TURNING *MIRANDA* RIGHT SIDE UP*

*Theodore O. Te***

> Miranda *warnings have little or no effect on a suspect's propensity to talk . . . Next to the warning label on cigarette packs,* Miranda *is the most widely ignored piece of official advise in our society.*[1]

INTRODUCTION: A "LOVE-HATE" RELATIONSHIP

Very few decisions of the United States Supreme Court[2] have stirred as much controversy, confusion, debate, discussion, vitriol, and even vilification as *Miranda v. Arizona.*[3] Similarly, very few decisions have

---

* *Cite as* Theodore Te, *Turning* Miranda *Right Side Up,* 87 PHIL. L.J. 51, (page cited) (2012).

** Assistant Court Administrator and Chief, Supreme Court Public Information Office. Former Assistant Professor, University of the Philippines College of Law. LL.M., Columbia Law School (2012). LL.B., University of the Philippines (1990). A slightly different version of this essay was submitted by the author as his LL.M. paper to Professor Jack Greenberg of Columbia Law School in compliance with the requirements of the degree of Master of Laws; the paper, as originally written, was titled differently and focused only on American law. This paper was revised to include a reference to the Philippine experience with *Miranda*-type warnings. The author is grateful to Professor Jack Greenberg for his invaluable comments and insights to the original draft of this paper.

[1] Patrick Malone, *You Have The Right To Remain Silent:* Miranda *After Twenty Years*, 55 AM. SCHOLAR 368 (1986).

[2] Unless specified, reference to "Supreme Court" or "Court" is to the United States Supreme Court; references to District Courts will expressly characterize the court involved as a district court or use the lower cased "court" instead of the initially-capitalized "Court." The comparative reference to the Supreme Court of the Philippines will be to the "Philippine Supreme Court" or "Philippine Court."

[3] 384 U.S. 436 (1966); with the possible exception of Roe v. Wade, 410 U.S. 113 (1973), very few decisions can claim to provoke as much controversy, passion and even vitriol from lawyers and even judges as *Miranda* does.

Yale Kamisar, who is one of the very few who can claim to have directly influenced the way *Miranda* was originally written and can claim parentage of it, describes *Miranda v. Arizona* as "one of the most praised, most maligned—and probably one of the most misunderstood" cases in American history. *See* Yale Kamisar,

seen the Court so engaged in a "love-hate" relationship with its own creation—with the Court trying, in the years since *Miranda*'s promulgation, to narrow down its scope while, at the same time, striking down efforts to circumvent it.[4] Like *Roe v. Wade*,[5] it is also a decision that has consistently divided the Court with five-vote majorities and even slimmer pluralities, marked by sharp, caustic and, on occasion, pointed language by the Justices in main, concurring or dissenting opinions. Perhaps more than any decision other than *Roe*, *Miranda* decisions also clearly show the delineation in the Court between those who favor it almost unqualifiedly, those who favor it consistently on principle, those who oppose it, and those in the middle.

Through the years, the Court itself has chipped away at *Miranda* by creating exceptions and nuanced readings that have resulted in the narrowing of *Miranda*'s reach[6] as far as its applicability to custodial

---

On the Fortieth Anniversary of the Miranda *Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007).

See also Patrick Malone, *"You have the Right to Remain Silent": Miranda after Twenty Years* in George C. Thomas III, Miranda*: The Crime, the Man and the Law of Confessions, in* THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING 7 (Northeastern University Press, Boston, Richard A. Leo & George C. Thomas, eds., 1998); *see, generally* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883 (2000).

[4] Kit Kinsports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L.& CRIMINOLOGY 375 (No. 2; 2011); Part II of this essay will discuss the occasions during which the Court has carved out exceptions that chip away at the protections intended by *Miranda*'s core ruling while, at the same time, deliberately not abandoning the doctrine.

[5] 410 U.S. 113 (1973)

[6] *See, e.g.,* Harris v. New York, 401 U.S. 222 (1971) (where the Court refused to completely exclude a statement given by a defendant despite the absence of *Miranda* warnings, ruling that it could be used by the prosecution to impeach the defendant's testimony but not to prove the prosecution's case in chief); Michigan v. Tucker, 417 U.S. 433 (1974) (where the testimony of a witness identified by a statement taken in violation of *Miranda* was admitted because even if the police disregarded *Miranda*, they did not violate the defendant's Fifth Amendment rights which formed the core of the *Miranda* ruling); New York v. Quarles, 467 U.S. 649 (1984) (where the Court created a "public safety exception" to *Miranda*, holding that the police were not required to provide the warnings to a suspect if they had a reasonable concern for the public's safety); Oregon v. Elstad, 470 U.S. 298 (1985) (where the Court held that a "two-step" interrogation technique, which involved withholding *Miranda* warnings until the suspect has already given a statement and then prompting the suspect to repeat the unwarned statement, did not result in inadmissibility of the statement; *contra*, *see* Missouri v. Siebert, 542 U.S. 600 (2004) *overruling Elstad*); Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (where the Court ruled that the suspect's invocation of the right to remain silent under *Miranda* cannot be presumed by his silence and that his short responses to specific questions indicated a waiver of the right to remain silent); and Howes v. Fields, No. 10-680, 2012 WL538280 (Feb. 12, 2012), holding that a prisoner

investigations while, at the same time, expanding the parameters of permissible waivers of the rights secured by *Miranda*. When faced with a *Miranda* situation, the Court confronts its instinct to re-create its own creation[7] while, at the same time, defend it from encroachment from others.[8] It is this process of re-visioning and reinventing *Miranda*, without expressly abandoning it, which has led to a great deal of confusion as to what *Miranda* actually means at present.

This essay looks at the core holding in *Miranda* 46 years after it was decided. It explores the effects of various rulings by the Court that clarify the core holding that statements obtained without the *Miranda* warnings are presumptively coerced and are inadmissible in evidence and looks at what *Miranda* stands for now. The analysis focuses on cases that have a nuanced reading of or carved out exceptions to *Miranda*'s essential features, such as: (a) the right to be warned, (b) the language of the warnings, (c) the meanings of "custodial interrogation," (d) the invocation of the rights to silence and counsel, (e) the knowing and intelligent waiver of the rights covered by *Miranda*, and (f) the exclusion of unwarned statements and other evidence arising from those statements.

Part of the analysis is to inquire into ways to make the Miranda rule a bright line rule again; toward this end, a comparative analysis of the Philippine experience with the *Miranda* "warning and waiver" requirement is made. Whereas the United States treats *Miranda* simply as a means of securing a constitutionally guaranteed right, the Philippines recognizes the *Miranda* warnings as a constitutional right.[9]

---

who is interrogated, while in prison, on a matter unrelated to the subject of his confinement need not be *mirandized*.

[7] One of the main arguments, of course, against *Miranda* is that it was an exercise in judicial legislation and that the ruling is overbroad. This would be resolved much later in *Dickerson*, *infra*.

[8] Dickerson v. United States, 530 U.S. 428, 432 (2000), where the Court, through Chief Justice Rehnquist, declared *Miranda* to be a constitutional principle and, on that basis, rejected a legislative effort to render *Miranda* inoperative declaring that "*Miranda*, *being a constitutional decision of this Court*, may not be in effect overruled by an Act of Congress and we decline to overrule *Miranda* ourselves . . . *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts

[9] CONST. art. III, §12 to wit:

> (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

Part One discusses *Miranda's* core holding and its bright line rule.[10] It looks at *Miranda*'s history to understand how it was arrived at and what the current state of the law is at present. Part Two examines the effects of these cases on *Miranda*'s core holding and its bright line rule, looking at how these cases have created an impact on its essential elements.[11] Part Three concludes the essay by deconstructing the bright line rule and confronting the question of *Miranda*'s effectiveness; examines the Philippine experience with the *Miranda* warnings; and looks at how the procedural and substantive law on confessions has not only adopted the protections provided under the warning system put in place by *Miranda* but has also strengthened and amplified the protections provided. In the face of empirical evidence, all the changes done by the Court and law enforcement agencies, the essay concludes that the protective warnings, as originally formulated, are no longer as effective and that it is time to formulate a new bright line rule consistent with *Miranda*'s original core holding. This essay also suggests specific measures to make *Miranda* relevant again, chief of which would be a change in the language and sequence of the warnings and the adoption of measures to create an objective record of any interrogations.

I. *MIRANDA*'S "BRIGHT LINE" RULE AND ITS CORE HOLDING

On its face, *Miranda* changed the legal landscape for confessions.[12] It expressly provided for the right to silence but at its core, it implicated a more fundamental value—a guarantee of fairness situated in the privilege

---

. . . .

(3) Any confession or admission obtained in violation of this . . . [s]ection . . . shall be inadmissible in evidence against him.

[10] Understood as a rule that is composed of objective factors or components that leave little or no room for varying interpretation. Justice O'Connor used the term "bright line" to describe *Miranda* in Oregon v. Elstad, 470 U.S. 298, 317 (1985). *See* discussion *infra*.

[11] As stated *supra*, these elements are: (a) the right to be warned, (b) the language of the warnings, (c) what it means to be in custody, (d) what interrogation means, (e) the invocation of the rights to silence and counsel, (f) the knowing and intelligent waiver of the rights covered by *Miranda*, and (g) the exclusion of unwarned statements and other evidence arising from those statements.

[12] Kamisar notes that the existing test prior to *Miranda*, the "voluntariness" or sometimes called the "totality of circumstances" test, was "too amorphous, too perplexing, too subjective and too time-consuming to administer effectively . . . '[g]iven the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload,' it seemed 'inevitable' that the Court would seek a better way, a more manageable way, to deal with the confession problem." (Citations omitted) *See* Kamisar, *supra* note 3 at 169.

against self-incrimination in the Fifth Amendment[13]—while strengthening the right to counsel under the Sixth Amendment.[14] Its core holding that "the prosecution may not use statements, whether exculpatory or incriminatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"[15] gave rise to the now-familiar set of "warnings"[16] which became the basis for the bright line rule, setting a clear standard for custodial investigations.[17]

From the time it was decided, *Miranda* has been interpreted so many times in so many different ways that it is difficult to understand what *Miranda* is and means now without looking at where and under what context it came from. In this part, I look at specific cases that are significant to the history of *Miranda* as doctrine.[18]

---

[13] "No person shall be held to answer for a . . . crime . . . nor shall [such person] be compelled in any criminal case to be a witness against himself . . . ."

[14] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[15] Miranda, *supra* note 3 at 444. This core holding may be divided into three components: (1) a finding that informal pressure for suspects to speak to law enforcement officers could amount to impermissible compulsion within the meaning of the self-incrimination clause, *id.* at 461; (2) a finding that custodial interrogations inherently yielded such coercive pressure, *id.* at 467; and (3) in order to protect the privilege against self-incrimination from coercive custodial interrogation, law enforcement officers are required to implement the procedural safeguards in the form of the warning and waiver system, *id.*

[16] *Id.* at 444-45, "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."

Current warnings are not so worded, although they retain the basic elements of the *Miranda* warnings. *See infra*, discussion on cases where the Court rules that the "talismanic incantation" of the precise language on *Miranda* is not required, it being sufficient that the essential principle behind the *Miranda* rights are "meaningfully conveyed."

[17] *See id.* at 442, where the Court characterized the warnings as "concrete constitutional guidelines for law enforcement agencies and courts to follow."

[18] There are certainly more cases decided by the Court than are included in this review but the scope of this study imposes this as a limitation; thus, the cases

A. The Pre-*Miranda* Law on Interrogation and Confessions

In 1833, the Supreme Court ruled in *Barron v. Baltimore*[19] that the power of the state governments was not limited by the protections provided in the Bill of Rights which "demanded security against the apprehended encroachments of the general [federal] government—not against those of the local governments." This pronouncement implied that States were not required to grant particular rights such as free speech, freedom of the press, or freedom of religion; particular to the criminal process, it also meant that states were permitted to conduct searches and seizures, to deny representation by counsel and even to determine the conduct of a jury trial.[20]

The incorporation of the Fourteenth Amendment ("[N]or shall any State deny any person life, liberty or property without due process of law") to the States had the practical effect of making the States less sovereign than they were before; it meant that they could no longer deny a defendant the right to defend himself because of the guarantee of due process. It also started to produce prohibitions against specific types of actions by the States, for instance, the rights of free speech and religion[21] and the right to counsel.[22]

---

chosen are those that have directly contributed to shaping the context, providing the basis for its core and "bright line" rule, and which also directly or indirectly have re-created *Miranda.*

[19] 32 U.S. (7 Pet.) 243, 250 (1833).

[20] This reflected an attitude of trust in the state governments and one of fear of the federal government. "States were trusted sovereigns in the federal scheme in 1834 and the Bill of Rights limited only the powers of the feared central government." *See* George C. Thomas III, Miranda*: The Crime, the Man and the Law of Confessions, in* THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING11 (Northeastern University Press, Boston, Richard A. Leo & George C. Thomas, eds., 1998).

[21] Gitlow v. New York, 268 U.S. 652 (1925).

[22] Powell v. Alabama, 287 U.S. 45 (1932). Despite these initial forays into fleshing out the due process guarantee into State prohibitions, the Court was generally slow, even tentative, to define more aspects of the criminal trial process as falling within the 14th Amendment due process guarantee. This may be seen in Palko v. Connecticut, 302 U.S. 319 (1884), where due process did not include the Fifth Amendment right to a grand jury indictment; in Twining v. New Jersey, 211 U.S. 78 (1908), where due process did not include the Fifth Amendment right against self-incrimination; and in Hurtado v. California, 110 U.S. 516 (1937),where the due process right did not include the right to be free from double jeopardy.

The judicial tentativeness towards proscribing a wide range of police conduct as prohibited under the due process clause was even more pronounced. One commentator observes that this was probably understandable because the thinking at that time was that while "[s]ociety must ensure that police observe a minimum standard of decency in interrogating suspects…the question of whether to suppress a

1. The Fifth Amendment and Admissibility of Confessions

The Fifth Amendment guarantee against self-incrimination[23] was not used as a basis for determining the admissibility of confessions until 1897 when the Court decided *Bram v. United States.*[24] Before *Bram*, the standard used was "reliability" though the preferred legal term was "voluntariness." Confessions induced by threats or promises were viewed as involuntary because these might cause an innocent person to confess, thus producing an unreliable confession.[25] For so long as such threats or promises were not present, confessions obtained were admissible because they would be presumed voluntary and thus reliable.

In *Bram,* the Court relied explicitly on the language of the Fifth Amendment to determine the admissibility of a confession. Instead of looking at the existence of a threat or promise, the Court considered the environmental circumstances surrounding the confession as well as the nature of the communication between the detective and Mr. Bram to determine that the latter's confession was involuntary. On the first point, the Court considered that "Bram had been brought from confinement to the office of the detective, and there, when alone with [the detective], in a foreign land, while he was in the act of being stripped, or had been stripped, of his clothing, was interrogated by the officer."[26] On the second point, it found that the detective had created an impression on Bram's part that confessing was necessary for him to save himself by telling him that the only other suspect had already confessed to the crime thus instilling in his mind "the fear that, if he remained silent, it would be considered an admission of guilt . . . and . . . by denying, there was a hope of removing the suspicion from himself."[27] The Court ruled that putting Mr. Bram in such circumstances that "perturb[ed] the mind and engender[ed] confusion of thought"[28] yielded a confession that cannot be considered voluntary or free of coercion.

After *Bram*, the Court's reliance on the Fifth Amendment as a basis to exclude confessions essentially stopped because the Fifth Amendment did not apply to the states until 1964 when the Court,

---

confession is more complicated than whether the police treated the suspect with decency." *See* Thomas III, *supra* note 20 at 13.

[23] U.S. CONST. amend. V, pertinently: "No person . . . shall be compelled in any criminal case to be a witness against himself."

[24] 168 U.S. 532 (1897).

[25] M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POLICY 319, 325 (2002-2003).

[26] *Id.* at 563.

[27] *Id.* at 562.

[28] *Id.* at 564.

through *Malloy v. Hogan*[29] held that the Fifth Amendment applied to the states through the Fourteenth Amendment. *Bram*'s language suggested that the Fifth Amendment imposed extraordinary limits on the scope of permissible interrogation because of its consideration of the environmental circumstances of the confession as well as the impressions conveyed by the interrogator's questions, regardless of the existence of actual coercion. In this aspect, *Bram* pre-figured *Miranda* in its reliance on the Fifth Amendment as well as in its use of a presumptively coercive environment. However, the Court in *Bram* did not articulate a clear standard for "voluntariness" of a confession.

2. The Standard of "Voluntariness" and Due Process

Powell v. Alabama[30] may be considered as having established the first criminal procedure right to be considered as part of the due process guarantee in the Fourteenth Amendment: the right to counsel. The State of Alabama failed to provide counsel to the defendants, who were black youths sentenced to death for raping two white women. The Court ruled that due process of law included the right to counsel in particular capital cases (peculiar to *Powell*, it meant cases where the defendants were young, illiterate and presumptively incapable of defending themselves) and reversed all the convictions.[31] *Powell*, however, did not involve the admissibility of confessions. *Bram* book-ended *Miranda* on this issue. In between *Bram* and *Miranda*, the question of the admissibility of a confession was largely analyzed according to a "voluntariness" test under the auspices of the due process clause of the Fourteenth Amendment.[32]

The 1936 case of *Brown v. Mississippi*,[33] which involved the brutal beatings of three African-American suspects over a prolonged period of time, accompanied with a threat of more beatings if they did not confess, started the due process analysis of the "voluntariness" of confessions. It was the Court's first review of a confession admitted into evidence by a state court and was set against a horrific factual backdrop: one suspect confessed after being hanged from a tree with a rope while being whipped repeatedly; two other suspects were whipped with a leather whip and a buckle by officials, accompanied by an angry mob.[34] The facts were uncontroverted and the torture undisputed. Clearly repelled by the torture,

---

[29] 378 U.S. 1 (1964).
[30] *Supra* note 22.
[31] *Id.*
[32] *See* Dickerson, *supra* note 8 at 433.
[33] 297 U.S. 278 (1936).
[34] *Id.* at 281-282.

the Court, in a unanimous decision, found a clear violation of due process[35] and created a Fourteenth Amendment exclusionary rule.

While *Brown* ushered in an era of increased scrutiny over police interrogation tactics to extract confessions, and signaled the start of the "voluntariness" analysis under the due process clause, *Brown*'s effects on police interrogation measures were not as widely and immediately felt.[36] Because *Brown* involved such manifest physical brutality, the logical conclusion would be that "voluntariness" would be intimately connected with the existence of similar conditions of brute force. Later cases, however, showed that this was not the case and did not result in much clarity in terms of what "voluntariness" as a test meant.

In *Ashcraft v. Tennessee*,[37] a majority of the Court held that a confession extracted under conditions that indicated psychological pressure—"for thirty six hours . . . he was held *incommunicado*, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite"[38]—instead of physical force could not be admitted because the pressure was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its fill coercive force is brought to bear."[39]

Justice Jackson dissented from the main holding in *Ashcraft*. Reiterating the propriety of the Court's refusal to admit confessions that are deemed "involuntary" because of the application of physical brutality, he noted that the Court was "in a different field" when considering confessions based merely on questioning, no matter if it was "persistent and prolonged."[40] In his view, interrogation was indispensable to justice[41] and observed that "the principles by which we may adjudge when [interrogation] passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply"[42] and

---

[35] *Id.* at 287.

[36] In Lisenba v. California, 314 U.S. 219 (1941), for instance, a confession produced as a result of *incommunicado* detention and physical coercion spread over a number of hours was considered admissible even as the detention was considered a felony under state law. The Court held the confession to be a result of "free choice" and found that the confessant had not "so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer." *Id.* at 241.

[37] 322 U.S. 143 (1944).

[38] *Id.* at 153.

[39] *Id.* at 154.

[40] *Id.* at 159-160 (Jackson, J., *dissenting*).

[41] *Id.* at 160.

[42] *Id.*

warned that the Court "cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal."[43] He was not convinced by the majority's finding that the confession should be suppressed simply because the interrogation was lengthy, and disputed the inherent coerciveness of the process on the sole ground that it was lengthy.[44] Conceding that such circumstances pressured the prisoner, he nonetheless questioned if such pressure was prohibited under the Constitution—"does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'? The Court does not quite say so, but it is moving far and fast in that direction."[45] For Jackson, the test was not the duration or intensity of the interrogation as the effects of intense interrogation over time would differ from person to person; rather, the test for him was whether the suspect who confesses "was in possession of his own will and self-control at the time of the confession,"[46] which test, he charged, the Court did not abide by.

In *Watts v. Indiana*,[47] the Court found a due process violation based on a lengthy interrogation[48] but had no consensus on how the case should be analyzed.[49] Aside from the length of the interrogation, the Court also looked at the totality of circumstances that included Watts being in solitary confinement for two days and that he did not have "friendly or professional aid and . . . advise as to his constitutional rights"[50] as well as decent conditions of detention such as reasonable opportunities to sleep and a decent allowance for food.[51] As in *Ashcraft*, Justice Jackson wrote separately in *Watts*, to concur in part and to dissent in part. In his separate opinion, he pointedly noted that:

---

[43] *Id.*

[44] *Id.* at 161. He observed that while a 36-hour interrogation would be inherently coercive, the same coercion inheres in a one-hour interrogation and in arrest and detention, by their very nature.

[45] *Id.* This question foreshadowed *Miranda*, which would be decided 22 years after.

[46] *Id.* at 162.

[47] 338 U.S. 49 (1949).

[48] *Id.* at 56 (Douglas, J., *concurring*). The suspect was arrested and held for six days without arraignment and subjected to lengthy nighttime interrogations—four hours starting at 11:30 on the first night, and for nine and a half hours starting at 5:30 on three of the next four nights, *id.* at 52. He confessed at the end of the last session. *Id.* at 57.

[49] Justice Frankfurter announced the decision for the Court but was joined in his opinion by only two justices with two others separately concurring, with another concurring and dissenting in part and with three dissenting.

[50] *Supra* note 47 at 53.

[51] *Id.*

> [T]he suspect neither had nor was advised of his right to counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.[52]

After *Watts*, the Court considered the use of psychological pressure that went out of bounds as a basis to declare a confession as involuntary and in violation of due process in *Spano v. New York*.[53] Here, the defendant's refusal to talk, as well as repeated requests for counsel, was ignored amid persistent attempts to interrogate him over a span of eight hours. Mr. Spano finally confessed after a false representation by a childhood friend, who was attending the police academy at that time, that he (the friend) had been adversely affected by Mr. Spano's situation and that the friend's pregnant wife and three children felt the effects also. This prevarication went through three unsuccessful attempts before Mr. Spano finally gave in, and agreed to make a statement on the friend's fourth attempt.[54] Chief Justice Warren, writing for the Court, emphasized that society's refusal to abide by involuntary confessions is based not just on their "inherent untrustworthiness" but also on the "deep-rooted feeling that the police must obey the law while enforcing the law."[55] In this case, the Court found that Mr. Spano's will was "overborne by official pressure, fatigue and sympathy falsely aroused."[56]

The decreasing reliance on the "reliability" of the confession and the focus on other circumstances that, in their totality, contribute to an inherently coercive environment that violates due process were reflected in *Rogers v. Richmond*,[57] where the trial court failed to consider that the police action in obtaining the confession was "such as to overbear [the] will to resist and bring about confessions not freely self-determined [sic]—a

---

[52] Watts, *supra* note 47 at 58-59 (Jackson, J., *concurring and dissenting*).

[53] 360 U.S. 315 (1959).

[54] *Id.* at 315, 319.

[55] *Id.* at 320.

[56] *Id.* at 323. The Court, in *Spano*, was manifestly more concerned with police conduct and its effect on the will of the suspect to freely choose whether or not to confess than with the reliability of a confession that was true, albeit coerced.

[57] 365 U.S. 534 (1961).

question to be answered with complete disregard of whether or not [the suspect] in fact spoke the truth."[58]

The then-already confusing state of the law was acknowledged by Justice Frankfurter, in his attempt to provide guidance to state courts in determining the voluntariness of a confession obtained under police interrogation, through his opinion in *Culombe v. Connecticut*.[59] However, his three-phased process was densely worded, tedious, cumbersome, and complicated and was not accepted by the Court, with only one Justice joining Frankfurter's three-phased formulation. Relevant to this discussion, however, is this portion of his opinion:

> In light of our past opinions and . . . the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions.
>
> The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[60]

The pre-*Miranda* decisions on "voluntariness" as an element of due process show three overarching themes: (a) unreliability of the confessions extracted under questionable circumstances, (b) deterrence of abusive police interrogation practices, and (c) protecting the autonomy of the suspect's will.[61] The initial dominant concern with the truthfulness of the confessions would later give way to the concern with the overborne will of the individual based on the "totality of the circumstances" with the Court looking more and more, beyond the concern for false confessions obtained from brute physical force to more subtle pressure—such as those arising from lengthy interrogations, inhumane detention conditions, use of deceit and misrepresentation and other psychological pressures—that

---

[58] *Id.* at 544, editorial modifications supplied.

[59] 367 U.S. 568 (1961).

[60] *Id.* at 601-602.

[61] *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998).

overbear on the individual's will to choose freely whether or not to confess, regardless of the truth of the confession.

3. The Decline in State Sovereignty and the Quest for a Uniform Standard

Until *Miranda* came along, *Powell* and *Brown* were considered the most significant bookends on the parameters of state sovereignty when it came to criminal procedure, on one end, and due process, on the other. The progress was slow and often seemed not so deliberate or clear; at times, it appeared that progress was also grudging with attempts to limit the space that *Powell* and *Brown* had cleared as far as due process under the Fourteenth Amendment was concerned.

Two cases illustrate the persistence, despite the space that *Powell* and *Brown* created, of the "state sovereignty" argument when it came to criminal processes as the 1940s ended.[62] The first, *Betts v. Brady*,[63] decided ten years after *Powell* found a due process right to counsel in some capital cases, clarified that this limited right existed in only a few cases which would be determined by "special circumstances." Such circumstances would make the absence of counsel "a denial of fundamental fairness, shocking to the universal sense of justice."[64] The second, *Wolf v. Colorado*,[65] held that a state defendant could not ask for the application of the exclusionary rule which was required in federal court for unconstitutional searches since 1914.[66]

The persistence of the "state sovereignty" view and the Supreme Court's refusal to impose national standards in criminal procedure created much confusion and uncertainty especially when it came to cases where race was involved. In 1954, a significant step was taken towards a uniform, national solution to racial discrimination with the promulgation of *Brown v. Board of Education*,[67] where the Court held segregated public schools to be unconstitutional. During this period, the Court also started to take another look at criminal procedure in the States, with an eye towards a uniform standard similar to *Brown v. Board of Education*. The example of that case demonstrated that, apart from the "state sovereignty" argument, there was really no clear justification for the obvious double standard where

---

[62] Thomas III, *supra* note 20 at 15.
[63] 316 U.S. 455 (1942).
[64] *Id.* at 462.
[65] 338 U.S. 25 (1949).
[66] Weeks v. United States, 232 U.S. 383 (1914).
[67] 347 U.S. 483 (1954).

defendants on the federal and the state level could have so very markedly different conditions.[68]

From 1957 to 1963, the Court decided ten cases involving convictions that were based on confessions given under police interrogations, all of them turning on the common issue of the "voluntariness" of the confessions.[69] The Court ruled that the confessions in eight of the ten cases were involuntary as they were given under conditions that could be considered coercive and intimidating, underscoring the weakness of a state-to-state test as well as of the "voluntariness" test and highlighting the need for a more uniform test.

In 1961, the same year that Justice Frankfurter attempted to provide guidance to state courts in determining the voluntariness of a confession obtained under police interrogation through his opinion in *Culombe v. Connecticut*,[70] the Court overruled *Wolf v. Colorado*—which had refused to apply the exclusionary rule to the states—in *Mapp v. Ohio*[71] by holding that due process required the exclusion in state courts of evidence seized in violation of the Fourteenth Amendment. Significantly, the Court acknowledged directly the persuasive influence of the "state sovereignty" argument through its finding that about half the states rejected the exclusionary rule as an interpretation of their respective state constitutions but nonetheless declined to uphold state sovereignty in favor of a uniform national policy in addressing Fourth Amendment violations. The impetus towards that national policy that *Mapp* started would continue in a series of decisions where the Court abandoned its previous rulings upholding state sovereignty.

---

[68] At that time, federal defendants had the right to have unlawfully-obtained evidence suppressed; indigent federal defendants had a right to have counsel appointed for them in every case and that the Federal Bureau of Investigation (FBI) would routinely warn federal suspects of their right to remain silent and to consult with a lawyer before answering any questions, should they choose to answer. That these procedures at the federal level were considered the standard of "fair" procedure would seem to suggest that the absence of such procedures would suggest the absence of fairness; yet the state sovereignty argument precluded such a suggestion, let alone such a finding. This double standard was apparently not lost on the Court which started to chip away at it. *See generally*, Thomas III, *supra* note 20 at 15.

[69] *See* Fikes v. Alabama, 352 U.S. 191 (1957); Thomas v. Arizona, 356 U.S. 390 (1958); Payne v. Arkansas, 356 U.S. 560 (1958); Crooker v. California, 357 U.S. 433 (1958); Spano v. New York, 360 U.S. 315 (1959); Blackburn v. Alabama, 361 U.S. 199 (1960); Rogers v. Richmond, 365 U.S. 534 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Lynum v. Illinois, 372 U.S. 528 (1963); Haynes v. Washington, 373 U.S. 503 (1963).

[70] *Supra* note 59.

[71] 367 U.S. 643 (1961).

In 1963, two years after *Mapp*, the Court changed its mind on its right to counsel holding in *Betts v. Brady* by ruling in *Gideon v. Wainwright*[72] that every indigent felony defendant had an absolute right to counsel at state expense. In the same year, the Court held in *Haynes v. Washington*[73] that a confession that was obtained under an atmosphere of coercion and compulsion was involuntary and inadmissible. The year after, in 1964, the Court ruled in *Malloy v. Hogan*,[74] to abandon *Twining v. New Jersey*,[75](which had held that due process did not include the right against self-incrimination) that the Fifth Amendment privilege against self-incrimination formed a part of the due process right under the Fourteenth Amendment and that states could not compel a witness to testify and later use the compelled testimony in a criminal case against the witness. Notably, *Malloy* involved a self-incrimination claim that was taken from compelled testimony *in the courtroom* and *not under police interrogation or custodial investigation.*

4. *Escobedo*: Ushering in *Miranda*

Perhaps because of the limitation imposed by the "in-court compelled testimony" standard in *Malloy*, the Court in *Escobedo v. Illinois,*[76] by a 5-4 vote, tried a different approach to the concerns of coerced confessions and police conduct during interrogations by putting in a Sixth Amendment right to counsel during police interrogations.

Justice Goldberg, writing for the Court, in a discourse that was part historical reminiscence and part philosophical reflection, held that the right to counsel during police interrogation under the Sixth Amendment is violated "where . . . the investigation is *no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect*, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent."[77] In such a situation, "no statement elicited by the police during the interrogation may be used against him at a criminal trial."[78]

---

[72] 372 U.S. 335 (1963).
[73] 373 U.S. 503 (1963).
[74] Malloy, *supra* note 29.
[75] 211 U.S. 78 (1908).
[76] 378 U.S. 478 (1964).
[77] *Id.* at 490-491, emphasis supplied.
[78] *Id.* at 491.

Significantly, the Sixth Amendment right to counsel spoke of this right being available "[i]n all criminal prosecutions" but the interrogation of Escobedo took place before he had been formally indicted. The majority held that that "should make no difference . . . [because] [w]hen petitioner [Escobedo] requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime'"[79] and that Escobedo "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."[80] To require a formal indictment before the right to counsel becomes available "would exalt form over substance . . . ."[81] The Court noted that the absence of the "guiding hand of counsel"[82] was clearly felt at pre-indictment which the Court characterized to be "as critical . . . as . . . arraignment . . . and . . . preliminary hearing . . . [because] . . . [w]hat happened at this interrogation would certainly 'affect the whole trial.'"[83]

In the end, the *Escobedo* Court assured the police that "[n]othing we have said today affects the powers of the police to investigate 'an unsolved crime' . . . by gathering information from witnesses and by other 'proper investigative efforts.' We hold only that when the process shifts from investigatory to accusatory—*when its* ***focus*** *is on the accused and the* ***purpose*** *is to elicit a confession*—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."[84] (Emphasis supplied)

---

[79] *Id.* at 485, editorial modification supplied, citations omitted.

[80] *Id.*

[81] *Id.* at 486, editorial modification supplied, citations omitted.

[82] *Id.*, citations omitted.

[83] *Id.*, editorial modification supplied, citations omitted.

Justice Goldberg, replying to the argument that affording the right to counsel pre-indictment would affect adversely the number of confessions obtained by the police because a lawyer would tell a suspect to not make a statement, wrote that the "argument . . . cuts two ways. The fact that many confessions are obtained during this period points up this critical nature as a 'stage when legal aid and advise' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advise." *Id.* at 488, citations omitted. Further, he wrote that "[n]o system worth preserving should have to fear if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." *Id.* at 490, citations omitted.

[84] *Id.* at 492, emphasis added, editorial modification supplied, citations omitted;

Escobedo reflected the Court's continuing quest for a uniform and stable test[85] in place of the "voluntariness" test for confessions which, because of its nature, did not always produce clear answers and was of minimal benefit in regulating police interrogations and protecting against coerced confessions. While the right to counsel under the Sixth Amendment would have been a more straightforward test than the "voluntariness" test, its extension to a "post-arrest, pre-indictment" situation, through *Escobedo*'s "focus" requirement, created similar problems of appreciating what the "focus" and "purpose" of the police were in interrogating a suspect. However, without the "focus and purpose" requirement, the link to the Sixth Amendment right to counsel could not be made.

The response to *Escobedo* was harsh,[86] and understandably so. It was muddled and rambling and was both "sweeping yet narrow."[87] Thus, the Court's quest for a new test—to replace "voluntariness" and to tweak *Escobedo*'s "focus and purpose" requirement—continued. The Court would find the constitutional justification for that new test a year after *Escobedo* in four petitions all involving a common issue which the Court would decide together and would later be known as *Miranda v. Arizona.*

5. *Escobedo's* "Focus" Requirement and the Need for a New Constitutional Justification

After *Escobedo* was announced and the difficulties with its "focus" requirement in relation to the Sixth Amendment right to counsel were being debated, Professor Yale Kamisar would write an essay that would impact very significantly on the issue that the Court was contemplating. His essay, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*,[88] suggested a new approach that would serve as the basis for the new constitutional justification: constitutional protections, which could only be invoked at trial, become irrelevant unless safeguards are introduced during police interrogation. Kamisar noted that while

---

[85] Justice White, in a strongly worded dissent joined by Clark and Stewart, described the new test approved by the majority as "wholly unworkable and impossible to administer", *Escobedo*, *id.* at 496, and calling it a mistake and in essentially *ultra vires*—"Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do." *Id.* at 499.

[86] Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 104 (1993).

[87] *Id.*

[88] Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *From* Escobedo *to . . . , in* CRIMINAL JUSTICE IN OUR TIME (1965).

> [t]he courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns . . . what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? . . . Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors . . . [the] 'gatehouse' of American criminal procedure through which most defendants journey and beyond which many never get.[89]

Suggesting a way to bridge the dichotomy between the full protection provided by the "mansion" and the almost unprotected period when the suspect is at the "gatehouse," Kamisar pointed to the Fifth Amendment right not to be a witness against oneself "in any criminal *case*"[90] (Emphasis supplied) as the solution to avoid the awkwardness of the Sixth Amendment right to counsel which would be available only "[i]n all criminal prosecutions." One year after Kamisar's essay, the Court, in a 5-4 decision[91] written by Chief Justice Earl Warren, promulgated its decision in *Miranda v. Arizona*,[92] where it relied on Kamisar's suggestion to use the Fifth Amendment right against self-incrimination instead of the Sixth Amendment right to counsel.

B. *Miranda* and its Fifth Amendment Pivot

Unlike *Escobedo*,[93] *Miranda*[94] turned on a different pivot. Like *Bram*,[95] it relied on the Fifth Amendment right against self-incrimination and not the due process right under the Fourteenth Amendment. However, like *Ashcraft*,[96] *Watts*,[97] and *Spano*,[98] it also considered the inherent pressure of custodial investigation as a factor that would overbear the suspect's will to freely choose.

The decision in *Miranda* was highly fact-specific but also largely presumption-based. The principle that bound the facts together—that

---

[89] *Id.* at 79.

[90] *Id.* at 80; emphasis added.

[91] Miranda, *supra* note 3, Justices Clark, Harlan, Stewart and White, *dissenting*.

[92] *Miranda* consisted of four cases, all similarly situated thus explaining why the Court decided them together. The petitioners were Ernesto Miranda (Miranda v. Arizona), Michael Vignera (Vignera v. New York), Carl Calvin Westover (Westover v. U.S.) and Roy Allen Stewart (California v. Stewart).

[93] *Supra* note 76.

[94] *Supra* note 3.

[95] *Supra* note 24.

[96] *Supra* note 37.

[97] *Supra* note 47.

[98] *Supra* note 53.

there was an imbalance in the relationship between the interrogator and the individual—was founded on the presumption that statements extracted from interrogation at a police station are presumptively involuntary because the post-arrest or custodial environment at a police station is inherently coercive. The Court described the setting in these words:

> From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advise. It is important to keep the subject off balance by trading on his insecurity about himself or his surroundings.
>
> . . .
>
> Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty on individual liberty and trades on the weakness of individuals.[99]
>
> . . .
>
> In each of these cases [*Miranda, et al.*], the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.[100]
>
> . . .
>
> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the will of the individual to the will of his examiner.[101]

The bright line rule that *Miranda* announced was, therefore, based on principles extracted from the four fact patterns presented, all of which became illustrative of what Chief Justice Warren set out to show—that when a person is under custody, the coercive atmosphere as well as the deliberate strategies and tactics employed by the interrogators will

---

[99] 384 U.S. 436, at 455.

[100] *Id.* at 457.

[101] *Id.*

subjugate the will to such an extent that any statement obtained under such circumstances cannot be considered voluntary.

Acknowledging the "difficulty in depicting what transpires at such interrogations . . . which largely take place *incommunicado*"[102] and in "[p]rivacy [resulting] in secrecy and in a gap in [the] knowledge as to what in fact goes on in the interrogation rooms,"[103] Chief Justice Warren relied on police manuals and texts that documented procedures and tactics used in interrogation and drew up representative samples of interrogation techniques. Thus, the need for warnings which are intended to ensure that, regardless of the setting or the strategy employed, suspects in custody know exactly where they stand, the police know exactly what they may (and may not) do, and courts know exactly how to evaluate *post hoc* any statements that may have been obtained by police officers from a suspect during police interrogation.

The Court took note of and affirmed its earlier ruling in *Escobedo*[104]—as providing for "precious rights . . . fixed in our Constitution only after centuries of persecution and struggle"[105]—while taking pains to underscore that the holding in *Miranda* was "not an innovation in . . . jurisprudence, but [simply] an application of principles long recognized and applied in other settings."[106]

Chief Justice Warren then spelled out the Court's holding—"*the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.*"[107] (Emphasis supplied) In the process, it also clarified *Escobedo*'s most important but also most contentious standard—"*where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect*"[108] (Emphasis supplied) —by defining "custodial interrogation" as "questioning initiated by law enforcement *officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.*"[109] (Emphasis supplied) Thereafter, he formulated the guidelines that would be required to make the Court's holding meaningful, thus:

---

[102] *Id.* at 445, editorial modification supplied.
[103] *Id.* at 448, editorial modification supplied.
[104] *Supra* note 76.
[105] Miranda, *supra* note 3 at 442.
[106] *Id.* at 442;
[107] *Id.* at 444, emphasis added.
[108] Escobedo, *supra* note 76 at 490.
[109] Miranda, *supra* note 3 at 444, emphasis added.

> As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[110]
>
> . . .
>
> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements that are direct confessions and statements that amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.[111]

---

[110] *Id.* at 444-445.

[111] *Id.* at 476. One critic of *Miranda* called the ruling "radical" because it treated "the constitutional bar against compulsory self-incrimination as absolute" and sought "to place all the participants [in the police interrogation process] on equal ground. To accomplish this objective, the Court sought to provide counsel to the suspect before the police could take advantage of the suspect's particular shortcomings. Thus, with one stroke, the Court boldly and improperly resolved the contradictions in the law of confessions by giving it a single focus—protection of the suspect." *See* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1447, 1469 (1985).

This criticism would, however, be rebutted by no less than the Court itself, through Justice O'Connor who wrote in Moran v. Burbine, 475 U.S. 412 (1986), that *Miranda* "embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests," *id.* at 433, n. 4, emphasis in the original, because the rule "as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights . . . " *id.* at 424 because it "attempted to reconcile these opposing concerns by giving the

Chief Justice Warren was not unaware of the impact that the decision would have on law enforcement and, like Justice Goldberg did in *Escobedo*,[112] he pointed out that:

> In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. . . This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confession may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions.[113]
>
> . . .
>
> Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. *Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other*

---

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, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning . . . could continue . . . but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt, or, short of that, call in an attorney to give advice . . ." *id.* at 426-427, emphasis in the original.

[112] Escobedo, *supra* note 76 at 486. Justice Goldberg, replying to the argument that affording the right to counsel pre-indictment would affect adversely the number of confessions obtained by the police because a lawyer would tell a suspect to not make a statement, wrote that the "argument . . . cuts two ways . . . that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advise' are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advi[c]e." *Id.* at 488, citations omitted. Further, he wrote that "[n]o system worth preserving should have to fear if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." *Id.* at 490, citations omitted.

[113] Miranda, *supra* note 3 at 481.

> *general questioning of citizens in the fact-finding process is not affected buy our holding.*[114] (Emphasis supplied)

What *Miranda*'s bright line rule sought to achieve was nothing more than ensuring that specific information is conveyed to a suspect *before* he is brought within the adversarial system, which starts with his being in custody. Thus, "[t]he [*Miranda*] principles . . . deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that [the] adversary system of criminal proceedings commences . . ."[115]

C. The Post-*Miranda* Regime

Almost immediately after *Miranda* was issued, the Court itself engaged in what may be called its "love-hate"[116] relationship with its own creation. Decisions that have followed *Miranda* have been exercises in both clarifying and obscuring its core holding and bright line rule.

Two early rulings addressed the retroactive application of *Miranda*. In *Johnson v. New Jersey*,[117] the Court ruled that the guidelines under both *Escobedo* and *Miranda* were to be applied prospectively, unlike previous rulings that the Court had held to apply retroactively.[118] In so holding, the Court said that "[w]e must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*"[119] and emphasized that giving retroactive effect to a new rule of procedure should

---

[114] *Id.*, emphasis supplied.

[115] *Id.* at 477.

[116] Kinsports, *supra* note 4 at 375.

[117] 384 U.S. 719 (1966).

[118] For instance, Gideon v. Wainwright, 372 U.S. 335 (1963) making the right of an indigent to counsel a constitutional right. *See*, however, Linkletter v. Walker, 381 U.S. 618 (1965), where the Court asserted for the first time its power to render a constitutional decision that was not fully retroactive when it held that Mapp v. Ohio, which applied the Fourth Amendment's exclusionary rule to the states, would not be retroactively applied to state court's decisions that had become final before *Mapp* was decided. The dissenters in *Johnson* (Black and Douglas) expressly alluded to their dissents in *Linkletter*.

[119] Johnson, *supra* note 117 at 727, citations omitted.

be done "'in each case' by looking to the peculiar traits of the specific 'rule in question.'"[120]

In *Davis v. North Carolina*,[121] the Court did not extend *Miranda*'s effects to confessions obtained as a result of "overbearing by police authorities"[122] but instead, applying *Johnson,* used the pre-*Miranda* standard of voluntariness.[123] The Court then went on to find that "[t]he facts established on the record demonstrate that Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts [and that] [e]vidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness . . . ."[124]

In the very first challenge to *Miranda* after the retirement of Chief Justice Warren, Chief Justice Warren Burger, writing for the Court in *Harris v. New York*,[125] held that defective *Miranda* warnings gave rise to statements that were inadmissible under *Miranda* only for purposes of the prosecution's case-in-chief *but not for purposes of impeaching the defendant's credibility* if the defendant voluntarily took the stand to testify.[126] (Emphasis supplied) This ruling carved out a very nuanced exception to *Miranda*'s

---

[120] *Id.* at 728, citations omitted.

[121] 384 U.S. 737 (1966).

[122] *Id.* at 739. Among the circumstances that went into this "overbearing" was the police refusal to let anyone, let alone a lawyer, see him nor to allow him to use the telephone, *id.* at 744, effectively holding him *incommunicado* for 16 days of detention and continuous interrogation, *id.* at 745, 746; each interrogation session would last 45 minutes to an hour spread out over the 26 to 29 men assigned to the case, *id.* at 746. The Court also considered the manner of interrogation, characterizing it as "coercive", *id.* at 749, not only because of the physical demands required by the police in forcing Davis to show the police exactly where he supposedly was and which involved a 14 mile walk handcuffed to an officer but also because it was known to Davis that the entire exercise was to break down his alibi, *id.* Moreover, the Court also noted the various ruses used by the police to obtain the confessions from Davis, *id.* at 749-751.

[123] "As we pointed out in *Johnson*, however, the non-retroactivity of the decision in *Miranda* does not affect the duty of the courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo*." *Id.* at 740, citations omitted.

[124] *Id.* at 752, editorial modification added, citations omitted.

[125] 401 U.S. 222 (1971).

[126] One commentator has noted that *Harris* is the "best example of the disconnect between *Miranda* and the Fifth Amendment" and "the very first case in which the (Burger) Court departed from *Miranda*'s bright line." George C. Thomas III, *Separated at Birth but Siblings Nonetheless*: Miranda *and the Due Process Notice Cases*, 99 MICH L. REV. 1081, 1089 (2001).

core holding and essentially limited a defendant's choice to testify on his own behalf.[127]

A second significant challenge to *Miranda* would come from *Michigan v. Tucker*,[128] written by then Associate (later Chief) Justice Rehnquist, which allowed the testimony of a witness whose identity had been discovered as a result of interrogation of a defendant who had not received a complete set of warnings.[129] In arriving at his conclusion that "the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination,"[130] even as he conceded that there was no full compliance with *Miranda*, Rehnquist framed the question from the point of view of "how sweeping the judicially imposed consequences of this disregard shall be."[131] Citing *Harris*[132] to justify the proposition that "a failure to give interrogated suspects full Miranda warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context,"[133] Rehnquist carved out another nuanced reading of the rule in relation to incomplete warnings that would later be used as basis for other, more express, exceptions.[134]

Michigan v. Moseley[135] dealt with what would become a recurring theme for *Miranda* cases involving more than one instance of interrogation with a break in between and which concerned that portion of *Miranda* involving the "right to cut off questioning."[136] This case involved two

---

[127] The dissenting justices in *Harris* pointed out that the defendant's decision "is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him." *Id.* at 230.

[128] 417 U.S. 433 (1974).

[129] The suspect was not told that if he could not afford counsel, one would be provided to him.

[130] *Supra* note 128 at 445.

[131] *Id.*

[132] *Supra* note 125. *Harris* would again be repeated a few years later when the Court decided Oregon v. Hass**,** 420 U.S. 714 (1975), involving statements taken by the police even after the defendant *asserted* his right to counsel (unlike in *Harris* where no warnings were given and no rights asserted). The Court in *Hass*, repeating *Harris*, ruled that these incriminating statements could be used to impeach the defendant.

[133] *Supra* note 128 at 451.

[134] Rehnquist himself would write the Decision carving out expressly a "Public Safety Exception" in New York v. Quarles, 467 U.S. 649 (1984), *see infra* for discussion; see *also* Oregon v. Elstad, 470 U.S. 298 (1985) where the Court, through Justice O'Connor, declined to apply the "fruit of the poisonous tree" doctrine to statements given post-*Miranda* after an initial un-warned statement.

[135] 423 U.S. 96 (1975).

[136] *Id.* at 103. This refers to the portion where the Court stated that "[o]nce warnings have been given . . . [i]f the individual indicates in any manner, at any time

interrogations of the same defendant for two separate offenses (robbery and homicide), with each interrogation accompanied by separate *Miranda* warnings. During the first interrogation, the defendant, then a suspect, informed the police officer, after being given the *Miranda* warnings, that he did not want to answer any questions about the robbery, at which point, the officer desisted. A few hours after, he was subjected to the second interrogation for a homicide—a crime for which he was not arrested and never subjected to interrogation. After being informed of his *Miranda* rights, he later confessed to the homicide without at any point asking for a lawyer.[137] The Court interpreted the "right to cut off questioning" portion of *Miranda*[138] to determine whether, in Mr. Moseley's case, it had been "scrupulously honored."[139] The Court ruled that it had been so honored because the officer did not continue the first interrogation after being told the suspect did not want to speak about the robbery and the second interrogation followed only after some time rendering them separate and distinct, with *Miranda* warnings having been given on each occasion.[140]

Oregon v. Mathiason[141] was the first time the Court applied the "custody" test in *Escobedo* which *Miranda* clarified—"where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to *focus on a particular suspect*"[142] and "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"[143]—to a situation where the suspect, who had been identified by a victim, was invited to the police station and there was informed that he was not under arrest. Here, the police officer contacted the suspect after the latter was identified by the burglary victim; the officer arranged to have the suspect meet him at the police station where, at the outset, the officer told the suspect that he believed that the latter was involved but that he was not under arrest. During this 30-minute interview, the suspect admitted his involvement in the burglary but was then allowed to leave. The Court ruled that, for purposes of *Miranda*, the suspect was not in custody as there was "no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way."[144] In fact, the Court noted that the suspect voluntarily went to the

---

prior to or during questioning, that he wishes to remain silent, the interrogation must cease" Miranda, 384 U.S. 436 at 473-474.

[137] *See generally id.* at 97-98.

[138] *Id.* at 100.

[139] *Id.* at 104.

[140] *Id.* at 106-107, citations omitted.

[141] 429 U.S. 492 (1977).

[142] Escobedo, *supra* note 76 at 490; *See also* Miranda, *supra* note 3, at 445.

[143] Miranda, *id.*

[144] *Id.* at 495; A similar finding was made by the Court in California v. Beheler, 463 U.S. 1121 (1983); this standard of voluntariness would later be replaced

station, was informed he was not under arrest and was allowed to leave after the interview.

In *North Carolina v. Butler*,[145] the Court took a crack at determining the standard needed for waiver under *Miranda*. The case involved the North Carolina Supreme Court's *per se* waiver rule—that a waiver of the *Miranda* warnings must be made expressly—which the Court struck down in favor of its own flexible "totality-of-the-circumstances" standard adopted in *Johnson v. Zerbst*[146]—that "the question of waiver must be determined on the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."[147] In so holding, the Court noted that "[t]en of the eleven United States Court of Appeals and the courts of at least 17 States [had] held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel . . ."[148] The defendant in this case had been advised of his rights by being asked to read a copy of the FBI's "Advise of Rights" and had expressed understanding of the rights but had refused to sign the waiver at the bottom of the form. When told that he need neither speak nor sign the form but that the agents wanted to speak with him, he indicated that "I will talk to you *but I am not signing any form*." (Emphasis supplied) In the course of speaking with the FBI agents, he made incriminatory statements which were offered in evidence and considered by the court.[149]

---

by another standard—that of "*how a reasonable man in the suspect's position would have understood his situation*"—articulated in Berkemer v. McCarty, 468 U.S. 420 (1984), Stansbury v. California, 511 U.S. 318 (1994), discussed *infra* and Thompson v. Keohane, 516 U.S. 99 (1995), also discussed *infra*.

[145] 441 U.S. 369 (1979).

[146] 304 U.S. 458 (1938).

[147] *Id.* at 464. In Fare v. Michael C., 442 U.S. 707 (1979), the Court again applied the "totality of circumstances" standard to a waiver involving a minor offender. The minor offender here, when asked if he wanted to talk, asked to see his probation officer and expressed misgivings and distrust over being given a lawyer; when told that the police would not call his probation officer, he spoke with the police and gave incriminating statements. The Court, in finding that the minor offender had validly waived his rights and consented to be interrogated, held that the question of "whether the statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, but who has not asked to consult an attorney or expressly asserted his right to remain silent, are admissible on the basis of the waiver remains a question to be resolved on the totality of the circumstances surrounding the interrogation." *Id.* at 728.

[148] Butler, *supra* note 145 at 375-376.

[149] *See generally, id.* at 371; quotation in the original, emphasis added. In his dissent, Justice Brennan pointed out that the majority "shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and

In *Rhode Island v. Innis*,[150] the Court considered the question of what constituted "interrogation" for purposes of the *Miranda* rule and held that this "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[151] The standard "focuses primarily upon the perceptions of the suspect,[152] rather than the intent of the police . . . reflect[ing] the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."[153] In ruling that the defendant was not interrogated, the Court ruled that "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."[154]

In *Edwards v. Arizona*,[155] the Court addressed the issue of the "voluntariness" of a waiver again but, this time, in relation to a

---

gestures. But *the very premise of* Miranda *requires that ambiguity be interpreted against the interrogator*. That premise is the recognition of the 'compulsion inherent in custodial' interrogation, and of its purpose, 'to subjugate the individual to the will of his examiner.' Under such conditions, only the most explicit waiver of rights can be considered knowingly and freely given . . ." *Id.* at 377-379, emphasis added.

[150] 446 U.S. 291 (1980).

[151] *Id.* at 301.

[152] A taxicab driver, who had been robbed by a man wielding a sawed-off shotgun, identified the defendant. The defendant was arrested by a patrolman and was advised of his *Miranda* rights. When other police officers arrived at the arrest scene, he was again advised of his Miranda rights, and he stated that he understood his rights and wanted to speak with a lawyer. He was then placed in a police car to be driven to the central station in the company of three officers, who were instructed not to question respondent or intimidate him in any way. While en route to the station, two of the officers engaged in a conversation between themselves concerning the missing shotgun. The defendant interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. Upon returning to the scene of the arrest where a search for the shotgun was in progress, respondent was again advised of his Miranda rights, he replied that he understood those rights, but that he "wanted to get the gun out of the way because of the kids in the area in the school," and then led the police to the shotgun. *Id.* at 293-295.

[153] *Id.* at 301.

[154] *Id.*

[155] 451 U.S. 477 (1981).

confession[156] made *despite* the *Miranda* warnings. The Court ruled that the trial court, in holding that Edwards had waived his *Miranda* rights, "applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel"[157] when it used only the voluntariness standard because "waivers of counsel must not only be voluntary, but *must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.*'"[158] (Emphasis supplied) The Court also noted that while "the accused may himself validly waive his rights and respond to interrogation . . . additional safeguards are necessary when the accused asks for counsel . . . [and thus] . . . *when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.*"[159] (Emphasis supplied)

In so holding, the Court created a "presumption of involuntariness" of an unwarned statement and underscored the "undisputed right"[160] under *Miranda* to "remain silent and to be free of

---

[156] Edwards was charged with robbery, burglary and first-degree murder. After being arrested and brought to the police station, he was informed of his rights based on *Miranda*; he acknowledged that he understood his rights and was willing to submit to questioning. After being told that another suspect in custody had implicated him, he denied involvement and gave a taped confession detailing an alibi; thereafter, he sought to make deal but was told by the police that they wanted a statement but were not authorized to negotiate a deal with him. He was then given the number of a county lawyer whom he did not call even as he indicated that "I want an attorney before making a deal." All negotiation ceased after this particular statement. The next morning, however, the police went back and asked to see him; Edwards informed the police that he did not want to talk to anyone but the guard insisted that "he had" to talk and brought him to see the police. While there, he was again informed of his *Miranda* rights and thereafter he mentioned that he would be willing to talk but wanted to listen first to the tape recording of the witness who had implicated him. After listening to the tape, he told the police he would be willing to talk with his only qualification being that he did not want it on tape. Thereafter, he incriminated himself. Here, the trial court had initially granted Edwards' motion to suppress his confession on the ground that his rights under *Miranda* had been violated when the officers had returned to question him even after he had already invoked his right to counsel but later reversed itself, finding that Edwards' confession had been voluntary. *See generally*, *id.* at 478-479.

[157] *Id.* at 481.

[158] *Id.*, emphasis added.

[159] *Id.* at 484-485, citation omitted, emphasis added.

[160] *Id.* at 485.

interrogation 'until he had consulted with a lawyer'"[161] and also "[had] counsel present at any custodial interrogation."[162]

The language of the required warnings was addressed in *California v. Prysock*.[163] Here, a defendant, who was a minor and in custody for murder, was given warnings[164] but "was not explicitly informed of his right to have an attorney appointed before further questioning."[165] The lower courts found a *Miranda* violation[166] but the Court disagreed, with a majority holding that the exact words of the warnings from the *Miranda* opinion did not have to be used[167] and chastising the California lower courts, thus:

> This Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.

---

[161] *Id.*.

[162] *Id.* at 486.

[163] 453 U.S. 355 (1981).

[164] *Id.* at 356-357; the warnings given to the defendant are quoted in the decision, to wit:

> Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
>
> Randall P.: Yes.
>
> Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
>
> Randall P.: Yes.
>
> Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
>
> Randall P.: Yes.
>
> Sgt. Byrd: You all, uh,-if,-you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
>
> Randall P.: Yes.
>
> Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?
>
> Randall P.: Yes.

[165] *Id.* at 359.

[166] *Id.* On this point, the Court of Appeals held that the warnings given were inadequate because respondent was not explicitly informed of his right to have an attorney appointed before further questioning. It stated that "[o]ne of [*Miranda*'s] virtues is its precise requirements which are so easily met . . . [T]he rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength."

[167] *Id.*

> Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."[168] (Emphasis supplied)

The standard of compliance with the form of the warnings advocated by the majority was a case-by-case factual inquiry in which the judge examines the warnings given to the suspect to determine if "the reference to appointed counsel was linked to a future point in time after the police interrogation."[169] Using this standard, the Court found no constitutional violation.[170] Until *New York v. Quarles*,[171] *Miranda* had remained essentially intact with only nuanced interpretations that limited its reach but no express *per se* exception that dispensed with its application. *Quarles* carved out the first express exception—a "Public Safety Exception"—to the *Miranda* "warning and waiver" requirement; notably, the Court made this exception applicable *per se* even if the ruling was based

---

[168] *Id.* at 359-360, citation omitted (quoting *Miranda* at 476), emphasis in the original.

[169] *Id.* at 360.

In *Duckworth v. Eagan*, 492 U.S. 195 (1989), the Court used a similar standard where the officer simply informed the suspect that a lawyer would be appointed "if and when you go to court." *Id.* at 198. The warnings provided to the defendant were contained in a form that read:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer. (Emphasis supplied)

Chief Justice Rehnquist, writing for the majority, stated that what was at issue "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*,'" *id.* at 203, (editorial modification in the original), and ruled that this essential message intended by the *Miranda* warnings was conveyed. *Id.*

[170] Prysock, *supra* note 163 at 362. *See* however, Justice Stevens' dissenting opinion, *id.* at 362-366, where he concludes that the defendant "was not given the crucial information that the services of the free attorney were available *prior to the impending questioning*," *id.* at 363 (emphasis in the original, citation omitted), and suggesting that the Court itself "[was] guilty of attaching greater importance to the form of the *Miranda* ritual than to the substance of the message it [was] intended to convey." *Id.* at 366.

[171] 467 U.S. 649 (1984).

on a very specific fact pattern.[172] Chief Justice Rehnquist, writing for a majority of the Court, held that "*on these facts* there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence and that the availability of that exception does not depend upon the motivation of the individual officers involved."[173] The ruling explained that police officers, in the act of apprehending a suspect and confronted with the immediate need to determine where a gun was located, should not be "required to recite the familiar . . . warnings before asking the whereabouts of the gun [because] suspects in Quarles' position might well be deterred from responding"[174] and "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[175] While conceding that it was carving out a "narrow exception to the *Miranda* rule *in this case*,"[176] the majority nonetheless proceeded to announce what was essentially a *per se* rule applicable in all similar situations.

Justice O'Connor concurred in the judgment in part but dissented in part—-she favored suppression of the initial statement ("the gun is over there") but concurred in the ruling to allow the admission of the gun itself.[177] In favoring suppression of the initial un-mirandized statement, she

---

[172] Quarles was arrested based on a report made by a woman who approached two police officers complaining that she had been raped, describing her assailant and informing the police that he had just entered a supermarket and was armed. One of the two officers went into the supermarket, spotted Quarles, pursued him and managed to corner him; the officer frisked Quarles and discovered an empty shoulder holster prompting the officer to ask Quarles where the gun was. Quarles pointed in the direction of some empty cartons, responding, "the gun is over there." The gun was recovered and Quarles was formally placed under arrest and read his *Miranda* rights. Quarles indicated that he would be willing to answer questions even without a lawyer present and when asked if he owned the gun, answered in the affirmative adding that he bought it in Miami. At trial, the judge excluded Quarles's statement "the gun is over there" and the gun because he had not been *Mirandized* yet when he uttered the statement; similarly, the statement as to his ownership of the gun and where he had bought it, as evidence tainted by the prior *Miranda* violation. The Appellate Division of the New York Supreme Court affirmed this; the Court of Appeals also affirmed it. The Supreme Court granted *certiorari* and reversed stating, *inter alia*, that "this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*." *See generally id.* at 651-653.

[173] *Id.* at 655-656, emphasis added.

[174] *Id.* at 657.

[175] *Id.*

[176] *Id.* at 658, emphasis added.

[177] *Quarles*, *supra* note 171 at 660 (O'Connor, J., *separate concurring and dissenting*).

pointed to the very text of the *Miranda* decision itself, emphasizing that "*Miranda* is now the law and . . . the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."[178] Her objection to the "public safety exception" was that it "unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand"[179] with the "end result [being] a finespun [sic] new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."[180] Ironically, Justice O'Connor zeroed in on the main difficulty with the "public safety exception" that Rehnquist carved out by quoting what Rehnquist himself said in another case—"[w]hile the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, . . . that rigidity [has also been called a] strength of the decision. It [has] afforded police and courts clear guidance on the manner in which to conduct custodial investigation: if it was rigid, it was also precise . . . This core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by . . . courts under the guise of interpreting *Miranda* . . ."[181] In her concurrence with the majority's ruling to admit the gun, however, O'Connor pointed out that "[o]nly the introduction of a defendant's own testimony is proscribed by the Fifth Amendment's mandate . . . [which] does not protect an accused from being compelled to surrender non-testimonial evidence against himself."[182]

Justice Marshall, joined by Justices Brennan and Stevens, dissented and pointed out that the "public safety exception" could not be justified factually[183] because: (a) the majority's premise that the public was at risk was not borne out of the facts as the arresting officer himself had admitted that he had everything under control and that the question posed to Quarles was not prompted by concern for the public safety;[184] and (b) there was no evidence on record to show exigent circumstances posing a risk to the public safety.[185] Marshall also argued that the "public safety" exception could not also be justified legally because the Court itself had previously considered the very same question twice and ruled in favor of

---

[178] *Id.*

[179] *Id.* at 663.

[180] *Id.* at 664, editorial modification added.

[181] *Id.* at 664-665, *quoting* Rehnquist, J., in chambers on application for stay in Fare v. Michael C., 439 U.S. 1310, 1314 (1978).

[182] *Id.* at 666.

[183] The fact-based attack by Marshall is significant because Rehnquist's majority opinion is fact-based as shown by his holding that "*on these facts* there is a 'public safety' exception . . ." *See id.* at 655.

[184] *Id.* at 675 (Marshall, J., *dissenting*).

[185] *Id.* at 679.

upholding *Miranda*.[186] Finally, Marshall argued that, as a practical matter, the exception could not be justified because it destroys the clarity that the bright line rule in *Miranda* brought—"[b]efore today's opinion, the procedures established in *Miranda* . . . had 'the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.' . . . As the majority candidly concedes, a public safety exception destroys forever the clarity of *Miranda* for both law enforcement officers and members of the judiciary."[187]

Justice O'Connor's separate partial concurrence in *Quarles* as to the "fruit of the unwarned statement" would become the main opinion in *Oregon v. Elstad*[188] with the Court, voting 6-3, not to apply the "fruit of the poisonous tree" doctrine, which is standard in search and seizure cases under the Fourth Amendment, to violations of the *Miranda* warnings. Here, Elstad was visited at home by police officers who proceeded to obtain an incriminating statement from him without first having been administered the *Miranda* warnings—the warnings were given only after about an hour and at the police station, at which point Elstad waived his rights and confessed to the crime. The Court ruled that the first statement taken at Elstad's home was inadmissible but the second one, made after having been notified of his rights and waiving the same, was admissible.[189]

---

[186] *Id.* at 677; referring to Rhode Island v. Innis, *supra* note 150, and Orozco v. Texas, 394 U.S. 324 (1969).

[187] *Id.* at 679, citations omitted; to underscore his point, Marshall noted that the New York Court of Appeals had gone over the very same record that the Court had and arrived at a diametrically opposite view—"no evidence in the record before us that there were exigent circumstances posing a risk to the public safety"—that the majority arrived at—"[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety." *Id.* In noting this, Marshall pointedly says that "[i]f after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world." *Id.*

[188] 470 U.S. 298 (1985).

[189] *Elstad* would prove to be very serious threat to *Miranda* simply because of the nature of confessions as a rich source of other evidence. A broad reading of *Elstad* would allow for the introduction of non-testimonial fruits of a *Miranda* violation in a criminal trial. The Court's recent cases, discussed *infra*, would bear this out; *see* US v. Patane, 542 U.S. 630.

Also, the Court in *Elstad*, 470 U.S. 298 at 318, pointed out that a *Miranda* violation may be considered in determining the existence of actual coercion in relation to the voluntariness of a confession; it is not dispositive under a "totality of

Rejecting the argument that a *Miranda* violation constitutes a "poisonous tree" for purposes of admissibility of derivative fruits, the Court ruled that the *Miranda* violation was not *ipso facto* a constitutional violation, but instead merely the violation of a judge-made "prophylactic" rule or preventive measure intended to protect the core constitutional privilege against self-incrimination.[190]

In *Stansbury v. California*,[191] the Court dealt with the unarticulated subjective focus of the interrogator in relation to the duty to give the *Miranda* warnings. Here, the facts dealt with an investigation involving a person initially considered a suspect and another initially invited to be a material witness. In the course of questioning the material witness, the police *shifted their focus* from their initial suspect to the material witness because of some of the statements mentioned by the latter. During the questioning of the material witness *before* the police shifted their focus, no *Miranda* warnings were given to him; the moment the focus shifted, the police ceased questioning and gave the *Miranda* warnings to the hitherto material witness now turned suspect who declined to make further statements, asked for counsel and was formally arrested. Inquiring into the admissibility of the statements made in view of the absence of *Miranda*warnings during that period, the Court ruled on the question whether the defendant was "in custody" at that time. Reversing the trial court's judgment, the Court stated that "(i)n determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation but *the 'ultimate inquiry is simply whether there [was] a "formal arrest or restraint of freedom of movement" of the degree associated with*

---

circumstances" analysis in relation to determining due process compliance. The Court said that:

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda,* was voluntary. [As in any voluntariness inquiry], the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is [however], highly probative.

Note, however, the specific admonition in *Miranda*, *supra* note 3 at 445 that "[t]he mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned" and that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475.

[190] Elstad, *supra* note 188 at 307-308.

[191] 511 U.S. 318 (1994).

a formal arrest."[192] According to the Court, "*a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody* for purpose of *Miranda*"[193] because "the initial determination of custody depends on the *objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.*"[194] (Emphasis supplied)

In *Davis v. United States*,[195] the Court dealt with the "counsel" component of the *Miranda* warning and an "insufficiently clear"[196] invocation of the right to counsel—"[m]aybe I should talk to a lawyer."[197] The Court held that a police officer is not obliged to cease questioning unless the suspect *unambiguously* requests counsel.[198] The Court noted that while *Edwards v. Arizona*[199] had established the "rigid prophylactic rule . . . to determine whether the accused *actually invoked* his right to counsel"[200] because "if a suspect requests counsel at any time during the interview, he

---

[192] *Id.* at 322, emphasis added.

[193] *Id.* at 323, emphasis added.

[194] *Id.*, emphasis added. On this point, the Court cited its previous ruling in Berkemer v. McCarty, 468 U.S. 420 (1984) that "the policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time [because] the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."

Subsequently, in Thompson v. Keohane, 516 U.S. 99 (1995), the Court provided a formula for the Miranda custody test. The Court stated that two inquiries are material to this determination: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 112. The Court emphasized an "objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest?" *Id.*

Yarborough v. Alvarado, 541 U.S. 652 (2004), also underscored the objective nature of the custody test in *Miranda* and highlighted the "important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." *Id.* at 667. According to the Court, the objective test serves an important function of furthering "'the clarity of [*Miranda*'s] rule' . . . ensuring that the police do not need 'to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Id.*, citation omitted.

[195] 512 U.S. 452 (1994).

[196] *Id.* at 454.

[197] *Id.*

[198] On this point, *see* Connecticut v. Barrett, 479 U.S. 523 (1987), which involved a situation where the suspect made it clear that he would not make a written statement without counsel being present but later orally admitted his participation in the crime. The Court rejected the contention that the suspect's expressed desire for counsel before making a written statement amounted to an invocation of the right to counsel. *Id.* at 528-529.

[199] *Supra* note 155.

[200] *Id.* at 458, citations omitted, emphasis added.

is not subject to further questioning until a lawyer had been made available or the suspect himself reinitiates conversation,"[201] the situation posed by an ambiguous reference to counsel is not sufficient to require police officers to cease questioning. Citing the effects on law enforcement if the Court were to extend *Edwards* to ambiguous references to possible requests for counsel, the Court stated that it was "unwilling to create a third layer of prophylaxis [the first layer being *Miranda*, the second being *Edwards*] to prevent police questioning when the suspect *might* want a lawyer . . . [and] [u]nless the suspect actually requests an attorney, questioning may continue."[202]

In *Dickerson v. United States,*[203] Chief Justice Rehnquist wrote the decision that many expected would result in the abandonment of *Miranda* as doctrine. Surprisingly, he sustained *Miranda* against a legislative challenge in the form of 18 USC § 3501, a statute which made the admissibility of statements turn solely on whether they were made voluntarily, thereby effectively negating the standard set by *Miranda*. The Court struck down the statute as unconstitutional, tritely holding that "*Miranda*, *being a constitutional decision of this Court*, may not be in effect overruled by an Act of Congress and we decline to overrule *Miranda* ourselves . . . *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts."[204] In so ruling, the Court effectively insulated *Miranda* from any future legislative challenge and left its continued existence and viability exclusively to the Court. Significantly, the Court stopped short of saying that *Miranda* was mandated by the Constitution[205] which Justice Scalia, dissenting and arguing for *Miranda*'s abandonment as doctrine, pointedly observed.[206]

---

[201] *Id.*, citations omitted.

[202] *Id.* at 462, editorial modification added.

[203] *Supra* note 8.

[204] *Id.* at 432, emphasis added. The Court cited the combined effect of *stare decisis*, the place of *Miranda* in national culture (calling it "embedded in routine police practice to the point where the warnings have become part of our national culture," *id.* at 443) and the efficacy of the Court's adjustments to the original decision ("our subsequent cases have reduced *Miranda's* impact on rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief," *id.* at 443-444) as justifications for preserving the core requirement of *Miranda* as a "constitutional rule." *Id.* at 444.

[205] One of the problems of the language of *Miranda* is that it also stops short of identifying the "warning and waiver" requirement as constitutional. Warren hints of a "constitutional dimension" to the issue, *Miranda*, 384 U.S. 436 at 490 ("the issues presented are of constitutional dimension" and again "[j]udicial solutions to problems of constitutional dimension . . ."), and also "constitutional standards," *id.* at 491 ("we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the

Following *Dickerson* and after the terror attacks on September 11, 2001, the question of *Miranda*'s applicability specifically to interrogations conducted abroad of foreign suspects involved in domestic terrorist activities would be answered by the United States District Court for the Southern District of New York in an opinion in *United States v. Bin Laden, et al.*[207] Ruling on motions to suppress statements obtained by U.S. law enforcement officers abroad without complying with the requirements of *Miranda*, the court held that "a defendant's statements, if extracted by U.S. agents acting abroad, should be admitted as evidence at trial *only if the Government demonstrates that the defendant was first advised of his rights and that he validly waived those rights*. Suppression in the absence of either requirement will protect that defendant insofar as he is the present subject of a domestic criminal proceeding."[208] (Emphasis supplied)

Expressly citing *Dickerson* as the basis for the holding, the district court further supported its position on the applicability of *Miranda* by citing the "joint venture exception."[209] This refers to "the line of cases involving the suppression of statements elicited during overseas interrogation by *foreign police* . . . [which] uniformly recognize an exception to the usual rule that the failure to provide *Miranda* warnings is not dispositive of the motion to suppress whenever questioning is conducted by foreign authorities . . . [which] provides that the lack of *Miranda* warnings will still lead to suppression if U.S. law enforcement themselves actively participated in the questioning . . . or if U.S. personnel, despite asking no questions directly, used the foreign officials as their

---

privilege"), but stopped short of declaring them as constitutional rights under the Fifth Amendment. Similarly, Warren emphasizes that the "warnings and waiver" requirement is "fundamental with respect to the Fifth Amendment privilege and not simply a ritual to existing methods of interrogation," *id.* at 476, but again stops short of situating the requirement squarely within the Fifth Amendment.

[206] *See* Dickerson, *supra* note 8 at 444 (Scalia, J., *dissenting*; joined by Thomas,J.) where Scalia argued for the abandonment of *Miranda* as doctrine—"[t]hose who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence." *Id.* at 445. Pointedly challenging the characterization of *Miranda* as a "constitutional rule," Scalia points out that "to justify today's agreed-upon result, the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that "announced a constitutional rule." *Id.* at 446, citations omitted, emphasis in the original.

[207] 132 F. Supp. 2d 168 (2001).

[208] *Id.* at 187, emphasis added.

[209] *Id.*

interrogational agents in order to circumvent the requirements of *Miranda*."[210] (Emphasis supplied) According to the district court, "[w]hatever the precise formulation . . . the assumption [is] that *Miranda* must apply to any portion of an overseas interrogation that is, in fact or form, conducted by U.S. law enforcement."[211] As to what would constitute sufficient warnings, the district court held that "he must be told that he has the right to remain silent, effective even if he has already spoken to the foreign authorities . . . that anything he does say may be used against him in a court of the United States or elsewhere."[212] As to the right to be assisted by counsel and to have counsel present, the court conceded that this would be more complicated and agreed with the government that "*Miranda* does not require law enforcement to promise that which they cannot guarantee or that which is in fact impossible to fulfill."[213] In this respect, the court simply directed that "[t]o the maximum extent reasonably possible, efforts must be made to replicate what rights would be present if the interrogation were being conducted in America."[214] Thus, the "fair and correct approach under *Miranda* is for U.S. law enforcement simply to be clear and candid as to both the existence of the right to counsel and the possible impediments to its exercise."[215] Using this standard, the court found that the Advise of Rights ("AOR")[216] used by

---

[210] *Id.*, citation omitted.

[211] *Id.*

[212] *Id.* at 187-188.

[213] *Id.* at 188.

[214] *Id.*

[215] *Id.*

[216] The Advise of Rights (AOR) employed by the FBI in United States v. Bin Laden, *id.*, reads, as follows:

> We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.
>
> You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.
>
> If you do speak with us, anything you say may be used against you in a court in the United States or elsewhere.
>
> In the United States, you would have the right to talk to a lawyer and to get advise before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.
>
> Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.
>
> If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.

the agents in their interrogations of two suspected terrorists abroad were "facially deficient in its failure to apprise defendants accurately and fully of their right, under *Miranda*, to the assistance and presence of counsel if questioned by U.S. agents, even considering that defendants were in the custody of foreign authorities."[217] The court's finding of facial deficiency notwithstanding, the AOR is significant for the manner that it sequences the warnings and explanations, with an eye towards clarity which is consistent with the overall objective of the protective warnings mandated by *Miranda*.

In 2003, the Supreme Court in *Chavez v. Martinez*[218] tangentially addressed the same issue the district court took on in *Bin Laden*. More importantly, *Chavez* took on *Dickerson* and effectively addressed *Miranda*'s core holding. Justice Thomas, writing for a plurality composed of Chief Justice Rehnquist, Justices O'Connor, Scalia, and Souter, effectively turned *Dickerson* around by ruling that a failure to read *Miranda* warnings is not, *per se*, a violation of the Constitution.[219] Reverting back to pre-*Dickerson* language that *Miranda* is a "prophylactic" or preventive aid that protects but "[d]oes not extend the scope of the constitutional right itself,"[220] *Chavez* held that the failure to give *Miranda* warnings before questioning did not involve a violation of the Fifth Amendment right against self-incrimination where the statements were not presented at trial. Characterizing the guarantee against self-incrimination as a "trial right" that could be violated only during trial and describing *Miranda* as merely a "prophylactic," *Chavez* created a third exception to *Miranda*,[221] diluted *Dickerson*'s characterization of *Miranda* as a "constitutional decision" and undermined the core holding of *Miranda*, that the only way by which a trial

---

> You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.
>
> . . . .
>
> . . . I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

[217] *Id.* at 189.

[218] 538 U.S. 760 (2003).

[219] *Id.* at 772.

[220] *Id.*

[221] The other two exceptions are *Harris*' admissibility for impeachment purposes and *Quarles*' "public safety" exception.

Notably, by reverting back to its description of *Miranda* as "prophylactic," *Chavez* also undermined the rationale behind the opinion of the district court in *Bin Laden* that *Miranda* applied to U.S. law enforcement agents abroad—an opinion premised on *Dickerson*'s characterization of *Miranda* as a constitutional rule.

right could be given meaning was to protect it *before* its violation through its "warning and waiver" requirement.

On June 28, 2004, the Court decided two cases dealing with *Miranda*, resulting in two very different results and reflecting divergent perspectives on *Miranda*. Both cases did not command a majority, each gaining only a plurality; thus leaving their respective dispositions to be basis for an authoritative precedent for some other time.

In the first case, *Missouri v. Siebert*,[222] the Court dealt with a "police strategy adapted to undermine the *Miranda* warnings"[223] characterized as "question first"[224] where the police would deliberately refrain from giving the warnings that *Miranda* requires, question the suspect until she or he gives a statement, then administer the warnings and repeat or confirm the statements given pre-*Miranda*.[225] The Court struck this practice down as being in violation of *Miranda* and as an "'end run'around *Miranda* [which] would encourage *Miranda* violations and diminish *Miranda*'s role in protecting the privilege against self-incrimination."[226]

In the second case, *United States v. Patane*,[227] involving an incomplete *Miranda* situation[228] and its effects on the physical evidence obtained from a voluntary admission by the suspect, the Court went the other way—in a very significant way.[229] Here, the detectives, after

---

[222] 542 U.S. 600 (2004); Justice Souter wrote for a plurality of four (Souter, Stevens, Ginsburg and Breyer, JJ.) with Kennedy, J. joining in the judgment only; O'Connor, J. dissented, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.

[223] *Id.* at 616.

[224] Also referred to as the "two-step," *see* Stewart J. Weiss, Missouri v. Seibert: *Two-Stepping Towards the Apocalypse*, 95 J. CRIM.L.& CRIMINOLOGY 945, No. 3 (2005); Daniel S. Nooter, *Is* Missouri v. Seibert *Practicable?: Supreme Court Dances the "Two-Step" Around* Miranda, 42 AM. CRIM. L. REV. 1093 (2005).

[225] *See generally* Siebert, *supra* note 222 at 604.

[226] *Id.* at 606, citations omitted.

[227] 542 U.S. 630 (2004); Justice Thomas wrote for a plurality of three, consisting of himself, Chief Justice Rehnquist and Justice Scalia with Justices Kennedy and O'Connor concurring only in the judgment; Souter wrote a separate dissent, joined by Stevens, Ginsburg and Breyer who also wrote a separate short dissent.

[228] Justice Thomas frames the issue—"whether a failure to give a suspect the warnings . . . requires suppression of the physical fruits of the suspect's unwarned but voluntary statements," *id.* at 633, as one "previously addressed," *id.* at 634, but without a "definitive conclusion," *id.*, citations omitted.

[229] An ironic twist that was not lost on Justice Souter who, in his dissent, pointed out that the plurality, in "closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda* . . . adds an important inducement for interrogators to ignore the rule . . ." *id.* at 646, citations omitted, and that "[t]here is no way to read [*Patane*] except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained . . . an odd

apprehending a suspect for violating a restraining order in a domestic case for alleged possession of a firearm, started to give the warnings but got no further than the right to remain silent[230] before being interrupted by the suspect who said he was aware of his rights thus leaving the warnings uncompleted.[231] When asked about the firearm, the suspect was "initially reluctant to discuss the matter"[232] but not for self-incrimination purposes.[233] After the detective persisted, the suspect then said that the gun was in his bedroom and gave permission to retrieve it.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, refused to extend the exclusionary rule arising from the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*[234] to the fruit of an unwarned though voluntary admission which yielded incriminating physical evidence. The plurality opinion, ignoring the clear language of *Dickerson*[235]in the same way that it had done in *Chavez*, which stated that *Miranda* is simply "a prophylactic employed to prevent against violations of the Self-Incrimination Clause . . . [which] however is not implicated by the admission into evidence of the physical fruit of a voluntary statement . . . [thus, giving] no justification for extending the *Miranda* rule to this context."[236] Describing the *Miranda* rule as one that "necessarily sweep[s]

[incentive], coming from the Court on the same day it decides *Missouri v. Siebert* . . ." *id.* at 647, citations omitted.

Kamisar notes that Justice Thomas, who was one of two dissenters in *Dickerson*, *supra* note 8 (together with Justice Scalia, who joined the *Patane* Decision), wrote the opinion "that treated *Dickerson* almost as if it did not exist . . . [using] pre-Dickerson language, [characterizing] the '*Miranda* rule' as a 'prophylactic employed to protect against violations of the Self-Incrimination Clause." Surprisingly, Chief Justice Rehnquist, who wrote *Dickerson*, was the third vote in the plurality of three who voted for *Patane*'s main holding. *See* Kamisar, *supra* note 3 at 202-203, *citing* Joshua Dressler & Alan Michaels, Understanding Criminal Procedure, 428-29, 520 (2006).

[230] Patane, *supra* note 227 at 635.

[231] There is no indication why the detectives did not, nonetheless, complete the warnings; neither is there an indication of a subsequent question by the officers as to whether the suspect was waiving the rights which he claims to have been aware of.

[232] *Supra* note 230.

[233] *Id.* He is quoted as saying "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me."

[234] 371 U.S. 471 (1963).

[235] Ironically, Dickerson, *supra* note 8, was written by Chief Justice Rehnquist. In *Dickerson*, Rehnquist wrote that "[t]his case therefore turns on whether the Miranda Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction . . .", *id.* at 437, which he answered by stating that "we conclude that Miranda announced a constitutional rule that Congress may not supersede legislatively." *Id.* at 444.

[236] *Supra* note 234 at 636.

beyond the actual protections of the Self-Incrimination Clause"[237] Justice Thomas cautioned that "any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination"[238] and insisted that "the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it."[239] Finally, the plurality opinion also ruled that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule"[240] because the "nature of the right protected by the Self-Incrimination Clause, which the *Miranda* rule protects"[241] is a "'fundamental *trial* right."[242] (Emphasis supplied) Thus, Thomas's plurality opinion holds that the violation occurs only "upon the admission of unwarned statements into evidence at trial . . . [a]nd, at that point, '[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy for any perceived *Miranda* violation"[243] and, for this reason, "unlike unreasonable searches . . . or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is with respect to mere failures to warn, nothing to deter . . . [and] therefore no reason to apply the 'fruit of the poisonous tree' doctrine of *Wong Sun*."[244]

In *Maryland v. Shatzer*,[245] the Court took up an issue it had decided before in *Edwards v. Arizona* when it considered "[w]hether a break in custody ends the presumption of involuntariness."[246] It ruled that "a break in *Miranda* custody lasting more than two weeks between the first and

---

[237] *Id.* at 639, *citing* Withrow v. Williams, 507 U.S. 680, 690–691(1993) and Oregon v. Elstad *supra* note 188 at 306.

[238] *Id.*, *citing* Chavez, *supra* note 218 at 778.

[239] *Id.* at 641.

[240] *Id.*

[241] *Id.*

[242] *Id.*, *citing* Withrow.

[243] *Id.* at 641-642, *citing* Chavez, *supra* note 218 at 790, editorial modification in the original, additional editorial modification supplied.

[244] *Id.* at 642, citations omitted.

[245] 130 S. Ct. 1213 (2010).

[246] *Id.* at 1213, citation omitted; *Edwards* established a "presumption of involuntariness" of any unwarned statements, i.e., statements taken without the benefit of a *Miranda* warning or provision of counsel in the face of a categorical waiver of the right to remain silent. *Edwards* raised the traditional standard for a waiver of rights by adding a "second layer of prophylaxis," Shatzer, *supra* note 245 at 1219, to the effect that "a valid waiver of [the right to counsel] cannot be established by showing only that he responded to further police-initiated custodial investigation even if he has been advised of his rights . . . [H]e is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *Id.*, *citing* Edwards, 451 U.S. 477 at 484-85.

second attempts at interrogation"[247] did not trigger the presumption of involuntariness in *Edwards* and did "not mandate suppression" of his last statement given within the period of fourteen days[248] prescribed by the Court. There was no question of failure to give the *Miranda* warnings but instead a corollary question of how long law enforcement officers needed to wait before any subsequent interrogation could be conducted on a suspect, once the right to counsel had been invoked.[249]

In *Berghuis v. Thompkins*[250] the Court ruled that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an un-coerced statement to the police"[251] even where the suspect was "largely silent during the interrogation . . . [and gave] a few limited verbal responses . . . such as 'yeah', 'no', or 'I don't know' [or] [o]n occasion . . . communicated

---

[247] *Supra* note 245 at 1227.

[248] *See generally id.* at 1222-1224. The Court thought it imperative to set a "bright line" period to settle any questions as to the duration of a break in custody that would be sufficient to defeat the *Edwards* presumption of involuntariness, holding that it was "impractical to leave the answer to that question [referring to the durational requirement] for clarification in future case-by-case adjudication . . . [because] law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." *Id.* at 1222-1223. Thus, "[w]e think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption 'will not reach the correct result most of the time.' . . . [and] that period is 14 days . . . [which] provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Id.* at 1223.

[249] Shatzer was incarcerated for a child-sexual-abuse offense when unrelated allegations of his having sexually abused his own three-year old son were being investigated. The detective assigned to investigate and interview Shatzer gave the *Miranda* warnings and obtained a written waiver of those rights; when the interrogation started, Shatzer subsequently declined to answer any questions without a lawyer present; at this point, the interview ended, the detective left and Shatzer was released back into the general population of the prison. Two years and six months after, more specific allegations about the same incident involving Shatzer came up; a different detective was asked to investigate. Again, Shatzer was read his *Miranda* rights and a written waiver was obtained. During the interrogation, Shatzer answered the questions, denying the allegations without invoking the presence of counsel. At the end of the interview, Shatzer agreed to take a polygraph. Five days later, Shatzer was administered the polygraph examination but not before he was again given, for the third time, his *Miranda* warnings and another written waiver was extracted from him. After being told that he had failed the polygraph exam, Shatzer became upset and emotional and incriminated himself. It was only after making the statements that he requested an attorney. The interrogation promptly ended at that point. *Seeid.* at 1217-1218.

[250] 130 S. Ct. 2250 (2010).

[251] *Id.* at 2264.

by nodding his head"[252] and where the coerced statements constituted of "yes" answers to seemingly unrelated but leading questions given during the tail-end of an interrogation lasting two hours and forty-five minutes.[253]

Justice Kennedy, writing for a majority of five Justices, made three specific points: (a) the right to remain silent must be "unambiguously" invoked and cannot be presumed by mere silence;[254] (b) the right to remain silent is waived by speaking at any point during the interrogation;[255] and (c) that a waiver of the right to remain silent need not be expressed but can be implied from the conduct of the suspect.[256]On the first point, Kennedy was not persuaded by Thompkins's argument that he "'invoked his privilege to remain silent by not saying anything for a sufficient period of time, so the interrogation should have 'cease[d] before he made his incriminatory statements"[257] and insisted on a rule that would "require an accused who wants to invoke his or her right to remain silent to do so unambiguously."[258] Finding that there was no clear invocation of his right to remain silent, the majority found that "Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police . . . [and that] [h]ad he made either of those simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'"[259] On the second point, Justice Kennedy found that "[t]he record . . . shows that Thompkins waived his right to remain silent"[260] because it was clear he was given the warnings and that he understood them and that, considering the specific text of the warnings,[261] "[i]f Thompkins wanted to remain silent,

---

[252] *Id.* at 2256-57.

[253] *See id.* at 2257; as described by the majority opinion, the statements were given under these circumstances: "About 2 hours and 45 minutes into the interrogation, [Detective] Helgert asked Thompkins, 'Do you believe in God?' . . . Thompkins made eye contact with Helgert and said, 'Yes,' as his eyes 'well[ed] up with tears' . . . Helgert asked, 'Do you pray to God?' Thompkins said 'Yes.' . . . Helgert asked, 'Do you pray to God to forgive you for shooting that boy down?' . . . Thompkins answered 'Yes' and looked away . . . Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later." *Id.* at 2257, citations omitted.

[254] *See generally*, *id.* at 2259-2260, *citing* Davis v. United States, *supra* note 195 at 459.

[255] *See generally, id.* at 2260-2264.

[256] *See generally*, *id.* at 2263-2264.

[257] *Id.* at 2259, citations omitted.

[258] *Id.* at 2260.

[259] *Id.*, *citing* Moseley, *supra* note 135 at 103.

[260] *Id.* at 2262.

[261] *See id.* at 2256, 2262. The warnings given to Thompkins were specific to Michigan and were derived from the *Miranda* rule. The fifth warning is not expressly stated in the *Miranda v. Arizona* decision. The specific text of the warnings are reproduced below:

he could have said nothing in response to Helgert's questions or he could have unambiguously invoked his *Miranda* rights and ended the interrogation."[262] On the third point, Kennedy cited *North Carolina v. Butler*[263] to justify the proposition that a waiver may be inferred "'from the actions and words of the person interrogated'"[264] and holding that "[t]he *Miranda* rule and its requirements are met if a suspect receives adequate . . . warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions . . . [and] [a]ny waiver, express or implied, may be contradicted by an invocation at any time."[265]

In dissent, Justice Sotomayor[266] pointed out that the majority's ruling "turns *Miranda* upside down . . . [because] [c]riminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively [sic], requires them to speak [and] [a]t the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so."[267] Calling it a

---

> 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 a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions. 4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. *5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned. Id.* at 2256, citations omitted, emphasis supplied.

Compare this formulation in *Thompkins, id.* with the original text of the warnings found in *Miranda*, *supra* note 3 at 444-445, to wit:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. *The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.* (Emphasis supplied)

[262] *Id.* at 2263.

[263] *Supra* note 145.

[264] *Id.* at 2258, citation omitted.

[265] *Id.* at 2263.

[266] Berghuis, *supra* note 250 at 2266 (Sotomayor, J., *dissenting*). The dissent is joined by Justices Stevens, Ginsburg and Breyer.

[267] *Id.* at 2278.

"substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* . . . [had] long provided during custodial interrogation,"[268] the dissent quoted the text of *Miranda* itself at length to demonstrate that the majority's finding—that Thompkins had impliedly waived his right to remain silent by not unambiguously invoking his rights—was unfounded. The dissent cited the *Miranda* text describing the burden to prove a waiver as a heavy one rightly placed on the prosecution in categorical and undeniable language—"a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[269] Further, citing *Butler* itself which Kennedy had used to justify Thompkins's implied waiver, Sotomayor pointed out that the Court in *Butler* precisely used the very portion from *Miranda* that she had quoted in order to caution against a finding of an implied wavier because "[t]he question is . . . whether the defendant . . . knowingly and voluntarily waived [his] rights"[270] and "mere silence is not enough."[271] Directly contradicting Justice Kennedy's reliance on the record to show that Thompkins had impliedly waived his right,[272] Justice Sotomayor pointed out that it was "objectively unreasonable under (the Court's) clearly established precedents to conclude the prosecution met its 'heavy burden' of proof on a record consisting of three one-word answers, following two hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions."[273] Calling the majority's ruling as a "dilution of the prosecution's burden of proof"[274] and describing it "as an unprecedented step away from the 'high standards of proof for the waiver of constitutional rights' this Court has long demanded,"[275] Sotomayor warned that the ruling "ignores the important interests *Miranda*

---

[268] *Id.*

[269] *Id.* at 2268-2269 *citing Miranda*, *supra* note 3 at 475, to wit: "If [an] interrogation continues without the presence of an attorney and a statement is taken, *a heavy burden rests on the government* to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . Since the State is responsible for establishing the isolated circumstances under which [an] interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado detentions, the burden is rightly on its shoulders . . . *A valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.* (Emphasis supplied)

[270] *Id.* at 2269, citation omitted.

[271] *Id.*, citation omitted.

[272] *Id.* at 2262.

[273] *Id.* at 2270; *see also id.* at 2257 describing the exchange between Helgert and Thompkins alluded to by Justice Sotomayor in her dissent, *id.* at 2270.

[274] *Id.* at 2272.

[275] *Id.*, citation omitted.

safeguards"[276] and thus "bodes poorly for the fundamental principles that *Miranda* protects."[277] Punctuating her dissent, Sotomayor described the "broad new rules [as] all the more unfortunate [for being] unnecessary to the disposition of the case."[278]

In its most recent *Miranda* decision in *Howes v. Fields*,[279] Chief Justice Roberts, writing for the Court with a 6-3 vote, defined "custody" for purposes of *Miranda* in relation to those in prison by holding that a prisoner who is serving sentence for one offense is not considered in custody, for *Miranda* purposes, even when he "is isolated from the general prison population and questioned about conduct outside the prison"[280] because "'custody [being] . . . a term of art that specifies circumstances that are thought generally to present a serious danger of coercion . . . [is determined] . . . in light of 'the objective circumstances of the interrogation' [where] a 'reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'"[281] The Court held that to "determine how a suspect would have 'gauge[d]' his 'freedom of movement,' [it] must examine 'all of the circumstances surrounding the interrogation'"[282] including such factors as the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning."[283] Interestingly, the Court also ruled that "freedom of movement" was only the "first step in the analysis"[284] because "[n]ot all restraints on freedom of movement amount

---

[276] *Id.* at 2273.

[277] *Id.*

[278] *Id.* The concern that the Court, in dealing with *Miranda* cases, would make rulings that were unnecessary to the disposition of fact-specific petitions would be a recurring theme. For instance, in J.D.B. v. North Carolina,, 131 S. Ct. 2394 (2011), Justice Sotomayor disposed of the question "whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*" by holding, through a 5-4 majority, that "a child's age properly informs the . . . custody analysis," *id.*, because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 2403. The dissent by Justice Alito uses the same grounds that Justice Sotomayor used in Berghuis v. Thompkins, i.e., "it is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases [and that the] holding is not needed to protect the constitutional rights of minors who are questioned by the police." *Id.* at 2408.

[279] No. 10-680, 2012 WL 538280 (Feb. 12, 2012).

[280] *Id.* at 7, citations omitted.

[281] *Id.*, citations omitted.

[282] *Id.*, citation omitted.

[283] *Id.*

[284] *Id.*

to custody for purposes of *Miranda*."[285] Thus, even if Mr. Fields were in jail during the interrogation, he would not be considered in custody if the conditions were such that they did not represent the same inherently coercive environment existing in *Miranda*.[286]

Justice Ginsburg, in her separate opinion (concurring and dissenting, in part), suggested that she would not question "whether there can be custody within custody . . . [but] [i]nstead . . . ask, as *Miranda* put it, whether Fields was subjected to 'incommunicado interrogation . . . in a police-dominated atmosphere,' . . . whether he was placed, against his will, in an inherently stressful situation . . . and whether his 'freedom of action [was] curtailed in any significant way . . . .'"[287] These were, she suggested, the "key questions . . . to each [she] would answer, 'Yes.'"[288] She cited the following circumstances—that Fields did not invite or consent to be interviewed; he was removed from his cell in the evening, taken to the conference room in the sheriff's quarters, and questioned by two armed deputies for several hours beyond the usual time when he would be already asleep; he was not told that he could refuse to speak to the deputies; that Fields described himself as feeling trapped—to demonstrate that though Fields was told that he could leave anytime he wanted, the reality was far from this.[289] Insisting that Fields was submitted to incommunicado interrogation, which was the very situation *Miranda* sought to prevent and deter, Ginsburg ruled that "[t]oday, for people already in prison, the Court finds it adequate to say: 'You are free to terminate this interrogation and return to your cell.' . . . [which] is not a substitute for one ensuring that an individual is aware of his rights."[290]

---

[285] *Id.*

[286] *Id.* In this respect, the Court used an "offsetting" framework to arrive at its conclusion that Fields was not taken into custody for purposes of *Miranda* by looking first at the duration of the interview (between five and seven hours in the evening and well past the usual time that Fields slept), and the intimidating nature of the interrogation (the deputies who were doing the questioning were armed, used a very sharp tone and, on occasion, profanity) and then offsetting these with the circumstances showing that the environment was not inherently coercive (the absence of physical restraints, the reminder that he was free to leave and go back to his cell whenever he wanted, and that he was interviewed in a well-lit room and even given food and drink). Taking all these circumstances into account, the Court concluded that Fields was not in custody for purposes of *Miranda* and that, therefore, his unwarned statement was admissible.

[287] *Id.* at 11.

[288] *Id*

[289] *Id.*

[290] *Id.*

II. *MIRANDA*: THE MESS AND THE MAZE

Miranda, at present, is a mess as well as a maze.[291] Its history reflects a peculiar two-pronged process of widening some, but also restricting other aspects of its core holding. When originally promulgated, *Miranda* set one rule where every part of it was—and remains—controversial.[292] Since then, it has evolved from one rule into a set of principles with nuanced readings, interpretations, variations and exceptions fashioned and carved out by the Court over the years. What remains of *Miranda*, as originally formulated and what has it now become forty-six years after it was decided?

A. *Dickerson* and *Chavez* and a Return to Prophylaxis

One of the most significant failings of *Miranda* is that, when it was decided, no one knew what to make of it or what to call it. Clearly judge-made but falling "emphatically [within] the province and duty of the judicial department to say what the law is,"[293] the Court could have declared *Miranda* to be a part of the Constitution but Chief Justice Warren stopped short of doing so. He simply hinted that the "issues presented are of constitutional dimension."[294] Significantly, it was Justice Clark, one of those who dissented, who called the new rule "a constitutional rule"[295] while another dissenter, Justice Harlan, called it a "constitutional code of rules for confessions."[296] In *Dickerson*,[297] it was characterized as a "constitutional decision"[298] but, most of the time, it has simply been called "prophylactic."

The significance of characterization is the clarity and the stability it brings to a regime. An essential part of setting a "bright line" rule is to

---

[291] Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L. J. 883 (1997).

[292] *See* Stephen A. Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L. J. 1 (1986); Matthew Lippman, Miranda v. Arizona: *Twenty Years Later*, 9 CRIM. JUST. J. 241 (1987), *citing* Yale Kamisar, *The Miranda Case, 20 Years Later,* N.Y. Times, June 11, 1986.

[293] Marbury v. Madison, 5 U.S. 137 (1803).

[294] Miranda, *supra* note 3 at 490. In another part of the decision, he states that "[j]udicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so." *Id.*

[295] *Id.* at 438, 499, 500 (1966) (Clark, J., *dissenting*).

[296] *Id.* at 438, 504 (1966) (Harlan, J., *dissenting*; joined by Stewart and White, JJ.).

[297] *Supra* note 8.

[298] *Id.* at 444.

know what the rule is and what to call the rule. Had the Warren Court characterized *Miranda* as forming part of the constitution and thus a constitutional rule, the Court's scrutiny of any measure that would depart, denigrate or dilute its core holding and the "warning and waiver" requirement would be much stricter than the manner by which the Court currently views any incursions into *Miranda*-protected areas, which is minimal. Even as it described the burdens of justification on the part of government to show why the requirements could not be complied with as "heavy," the Court has not exacted this burden of justification from government but has instead effectively shifted the burden to the suspect to show that he was in custody or that he had invoked his rights.

Characterizing *Miranda* as a "constitutional rule" in *Dickerson* insulated the rule from legislative interference but it also, at the same time, emphasized its nature as a judge-made rule that could be abandoned at any time the Court chose to do so. More than revitalizing *Miranda* and infusing it with constitutional vigor, *Dickerson* simply shut the door to assaults on *Miranda* from the other branches and threw it a lifeline—". . . we decline to overrule *Miranda* ourselves."[299] What the Warren-era Court failed to fully complete by way of characterization, the Rehnquist-era Court did—*Miranda* is not part of the Constitution, it simply supports a constitutional right and a violation of *Miranda* does not, in itself, constitute a violation of the Constitution.

The Court's decisions in *Chavez*[300]—with a majority of five—and, to a lesser extent, *Patane*[301]—with its plurality of three—made that absolutely clear. Both decisions, written by Justice Thomas,[302] pointedly *ignored Dickerson*'s characterization of *Miranda* as a "constitutional rule" and insisted on it being merely a "prophylactic rule" with no constitutional significance. Justice Thomas's insistence in *Chavez*, that a separate violation

---

[299] *Id.* at 432.

[300] *Supra* note 218.

[301] *Supra* note 227.

[302] Justice Thomas joined in the dissent written by Justice Scalia in *Dickerson*, arguing that *Miranda* should be abandoned and that, between an Act of Congress that mandated the return to the "totality of circumstances" standard for determining "voluntariness" and a judge made "prophylactic" rule, the statute should prevail. Chief Justice Rehnquist would join Justices Scalia and Thomas in both *Chavez* and *Patane*, despite having written *Dickerson*, leading to a view that *Dickerson* was more of a compromise than an articulation of Rehnquist's own views on *Miranda*—that rather than let *Dickerson* be decided as a broad affirmation of *Miranda* and perhaps a characterization as part of the Constitution, Rehnquist wrote a narrow decision that sustained *Miranda* against the statute but, at the same time, reaffirmed what its opponents had been saying all along, that it was a judge made prophylactic that had no separate constitutional value.

of the Fifth Amendment did not occur despite custodial questioning of a suspect who had not been warned of his *Miranda* rights where the statement was not presented at trial, clearly removed any doubt that *Miranda* remained a bright line rule.

The purpose of a bright line rule is to set a standard for all future, similar conduct that would dispense with the unstable and confusing "case to case" review. *Miranda*'s "warning and waiver" requirement was designed as that bright line rule. *Chavez* removed that bright line when the Court decided that failure to give *Miranda* warnings did not violate the Fifth Amendment where the statements were never presented in court. With *Dickerson* and later, *Chavez* and *Patane*, the Court had removed what little was left of *Miranda*'s core holding and its bright line rule.

B. The *Harris-Quarles-Chavez* Triad

That *Miranda* is no longer a clear bright line rule may be seen in the exceptions that have been created by the Court out of its interpretations of *Miranda* situations presented to it over the years. While originally narrowly written, the invocation of these narrow exceptions to other cases has cemented these into broad exceptions. There are three clear exceptions that have been established, over the years, and these form the three prongs of the *Harris-Quarles-Chavez* triad based on the decisions in *Harris v. New York*,[303] *New York v. Quarles*[304] and *Chavez v. Martinez*.[305]

Harris provided for the first prong of the triad. Here, the Court created an exception to the exclusion of statements obtained in violation of the bright line "warning and waiver" rule. The narrow exception pertained to the purpose for which the statements may be used—impeachment of the defendant who made the statement when he decides to voluntarily testify during trial. The narrow exception carved out by *Harris* did not meet with any opposition, even from proponents of *Miranda* and was largely accepted as modifying the original bright line rule.

The second prong would come from *Quarles*, which carved out an express *per se* exception to the "warning and waiver" requirement by way of the "public safety exception."[306] The narrow, fact-specific exception evades statement as an exception because then Associate (later Chief) Justice Rehnquist, writing for the Court, did not precisely define its contours, preferring to state the exception by way of example, pointing to

---

[303] *Supra* note 125.
[304] *Supra* note 171.
[305] *Supra* note 218.
[306] *Supra* note 171.

the facts presented in the *Quarles* case, and simply recognizing the exception without a hint or clue as to its basis or origin other than the trite statement that "*on these facts* there is a 'public safety' exception to the requirement that *Miranda* warnings be given . . . ."[307] (Emphasis supplied) Under this "Public Safety" exception, the *Miranda* "warning and waiver" requirement is dispensed and any statement obtained where a "public safety" exception takes place may be admitted into evidence.[308] The reason behind the exception in *Quarles* was to prevent the suspect from invoking his right to silence and, thus, not yield information that might lead to the discovery of the gun.[309] By stating the exception without any clear parameters, however, the Court created a broad *per se* exception that, like *Harris*, substantively modifies the core holding of *Miranda*. Effectively, the "public safety" exception becomes a broad *per se* rule in situations where exigencies involving "public safety" may be implicated.

Notably, *the only instance* under *Miranda* when the warnings may be dispensed with is when there are "*other fully effective means* . . . to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."[310] (Emphasis supplied) Absent these "other fully effective means," the warnings are required. This insistence on "other fully effective means" sets the floor, not the ceiling, as far as protection of the right against self-incrimination is concerned; and because the *Miranda* Court prescribed only a regime of substitution, the warnings can only be replaced by "other fully effective means," and not dispensed with. It is curious how *Quarles* can be justified short of abandoning *Miranda* itself.

---

[307] *Id.* at 655-656.

[308] Justice O'Connor, who had originally called *Miranda* a bright line rule, would criticize this formulation for being unclear and for placing the police in a situation where they would need to guess if there was a danger to the "public safety" such that *Miranda* need not be complied with. *See* Quarles, *id.* at 653, where O'Connor states that the exception "unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand" resulting in "a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."

In the main Opinion, Rehnquist himself conceded that "[i]n recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule." *Id.* at 658.

[309] *Id.* at 657.

[310] Miranda, *supra* note 3 at 444, emphasis added. In another portion, *id.* at 477, the Court reiterates that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."

Notwithstanding the constitutional floor set by *Miranda*, the Court in *Quarles* announced an exception—"on these facts"[311]—which amounted to a *per se* rule that *"[w]hatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.*"[312] (Emphasis supplied) From a fact-based and context-specific question—on whether the officer "was justified in failing to make available to respondent the procedural safeguards . . . [pursuant to] *Miranda*"[313]—the majority proceeded to draw up a *per se* rule that would not simply retroactively justify the officer's actions in *Quarles* but prospectively widen the area where *Miranda cannot operate*.

In characterizing the "public safety" exception, as a "narrow exception to the *Miranda* rule"[314] and, at the same time, a "workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront,'"[315] the majority acknowledged that it "lessened the desirable clarity of [*Miranda*]."[316] Far from being narrow, however, the *Quarles* exception is actually too broad precisely because of the lack of specificity. Under the broad parameters set forth in *Quarles*, almost any situation involving an arrest where the public may be involved may be considered "exigent." Without a clear standard to determine what "exigent circumstances" are for the purpose of the "Public Safety Exception," which the *Quarles* Court declined to set forth, the police would be guessing and the courts second-guessing— contrary to what the Court in *Quarles* set out to do. As it stands, the "warning and waiver" requirement becomes the exception in "public safety" situations despite the standard set forth in *Miranda* that only the use of "other fully effective" means can substitute, not eliminate, the warnings.

---

[311] *Supra* note 171 at 656.

[312] *Id.* at 656. Emphasis added.

[313] *Id.* at 654-655.

[314] *Id.* at 658.

[315] *Id.*

[316] *Id.* Clarity was a quality in *Miranda* that Rehnquist appreciated, as may be seen in a portion of this order given in chambers in another case—"While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court . . . that rigidity [has also been called a] strength of the decision. It [has] afforded police and courts clear guidance on the manner in which to conduct custodial investigation: if it was rigid, it was also precise . . . [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by . . . courts under the guise of [reinterpreting] *Miranda* . . . ." *See* Rehnquist, J., in chambers on application for stay in Fare v. Michael C., 439 U.S. 1310, 1314 (1978).

The third prong of the triad comes from *Chavez*. It may be recalled that *Chavez* held that a constitutional violation does not occur even where the *Miranda* warnings are not given if the statements obtained are never presented during trial because the Fifth Amendment right against self-incrimination is a "trial right" which is violated not by the taking of the un-Mirandized statement but by the introduction of the statement at trial as part of the government's case-in-chief. This language comes from the dissenting opinion by Justice Thurgood Marshall in *Quarles* where he criticizes the need for the "public safety" exception and, in a famous "by the way," suggests that:

> The irony of the majority's decision is that the public safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. *All the Fifth Amendment forbids is the introduction of coerced statements at trial.*[317] (Emphasis supplied)

Ironically, the last sentence of Marshall's dissent would later be expressly cited by Justice Thomas, who succeeded to his seat, in *Chavez* as the basis for the Court's holding that *Miranda*'s exclusionary rule is a "prophylactic measure to prevent violations of the right protected by the text of the Self-Incrimination Clause—the admission into evidence in a criminal case of confessions obtained through coercive custodial questioning."[318]

By linking the failure to comply with the "warning and waiver" requirement in *Miranda* to the self-incrimination clause in the Fifth Amendment and holding that the failure to comply with the former did not, by itself, mean a violation of the latter unless the statement obtained without the warnings or a waiver is presented during the trial, *Chavez* made law Marshall's "by the way" sentence in his dissent and established the third prong of the triad and another *per se* exception. Thus, if the police

---

[317] *Supra* note 171 at 686 (Marshall, J., *dissenting*), emphasis added.

[318] *Supra* note 218 at 772.

know beforehand that they do not intend to use the statement in trial, under *Chavez*, they can simply dispense with the "warning and waiver" even without the exigencies of "public safety" required by *Quarles*.

As it stands, the *Harris-Quarles-Chavez* triad provides three clear exceptions to the "warning and waiver" mandate in *Miranda* and reduces its core holding on exclusion of presumptively coerced statements into narrow and isolated instances. Borrowing a phrase from Justice Sotomayor's dissent in *Berghuis v. Thompkins*, the triad turns *Miranda* "upside down"[319] because the supposedly-narrow exceptions to the hitherto bright line rule have now become *per se* exceptions that actually dispense with the requirement to give warnings and wait for waivers as prescribed by *Miranda*.

C. The Words of the Warnings

As important as the right to be warned of the rights to silence and to counsel would be the content of the warnings subject of the right. Chief Justice Warren repeatedly emphasized the word "effective" in relation to the *Miranda* warnings. This clearly expressed the value of the words contained in the warnings[320] and would indicate that the Court

---

[319] Berghuis, *supra* note 250 at 2266 (Sotomayor, J., *dissenting*).

[320] Miranda, *supra* note 3 at 444, "[t]he prosecution may not use statements, whether exculpatory or incriminatory, stemming from custodial interrogation . . . unless it demonstrates the use of procedural safeguards *effective* to secure the privilege against self incrimination. . . . As for the procedural safeguards to be employed, unless other *effective* means are devised . . . the following measures are required." Also, *id.* at 467, "In order to combat these pressures and to permit a full opportunity to exercise the privilege against self incrimination, the accused must be adequately and *effectively* apprised of his rights . . . . We encourage Congress and the States to continue their laudable search for increasingly *effective* ways of protecting the rights of the individual . . . [h]owever, unless we are shown other procedures which are at least as *effective* in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed." Further, *id.* at 476, "[t]he warnings required and the waiver necessary are . . . in the absence of a *fully effective* equivalent, prerequisites to the admissibility of any statement made by the defendant." Finally, *id.* at 498-99, "[i]n dealing with custodial interrogation, we will not presume that a defendant has been *effectively* apprised of his rights and that his privilege against self incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any *effective* alternative has been employed."

While the word "effective" is not used in the following portion of *Miranda, id.* at 469, Chief Justice Warren clearly suggests it, "[t]he warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. *This warning is needed in order to make him aware not only of the privilege but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the*

intended the warnings to be given as they were explained in the decision "unless [it can be] shown [that] other procedures which are at least as *effective* in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it"[321] have been devised. Related to this, the Court's final word expresses the same sentiment: "[i]n dealing with custodial interrogation, *we will not presume that a defendant has been* effectively *apprised of his rights and that his privilege against self incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any* effective *alternative has been employed.*"[322] (Emphasis supplied)

On this point, however, the Court has ruled, in *California v. Prysock*[323] and then in *Ducksworth v. Eagan*,[324] that the exact words of the *Miranda* warnings were not needed because:

> [t]his Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.
>
> Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."[325]

In *Prysock*,[326] the standard of compliance advocated by the majority was a case-by-case factual inquiry in which the judge examines the

---

privilege." And again, *id.* at 469-70, "[o]ur aim is to assure that the individual's 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 . . . A mere warning given by the interrogators is not alone sufficient to accomplish that end.*"(Emphasis supplied)

[321] *Id.* at 467, emphasis supplied; editorial modification added.

[322] *Id.* at 498-99, emphasis supplied.

[323] *Supra* note 163.

[324] 492 U.S. 195 (1989).

[325] *Supra* note 163 at 359-360, citation omitted (quoting Miranda *supra* note 3, at 476), emphasis in the original.

[326] *Id.* at 362. *See* however, Justice Harlan's dissenting opinion, *id.* at 362-366, where he concludes that the defendant "was not given the crucial information that the services of the free attorney were available *prior to the impending questioning*," *id.* at 363, emphasis in the original, citation omitted, and suggesting that the Court itself "[was]

warnings given to the suspect to determine if "the reference to appointed counsel was linked to a future point in time after the police interrogation."[327] Clearly, this "future point in time" referred to the trial. Using this standard, the Court found no constitutional violation. In *Ducksworth,* the Court used a similar standard where the officer simply informed the suspect that a lawyer would be appointed "if and when you go to court."[328] Chief Justice Rehnquist, writing for the majority, stated that what was at issue "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*'"[329] and ruled that this essential message intended by the *Miranda* warnings was conveyed.[330]

As it stands, therefore, the "at least as effective" standard of *Miranda* in relation to the warnings has been replaced by the *Prysock-Duckworth* "reasonable conveyance of information that is linked to a future point in time after the police interrogation" to be determined on a "case-to-case" basis. Whether this is "at least as effective" as contemplated by *Miranda* can only be determined by inquiring into the subjective understanding of the information conveyed to each individual suspect. The refusal of the Court to provide for a standard set of warnings, therefore, results in an inability to measure the efficacy of the warnings in relation to *Miranda*'s objectives of protecting the right against self-incrimination at the pre-trial stage and deterring confessions given under a presumptively coercive environment.

There is clearly no "bright line" rule as far as the content of the warnings and each case stands to be reviewed *post hoc* subject to the *Prysock-Duckworth* standard. Without a rule that provides uniformity in the content of the warnings, there is very little sense in characterizing *Miranda*'s

---

guilty of attaching greater importance to the form of the *Miranda* ritual than to the substance of the message it [was] intended to convey." *Id.* at 366.

[327] *Id.*, at 360.

[328] *Supra* note 324, at 198. The warnings provided to the defendant were contained in a form that read:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer. (Emphasis supplied)

[329] *Id.* at 203, *citing* Prysock, *supra* note 163 at 361, editorial modification in the original.

[330] *Id.*

"warning and waiver" requirement as a bright line rule because each situation presented is effectively *sui generis* and clearly antithetical to the notion of a governing bright line rule.

D. Defining "Custody"

One of the most vexing areas in the doctrinal history of *Miranda* is the aspect of custody, for purposes of defining the element of custodial interrogation that triggers *Miranda*.[331] The original test in *Miranda* was straightforward: "custodial interrogation . . . mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[332]

The Court has moved away from the "restraint on freedom of movement" standard, originally described in *Miranda*, and has developed an analytical framework which starts with a subjective analysis of the circumstances that lead to an objective appreciation of whether the suspect has been arrested or otherwise deprived of freedom of movement associated with an arrest. This framework is set forth in *Oregon v. Mathiason*,[333] *Berkemer v. McCarty*,[334] *Stansbury v. California*[335] and *Thompson v. Keohane*,[336] all of which describe that "the only relevant inquiry [as far as *Miranda* custody is concerned] is how a reasonable man in the suspect's position would have understood his situation"[337] regardless of "the subjective views harbored by either the interrogating officers or the person being questioned."[338] Of these cases, *Keohane* proposes a more structured analysis, thus:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there

---

[331] *Supra* note 3 at 444.
[332] *Id.*
[333] *Supra* note 141.
[334] 468 U.S. 420 (1984).
[335] 511 U.S. 318 (1994).
[336] 516 U.S. 99 (1995).
[337] *Supra* note 334 at 442.
[338] *Supra* note 335 at 323.

> a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.[339]

Notably, the use of the "reasonable man" as the basis for analysis would preclude a highly-technical, legal or nuanced appreciation of the circumstances. Appreciation of the custody requirement would not, then, be viewed from the eyes of a judge or a lawyer but from a person who may not know the law but understands what it means to be deprived of freedom of movement or to be arrested.

Yarborough v. Alvarado,[340] which involved a youth offender, highlighted the "important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience."[341] The case noted that "the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the mindset of a particular suspect, where . . . a suspect's age and experience [is considered]."[342] Thus, individual characteristics such as age and experience of a suspect are not relevant to determining whether a suspect is in custody as such would be "a subjective inquiry"[343] whereas the *Miranda* custody inquiry "states an objective rule designed to give clear guidance to the police"[344] without regard to a consideration of such individual characteristics.

The standard of custody when it comes to incarcerated suspects is a bit more complicated for two reasons. First, until *Maryland v. Shatzer*,[345] the Court had "never decided whether incarceration constitutes custody for *Miranda* purposes;"[346] and, second, questioning already-incarcerated persons involve "break-in-custody" situations which invariably call in fact- and context-specific inquiries that would generate as many rules as there are facts and contexts.

Shatzer defined a test that went beyond whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest"[347] which it described as "only a necessary [but] not a sufficient condition for *Miranda* custody."[348] It looked into the

---

[339] *Supra* note 336 at 112, citation omitted.
[340] 541 U.S. 652 (2004).
[341] *Id.* at 667.
[342] *Id.* at 651, editorial modification supplied.
[343] *Id.*
[344] *Id.*
[345] *Supra* note 245.
[346] *Id.* at 1224.
[347] *Id.* at 1224, *citing* Quarles, *supra* note 171 at 649, 655.
[348] *Id.*

environmental conditions of the inmate that might lead to a reasonable belief that the "inherently compelling pressures" of custodial interrogation might be present, "distinguish[ed] the duration of incarceration from the duration of . . . interrogative custody."[349] It also considered the two-week difference between the first and second attempts at interrogation in relation to the fact that Shatzer was released into the general population of the prison after the first interrogation, staying there continuously for two weeks until the second interrogation. The fourteen-day period, according to the Court, "meets . . . [the] concern that a break-in-custody rule lends itself to police abuse"[350] because it is long enough to eliminate the coercive effect of interrogative custody.

The *Shatzer* analysis tracks very closely that of *Bram v. United States*,[351] where the Court relied explicitly on the language of the Fifth Amendment to determine the admissibility of a confession but, instead of looking at the existence of threat or promise as indicative of involuntariness, considered the environmental circumstances surrounding the confession as well as the nature of the communication between the detective and Bram to determine the voluntariness of the confession. On the first point, the Court in *Bram* considered that "Bram had been brought from confinement to the office of the detective, and there, when alone with [the detective], in a foreign land, while he was in the act of being stripped, or had been stripped, of his clothing, was interrogated by the officer."[352] On the second point, it found that the detective had created an impression on Mr. Bram's part that confessing was necessary for him to save himself by telling him that the only other suspect had already confessed to the crime thus instilling in his mind "the fear that, if he remained silent, it would be considered an admission of guilt . . . and . . . by denying, there was a hope of removing the suspicion from himself."[353] The Court ruled that putting Bram in such circumstances that "perturb[ed] the mind and engender[ed] confusion of thought"[354] yielded a confession that cannot be considered voluntary or free of coercion.

Howes v. Fields,[355] also involving a "break-in-custody" borrows liberally from the unanimous opinion in *Shatzer*.[356] Mr. Fields, who was

---

[349] *Id.* at note 8.

[350] *Id.* at 1223.

[351] *Supra* note 24.

[352] *Id.* at 563.

[353] *Id.* at 562.

[354] *Id.* at 564.

[355] *Supra* note 279.

[356] It, however, does not convince as fully as *Shatzer* does because the factual environment differs and *Shatzer* therefore represents an "ill-fit"—to borrow Justice Thomas's oft-repeated phrase in *Patane* (542 U.S. 630). Why *Shatzer* convinces but

serving sentence for third-degree criminal sexual conduct, was questioned for another crime allegedly committed before he was incarcerated. He was escorted from his cell by a corrections officer well beyond the customary time he retired for the night, brought to a conference room where he was not restrained but questioned from five to seven hours by two armed deputies without having been given any *Miranda* warnings nor advised that he did not have to speak with the deputies, although he was advised that he was free to leave and return to his cell. Several times during the interview, Mr. Fields stated that he no longer wanted to talk to the deputies but never asked to go back to his cell. The interview stopped only after Fields confessed, but even then, he had to wait for about 20 minutes so that he could be escorted back to his cell.[357]

The Court held that Mr. Fields was not in custody for purposes of *Miranda* using a multi-step test, of which the curtailment of individual freedom of movement was, borrowing from *Shatzer*, "simply the first step in the analysis, not the last"[358] and "only a necessary [but] not a sufficient condition for *Miranda* custody."[359] The Court proceeded to "focus on all the features of the interrogation"[360] such as language used in summoning the prisoner and the manner in which the interrogation was conducted.[361] Central to the majority's determination that Fields was not in custody was its reliance on its earlier decision in *Shatzer v. Maryland,*[362] which held that

---

Fields does not may be explained by important factual differences between the two cases. In *Shatzer*, the question did not involve a failure to provide the warnings but continuous interrogation *after the suspect had invoked his right to counsel* after the *Miranda* warnings had been given; in *Fields*, the *Miranda* warnings were never given during the second interrogation. Shatzer, 130 S. Ct. 1213 at 1217; Fields, No. 10-680, 2012 WL 538280 at 5. In *Shatzer*, the subsequent interrogation was conducted two years and six months after the first interrogation which Shatzer had declined and lasted only thirty minutes; in *Fields*, the interrogation lasted between five to seven hours and was done at night, beyond the usual time that Fields would have retired for the day. Shatzer, *supra* note 245 at 1217; Fields, *supra* note 279 at 10. Of the two situations, clearly the less coercive was the one presented by *Shatzer*; the conditions surrounding the interrogation in *Fields* was inherently more coercive and was precisely the situation *Miranda* sought to forestall.

[357] Fields, *supra* note 279 at 15.

[358] *Id.* at 9; the 6-person majority, through Justice Alito, also borrowing from *Shatzer*, "'decline[d] to accord talismanic power' to the freedom-of-movement inquiry," *id*, choosing to ask "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*," *id.* at 8.

[359] *Id.* at 8.

[360] *Id.* at 9.

[361] *Id.*

[362] In Fields, *supra* note 279 at 8, the Court cited Shatzer, 130 S. Ct. 1213, as authority for the proposition that the rule on "presumption of involuntariness" of a

"lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*."[363]

After determining the features of the interrogation, the Court then went into an offsetting process where it considered the duration of the interview (between five and seven hours in the evening and well past the usual time that Fields slept), the intimidating nature of the interrogation (the deputies who were doing the questioning were armed, used a very sharp tone and, on occasion, profanity) and then offset these with the circumstances showing that the environment was not inherently coercive (the absence of physical restraints, the reminder that he was free to leave and go back to his cell whenever he wanted, and that he was interviewed in a well-lit room and even given food and drink).[364] Taking all these circumstances into account, the Court concluded that Fields was not in custody for purposes of *Miranda*.

Michigan v. Moseley[365] did not involve incarcerated suspects but also dealt with an issue brought up in *Shatzer* and *Fields*—the "right to cut off questioning," which falls within the definition of "custody." In *Moseley*, the two interrogations were for two separate offenses (robbery and homicide) with each interrogation accompanied by separate *Miranda* warnings, similar to *Shatzer* but unlike *Fields*; and, again similar to *Shatzer* but unlike *Fields*, the suspect in *Moseley* indicated, during the first interrogation (for robbery), after having been Mirandized, that he did not want to answer any questions about the robbery, thereby ending the interrogation. The *Miranda* question arose because the second interrogation (for homicide) was conducted *a few hours later*, which resulted in his confession. The *Moseley* Court held that the "right to cut off questioning" had been "scrupulously honored"[366] because the first officer did not continue the

---

statement obtained on questioning made after a suspect has invoked his rights under *Miranda*(*see* Edwards, 51 U.S. 477) "does not apply when there is a sufficient break in custody between the suspect's invocation of the right to counsel and the initiation of subsequent questioning."

[363] Shatzer, *supra* note 245 at 1224; the *Shatzer* Court considered a 14-day period between questionings as a reasonable period for purposes of determining whether the *Edwards* presumption applies. According to the Court, "[t]he 14-day limitation meets [the] concern that a break-in-custody rule lends itself to police abuse . . . that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for re-interrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain from such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his . . . rights." *Id.* at 1223.

[364] Fields, *supra* note 279 at 10.

[365] *Supra* note 135.

[366] *Id.* at 104.

robbery interrogation after Moseley invoked his rights and the second interrogation followed after some time, with each interrogation being separate and distinct from each other.

While the element of custodial interrogation remains the trigger for *Miranda*, the understanding that it is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"[367] has given way to an objective analysis of the circumstances based on the understanding of the hypothetical "reasonable man in the suspect's position," as articulated in *Mathiason, Berkemer, Stansbury* and *Keohane.* For suspects already incarcerated, this objective analysis is supplemented by the rule in *Shatzer* where restriction of movement is "only a necessary [but] not a sufficient condition for *Miranda* custody"[368] and where the environmental circumstances that would indicate the presence of "inherently compelling pressures"[369] that *Miranda* protects against. As it stands, "custody" is an element that needs to be determined on a case-to-case basis, purely antithetical to the notion of a bright line rule.

E. The Interrogation Inquiry

The other half of the "custodial interrogation" component of *Miranda*, i.e., "interrogation," also defies categorization into a bright line rule. In *Rhode Island v. Innis*,[370] the Court considered what constituted "interrogation" for purposes of the *Miranda* rule under a specific factual situation. Here, a taxicab driver, who had been robbed by a man wielding a sawed-off shotgun, identified the defendant who was then arrested by a patrolman and advised of his Miranda rights. When other police officers arrived at the arrest scene, the defendant was again advised of his Miranda rights, and he stated that he understood his rights and wanted to speak with a lawyer. He was then placed in a police car to be driven to the central station in the company of three officers, who were instructed not to question respondent or intimidate him in any way. While en route to the station, two of the officers were engaged in a conversation between themselves concerning the missing shotgun. The defendant interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. Upon returning to the scene of the arrest where a search for the shotgun was in progress, respondent was again advised of his Miranda rights, he replied that he understood those rights, but that he "wanted to get the gun out of the way because of

---

[367] *Id.*

[368] Shatzer, *supra* note 245 at 1224.

[369] *Id.*

[370] *Supra* note 150.

the kids in the area in the school," and then led the police to the shotgun.[371]

The Court ruled that there was no interrogation under these circumstances and held that the term "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"[372] and the standard "focuses primarily upon the perceptions of the suspect, rather than the intent of the police . . . reflect[ing] the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."[373] As it stands, a purely voluntary but incriminating statement made without any questioning by the police is admissible even if the defendant was clearly under custody.

That the focus of inquiry under *Innis* is on the subjective perception of the suspect rather than the intent of the police switches the "heavy burden"[374] that was originally reposed by *Miranda* on government to establish that the suspect had knowingly and intelligently waived his right against self incrimination. Under *Innis*, it is no longer the police's burden to demonstrate that the suspect had waived his rights or that their questions were not intended to elicit incriminating statements, but the burden is now on the suspect to show that his subjective perception and understanding of the police's conduct and questions were such that they were intended to elicit incriminatory statements from him. Clearly, this analysis would place an impermissibly oppressive burden on defendant to show both an affirmative invocation of his rights under *Miranda* but that his statements were prompted by his subjective perception that the questioning was intended by the police to incriminate him. Not only would this be unduly burdensome, it would be manifestly counter-intuitive, irreparably undermining the framework set in *Miranda.*

F. Ambiguity, Equivocation and Implied Waivers

One of *Miranda*'s greatest protections is the right to silence and the absence of any adverse presumptions arising from that silence, as for instance the presumption that he has waived his rights. The Court in

---

[371] *Id.* at 293-295.
[372] *Id.* at 301.
[373] *Id.* at 301.
[374] Miranda, *supra* note 3 at 475.

Miranda was explicit on this—"he has a right to remain silent"[375] and "a valid waiver [of the right to counsel] will not be presumed simply from the silence of the accused after warnings are given . . . ."[376]

Berghuis v. Thompkins,[377] however, gives a different rule from that originally stated in *Miranda*. The *Thompkins* Court, through Justice Kennedy, came up with a rule that required an accused to *clearly and unambiguously invoke his right to silence*, absent which a valid waiver would be inferred from either his silence or, in particular to the defendant Thompkins in this case, the occasional one-syllable "yes" or "no" responses to leading questions. Citing by analogy *Davis v. United States*[378] which discussed the *Miranda* right to counsel—the Court held in *Thompkins* that "[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously"[379] because this would "result[ ] in an objective inquiry that 'avoid[s] difficulties of proof . . . and provide[s] guidance to officers' on how to proceed in the face of ambiguity."[380] From here, the *Thompkins* Court held that "[t]he prosecution does not need to show that a waiver of *Miranda* rights was express . . . [because] [a]n implicit waiver of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence."[381]

Prior to *Thompkins*, the Court had addressed standards for determining a valid waiver of *Miranda* rights in *North Carolina v. Butler,*[382] *Edwards v. Arizona*[383] and *Davis v. United States.*[384] *Butler* holds that a waiver could be implied for so long as it met the flexible "totality-of-the-circumstances" standard in *Johnson v. Zerbst.*[385] *Edwards*, on the other hand, established a second layer of protection insofar as the right to have counsel present during an interrogation is concerned with its "presumption of involuntariness," i.e.:

> [while] the accused may himself validly waive his rights and respond to interrogation . . . additional safeguards are necessary when the accused asks for counsel . . . [thus] . . . *when an accused has invoked his right to have counsel present during custodial interrogation,*

---

[375] *Id.* at 444.
[376] *Id.* at 475.
[377] *Supra* note 250.
[378] *Supra* note 195.
[379] Berghuis, *supra* note 250 at 2260.
[380] *Id.* at 2261.
[381] *Id.*
[382] *Supra* note 145.
[383] *Supra* note 155.
[384] *Supra* note 195.
[385] Butler, *supra* note 145 at 376;

> *a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . [H]e is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.*[386] (Emphasis supplied)

Finally, *Davis* dealt with an ambiguous invocation of the right to counsel—"[m]aybe I should talk to a lawyer"[387]—which, for the Court, did not suffice as far as *Miranda* was concerned. In *Davis,* the Court was "unwilling to create a third layer of prophylaxis (the first layer being *Miranda*, the second being *Edwards*) to prevent . . . questioning when the suspect *might* want a lawyer . . . [and] [u]nless the suspect actually requests an attorney, questioning may continue."[388]

As it stands, therefore, a valid waiver of *Miranda* rights (to silence or to assistance of counsel) may be established in three ways: (1) by silence, (2) an unarticulated desire to invoke the right to counsel or occasional responses to unrelated questions under *Thompkins*, or (3) an ambiguous invocation of the right to counsel under *Davis*. Where *Miranda* stood originally for the proposition that "[t]he defendant may waive . . . [the] rights . . . voluntarily, knowingly and intelligently,"[389] the waiver standard is now more flexible. Where silence under *Miranda* originally meant that no interrogation could commence or continue—"[o]nce warnings have been given . . . [and] the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"[390]—the significance of silence now is that the defendant will be considered to have impliedly waived his right to silence under *Thompkins*—notwithstanding that pursuant to *Miranda*, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[391] And where the heavy burden of proving an intelligent and knowing waiver of the rights secured by *Miranda* rested originally on the prosecution,[392] the burden now rests on the defendant to prove that he intended to unequivocally keep silent under *Thompkins*, or to invoke counsel under *Davis*.

---

[386] Edwards, *supra* note 155 at 484-85, citation omitted, emphasis added.
[387] Davis, *supra* note 195 at 454.
[388] *Id.* at 462, editorial modification added.
[389] *Supra* note 3 at 444.
[390] *Id.* at 473.
[391] *Id.* at 475.
[392] *Id.*

Under these circumstances, it is clear that there is not one uniform rule that would define how a waiver of the *Miranda* rights could be determined. And because the cases on "implied waivers" rest, ironically, on the very silence that *Miranda* guarantees, no bright line rule can be formulated as, in fact, there might be very little left on which to base any such rule.

G. Taking the Fruit from the Poisonous Tree; the *Elstad* Exception

Miranda's core holding is that "the prosecution may not use statements, whether exculpatory or incriminatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[393] What this did not explicitly provide was how to deal with any evidence that arose from the unwarned statement. While *Miranda* appeared to imply that any statement obtained as a result of a failure to warn would be inadmissible for any purpose, it did not explicitly say so. This has resulted in a disconnect between *Miranda* and the Fourth and the Fifth Amendment, when it comes to the exclusionary rule.

The exclusion of evidence obtained without *Miranda* warnings is based on the Fifth Amendment right against self-incrimination and not on the principle of "the fruit of the poisonous tree" that is implicated by the Fourth Amendment right against unreasonable searches and seizures. Thus, *Harris v. New York*[394] provided, for the first time, that *Miranda* was not an absolute rule by holding that an unwarned statement that is inadmissible for the purpose of proving the prosecution's case-in-chief was admissible for impeaching the defendant if the defendant chose to testify voluntarily.

The disconnect between *Miranda* and the exclusionary rule under the Fourth Amendment would widen in *Oregon v. Elstad*[395] when the Court declined to apply the "fruit of the poisonous tree" doctrine to violations of *Miranda*. Here, the initial statement, obtained without the *Miranda* warnings having been given, was considered inadmissible. However, a second statement, given after advising the suspect of his rights under *Miranda*, was considered admissible. No longer would the admissibility of an unconsented statement be limited to impeachment but a subsequent statement, obtained after the initially inadmissible unwarned statement, would be admissible, even to prove the case-in-chief.

---

[393] *Supra* note 3 at 444.
[394] *Supra* note 125.
[395] *Supra* note 188.

The gap would be widened even further by the Court's ruling in *United States v, Patane*[396] where the Court refused to extend the "fruit of the poisonous tree" doctrine to the fruit of a statement obtained through a violation of *Miranda.* Notably, *Patane* used pre-*Dickerson*[397] language to characterize *Miranda*—as a "prophylactic rule" instead of a "constitutional decision."

As it stands, therefore, the exclusionary rule that is at the heart of *Miranda*'s core holding now excludes only compelled testimonial evidence obtained without the warnings having been given but does not extend to: (a) the use of that same inadmissible statement at trial for impeachment of the defendant's testimony under *Harris*, (b) the admission of subsequent statements obtained after the initial unwarned statement under *Elstad* and (c) objects or other physical evidence subject of the initial unwarned statement under *Patane.*

With *Patane* and *Elstad* holding that an inadmissible statement may yield admissible fruit, there is very little left of *Miranda*'s core holding. The exclusion of all statements, whether incriminatory or exculpatory, remains simply an exhortation that is severely limited because of the exceptions carved out. Whatever deterrent effect *Miranda* was envisioned to have in relation to police interrogation strategies that violate the suspect's Fifth Amendment right against self-incrimination loses force in the face of the realization that the *Miranda* tree does not always yield poisonous fruit.

III. CONCLUSION: TURNING *MIRANDA* RIGHT SIDE UP

A. Did (Does) *Miranda* Work?

In a study that sought to "question assumptions about the effects of *Miranda* and to suggest that legal scholars devote more energy to the empirical study of other, more significant, aspects of police interrogation and confessions,"[398] Professor Richard Leo, one of the more prolific scholars on *Miranda*, concluded that "*Miranda* has had very limited impact (positive or negative) on the criminal justice system in the last two decades."[399]

Looking at first-generation *Miranda* Impact Studies from 1966-1973, Leo noted several general patterns:

---

[396] *Supra* note 227.

[397] *Supra* note 8.

[398] Richard Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1001 (2000-2001).

[399] *Id.*

1. In the initial aftermath of *Miranda*, some immediately complied while others ignored it or failed to recite part or all of the warnings but after a brief adjustment period, virtually all members of the police began to regularly comply with the letter, though not always the spirit, of the "warning and waiver" requirement; despite compliance, many still resented the requirements imposed by *Miranda*;

2. Despite the warnings, suspects frequently waived their rights and chose to speak to the police—some attributed this to the manner by which the warnings were delivered, while others attributed this to failure of suspects to understand the meaning of the rights explained to them;

3. Once a waiver had been obtained, the tactics and techniques of police interrogation did not appear to change as a result of the warnings;

4. Confessions were still obtained, with researchers reporting inconclusive findings as to the comparative rate of confessions pre-and post-*Miranda*; and,

5. Clearance and conviction rates had not been adversely affected by the *Miranda* requirements, as any decline in confession rates in some states did not see a corresponding decline in conviction rates.

From these patterns, Leo concluded that the consensus that emerged from the "first generation" of *Miranda* Impact Studies was that the *Miranda* rule had only a marginal effect on the ability of the police to successfully elicit confessions and on the ability of the prosecutors to win convictions, despite the fact that some continued to oppose *Miranda* and perceived its impact as substantial.[400]

Leo's exploration of the second-generation studies (1996-2001) also generated some general patterns about police behavior in relation to *Miranda*:

1. The police appear to issue and document *Miranda* warnings in virtually all cases;

---

[400] *Id.* at 1002-1005, citations omitted.

2. They appear to have successfully adapted to the requirements and have developed strategies to induce *Miranda* waivers;

3. Waivers are elicited from suspects in roughly 80% of their interrogations though suspects with criminal records appear disproportionately likely to invoke their rights and terminate interrogation;

4. In some jurisdictions, police are systematically trained to violate *Miranda* by questioning "outside" *Miranda* and,

5. Some research tends to show that *Miranda* eradicated the last vestiges of third degree interrogation, increased the level of professionalism among interrogators and raised public awareness of constitutional rights.[401]

From these patterns and considering the language of the Court in *Dickerson*[402] professing reticence to abandon *Miranda*, Leo suggests that there may be "little incentive . . . to continue the difficult task of gathering and interpreting data on *Miranda*'s measurable effects"[403] and doubts if a third generation of *Miranda* Impact Studies would be forthcoming.

For a rule that has been in existence for 46 years but has been largely a "work in progress, as may be seen from the continuing judicial tweaking that has been done to its core holding and its bright line rule, there is a serious need to re-examine what *Miranda* stands for, at present. In Part Two, we looked at how much *Miranda*'s core holding and bright line have been so eroded and diluted as to be unrecognizable. The conclusions reached by Leo in his study, showing the relative inconsequential impact of *Miranda* on police interrogation practices as well as suspect behavior towards interrogation, point to a need to examine whether *Miranda*'s "warning and waiver" requirement is still necessary. Notably, even its most vocal opponents on the Court concede the reality that *Miranda* is here to stay and that it is up to the Court to overrule. though the current sentiment and reluctance to overrule it is not proportional to the alacrity by which they ridicule *Miranda*'s holding.[404]

---

[401] *Id.* at 1009-1010.

[402] *Supra* note 8.

[403] *Id.* at 1010.

[404] Yale Kamisar wryly observes that "[a]s *Dickerson* demonstrates, a majority of the Court is unwilling to overrule *Miranda* (or to let Congress do so). As *Patane* makes plain, however, a majority is also unwilling to take *Miranda* seriously." *See* Kamisar, *supra* note 3 at 203.

In this part, I look into why *Miranda* did not work as effectively in the United States and suggest some ways by which its core holding may be made more meaningful and enforceable and its intention as a bright line rule may be restored.

B. Practical Difficulties

As pointed out, one of *Miranda*'s main difficulties was how to characterize and explain what it actually was. When it was first announced, there was difficulty determining whether it was a code of conduct, a prophylactic rule, a rule limited to the police station, evidentiary rule, or simply an exercise in judicial legislation.[405] It is this "identity crisis" that has led to misunderstanding, antagonism, confusion, resistance, and a perspective that it is a necessary hazard but nothing much more. The Court's attitude toward *Miranda* has reflected this. It is fair to say that *Miranda*, more than any other case, has divided the Court, as reflected by the many three-person pluralities and five-person majorities that post-*Miranda* rulings have garnered.

The purpose of a bright line rule, like *Miranda*'s "warning and waiver" requirement, is to provide guidance for action that would result in uniformity and consistency and enhance stability. The desired effect is to lessen the instances where a fact- or context-specific review would be resorted to in instances where the factual environment presents almost identical parameters. As discussed previously, the cases decided by the Court post-*Miranda* have recast the parameters of this situation and reframed the original "warning and waiver" bright line rule in very different ways. The nuances that have arisen from the Court's decisions have rendered what used to be a clear bright line rule into one that is "riddled with exceptions and strapped with limitations."[406]

The reduction of the "heavy burden" of justification on the part of government and the shifting of the burden to justify the application of the "warning and waiver" requirement from the government to the suspect have also resulted in the erosion of the protection originally envisioned by the *Miranda* Court. The presumptively coerced confession that was deemed inadmissible under *Miranda*'s original formulation is no longer the starting point of inquiry when faced with the admissibility of a confession obtained without complying with the "warning and waiver" requirement.

---

[405] Jay Goldberg, *Interrogations and the Law: Does* Miranda *Work?* 241 N.Y.L.J. (2009), citations omitted. Chief Justice Earl Warren refers to this difficulty in riposte when he alludes to *Miranda* not being a "constitutional straitjacket." Miranda, 384 U.S. 436 at 467.

[406] Marcus, *supra* note 86 at 94.

Instead, the starting point now is whether the warnings even need to be given at all, first, under the *Chavez*[407] prong and, then, under the *Quarles*[408] prong of the *Harris-Quarles-Chavez* triad. If one of these exceptions applies, then there would either be no violation of the Fifth Amendment right under *Chavez* or an insulation of the confession obtained under the exigencies of the "public safety" exception under *Quarles*. Either way, the burden has been reduced and it is far easier now for government to justify dispensing with the warnings.

The shifting of the burden from the government to the suspect has also resulted in *Miranda*'s failure to protect suspects from making involuntary or false confessions. Placing the burden on the suspect facing custodial interrogation to affirmatively and unequivocally invoke the right to silence, as demanded by the Court in *Berghuis v. Thompkins*,[409] is an absurd reading of *Miranda* and a cruelly perverse infliction on the suspect of a duty that *Miranda* shields him from. The need to be unequivocal about choosing the right to counsel before the Court will recognize the applicability of *Miranda* under *Davis v. United States*[410] is similarly a misreading of *Miranda*.

Shifting the burden to the suspect and imposing almost impossible standards of proof to justify entitlement to rights originally envisioned for his protection will almost certainly guarantee that the suspect will never be able to discharge the burden. More than any other reason perhaps, this would explain why *Miranda* did not (or does not) work.

C. The Now-Unrecognizable Bright Line Rule

The clearest indication of what *Miranda* is may be divined from what it was intended to be. Chief Justice Warren made it clear that he intended *Miranda* to be a bright line rule to guide police interrogations of suspects under custody. Thus, the defendant must be told: (a) "in clear and unequivocal terms that he has the right to remain silent;"[411] (b) ". . . that anything said can and will be used against [him] in court;"[412] (c) "[that he] may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently . . . ;"[413] (d) ". . . that he has the right to consult with a lawyer and to have the lawyer with him during

---

[407] *Supra* note 218.
[408] *Supra* note 171.
[409] *Supra* note 250.
[410] *Supra* note 195.
[411] Miranda, *supra* note 3 at 467-68.
[412] *Id.* at 469.
[413] *Id.* at 444.

interrogation;"[414] and (e) "if he is indigent a lawyer will be appointed to represent him."[415]

The specificity of the warnings, explanations and obligations imposed left little doubt that *Miranda* was intended to be a bright line rule and one that was designed to be a floor not a ceiling—"[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."[416]

However, forty-six years after its creation, *Miranda*'s bright line rule may be said to not have aged gracefully and well. Through those years, not only has its core holding barely remained intact, the principles that formed its original bright line rule have also practically disappeared, obscured by judicial tweaking, shading, and nuancing.

Chief Justice Rehnquist, one of *Miranda*'s most vocal opponents, acknowledged as much in *Dickerson* when he disputed the need to abandon *Miranda*—characterizing it as a rule that has "become embedded in routine police practice to the point where the warnings have become part of [the] national culture"[417]—while, at the same time acknowledging that "subsequent cases [after *Miranda*] have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[418]

As discussed, the Court has interpreted and tweaked almost every portion of *Miranda* making corresponding changes (in restriction, limitation and expansion) to *Miranda*'s core holding and its former bright line rule.

The *Harris-Quarles-Chavez* triad tells us when the warnings may be dispensed with without adverse consequences on admissibility. *Quarles* tells us that, when providing the warnings will pose a threat to the public in the estimation of the police officer, the warnings can be dispensed with altogether. *Harris* tells us that otherwise inadmissible evidence is admissible if used only for impeachment purposes. And *Chavez* tells us that if the statement to be obtained is not to be presented at trial, then dispensing with the warnings will not violate the Fifth Amendment even if it is not in compliance with the rule set forth in *Miranda*.

---

[414] *Id.* at 471.
[415] *Id.* at 473.
[416] *Id.* at 476.
[417] Dickerson, *supra* note 8 at 443.
[418] *Id.*

The *Prysock*[419]-*Ducksworth*[420] standard tells us that the exact words of the *Miranda* warnings need not be recited and that any substantially meaningful language will suffice for so long as the essential meaning of the protections that *Miranda* seeks to ensure is conveyed to the suspect and that the warnings, no matter how couched, are sufficient if they refer to some future point, i.e., the trial.

Custody, for purpose of "custodial interrogation", is no longer the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way"[421] but is part of an objective analysis of the circumstances based on the understanding of the hypothetical "reasonable man in the suspect's position" as articulated in *Mathiason,*[422] *Berkemer,*[423] *Stansbury*[424] and *Keohane.*[425] For suspects already incarcerated, this objective analysis is supplemented by the rule in *Shatzer* that restriction of movement need not be present to constitute custody.[426] Also, where environmental circumstances that would indicate the presence of "inherently compelling pressures"[427] that *Miranda* protects against exist, these must also be considered.

As for a valid waiver of the *Miranda* rights to silence or to assistance of counsel, this may now be established by silence, an unarticulated desire to invoke the right to counsel or occasional responses to unrelated questions under *Thompkins,* or an ambiguous invocation of the right to counsel under *Davis.* The rigid waiver standard under *Miranda*—"[t]he defendant may waive . . . [t]he rights . . . voluntarily, knowingly and intelligently,"[428]—is now less rigid and more flexible under *Butler,*[429] *Zerbst*[430] and *Davis*, which preach a "totality of circumstances test."

The silence that is a central and integral core of the *Miranda* warnings has now been turned on its head as it now means, under *Thompkins,* that the suspect has waived his rights; this, notwithstanding the original holding in *Miranda* that "a valid waiver will not be presumed

---

[419] *Supra* note 163.
[420] *Supra* note 324.
[421] Moseley, *supra* note 135.
[422] *Supra* note 141.
[423] *Supra* note 334.
[424] *Supra* note 335.
[425] *Supra* note 336.
[426] Shatzer, *supra* note 245 at 1224.
[427] *Id.*
[428] Miranda, *supra* note 3 at 444.
[429] *Supra* note 145.
[430] *Supra* note 146.

simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[431]

The heavy burden of proving an intelligent and knowing waiver of the rights secured by *Miranda*, originally reposed on the prosecution,[432] now rests on the defendant, who must now prove that he intended to unequivocally keep silent under *Thompkins*, or to invoke counsel under *Davis*.

Finally, the exclusionary rule, which lies at the core of the *Miranda* holding, now excludes only compelled testimonial evidence obtained without the warnings having been given but does not extend to: (a) the use of that same inadmissible statement at trial for impeachment of the defendant's testimony under *Harris*, (b) the admission of subsequent statements obtained after the initial unwarned statement under *Elstad*[433] and (c) objects or other physical evidence subject of the initial unwarned statement under *Patane*.[434]

The decisions of the Court post-*Miranda* have clearly shown that, while the Court is not keen on abandoning *Miranda*, it has no compunctions about reinventing it with tailored, narrow exceptions which eventually become the rule. In this way, the Court has effectively obscured *Miranda*'s bright line rule and substantially eviscerated its core holding.

1. Adapting to Avoid *Miranda*

When *Miranda* was announced in 1966, many were unconvinced, thinking that it was an impractical rule. Others were antagonistic, thinking that it would shackle police investigations. It is significant that this reaction would later be reflective of the reactions on *Miranda* many years later—where some would complain that it works too well and others would complain that it does not work at all.

Justice White, in his dissent in *Miranda*, stated that "[t]here is . . . every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court had previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test . .

---

[431] *Id.* at 475.
[432] *Id.*
[433] *Supra* note 188.
[434] *Supra* note 227.

."[435] Police and other law enforcement officers were of the same mind, if less diplomatic in how they expressed the sentiment. Police chiefs predicted chaos, believing that *Miranda* requirements were the equivalent of a virtual ban on interrogation.[436]

After the initial shock and perhaps outrage, the police, however, adjusted to the new rules such that it would later become second nature—described by Chief Justice Rehnquist as "embedded in routine police practice to the point where the warnings have become part of [the] national culture"[437] in police investigations. Inevitably, the police had to devise strategies to avoid or delay *Miranda*'s mandate. Many of these strategies have already been subject of judicial treatment but, because *Miranda* is apparently a "work in progress," there has been no end to efforts to sidestep *Miranda*'s requirements.

As hypothetical examples and only to demonstrate the ease with which an "end run" around *Miranda* may be made, I submit some strategies that would find themselves within the narrow interstices of *Miranda* and may, thus, escape attention or, if challenged, fit within the nuanced exceptions that have formed the *Miranda* literature.

1. **"Let me tell you a story."** The *Miranda* "warning and waiver" requirement applies to an interrogation or any exchange between police and the suspect, where the purpose of the questions is to get incriminatory answers. All interrogations involve storytelling, though it is traditionally from the suspect's point of view prompted by the policeman's questions. This strategy involves the "story" being told by police officers without giving the *Miranda* warnings. Typically, it would involve using selected incriminating facts—not all of which may be supported by evidence—that would convince the suspect that the police had already completely solved the case, even without his participation. The "story" would imply that the police already know what the suspect did, even without a confession but that a confession would make things easier on him. The advantage of this strategy is that it does not involve interrogation, as there is no exchange between the suspect and the police officer. Even without asking the suspect any question, the police would simply end with a rhetorical *"Am I wrong? I don't know, you tell me if I'm wrong*" after the "story" ends. There is a misleading "absence of coercion" because no questions are thrown his way but as he listens to the "story," the suspect slowly becomes convinced that the police do know something though he is unsure what it is and how much they know and that perhaps it might be best to simply "confess and

---

[435] Miranda, *supra* note 3 at 542 (White, J., *dissenting*).

[436] *See* Malone, *supra* note 1.

[437] Dickerson, *supra* note 8 at 444.

cut a deal" while he still can. It would only be, at that point, when he decides to confess and says so that the police would then give him the *Miranda* warnings—but, at that point, he would already have decided to confess and the warnings would not have achieved their purpose.[438]

2. **"An invitation he shouldn't refuse."** Since it is custody that triggers the *Miranda* mandate, logically any strategy to avoid *Miranda* would involve those that would allow questioning that would not be considered "custodial." Under this strategy, the police would "invite," not arrest, the person to "shed light" on certain matters. Some would even mention that he is free to leave at anytime or that, if he declines, then they would have no choice but to get a warrant. More often than not, the suspect would not refuse the "invitation" because: (a) he feels that, being actually innocent, he has nothing to fear, (b) he feels that declining the "invitation" might make the police think he is guilty, or (c) he does not want to antagonize the police by making them get a warrant. The pressure that is exerted is subtle and implied and there are very few who would actually think of declining such an invitation.

3. **"Until the last minute."** *Miranda* does not contain a time bar. Its only command, in relation to time, is that the warnings must be given prior to any questioning. For purpose of extracting a confession, that could be anytime from the arrest or fact of custody and within the period allowed to keep the suspect without charging him. A simple strategy where the police simply tells the suspect that "I know you have rights but since I'm not going to be asking you any questions yet, I'm not obliged to tell these to you. I am entitled to keep you for (x days or hours) while I investigate." The absence of any questions would not prompt the suspect to ask for a lawyer and any demand for a lawyer by the suspect would be answered simply by telling the witness, "You don't need a lawyer yet because we're not yet questioning you." Keeping the suspect for the longest possible time without asking any questions allows the inherent pressure of the environment to sink in yet without any overt action on the part of the police. This would most likely lead to the suspect asking again for a lawyer, at which point, the police would simply then ask, "Are you ready to talk?" before giving the *Miranda* warnings.

4. **"Using the carrot."** The police may simply dangle an incentive for the suspect to confess, for instance, a promise that the suspect will get a lighter sentence if he confesses or, depending on what he says, even dropping of the charges. This becomes particularly enticing to a

---

[438] This would be different from the two-step questioning in Missouri v. Siebert, *supra* note 222, because there would be no questions asked, unlike in *Siebert.*

suspect who may be a repeat offender and cannot risk being charged for another felony.

5. **"Bringing out the stick."** The other half of "using the carrot" obviously would be the "stick." This would involve telling the suspect about adverse consequences that would happen, should the suspect refuse to confess.

These strategies lack the scientific rigor of those that have been professionally devised. Yet, from an intuitive viewpoint with knowledge of how the Court views *Miranda*, it is possible even for non-professionals, like myself, to devise strategies to do an "end run" around *Miranda*.

It is this continuing propensity to do creative "end runs" around *Miranda* that has led many to conclude that the bright line rule no longer exists and that it may be the right time to come up with a new bright line rule. Kamisar notes that "[o]ne of the principal purposes of the four-fold warning is . . . 'to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.' But many of the [strategies devised by law enforcement officials] seriously undermine this purpose by leading (or should one say, misleading) the suspect into believing that it is in his best interest to waive his rights and talk to his 'friends' in the interrogation room."[439]

If the goal of *Miranda* was to remove the incentive for the police to coerce confessions, then it would appear that the current regime of warnings does not address the goal; on the contrary, it has encouraged creative attempts to subvert the "warning and waiver" requirement. Viewed in this light, the reading of rights and the taking of waivers become, seemingly, an empty ritual,[440] with the deception, manipulation, coercion, and persuasion that the Court condemned in *Miranda* still prevailing.

2. A Masterful Matter of Words

In his dissent in *Miranda*, Justice Harlan characterized the four-fold warnings in *Miranda* as a "code of rules for confessions"[441] and complained that it would "serve wholly to frustrate an instrument of law enforcement that has long and quite reasonably been thought worth the

---

[439] Kamisar, Miranda at 40, *supra* note 3 at 186-187 (citation omitted).

[440] Richard Leo, *supra* note 398 at 1021 *citing* H. RICHARD UVILLER, THE FLAWED PROSECUTION OF CRIME IN AMERICA 124 (1996).

[441] Miranda, *supra* note 3 at 504 (Harlan, J., *dissenting*).

price paid for it."[442] Yet, the complaint over the past two decades from the law enforcement community has not been that they are required to give the warnings but that these warnings deviate from those set in *Miranda*, which is considered too confusing and too uncertain.[443]

It would be intuitive and, in fact, imminently sensible and reasonable to say that, for a bright line rule like *Miranda* to work, it must operate uniformly and consistently. The easiest example to give would be the required language of the warnings. It is entirely counter-intuitive to have a bright line rule that is not stated uniformly, yet that is precisely what the Court has allowed. In *California v. Prysock*[444] and then in *Ducksworth v. Eagan*,[445] the Court ruled that the exact words of the *Miranda* warnings did not need to be used because:

> [T]his Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.
>
> Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."[446]

The logic of the holding is difficult to follow.

The objective of *Miranda* was to effectively convey to suspects their rights to silence and to counsel, and also to place no undue hardship on police in giving the warnings such that compliance would be considered burdensome. This is best served by simply requiring the police to follow the warnings as given in the decision.[447] One of the most important

---

[442] *Id.* at 516; Justice Harlan was referring to "confessions."

[443] Marcus, *supra* note 86 at 124-125.

[444] *Supra* note 163.

[445] *Supra* note 324.

[446] Prysock, *supra* note 163 at 359-60, citation omitted (quoting *Miranda* at 476), emphasis in the original.

[447] This was one of the arguments raised by Justice Thurgood Marshall in his dissent in Ducksworth v. Eagan, *supra* note 336 at 220, which I agree with. He shows that Chief Justice Warren had repeatedly pointed out that the *Miranda* warnings were

features of *Miranda* was the ease with which the police could satisfy the requirement by simply reading the precise language off a card.[448]

Allowing a non-uniform set of warnings represents a departure from the intention of the *Miranda* Court and erodes *Miranda*'s bright line rule because it requires the Court to engage in a context-specific rather than a standard-based review. More importantly, allowing a non-uniform set of warnings may hinder the purpose behind *Miranda*, which is that it was designed to be an effective remedy.[449] In this regard, as the warnings are intended to convey meaningful information, the effectiveness of the warnings is directly connected to their comprehension.

Different words convey different meanings or shades of meaning or convey the intended meaning in different ways. This defeats the objective that the *Miranda* warnings must be effective. To the extent that *Prysock* and *Ducksworth* allow the police to devise their own warnings for so long as "the reference to appointed counsel [is] linked to a future point in time after the police interrogation,"[450] it may be said that there is no longer a bright line rule in this regard.

D. Formulating a New Bright Line Rule and Making *Miranda* Matter Again

Whether it was through judicial action or police strategy or simply failure to comprehend the warnings given because of differences in the words used, it is clear that the once-rigid *Miranda* rule has become less rigid and less understandable. Certainly, it has succeeded only in being "embedded" in police procedure to the extent that it now forms part of the national culture but insofar as preventing confessions—false or otherwise—and in transforming police conduct during interrogations, *Miranda* may be characterized, charitably, as being irrelevant. Forty-six years after its issuance, *Miranda* is no longer a bright line rule but simply a

---

intended to be "effective," implying that the language of the warnings must be such that meaningful information is conveyed.

[448] Marcus, *supra* note 86 at 128.

[449] This is demonstrated by the repeated reference to the word "effective" and allusions to the concept in the text of *Miranda* itself.

[450] Prysock, *supra* note 163 at 360.

In *Ducksworth*, the Court used a similar standard where the officer simply informed the suspect that a lawyer would be appointed "if and when you go to court." *Id.* at 198. Chief Justice Rehnquist, writing for the majority, stated that what was at issue "is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*,'" *id.* at 203, (editorial modification in the original), and ruled that this essential message intended by the *Miranda* warnings was conveyed. *Id.*

broad aspirational goal that ironically invites very particularized factual inquiries in application.[451]

The problem of crime is too complex, complicated, and confounding, and it would be simplistic to say that a rule like *Miranda* would be the solution to that problem. It is certainly not my intention to take that position. My intention is to address what the *Miranda* Court sought to address when it first announced the decision—the concern that a person, suspected of a crime, has his will subjugated by the inherent pressures and subtle coercions that exist in the interrogation room atmosphere to the extent that his right against self-incrimination and with that his rights to a fair trial and to due process would be gravely prejudiced. While a bright line rule like *Miranda*'s is not the entire solution, it is one that helps in ensuring stability, consistency, and predictability. One of the principal objectives of the *Miranda* ruling that led to the bright line rule, which even its opponents would concede as important,[452] is the "desirable clarity" that Chief Justice Rehnquist and Justice O'Connor both spoke of in *Quarles*.

The empirical evidence reveals that, at best, *Miranda*, as it presently exists, is not and has not been relevant to law enforcement as well as in protection against coerced, involuntary, or false confessions.[453] The police have adapted to it and the Courts have made a hobby of tweaking the rule into unimagined contours that the reality of confessions in the interrogation room still persists.

The core holding of *Miranda* stands intact only in the *Dickerson* understanding that the Court has not yet decided to abandon the rule; but, in every other respect, the core holding of *Miranda*—that presumptively coerced statements given during custodial interrogation, without effective advise as to the rights to silence and to be assisted by counsel, are inadmissible—no longer exists. *Harris*, *Thompkins*, *Patane*, and *Elstad*, among many others, have seen to that. The rule has not stood the test of time nor has it withstood the scrutiny of its opponents.

The "warning and waiver" requirement, which forms the mechanism to implement the bright line rule, has successfully passed on

---

[451] *See* Marcus, *supra* note 86 at 143.

[452] In Quarles, *supra* note 171 at 658, Chief Justice Rehnquist conceded this value when he stated that "[i]n recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree *we lessen the desirable clarity of that rule*." In her separate concurring and dissenting opinion, Justice O'Connor also alluded to the lessening of clarity as an important consideration of the *Miranda* rule.

[453] *See* Leo, *supra* note 398 at 1001.

into popular culture, but has not been as successful in preventing coerced, involuntary, or false confessions. The relative ease by which the *Miranda* mandate may be sidestepped by creative police interrogation strategies makes the formulation of a new regime of warnings imperative.[454] The

---

[454] Some proposals for changes to the "bright line" rule have been put forward. See Marcus, *supra* note 86 at 144-145, where he submits *a* proposal in five parts, to wit:

> (1) *Custody.* Today, the Court considers whether law enforcement officials deprived the defendant of the freedom of movement in a significant way. The proposed rule accepts this inquiry but broadens it by also applying the rule to cases in which law enforcement officials interrogate an individual *suspected* of a crime.
>
> (2) *Interrogation.* The current definition is a fair one, covering any actions by the police reasonably likely to elicit a response. My suggestion is that this definition be supplemented by including two other situations: cases in which the officer intended to elicit an incriminating response and cases in which the suspect believed he was undergoing interrogation.
>
> (3) *The Warnings.* The Court has allowed law officers to drift away from the four warnings set forth in *Miranda.* Currently, courts ask whether the warnings given reasonably conveyed the suspect's Fifth Amendment rights. Instead, courts should require the police to give the warnings as explicitly set forth in *Miranda* or demonstrate that any deviation from those warnings could not have led to any deviation from those warnings could not have led to confusion regarding the privilege against self-incrimination.
>
> (4) *The Resumption of Questioning.* If a person asks to speak with an attorney, all questioning must cease and not be resumed. Currently, however, if a person asks to remain silent, in some, not very precisely defined situations, the interrogator can later resume questioning. I propose treating both cases the same. If the person does not wish to speak, either because of a desire to see a lawyer or a desire to remain silent, questioning cannot resume.
>
> (5) *Waiver.* The present system requires courts to weigh the totality of circumstances to determine if the defendant freely and knowingly waived rights under the Fifth Amendment. My proposal would retain this system, but additionally would require an explicit waiver, some clear expression by the defendant of an understanding of her constitutional protections and the relinquishment of those rights.

See also Geoffrey Corn, *The Missing MirandaWarning: Why What You Don't Know Really Can Hurt You*, *available at* http://works.bepress.com/geoffrey_corn/4 (last visited Mar. 22, 2012), where he submits:

> There are two conceivable methods to address the defect in the *Miranda* warnings . . . The first would be to require consultation with counsel prior to executing a *Miranda* waiver. This approach would certainly protect a suspect from the effect of the erroneous assumption that silence in the face of an allegation creates an inference of guilt.
>
> The much more efficient method to cure this defect would be to modify the required . . . warnings to include informing the suspect of the legal consequence of invocation. This is much more feasible than the stated alternative, as it would require nothing more than a simple additional

once-radiant bright line rule alluded to by Justice O'Connor no longer shines as bright, if at all. Considering all that has been said and done about the rule, it is time for a new bright line built around the original core holding of *Miranda*, addressing the various nuances brought about by judicial interpretation and the practices of law enforcement.

A new bright line rule needs to consider the fundamental premise in *Miranda*—"that without proper safeguards, the process of [custodial] interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"[455]—in relation to its objective of ensuring that any confessions obtained from the process of custodial interrogation may be presumed to have been voluntarily and freely given. Any such rule also needs to consider the ultimate standard set forth in *Miranda* that it must be "at least as effective"[456] in assuring the protection of the right against self-incrimination. Any such rule must also help ensure truth-telling, to deter perjury on the part of law enforcement or the suspect, because the determination of the truth lies at the heart of the criminal investigation process.[457] Finally, the rule must also be "clear and certain . . . [and] one which will respond to the foreseeable situations which arise daily."[458]

E. Constitutionalizing *Miranda*; the Philippine Experience with a Constitutional *Miranda* "Warning and Waiver" Requirement

The best way to make *Miranda* a meaningful bright line rule again is to make it predictable and consistent; to lessen the variables and the discretion that officers and investigators have in the timing, sequence, and

---

warning. Prior to requesting a *Miranda* waiver, the interrogator would be required to inform the suspect that invoking the right to silence—either expressly or by requesting a lawyer and thereby terminating the counter—cannot and will not be used against the suspect in a court of law."

[455] *Supra* note 3 at 467.

[456] *Id.*, at 444. Expressed another way, "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the [procedural safeguards] are required. *Id.* at 444, editorial modification provided.

[457] In his dissent in Quarles, *supra* note 171 at 687, Justice Marshall stated that:

> The Fifth Amendment prohibits compelled self-incrimination. As the Court has explained on numerous occasions, this prohibition is the mainstay of our adversarial system of criminal justice. Not only does it protect us against the inherent unreliability of compelled testimony, but it also ensures that criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness.

[458] Marcus, *supra* note 86 at 95.

text of the warning as well as the format of the waiver. The quickest, though not necessarily the most practicable, way would be to constitutionalize *Miranda*.[459]

The Philippines is among the few countries outside of Europe and the Americas that have adopted and incorporated the *Miranda* "warning and waiver" requirement within its laws. In fact, the Philippines has gone beyond the "prophylactic" nature of the warnings and constitutionalized *Miranda*. What the United States Supreme Court failed to do when *Miranda*[460] was first decided and refused to do when *Dickerson*[461] was later decided, the Philippines has done on three separate occasions.

In its 1973 Constitution, the protections afforded by the *Miranda* "warning and waiver" requirement were reflected in Article IV (Bill of Rights), Section 20, thus:

> No person shall be compelled to be a witness against himself. Any person under investigation for an offense shall have the right to remain silent and to counsel, and to be informed of such right. No force, violence, threat, intimidation or any other measure which vitiates the free will shall be used against him. Any confession obtained in violation of this section shall be inadmissible against him.[462]

The first sentence in the 1973 text is identical to a counterpart provision of the Philippines' 1935 Constitution,[463] and is clearly based on the Fifth Amendment to the US Constitution,[464] even as the Philippine text is broader—applying to all cases and not only to criminal cases. The

---

[459] The whole tug of war in the US Supreme Court over *Miranda*'s reach and effects is precisely an exercise in one side trying to constitutionalize the warnings and the other side trying to make the warnings simply prophylactic. *Dickerson* represented the best opportunity to do so but Chief Justice Rehnquist stopped short of declaring *Miranda* to be a constitutional rule; thus, *Patane* has significantly eroded and undermined the efforts at making *Miranda* a constitutional rule.

[460] *Supra* note 3.

[461] *Supra* note 8.

[462] CONST. (1973), art. IV, §20. *See* People v. Duero, G.R. No. L-52016 (1981), where the Philippine Supreme Court traced the origin of Article IV, Section 20 to the *Miranda* ruling, thus: "[t]he new provisions in section 20, Article IV of the 1973 Constitution [referring to everything after the first sentence] were adopted from the ruling in *Miranda v. Arizona* ('an earthquake in the world of law enforcement') which specifies the . . . procedural safeguards for in-custody interrogation of accused persons . . ."

[463] CONST., (1935), art. IV, §18.

[464] U.S. CONST., amend. V, pertinently, "No person shall . . . be compelled in any criminal case to be a witness against himself."

second and third sentences of the 1973 text carry the key features of the *Miranda* "warning and waiver regime." This is not surprising as the Philippine Supreme Court in *People v. Duero*[465] quoted the exact text of the guidelines issued by the United States Supreme Court, thus:

> As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[466]
>
> . . .
>
> The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements that are direct confessions and statements that amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.[467]

The 1973 Constitution of the Philippines was superseded in 1986 by a transitional Constitution called the "Freedom Constitution"[468] and

---

[465] G.R. No. L-52016 (1981).

[466] Miranda, *supra* note 3 at 444-445.

[467] *Id.* at 476.

[468] Proc. No. 3 (1986) entitled "Declaring a National Policy to Implement Reforms Mandated by the People Protecting their Basic Rights, Adopting a Provisional Constitution, and Providing for the Orderly Transition to a Government Under a New Constitution," *available at* http://www.gov.ph/1986/03/25/proclamation-no-3-s-1986-2/ (last visited Sep. 13, 2012).

later by the current 1987 Constitution.[469] Article IV, Section 20 of the 1973 Constitution was retained in the 1986 Freedom Constitution.[470] The current 1987 Constitution retains the spirit and key features of the *Miranda* "warning and waiver" requirement in the 1973 text, but further enhanced it by adding additional requirements not found in the original text of the *Miranda* Decision. Article III, Section 12 of the 1987 Constitution provides, pertinently, that:

> (1) Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.
> . . .
>
> (3) Any confession or admission obtained in violation of this or Section 17[471] hereof shall be inadmissible in evidence against him.

More than just constitutionalizing the warnings, the Philippines has amplified on them by expanding the requirements for a valid waiver and incorporating the exclusionary rule for "fruits of an uncounseled statement."[472] It has also allowed for a simpler understanding and definition of the "custody" requirement that triggers the "warning and waiver" rule than the United States. This, by itself, leads to a strengthening of its nature as a bright line rule, independently of its inclusion as a constitutional rule.

On February 25, 1986, Mrs. Corazon C. Aquino was installed as President of the Philippines by a popular uprising that ousted Ferdinand Marcos, who had ruled the country for 14 years under martial law. One of Mrs. Aquino's first official acts was to issue Proclamation No. 3 abolishing the 1973 Constitution and replacing it with the provisional Constitution, popularly referred to as the "Freedom Constitution."

[469] *Available at* http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines (last visited Sep 13, 2012).

[470] CONST., (1986), Art. IV, §1, "All existing laws, decrees, executive orders, proclamations, letters of instruction, implementing rules and regulations, and other executive issuances not inconsistent with this Proclamation shall remain operative until amended, modified, or repealed by the President or the regular legislative body to be established under a New Constitution."

[471] CONST., art. III, §17. "No person shall be compelled to be a witness against himself."

[472] *See* U.S. v. Patane, *supra* note 227, and Oregon v. Elstad, *supra* note 188, where the Court refused to extend the "fruit of the poisonous tree" doctrine to the fruit of a statement obtained through a violation of the *Miranda* rights of the person questioned.

The Philippine view of "custodial interrogation" may be found in illustrative cases similar to *People v. Marra*,[473] where the Philippine Court defined "custodial investigation [as one that] involves any questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. It is only after the investigation ceases to be a general inquiry into an unsolved crime and begins to focus on a particular suspect, the suspect is taken into custody, and the police carries out a process of interrogation that lends itself to eliciting statements that the rule begins to operate."[474] Significantly, this brings back the definition to *Miranda* and removes any other analytical standard that complicates the analysis and unduly burdens the suspect. Moreover, it also clearly specifies the motivation and underscores the coerciveness of the atmosphere during a custodial investigation and thus places the burden squarely on the police to show the contrary and not on the suspect to justify the waiver.

In the current incarnation of *Miranda* under the 1987 Philippine Constitution, the requirements for a valid waiver of the warnings are more stringent. Thus, Article III, Section 12 of the 1987 Constitution provides that "[t]hese rights cannot be waived *except in writing and in the presence of counsel*." (Emphasis supplied) A waiver in any other form will be a violation of the Constitution and will result in the inadmissibility of any confession or admission given by the suspect.[475] Notably, the Constitution also distinguishes between a "confession" and an "admission"[476] but, for purposes of the *Miranda*-type warnings under Section 12, considers both inadmissible if both the "warning and waiver" requirements were not met. It is significant that the rule on waivers now assumes the character of a bright line rule where the mere violation results in inadmissibility, regardless of its voluntariness or reliability.

The sequence of the warnings required is also significant. Article III, Section 12 requires that the following warnings ought to be given: (a) that the suspect has a right to be informed that he has rights; (b) that he

---

[473] G.R. No. 108494 (1994). *See also*, for instance, People v. Dela Cruz, G.R. No. 118866-68 (1997).

[474] *Id.*

[475] *See*, for instance, People v. Rama, G.R. No. 80738 (1990), where the Court held that even if the suspect had been apprised of her rights and that she had allegedly verbally waived the right to counsel and confessed, the requirements in the Constitution of a written waiver made in the presence of counsel were not complied with and thus, the confession was inadmissible.

[476] People v. Satorre, G.R. No. 133858 (2003). Here, the Court distinguished the two terms, thus: "An admission [is] an 'act, declaration, or omission of a party as to a relevant fact." A confession . . . is the 'declaration of an accused acknowledging his guilt of the offense charged, or any offense necessarily included therein.'"

has the right to remain silent, and to have competent, independent counsel, preferably of choice, and (c) that if he cannot afford one, counsel can be provided. The information provided is deliberately done with the intention of providing the greatest degree of understanding on the part of the suspect. Thus, the first thing that he is told is that he has specific rights; presumably, information about this will help to reduce the level of coerciveness that the atmosphere is creating. That it is the police informing him of this, at the outset, is significant because it communicates to the suspect that the police will presumably honor the warnings.

One other thing that is significant in the Philippines is the application of the "exclusionary rule" to a violation of the *Miranda* "warning and waiver" requirement. Traditionally associated only with the right against unreasonable searches and seizures under the Fourth Amendment of the United States Constitution, the United States Supreme Court has rejected the application of the "fruit of the poisonous tree" principle to "uncounseled" statements under *Miranda*. The Philippines has not only constitutionalized *Miranda* but it has also extended the exclusionary rule associated with a violation of its Fourth Amendment counterpart[477] to violations of the "warning and waiver" requirement. In the case of *People vs. Alicando*,[478] the Court ruled that:

> We have not only constitutionalized the Miranda warnings in our jurisdiction. We have also adopted the libertarian exclusionary rule known as the "fruit of the poisonous tree," . . . According to this rule, once the primary source (the "tree") is shown to have been unlawfully obtained, any secondary or derivative evidence (the "fruit") derived from it is also inadmissible. Stated otherwise, illegally seized evidence is obtained as a direct result of the illegal act, whereas the "fruit of the poisonous tree" is the indirect result of the same illegal act. The "fruit of the poisonous tree" is at least once removed from the illegally seized evidence, but it is equally inadmissible. The rule is based on the principle that evidence illegally obtained by the State should not be used to gain other evidence because the originally illegally obtained evidence taints all evidence subsequently obtained.

By constitutionalizing and amplifying the protections originally intended by Chief Justice Warren when *Miranda* was first decided, the Philippines has strengthened the protection that the "warning and waiver" requirement contemplates. It has also underscored the rule as a "bright

---

[477] CONST., art. III, §2.

[478] 251 SCRA 293, 314-315 (1995).

line" standard, the mere violation of which would bring about the consequences of inadmissibility.

F. Reformulating the Bright Line Rule

The burden of proof is central to an effective bright line rule. *Miranda* clearly reposed the "heavy burden"[479] on the prosecution to demonstrate a waiver; similarly, it also imposed the burden on the prosecution to show that it had come up with "other procedures which are at least as effective"[480] as the warnings. The presumption, therefore, is that the warnings must be given—as a fact—and the prosecution, not the defense, must show the justification for any deviation from this requirement. Thus, any unwarned statement comes to court carrying a heavy presumption against its validity. With this in mind, any inquiry into the admissibility of an unwarned statement, consistent with the core holding in *Miranda*, should thus consist of only two inquiries:

The first inquiry would be a factual one—"were the warnings given?" This is a factual inquiry, without need of any legal shading or nuancing. If the warnings were given, the court may then proceed to consider whether the warnings were "effective."[481] If the warnings were not given at all as a fact "prior to any questioning," the inquiry stops and the issue of admissibility becomes ripe. The burden of justification now rests on the government to show why the confession should be allowed by proving any of only two justifications: (1) any of the two *per se* exceptions allowed by the Court—the "public safety" exception under *Quarles* and the *Chavez* exception premised on a commitment that the confession will not be presented during the trial, or (2) that other more "fully effective means"[482] have been implemented and observed, thus dispensing with the warnings. Failure to show any of these two justifications will result in suppression of the statement. If the warnings were not given because the prosecution pleads that the defendant waived the warnings—not the exercise of the rights but the right to be warned—the court, consistent with the "heavy burden"[483] imposed on the prosecution to demonstrate that the waiver was knowingly and intelligently done, must require the prosecution to prove this waiver through evidence other than "silence of

---

[479] Miranda, *supra* note 3 at 467.

[480] *Id.*

[481] *Id.*, at 444, "demonstrate[d] the use of procedural safeguards effective to secure the privilege against self-incrimination."

[482] Note that under *Miranda*, the prosecution may justify not giving the warnings only if it can show compliance through "other fully effective means" that may substitute for the warnings.

[483] Miranda, *supra* note 3 at 475.

the accused"[484] or "the fact that a statement was . . . eventually obtained."[485]

The second inquiry would be a legal determination of (1) the validity of the waiver and (2) the effectiveness of the defendant's invocation of rights. The second part of the inquiry would be dependent on the first part being satisfied, i.e., the warnings were given, as a factual matter or, if not given, was justified by a *per se* exception or other "fully effective means" aside from the warnings.

The waiver subject of this inquiry would refer, initially, to a waiver of the right to silence, which would be the trigger for the possible invocation of the right to have counsel present. Notably, there would be no occasion for the right to counsel to be invoked unless there is, first, a clear waiver of the right to silence.[486] The right to counsel in *Miranda* is rooted in the Fifth Amendment right to due process and not the Sixth Amendment right to counsel at trial and refers to the right to have counsel present **during the interrogation;** this is, in turn, rooted on a valid waiver of the right to remain silent.

Assuming that the prosecution has proven that there was a valid waiver of the right to remain silent, the next inquiry would be the invocation of the right to counsel. Unless there is a waiver of the right to have counsel present, any interrogation without counsel must be considered to be in violation of *Miranda* and, thus, presumptively inadmissible.

The two inquiries must be linked to the burden of proof, which must, consistent with *Miranda*, be reposed strictly on the government. This would be the only way to encourage law enforcement agents to comply strictly with the *Miranda* rule and the only way to deter deviations. The current situation, which shifts the burden to the claimant to show that the government failed to comply with the *Miranda* "warning and waiver" requirement, is inconsistent with the language and intent of *Miranda;* it also unduly burdens the defendant who, having already been prejudiced by an unwarned statement, is further asked to affirmatively prove a fact that is essentially, under *Miranda*, a justification reposed on government.

---

[484] *Id.*

[485] *Id.*

[486] The ruling in *Fields*—that silence amounts to an implied waiver—is inconsistent with the burdens imposed by *Miranda* on the government and, without abandoning that portion of *Miranda*, it is submitted that *Fields* is wrong.

This proposed bright line rule is, moreover, contingent on changes to the language and sequence of the warnings. The effectiveness of a regime of warnings must necessarily be intimately connected to the manner of articulation and the extent of comprehension. The much-desired clarity, spoken of in *Quarles* and in *Miranda* itself, can only be achieved if the language used is clear, precise, and uniform. Moreover, the sequence of warnings and advice used is crucial to ensuring that the information as to the rights available and the protection afforded is meaningfully conveyed. Notwithstanding the Court's holding in *Prysock* and *Duckworth*—that the Court is not concerned with a "talismanic incantation" of the warnings—the value of the *Miranda* "warning and waiver" regime is that it removes any inconsistency, ensures predictability, and maintains stability—all values that a bright line rule should possess.

1. Looking at Language, Comprehension, and Sequence

Miranda has been described as "sweeping" in its reach. Despite this, *Miranda* has not succeeded as much as it set out to achieve. One of the things that may be said about *Miranda* is that it was never followed-up by practical, enforceable, and clearer measures. As may be shown by the doctrinal history, it may have been because of the antagonism that met the decision. Nonetheless, it stands as one of the biggest chinks *Miranda*'s armor.

It may not be an exaggeration to say that a great majority may be able to recite a version of the *Miranda* warnings better than they would be able to recite Lincoln's famous Gettysburg Address. The proliferation of film, television, and print material about police work and criminality has added to the warnings being embedded in national culture. In his study, however, Professor Richard Leo notes that, despite the knowledge of the rights, an overwhelming majority of suspects—78% to 98%—waive their rights and consent to interrogation, whether explicitly or implicitly.[487] This may indicate that the suspects fail to understand the meaning, significance, or consequences of the warnings despite full knowledge of the words that make up the warnings.

Despite the Court's explicit disdain, expressed in *Prysock* and *Duckworth*, for "talismanic incantation"[488] of the warnings, it may be an opportune time to consider the language of the warnings as well as the mode by which the language is conveyed. To my mind, there is great value to a *uniform* set of warnings expressed in *clear and precise language* that need

---

[487] Leo, *supra* note 398 at 1012.

[488] Prysock, *supra* note 163 at 360, citation omitted.

only be read by the police officer to the suspect because such would preclude the police from guessing (as to the comprehension by the suspect) and the court, from second-guessing (as to the efficacy of the warnings by the police).

In this part, I look at the existing "warning and waiver" regime and put forward a recast set of warnings and a proposal for demonstrating that waivers are "knowing and intelligent."

2. Recasting the Warnings and Revitalizing the Waiver Requirement

The text of *Miranda* provides for these warnings:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.[489]

The better-known version of the *Miranda* warnings differs slightly from the more formal text in the case:

> 1. You have the right to remain silent. Anything you say can and will be used against you in a court of law.
>
> 2. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you free of charge.
>
> Do you understand these rights?

While the language is simple enough, the construction of the warnings may stand improvement in order to more effectively convey the essential meaning of the protections that *Miranda* seeks to guarantee.

(a) *"Before I proceed with this investigation, you are entitled to be informed that you have the following rights. I am going to also ask you a series of questions about those rights and what you choose to do with them. Your answers to those questions are not a part of this investigation. Do you understand what I have just told you?"*

[489]Miranda, *supra* note 3 at 444, emphasis supplied.

The most important information that a suspect needs to know prior to custodial interrogation is that he has rights[490] and that the police will respect these rights.[491] Knowledge of one's rights cannot be assumed by the police and must be made part of the warnings under *Miranda* if the rest of the rights in the original text are to be made more meaningful.[492] That he is also told that the investigation has not yet started—"before I proceed with this investigation"—will ensure that the suspect is free to say "yes" or "no" without fear of it being misconstrued as a waiver or an ambiguousinvocation of counsel. At this preliminary stage, the suspect must also be told what the police expect from him. Thus, it is essential that he be told by the police that "I am going to also ask you a series of questions about those rights and what you choose to do with them. Your answers to those questions are not a part of this investigation."

(b) *"You have the right to remain silent . . ."*

The first of the two fundamental rights in the *Miranda* mandate is expressed in terms of a declaration of a right and an explanation of the consequence. Thus, the warning starts with *"[y]ou have the right to remain silent"* and is immediately followed by *"[a]nything you say can and will be used against you in a court of law."* While this satisfies *Miranda* on its face, the essential meaning of the right to silence is not clearly conveyed.

---

[490] This is implicit in the language of the Court in *Miranda*, *supra* note 3 at 444 that "[p]rior to any questioning, the person must be *warned* . . ." (Emphasis supplied)

[491] This perspective has been taken by the Philippines, which patterned its procedural, constitutional, administrative laws after the United States. *Miranda* and its progeny has found a home in the Philippines first, in its jurisprudence, later, as part of criminal procedure rules and, finally, as part of the Constitution. The latest Philippine Constitution, ratified in February 1987, provides for this version of *Miranda* in the Bill of Rights.

> Art. III, sec. 12(1) Any person under investigation for the commission of an offense shall have *the right to be informed of his right* to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel. (Emphasis supplied)

A major addition to this bundle of rights was "the right to be informed" which was not expressly stated in previous incarnations. *See* discussion *infra.*

[492] A common question that is posed is whether the *Miranda* warnings ought to be given to a lawyer who is, presumably well versed in the law. Ultimately, the "warning and waiver" requirement in *Miranda* does not proceed on the premise that the suspect is unaware of the law—indeed he may be well aware of the law—but on the premise that he may be unaware that the process that will follow the warnings will be vastly different from any that he has experienced. For this reason, the *Miranda* warnings must be given to everyone who faces custodial interrogation, regardless of his knowledge or awareness of the law or his rights.

Consistent with *Miranda*, the import of this first warning is to inform the suspect that "*he does not need to say anything*" and that his silence will not be taken adversely against him by the police. The current formulation, however, does not convey this at all. On the contrary, it conveys the opposite as it presumes that he will, in fact, speak because the explanation that follows the warning—"[a]nything you ***say*** can and will be used against you"—conveys a presumption that the police expect a statement from him. This formulation, coupled with the inherently coercive atmosphere of an unfamiliar, intimidating, and hostile environment of a police station, will certainly bring about the opposite of the desired consequence and compel the suspect to speak, rather than keep silent.

A better formulation of this warning and explanation, more consistent with *Miranda* and its progeny, would be the following:

> You have the right to remain silent. **Should you choose to give up the right to remain silent by giving a statement in this investigation,** [a]nything you say can and will be used against you in a court of law. **Should you choose to remain silent, your silence will not be considered an admission on your part.**

Inserting the phrase—*"[s]hould you choose to give up the right to remain silent by giving a statement in this investigation"*—to modify the explanation of the consequence separates the right to silence from the explanation, thus conveying the information that "he does not need to say anything." The phrase "[s]hould you give up the right to remain silent by giving a statement in this investigation . . ." adds two things to the warning: first, it indicates that the right to silence can be given up, with the consequence that any incriminating statement can and will be used against him; and second, that the right to silence pertains only to a statement *in the investigation,* thus ruling out the situation in *Thompkins*.

Being informed of the right to remain silent and the consequences of waiving the right is distinct and separate from being informed of the consequences of invoking it. This is not covered by the warnings mandated by the original text of *Miranda.* Under the recast warning, the consequence of invoking the right to silence is clearly specified—that it will not be considered an admission. This recast warning is consistent with the "more effective" substitute that Chief Justice Warren prescribed in *Miranda.*

(c) "*Do you wish, at this time, to give up your right to remain silent by giving a statement during this investigation? Do you understand that, having given up your right*

to remain silent at this time, you may opt to stop questioning at any time by simply saying so?"

This question must logically follow the first warning and explanation simply because if the suspect indicates that he does not wish to give up his right to remain silent, then the remaining warnings are rendered moot and no further questions need to be asked. On the other hand, if he indicates that he wishes to give up his right to remain silent, then the process of giving him additional warnings will then go on.

The qualifier "*at this time*" is crucial to convey to the suspect that the waiver is temporary and that he may, at a later time, revoke the waiver by simply saying so; thus, the second part of the warning.

(d) "*You have a right to an attorney . . .*"

The right to counsel referred to in the *Miranda* warnings is not the Sixth Amendment right to counsel, which would refer to counsel during the trial and criminal prosecution, but a separate due process right under the Fifth Amendment in relation to the Fourteenth Amendment. Specific to *Miranda* custodial interrogation, it is the right is to be accompanied by a lawyer during custodial interrogation, not necessarily during trial.

Thus, this warning only becomes relevant if the suspect chooses to remain silent and not waive his right because if the suspect chooses to remain silent, under *Miranda* in relation to *Edwards*,[493] any questioning must cease. It is only if the suspect gives up his right to silence and indicates that he is willing to answer questions relevant to the investigation that the question of right to counsel becomes important.

The formulation of this warning must also be carefully considered. Informing a person that he has the right to be represented by an attorney without indicating under what circumstances is incomplete and will tend to confuse the suspect. Many suspects, who may believe they are innocent and thus do not need a lawyer, will choose to disregard this warning—to their detriment. To make the information more meaningful, the warning should be modified to read, "*You have the right to* ***have*** *an attorney* **present with you when you are questioned later during this investigation . . .**" The additional phrase underscores the occasion when the attorney will be relevant and will inform the suspect that it is specifically for the purposes of custodial interrogation that the lawyer will be assisting him.

---

[493] *Supra* note 155. *Edwards* has been referred to as having provided a second layer of prophylaxis after *Miranda*, specifically in relation to the invocation of the right to counsel.

The second part of the warning, as to the source of the legal assistance, also needs to be stated more clearly. The statement must encompass two situations: (a) financial incapacity to retain a lawyer for that purpose, or (b) present inability to call a lawyer of choice. A suspect who is not indigent will not be able to relate to the statement "*[i]f you cannot afford a lawyer . . .*" and the importance of the lawyer being present during custodial interrogation may again be underemphasized. On the other hand, a suspect who is indigent will relate to the statement of financial incapacity but may not really care at all. A modification that incorporates both situations may make the statement more relevant, thus:

> You have the right to have an attorney present with you when you are going to be questioned later during this investigation. **If you do not have one, or cannot afford one, a lawyer will be provided to you, free of charge.**

(e) "*Do you want your lawyer present with you during this investigation? Do you want to be provided with a lawyer?*"

This last question must necessarily follow the previous warning and statement. Again, it cannot be presumed that the suspect will understand the distinction between retained and appointed lawyer. The first question refers to "your" lawyer while the second refers to being "provided with a lawyer," thus distinguishing between retained counsel of choice and appointed counsel *de oficio*.

The language and the sequence of the warnings are crucial to the effectiveness of the warnings and the level of comprehension of the suspect. The language must be clear, precise, meaningful, uniform, and of logical sequence. Recasting the warnings in *Miranda* to arrive at a new set of warnings makes *Miranda* work better because the information is more meaningful and better conveyed. This would also strengthen the presumption that a confession that may be obtained is voluntary. Recasting and sequencing the warnings would result in this particular set of warnings and explanations:

> 1. Before I proceed with this investigation, you are entitled to be informed that you have the following rights. I am going to also ask you a series of questions about those rights and what you choose to do with them. Your answers to those questions are not a part of this investigation. Do you understand what I have just told you?
>
> 2. First, you have the right to remain silent. Should you give up the right to remain silent by giving a statement in this investigation, anything you say can and will be used against you in a court of law.

Should you choose to remain silent, your silence will not be considered an admission on your part.

2.1. At this time, do you wish to give up your right to remain silent by giving a statement during this investigation?

2.2. Do you understand that, having given up your right to remain silent at this time, you may opt to stop questioning at any time by simply saying so? *(Should the suspect indicate that he does not wish to give up his right to remain silent, the questioning should then cease. If, however, he indicates that he wishes to give up his right to remain silent, then the next question should then be asked.)*

3. *(To be asked only if the suspect gives up his right to remain silent)* You have the right to have an attorney present with you when you are questioned later during this investigation. If you do not have one, or cannot afford one, a lawyer will be provided to you, free of charge.

3.1. Do you want your lawyer present with you during this investigation?

3.2. Do you want to be provided with a lawyer?"[494]

---

[494] Compare this formulation to the Advise of Rights (AOR) employed by the FBI in United States v. Bin Laden, *supra* note 207, to wit:

> We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.
>
> You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.
>
> If you do speak with us, anything you say may be used against you in a court in the United States or elsewhere.
>
> In the United States, you would have the right to talk to a lawyer and to get advise before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.
>
> Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.
>
> If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.

The use of a uniformly worded set of warnings will be of great use in enforcing a bright line rule, such as the one that I have proposed. It reduces the factors that contribute to variance and minimizes the case-to-case determination and consideration that has plagued *Miranda* inquiries. To my mind, any confession that is obtained, based on this recast set of warnings, will be presumptively voluntary, thus, achieving both objectives of the *Miranda* Court, i.e., to deter coercive interrogation tactics and to preserve confessions as a vital component of law enforcement.

3. Discouragement and Deterrence: Keeping an Objective Record of the Warning, Waiver, and Interrogation

The second part of the *Miranda* mandate is the "waiver" which must be "knowing and intelligent." The two components—warning and waiver—are essential to ensure that the rights of the suspect are better protected. Thus, it is necessary to ensure that any waiver of rights protected by the *Miranda* warnings is intelligently and knowingly done.

One of the most striking portions of *Miranda* is the finding that "the modern practice of in-custody interrogation is psychologically rather than physically oriented . . . [and] [i]nterrogation . . . takes place in privacy . . . [which] results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room."[495] Despite this finding, one of the things that *Miranda* failed to do was "require the police to make an objective record of the proceedings in the

---

> You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.
>
> . . . .
>
> . . . I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

In Bin Laden at 189-192, the District Court for the Southern District of New York found that AOR facially deficient especially where it misleadingly conveys that the right to counsel was a function of geography and not jurisdiction. The defect was, however, cured only by a set of oral warnings hewing closely to the *Miranda* text. It is important to note, however, that the interrogation conducted here was done abroad.

The District Court's finding of facial deficiency notwithstanding, the AOR is significant for the manner that it sequences the warnings and explanations, with an eye towards clarity. I share the concern with the sequencing of warnings and explanations to ensure precision in the text of the warnings, clarity in the information conveyed and comprehension on the part of the suspect.

[495] Miranda, *supra* note 3 at 448.

interrogation room."[496] "*Miranda* allows the police to obtain waivers from custodial suspects *without* the advice or presence of a judicial officer, and without the police having to videotape or audiotape—or make any objective record whatsoever—of the proceedings in the stationhouse."[497] This points to an area of change that is particularly relevant in the 21st century—the need for objective documentation.

Many states already have waiver forms, containing the warnings as well as tick-off boxes to indicate that the warnings were given and that a waiver was made. The difficulty with such a document is that it fails to address the presumption in *Miranda* of the inherent pressures of interrogation at the station house. Without an objective record of the entire process, detailing when the warnings were given, what was actually said, and how the suspect responded, the document will simply be the subject of yet another "swearing contest" between the police and the suspect, with the court none the wiser for lack of any objective basis to determine the truth of each side's contentions. This difficulty was addressed in the Philippines, a jurisdiction that has adopted the system of *Miranda* warnings as part of its criminal procedure and elevated the rights as part of the Constitution's Bill of Rights, by requiring that a waiver of the right to counsel be in writing and done in the presence of counsel.[498]

An idea that is both timely and appropriate and has garnered almost unanimous support from scholars who have studied *Miranda* is electronic audio or video recording of interrogations.[499] As Leo points out, it is, in fact, like *Miranda*, a low-cost remedy with potentially high benefits. Kamisar notes, however, that "[i]t is astonishing that despite the fact the '[n]eed for video-and audio taping is the one proposition that wins universal agreement in the *Miranda* literature,' only four states require law enforcement officials in certain cases . . . to make an audio or videotape of all the facts of police 'interviews' or 'conversations' with a suspect—

---

[496] Kamisar, *supra* note 3 at 188.

[497] *Id.* at 173, italics in the original.

[498] Under the 1987 Philippine Constitution, the right to counsel (comprising the right to be informed of the right to be silent and the right to counsel) can only be waived if done in writing and in the presence of counsel. *See* CONST. art. III, §12(1).

[499] *See* Leo, *supra* note 398 at 1028; *see also* Goldberg, *supra* note 405; Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493 (1998); Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 N.W. U. L. REV. 387, 486-97 (1996); Stephen A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L. J. 337 (2001).

including how the warnings are delivered and how waivers of rights are obtained."[500]

Videotaping the entire process from warning, to waiver, to interrogation creates an objective record that may serve as the basis for a more meaningful review.[501] It transforms the process from a "swearing contest," where it is essentially the word of the police against the word of the suspect, and places the burden back to where it was rightfully imposed, in the first place: with the police. Having an objective record also removes the temptation for impropriety, on the part of the police and, thus, achieves one other goal of the Fifth Amendment—to "ensure that criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness."[502]

It also encourages fairer treatment of suspects during custodial interrogation and offers suspects greater protection against the possibility

---

[500] Kamisar, *supra* note 3 at 189, citations omitted; the four states are Alaska, Illinois, Minnesota and New Jersey, *see id.*, citations omitted.

[501] Of course, videotaping alone will not ensure that false confessions will not be made. The case of the "Central Park jogger" is a prime example that videotaping alone will not prevent this phenomenon.

In April 1989, a 28-year old investment banker was violently assaulted while jogging in New York's Central Park; she was raped and beaten and left for dead. Found almost four hours later suffering from hypothermia and blood loss from multiple lacerations and internal bleeding, she was given very little chance to survive her injuries. She recovered from her injuries but had no memory of the events leading to her attack due to the trauma she suffered. Suspicion centered on a gang of teenagers—five African-American and Hispanic boys, aged 14 to 16 years old—and after police-induced confessions taken from them within 48 hours from the crime, they were charged, tried and convicted. It was not difficult to see how they were convicted; the confessions were videotaped and were presented at the trial. The boys narrated in vivid—although often erroneous—detail how the jogger was attacked, when, where, and by whom and the role that each played. The taped confessions convinced the police, prosecutors, two trial juries, a city and a nation. Thirteen years later, Matias Reyes, who was in prison for three rapes and a murder committed subsequent to the jogger attack, came forward with a voluntary confession, claiming that he was the one who raped the Central Park jogger and that he acted alone. After a reinvestigation, the Manhattan district attorney's office questioned Reyes and discovered that he had accurate, privileged and independently corroborated knowledge of the crime and the crime scene. DNA testing further revealed that the semen samples originally recovered from the jogger's body and socks—which had conclusively excluded the boys as donors—belonged to Reyes. The convictions of the boys were vacated. *See* Saul M. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCH. 215 (2005).

[502] Quarles, *supra* note 171 at 687 (Marshall, J., *dissenting*).

of a wrongful conviction based on a false confession to the police.[503] An objective record, by videotape, also allows the court to independently assess – on its own or with the help of experts – claims that the accused was coerced into confessing during custodial interrogation.

E. Turning *Miranda* Right Side Up

In 1966, *Miranda* was considered radical simply because Chief Justice Warren put down in a decision what was simply intuitive knowledge or common sense—that a person who is suspected of a crime does not stand on the same footing as everyone else. Against that person, the entire force of collective resources will be brought to bear—from investigation, to interrogation, to indictment, then to trial, judgment, and sentence. At no other point in time is the person more vulnerable than during the first few moments when he is alone in the room with his interrogator and at no other point in time is protection more needed.

Forty-six years ago, *Miranda* stood for the proposition that it was possible to try to equalize the relationship between the suspect and the police when it came to custodial interrogation. Looking at how the Court has treated it, *Miranda* appears to have become all the worse for wear as its bright line rule has been greatly diminished and practically none of its core holding stands.

Miranda set a bright line standard that was intended to stand as protection against schemes and devices to elicit a confession in violation of the suspect's right against self-incrimination. That bright line has since disappeared and has been replaced by a context-specific case-to-case review that invariably results in a shifting of the burden from the government, to whom the ruling is addressed, to the defendant, for whom the ruling was issued.

In this essay, I have proposed a formula consisting only of two inquiries that turn on a single burden of proof. I have also proposed changing the language and sequence of the warnings, with the requirement that the warnings be uniformly worded; so too, other measures such as creating an objective and permanent record of the entire process of warning, waiver, and interrogation. The measures proposed in this essay

---

[503] Richard Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 691-92 (1996).

will not solve *Miranda*'s many other problems[504] but, to some extent, they will address some of the current ones.

In the end, reliance on *Miranda* alone will not solve pressing and pertinent problems such as false, involuntary, and coerced confessions. It is not a silver bullet and was never meant to be one. *Miranda* must be viewed as but one of many weapons in an arsenal—the shield definitely, perhaps even the sword, but certainly not the entire armor or armory. It must be complemented by a broader vision of law enforcement that does not depend only on eyewitness identification and confessions to solve crimes but considers options such as the use of scientific forensic evidence.

Justice Sotomayor's protest in *Berghuis v. Thompkins*[505]—that the Court has turned *Miranda* "upside down"—is memorable not only for its vehemence but also for its truth. The Court has, indeed, turned the rule upside down by characterizing the "warning and waiver" requirement as a mere prophylactic rule carrying with it no separate constitutional significance; by removing the "heavy burden" reposed on the government to justify waivers of the warnings and instead shifting the burden to defendants to justify why remaining silent should not be considered a waiver of the right to remain silent. It is hoped that Justice Sotomayor's protest in *Berghuis v. Thompkins* will not remain to be the last word on *Miranda* and that one day, she, or someone in her seat, may start an opinion happily proclaiming that "today, we turn *Miranda* right side up."

– o0o –

[504] For instance, the question of *Miranda* being applicable to those held in relation to the War on Terror remains an open one. That topic is not part of this essay and will be the subject of a separate essay on another occasion.

[505] *Supra* note 250 at 2266, 2278 (2010) (Sotomayor, J., *dissenting*).