER BY THE PROPER AUTHORITY, WITHOUT COST OR CHARGE TO ME.

   I understand this segment (initial)_____

5. THAT I CAN REFUSE TO ANSWER ANY QUESTIONS OR STOP GIVING ANY STATEMENT ANY TIME I WANT TO.

   I understand this segment (initial)_____

I have read or have had read to me the five (5) inclusive segments stipulating my Constitution rights and understand each to the fullest extent.

_____
Signature

witnessed:

_____

_____

Forms such as this are not rare; they, or comparable ones, are in general usage by many police departments.

Most police departments rely upon the oral issuance of both the warnings and the waiver questions. Their officers are supplied with printed plastic cards, on one side of which appear the warnings to be read, and on the other the wavier questions to be asked. Usually the phraseology on the cards is prepared, or at least approved, by the local prosecuting attorney. The warnings on a typical card are as follows:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.

The waiver questions sometimes are:

1. Do you understand each of these rights?
2. Having these rights in mind, do you wish to talk to us now?

Observe, again, the gratuitous inclusion of the fifth warning. As earlier stated, this is not a warning required by *Miranda,* but rather an expression the Supreme Court employed by way of an *admonition to interrogators* regarding their obligation in those instances where a person has already agreed to talk without an attorney being present. It was intended as a guideline in case situations where, during the course of the interrogation, a suspect decides to discontinue the conversation or asks for an attorney. The Court did not indicate that this admonition to interrogators should be included as one of the required warnings to suspects.

The inquiry on the waiver side of the card about "understanding the rights" and "bearing them in mind" is the result of caution deemed necessary by law enforcement agencies to avoid being faulted by the courts for obtaining waivers that were not made "knowingly and intelligently." This was the expression used by the Court in *Miranda.*

The phrase "knowingly and intelligently" prompts the writer to pose the following rhetorical questions for reader consideration. Assume that the person who is about to be interrogated actually committed the crime. He receives the warnings and is asked the waiver questions that have been described. If, after

hearing that ritual, he decides to submit to an interrogation, does not that fact in itself display a lack of the intelligence necessary to make an intelligent waiver? With all such red-flag-waving by the interrogator, is it any wonder that many guilty suspects, the intelligent as well as some unintelligent ones, decide to remain silent or to ask for a lawyer? Presumably the Supreme Court only intended that the waiver must be knowingly made, but mischief has nevertheless resulted from attempts precisely to satisfy the presumed requirements for waiver. Why else would a waiver contain the words, "*[h]aving these rights in mind,* do you wish to talk to us now?"

What has just been stated about the plastic card guides for the oral issuance of the warnings, and for the asking of oral waivers, is true to an even greater degree when a printed form is used, such as the one earlier reproduced, which requires name-initialing after each of the five segments of the set of warnings, to be followed by the suspect's signature, witnessed by two persons.

In addition to over-reaction with regard to the language of the warnings and waivers, considerable mischief results from the frequently followed police practice of issuing "fresh" *Miranda* warnings every time an interrogation has been renewed by the original interrogator, or when a different interrogator becomes involved. This occurs even after the suspect waived his rights upon the first occasion, and even though only a short time has elapsed since the first set of warnings were given. Then, too, the interrogators usually are not content with an oral waiver; they will also present the suspect with a written one for his signature.

Sometimes the requested signature to a written waiver will not be forthcoming, as illustrated by the previously discussed case of *North Carolina v. Butler.* When this happens, police testimony that the suspect actually made an oral waiver may not be considered plausible at a confession suppression hearing, in light of the signature refusal. Also, defense counsel probably would contend that even assuming an oral waiver, the signature refusal evidences a change of mind, which, of course, would require a termination of the interrogation. A factor that should not be overlooked, however, in any evaluation of a situation of this type, is the natural reluctance of people generally to sign any document, regardless of the truthfulness of its disclosures.

As is implicit in what has already been stated, prosecuting attorneys (and other legal advisors to the police) also partici-

pate in the over-reaction process. Prosecutors are concerned, and understandably so, about trial court rejection of confessions, or appellate court reversals of convictions, because of some presumed flaw in the *Miranda* warnings or in the waiver. Even more damaging, however, are the super-cautious warnings and waiver forms that are prepared or approved for police usage, such as the ones already discussed. Prosecutors seem to exercise as much meticulous care with the warnings and waivers as they do in the drafting of jury instructions for the presiding judge. Nothing must be left out!

Not only have the police and prosecutors over-reacted to *Miranda*; the same has been true of lower federal courts and of the state courts at all levels. An early over-reaction by a federal circuit court of appeals concerned the phraseology of the warning about the right to appointed counsel. When the appellant in *Lathers v. United States*[12] was to be questioned while a custodial suspect, the *Miranda* warnings he received included the statement that "if he was unable to hire an attorney the Commissioner or the Court would appoint one for him." This was held by the Fifth Circuit Court of Appeals to be defective because the suspect "was not advised that he could have an attorney present with him before he uttered a syllable." The court said, "[t]he message to him indicated only that a judge or commissioner somewhere down the line would appoint a lawyer for him if he so requested."[13] This ruling prevailed for *thirteen years* in that circuit, which prescribed the law for the lower federal courts (and indirectly, therefore, for federal law enforcement officers) within a six state area.

A recent decision has overruled *Lathers*. The court in *United States v. Contreras*[14] expressed its reluctance to overturn a prior decision in its own circuit, but felt impelled to do so because of the 1981 Supreme Court decision in *California v. Prysock*.[15] In that case the Supreme Court held there was no requirement "that the contents of the *Miranda* warnings be a virtual incanta-

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[12] 396 F.2d 524 (5th Cir. 1968).

[13] *Id.* at 535.

[14] 667 F.2d 976 (11th Cir. 1982). This appears as a decision of the Eleventh Circuit Court of Appeals, which was split off from the Fifth Circuit by Congressional action due to the excessive case load in the original Fifth Circuit. Nevertheless, in the *Contreras* opinion the court referred to the *Lathers* decision as one of its own. The present Eleventh Circuit encompasses Alabama, Florida, and Georgia; the Fifth Circuit, Louisiana, Mississippi, Texas, and the Canal Zone.

[15] 453 U.S. 355 (1981).

tion of the precise language contained in *Miranda.*" Instead, it is sufficient if the warnings convey the basic rights to the suspect. According to the *Contreras* court, this meant, therefore, that the warnings about the right to counsel "need not," as the earlier *Lathers* case indicated, "explicitly convey to the accused his right to counsel 'here and now.'" Ultimately, therefore, the thirteen years of mischief that was created within the Fifth Circuit was finally dissipated.

An even more pervasive misconception with respect to the phraseology of the right to counsel warning developed within the Seventh Circuit. This circuit court of appeals, in two decisions, one in 1969 and another in 1974, decided that the basic philosophy of *Miranda* warranted the requirement that the warnings should be issued whenever a suspect about to be interrogated was the "focus of suspicion."[16] In other words, not only were the warnings to be given when a suspect who [sic] was in "custody" or "deprived of his freedom in any significant way," but also in situations where the investigators wanted to question someone they suspected but had not yet placed in a custodial setting. The rationale for this embellishment of *Miranda* was the circuit court's perception of "focus of suspicion" as "psychological compulsion . . . tantamount to the deprivation of the suspect's 'freedom of action in any significant way,' repeatedly referred to in *Miranda.*"[17] This perception, however, was not acceptable to the Supreme Court. In its 1976 decision in *Beckwith v. United States,* the Court unequivocally declared, with one justice dissenting, that "focus of suspicion" was not the test for determining whether the *Miranda* warnings were required; the test was, rather, whether a custodial situation existed.[18] Nevertheless, the "focus of suspicion" rule had prevailed within the Seventh Circuit, which encompasses three large states, from the time of its imposition in 1969 until the 1976 Supreme Court decision in *Beckwith,* a span of nine years. After *Beckwith,* of course, the issue was resolved for all federal courts and for all federal officers. "Custody," not "focus of suspicion," now definitely prevails as the test throughout the federal system.

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[16] United States v. Oliver, 505 F.2d 301 (7th Cir. 1974); United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969).

[17] United States v. Oliver, 505 U.S. at 305.

[18] 425 U.S. 341, 347 (1976). Justice Stevens, who authored the opinion in *Oliver,* took no part in the *Beckwith* case.

Prior to *Beckwith*, a few state appellate courts had adopted, or viewed with favor, the "focus of suspicion" test. One of them, the Supreme Court of Minnesota, which had adopted the test in 1970,[19] and reaffirmed that position in 1975,[20] has not rendered any subsequent decision upon the subject since the *Beckwith* case. This being so, the police of that state continue to give the *Miranda* warnings whenever suspicion has focused upon the person to be interrogated. Consequently, the mischief persists in that state.[21]

Another state whose courts had adopted the focus test rejected it after *Beckwith*, and the courts there now apply the custody test.[22] The Colorado Supreme Court referred to the "focus test" in a case decided shortly after *Miranda*, but the case actually involved a custodial situation.[23] Since then, and even before *Beckwith*, custody was declared by the courts of that state to be the proper standard for the police to follow.[24]

There is one final example of the mischief of *Miranda* that deserves mention, although there are many others that might be included. In the 1979 California Supreme Court case of *People v. Braeseke*,[25] the police issued the *Miranda* warnings before questioning a defendant in custody for a triple murder. Although he waived his right to silence and to a lawyer, the defendant later refused to talk without having an attorney present when some incriminating physical evidence was pointed out to him. The interrogation ceased, but as he was being booked, he requested to speak "off the record." He then proceeded to admit the murder and told of the location of the gun he had used in the killings. The California Supreme Court, in a 4 to 3 decision, held that the "off the record" request did not constitute a

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[19] State v. Kinn, 288 Minn. 31, 178 N.W.2d 888 (1970).

[20] State v. Raymond, 305 Minn. 160, 232 N.W.2d 879 (1975).

[21] The statement regarding the present police practice of giving the warnings in "focus of suspicion" cases is based upon information received from a number of police officers and from the director of one of the police training schools in Minnesota.

[22] In People v. Martin, 78 Mich. App. 518, 521, 260 N.W.2d 869, 870 (1977), the court stated that "at first blush, it would seem we are bound to follow the mandate of People v. Reed 393 Mich. 342, 224 N.W.2d 867 (1975)," which used the "focus" test, but followed *Beckwith*, as did a subsequent Michigan appellate court case, People v. Schram, 98 Mich. App. 292, 296 N.W.2d 840 (1980).

[23] People v. Orf, 172 Colo. 253, 472 P.2d 123 (1970).

[24] *See, e.g.*, People v. Conner, 195 Colo. 525, 579 P.2d 1160 (1978).

[25] 25 Cal. 3d 691, 602 P.2d 384, 159 Cal. Rptr. 684 (1979).

waiver. The confession and the evidence derived from it were held inadmissible.[26]

Up until 1966, the highest courts of over thirty states,[27] and one federal circuit court of appeals,[28] had held that there was no constitutional requirement that criminal suspects be warned of their self-incrimination privilege prior to police interrogation. *Miranda v. Arizona* changed this by declaring that the constitutional privilege mandated the issuance of the warning to all custodial suspects. In the words of Justice Clark, in his dissenting opinion in *Miranda*, the case represented "one full sweep changing [of] the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society."[29]

Justice Harlan also dissented in *Miranda*, in an opinion in which Justices Stewart and White concurred. He made the following observation and prediction (writing, of course, even before the embellishments which the original warnings have incurred over the years since 1966):

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[26] After the grant of review by the Supreme Court of the United States, the case was remanded to the California Supreme Court "to consider whether its judgement was based on federal or state grounds, or both." California v. Braeseke, 446 U.S. 932 (1980). The California court certified that its judgment was "based upon *Miranda v. Arizona* . . . and the Fifth Amendment to the United States Constitution." It added: "we reiterate [our opinion] in its entirety." 28 Cal. 3d 86, 618 P.2d 149, 168 Cal. Rptr. 603 (1980). Further review was denied by the United States Supreme Court. 451 U.S. 1021 (1981).

The defendant Braeseke was retried and convicted. The prosecution used as evidence incriminating statements Braeske [sic] made while in jail after his first conviction, during an interview with Mike Wallace on CBS's "60 Minutes" T.V. program. Braeseke's defense at his second trial was influence of an hallucinogenic drug ("angel dust") at the time of the killings.

[27] For an alphabetical listing of the state cases, see F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 169-71 (2d ed. 1967). Included, until 1965, were the state courts of California and Oregon, but the supreme courts of both of those states changed their position and prescribed the warning. *See id.* at 173. They did so because of their broad interpretation of Escobedo v. Illinois, 378 U.S. 478 (1964) and a correct anticipation of what was forthcoming in *Miranda* in 1966.

The only other pre-1965 requirements for the warnings appeared in the Texas Code of Criminal Procedure (Article 727), and in the Code of Military Justice (Article 31).

[28] *See* United States v. Wilson, 264 F.2d 104 (2d Cir. 1959); Heitner v. United States, 149 F.2d 105 (2d Cir. 1945).

Also relevant are two 1958 decisions of the United States Supreme Court about which Justice Clark had this to say in his dissenting opinion in *Miranda*: "To require all [the warnings and rights prescribed by *Miranda*] at one gulp should cause the Court to choke over more cases than Crooker v. California, 357 U.S. 433 (1958), and Cicenia v. Lagay, 357 U.S. 504 (1958), which it expressly overrules today." Miranda v. Arizona, 384 U.S. at 502.

[29] *Id.* at 503.

> There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.[30]

The presence of counsel at an interrogation scene, alluded to by the dissent, is the most damaging feature of *Miranda*'s mandate. Why? Because of the fact that when defense counsel appears, his first act is to advise his client to keep his mouth shut. The writer is not submitting a condemnation of such defense tactics; the lawyer is simply following an unwritten rule subscribed to by all lawyers in similar situations. The traditional concept is that his role is of a partisan nature. His obligation is to his client, and to no one else.[31]

On the trial court level, or whenever the judicial process has begun, a lawyer's advice to his client to remain silent is a practice that reasonable laypersons can appreciate. The burden is on the prosecution to prove guilt beyond a reasonable doubt, and the fifth amendment requires that it must do so without verbal help from the defendant. In practice, therefore, it is considered fair and proper for defense counsel to keep the defendant off the witness stand and force the prosecution to prove its case without asking him to utter a single word. It is an entirely different matter, however, to require the police to invite the presence of counsel into an interrogation room, during the *investigation* of a criminal case. This signals, as Justice Harlan stated, "the end of the interrogation." And indeed it would be, in all but the very exceptional case situation where, for instance, counsel knows of an unassailable alibi.

The Court in *Miranda* formulated the warnings about the right to counsel for the announced purpose of assuring that custodial suspects would be made aware of their fifth amendment self-incrimination privilege. That privilege, however, is unrelated to the sixth amendment right to counsel, although

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[30] *Id.* at 516-17. In a footnote Justice Harlan stated that the Court's "vision of a lawyer 'mitigat[ing] the danger so untrustworthiness' ... by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession." *Id.* at 516 n.12.

[31] Consider the following comment from Justice Jackson's dissent in Watts v. Indiana, 338 U.S. 49, 59 (1949): "[u]nder our adversary system, ... any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

the two rights are sometimes viewed as though in tandem. It is well, therefore, to be mindful of the language of the sixth amendment provision: "In all criminal *prosecutions*, the accused shall enjoy the right . . . to have the assistance of counsel *for his defense.*"[32]

Apart from the lack of sound judicial reasoning underlying *Miranda*, so eloquently expressed by the four dissenting Justices, as well as the practical considerations the dissenters discussed, there is another substantive factor worthy of consideration in determining whether *Miranda* is deserving of vitality. The *Miranda* doctrine did not evolve because of a perceived need to protect innocent persons suspected of crime. It was created as a product of the Warren Court's pursuit of its egalitarian philosophy. Toward that objective the basic consideration was this: the rich, the educated, the intelligent suspect very probably knows from the outset that he has the privilege of silence, whereas the poor, the uneducated, or the unintelligent suspect is unaware of that privilege. Consequently, *all* persons in custody or otherwise deprived of their freedom, must receive the warnings prescribed in *Miranda.*

As commendable as is much of what the Warren Court attempted or accomplished with its egalitarian philosophy in the area of social inequalities emanating from a disregard of clearly appliable [sic] constitutional provisions, the writer suggests that the same egalitarian philosophy does not lend itself to the field of criminal investigation. Foremost is the fact that a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of little comfort to them to be told that the warnings administered to the person suspected of robbing or raping them, or of burglarizing their homes while they were at work, was for the noble purpose of equalizing humanity, and this is especially so in those instances where the suspect, reasonably presumed to be guilty, accepted the invitation to remain silent, or where his conviction was reversed because the *Miranda* rights were not properly accorded him. The time to show compassion toward a criminal

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[32] U.S. CONST. amend. VI (emphasis added). In other decisions unrelated to the subject matter of the present paper, the Supreme Court has interpreted "criminal prosecution" to extend to the very beginning of the judicial process, such as preliminary hearing or indictment. Even in *Miranda*, however, the Court did not rule that the sixth amendment right was invoked by a custodial interrogation; the right to counsel in that setting, as has already been stated, was considered only as an implementation of the fifth amendment right to silence.

suspect's unfortunate background is *after* a determination of whether or not he committed the offense, not before.

There is no better refutation of *Miranda* philosophy than the opinion of Chief Justice Joseph Weintraub of the New Jersey Supreme Court in a 1968 case, in which he stated:

> There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. Voluntary confessions accord with high moral values, and as to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself.[33]

CONCLUSION

In Shakespeare's *Henry VI* the suggestion was made that "[t]he first thing we do, let's kill all the lawyers." If we, as lawyers, continue to tolerate the kind of mischief created by *Miranda*, some laypersons may think Shakespear's idea was not at all bad. The following suggestion is an effort to forestall such an unfortunate event, although, to be sure, there are more realistic reasons for offering it.

The Supreme Court, at the earliest opportunity, ought to overrule *Miranda*, or else uphold the validity of the test of confession admissibility enacted by Congress shortly after *Miranda*, as part of the 1968 "Omnibus Crime Bill."[34] It provides that a confession "shall be admissible in evidence if it is voluntarily given." Congress submitted the following guidelines for determining whether a confession meets the test of voluntariness:

> The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at

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[33] State v. McKnight, 52 N.J. 35, 52-53, 243 A.2d 240, 250 (1968). The case involved a *Miranda* issue.

[34] 18 U.S.C. § 3501 (1969).

> the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

The state of Arizona enacted an identical provision in 1969.[35] A test case should be sought, therefore, either within the federal system or within the state of Arizona, and brought to the Supreme Court as soon as possible. Alternatively, the Supreme Court on its own initiative might avail itself of a suitable opportunity to address the issue in a case that may already be in the process toward Supreme Court consideration. Meanwhile, the police and prosecutors should reconsider their *Miranda* practices, and the state as well as federal trial and appellate courts should moderate their apprehension over possible reversals because of shortcomings in *Miranda* formalities. This three-pronged approach to the problem would help diminish the mischief of *Miranda* until the Supreme Court eliminates it completely or modifies its principles in conformity with the foregoing Congressional enactment.

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[35] ARIZ. REV. STATS. ANN., § 13-3988 (1978).