

William & Mary Law Review

Volume 35 (1993-1994)
Issue 1 *Symposium: The American Criminal
Justice System Approaching the Year 2000*

Article 4

October 1993

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Paul Marcus, *A Return to the "Bright Line Rule" of Miranda*, 35 Wm. & Mary L. Rev. 93 (1993),
<https://scholarship.law.wm.edu/wmlr/vol35/iss1/4>

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A RETURN TO THE "BRIGHT LINE RULE" OF *MIRANDA**

PAUL MARCUS**

I. INTRODUCTION

This Article is not intended to further the debate concerning the Supreme Court's decision in *Miranda v. Arizona*.¹ More than ample scholarly and judicial analysis has considered all sorts of questions raised by the Court's holding including the wisdom of the decision,² the development of its "code" of law enforcement,³ the application of the Fifth Amendment,⁴ the legitimacy of the "prophylactic" warnings,⁵ and the ultimate impact of the case.⁶

* The phrase was used by Justice O'Connor in *Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

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1. 384 U.S. 436 (1966).

2. For commentary supporting the Court's holding in *Miranda*, see Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986). For commentary opposing the Court's holding in *Miranda*, see Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Fred E. Inbau, *Overreaction—The Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982).

3. *Miranda*, 384 U.S. at 504 (Harlan, J., dissenting).

4. See David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311 (1991).

5. Chief Justice Rehnquist has used the term "prophylactic" on many occasions. In *New York v. Quarles*, 467 U.S. 649 (1984), he wrote that "the prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *Id.* at 654 (alterations in original) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

The academic debate concerning these so-called "prophylactic" rules has been intense. Compare Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) with Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988). In almost 20 years of teaching this subject, I confess to being puzzled by the emphasis on the notion of prophylactic rules and the intensity surrounding the debate. *Miranda* is without question the law of the land and has been reaffirmed on many occasions. See *infra* note 94 and accompanying text. Moreover, to categorize the warnings requirements as not constitutionally-mandated seems to fly in the face of the holding of the Court. After all, the Court repeatedly has said that unless warnings are given, state-

Indeed, the view of one seasoned commentator is correct. "It is too late in the game to reargue the anomalies of the *Miranda* solution to the troubling problem of confessions."⁷ Few today continue to question either the policy basis for the opinion⁸ or its staying power.⁹ The problem is not the holding in *Miranda*. The problem instead is that the holding is riddled with exceptions and strapped with limitations. Often times somewhat lengthy and confusing factual inquiries are necessary in criminal prosecutions in which *Miranda* is properly raised. It is not the wisdom of the Court that should be debated,¹⁰ but rather the application of the decision.

Miranda today suffers from a similarly agonized case-by-case review process which still plagues dispositions involving standing under the Fourth Amendment,¹¹ and which formally was the main-

ments made in response to custodial interrogation cannot be admissible at trial to prove the defendant's guilt. Whether such a mandate is characterized as a prophylactic rule or a holding essential under the Constitution seems somewhat beside the point.

6. Some commentators argue that the "harm to the effectiveness of police investigation has been extreme." Stephen J. Markman, *The Miranda Decision Revisited: Did It Give Criminals Too Many Rights?*, 57 UMKC L. REV. 15, 17 (1988). Others, such as Professor Ogletree, contend that "in the harsh reality of a police interrogation room [the *Miranda* warnings] are woefully ineffective." Ogletree, *supra* note 2, at 1827. Richard Uviller wrote an incisive book, *Tempered Zeal*, based upon eight months he spent in a New York City precinct. During this period, Uviller observed the way in which police officers satisfied rules of procedure. Professor Uviller quotes twice from the same experienced officer indicating the mixed review *Miranda* receives in terms of the impact on the criminal justice system. At one point the sergeant says, "the *Miranda* warnings do not make a particle of difference it's just plain silly." H. RICHARD UVILLER, *TEMPERED ZEAL* 208, 209 (1988). Later, he laments the opinion: "I think *Miranda* is just another way for the courts to throw out perfectly good cases." *Id.* at 209.

7. UVILLER, *supra* note 6, at 196.

8. But see the exchange between Markman and the author, *supra* note 6, debating the effect of *Miranda* on crime enforcement.

9. See *infra* note 94 and accompanying text.

10. Certainly the wisdom of the case has prevailed through the years. The Justice Department and the Internal Revenue Service now routinely give *Miranda* warnings in connection with criminal investigations, even when the taxpayer is not in custody. See *infra* notes 130-36 and accompanying text. Also, the Immigration and Naturalization Service recently entered into a settlement in which the INS agreed to inform individuals arrested as illegal aliens of their legal rights, and to offer them the opportunity to consult a lawyer. See Marvin Howe, *Legal Settlement Widens Rights of Detained Aliens*, N.Y. TIMES, June 12, 1992, at A13.

11. In the landmark Fourth Amendment standing decision, *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court announced a rule which did "not provide law enforcement officials with a bright line between the protected and the unprotected" because the rule focused on the individual facts which establish sufficient interests of privacy to support standing. *Id.* at 168

stay for right to counsel questions under the Sixth Amendment.¹² In short, contrary to Justice O'Connor's words, *Miranda* no longer provides a "bright line rule." What is needed is a clear and certain rule, one which will respond to the foreseeable situations which arise daily throughout the United States. I propose in this Article such a bright line rule.

II. WHY BRIGHT LINES WORK

Prior to the decision in *Miranda*, the chief challenge to the admissibility of confessions was the contention that the statement

(White, J., dissenting). The Court's recent opinion in *Minnesota v. Olsen*, 495 U.S. 91 (1990), did little to reestablish the bright line. The Court found that an overnight guest had sufficient privacy interests and thus conferred standing on him to attack a search of the premises. *Id.* After *Olsen*, the lower courts have had difficulty determining what constitutes a sufficient privacy interest. The decisions, all case specific, concerning the holding of keys, regular use of premises, and right to exclude others, have raised various questions regarding the application of the standing principle and whether the specific facts of the case support a right to standing. *See, e.g.*, *United States v. McNeal*, 955 F.2d 1067 (6th Cir.), *cert. denied*, 112 S. Ct. 3039 (1992); *United States v. Osorio*, 949 F.2d 38 (2d Cir. 1991); *Harless v. State*, 577 N.E.2d 245 (Ind. Ct. App. 1991); *State v. Taylor*, 818 P.2d 561 (Utah Ct. App. 1991).

Cases arising under the Fourth Amendment are loaded with "precedentless," case-by-case adjudications. Two of the more noteworthy cases include *Illinois v. Gates*, 462 U.S. 213 (1983) (finding probable cause existed when facts of an anonymous tip coincided sufficiently with actual events under the Court's "common sense" approach), and *United States v. Leon*, 468 U.S. 897 (1984) (finding an exception to the exclusionary rule when evidence is detained in good faith).

12. In 1942, the Court held that the Sixth Amendment required counsel in criminal cases only when "special circumstances" mandated an attorney as a matter of fundamental constitutional right. *Betts v. Brady*, 316 U.S. 455 (1942). Prior to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court floundered in a host of cases in which it sought to apply this doctrine to fact specific situations. *See, e.g.*, *Chewning v. Cunningham*, 368 U.S. 443 (1962) (involving a defendant who might have been able to raise a claim had he been assisted by counsel); *Bute v. Illinois*, 333 U.S. 640 (1948) (involving capital punishment).

Virtually no one contends that this kind of case-by-case analysis, either under the Fourth Amendment or under the Sixth Amendment, gives sufficient guidance to victims, the accused, or law enforcement officials. As noted by one of the most astute observers of the Supreme Court, former *Wall Street Journal* reporter and current professor of law, Stephen Wermiel:

For police officers throughout the country, law enforcement grows legally more complex all the time. The tangled web of decisions from the U.S. Supreme Court and other federal and state courts makes it difficult, and sometimes impossible, for police officials to know precisely what the law requires of them in searching for evidence and making arrests.

Stephen Wermiel, *Recent Rulings Leave Police More Confused About What's Legal*, *WALL ST. J.*, Aug. 9, 1985, at 1.

had been coerced by the government.¹³ As stated by Justice Frankfurter, the question of admissibility is one of voluntariness.

The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-

13. Of course, coercion was not the only basis for challenge. The privilege against self-incrimination has been part of our jurisprudence since its adoption in the Fifth Amendment and has "enjoyed more unqualified, reverential praise than any other amendment, the First Amendment included." Schulhofer, *supra* note 4, at 311. In a thoughtful article, Professor Schulhofer demonstrates that the self-incrimination clause "has a perfectly coherent, and indeed compelling basis." *Id.* at 336. Professor Uviller also extols the virtues of the Fifth Amendment privilege against self-incrimination by writing that "no one ever doubted that applying physical force to induce a person to utter self-inculpatory statements amounts to compelling that person to be a witness against himself." UVILLER, *supra* note 6, at 188.

Praise for the privilege against self-incrimination notwithstanding, reliance on the privilege is difficult because it was used so rarely, in such extreme situations, and hardly ever in connection with interrogation. Hence, for a long time it was not seriously argued that the privilege operated in an effective way with respect to police interrogation. Moreover, it was not until the Court's decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the self-incrimination provision of the Fifth Amendment was even incorporated to apply against the States. The *potential*, therefore, existed for heavy use of the privilege against self-incrimination, even before *Miranda*. The reality, however, was that the Fifth Amendment privilege simply was not viewed as a major factor in the sorts of challenges that are routinely made to the admissibility of confessions.

Other challenges were also present. Probably the most prominent is the so-called *McNabb-Mallory* rule which requires an arrested person to be brought before a judicial officer "without unnecessary delay" and any statements obtained from the accused during an undue delay will be suppressed. *Mallory v. United States*, 354 U.S. 449, 451 (1957) (citing *FED. R. CRIM. P. 5(a)* (1946)); *McNabb v. United States*, 318 U.S. 332 (1943). The rule, however, is based upon the Federal Rules of Criminal Procedure which do not provide for the suppression of statements if delays occur. Reliance on the Federal Rules means that Congress can alter the rules, and that the States are not bound to follow this direction. In 1988 Congress sought to eliminate the *McNabb-Mallory* rule:

[Confessions] shall not be inadmissible solely because of delay in bringing such person before a magistrate if such confession is found by the trial judge to have been made voluntarily and if such confession was made or given by such person within six hours immediately following his arrest [except that the six hour period will not apply if the delay] is found by the trial judge to be reasonable.

18 U.S.C. § 3501(c) (1988).

In *State v. Beach*, 705 P.2d 94 (Mont. 1985), the state supreme court adopted the *McNabb-Mallory* rule for state criminal prosecutions under its judicial supervisory power. *Id.* at 105.

determination critically impaired, the use of his confession offends due process. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.¹⁴

If the statement is not voluntarily given, it makes "the whole proceeding an effective instrument for extorting an unwilling admission of guilt, [and] due process precludes the use of the confession thus obtained."¹⁵

As a standard, voluntariness works well in a limited group of cases, prosecutions in which the government behavior is absolutely coercive in nature. The classic case is *Brown v. Mississippi*¹⁶ where a unanimous Supreme Court reacted to the truly shocking government actions:

Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

14. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (citation omitted).

15. *Id.* at 635.

16. 297 U.S. 278 (1936).

The other two defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.¹⁷

Other cases followed *Brown*, striking down convictions on the basis of extreme and unsavory police actions. For example, in *Brooks v. Florida*¹⁸ the defendant was confined to a very small cell which had "no external window, contained no bed or other furnishing or facilities except a hole flush which served as a commode."¹⁹ During a 14-day confinement period he was not allowed to speak with anyone outside the prison and only was given as food "four ounces of soup three times a day and eight ounces of water"²⁰ and was thrown naked into the cell.²¹ *Beecher v. Alabama*²² is another case in which application of the voluntariness standard was not difficult. In *Beecher*, police officers cornered the defendant in an open field and fired a bullet into his leg. When the defendant denied committing the crime, the police chief told him, "If you don't tell the truth I am going to kill you."²³ When another officer fired his rifle next to the defendant's ear, he confessed.²⁴

The Court had no difficulty with these cases because they involved genuinely outrageous conduct by the government. Other cases, however, were not so clear. In *Lynum v. Illinois*,²⁵ the police lied to the defendant when they told her that her children would be taken by strangers and that she had to talk "if [she]

17. *Id.* at 281-82.

18. 389 U.S. 413 (1967) (per curiam).

19. *Id.* at 413.

20. *Id.* at 414.

21. *Id.*

22. 389 U.S. 35 (1967) (per curiam).

23. *Id.* at 36.

24. *Id.*

25. 372 U.S. 528 (1963).

wanted to see [her] kids again."²⁶ The police officers in *Spano v. New York*²⁷ also lied to the defendant. In *Spano*, a family friend who was attending the police academy was brought into the interrogation process.²⁸ He told Spano that unless there was a confession, the friend and his family would suffer greatly.²⁹ The interrogation was lengthy and the police repeatedly told the defendant how his friend would suffer if the defendant did not confess.³⁰ At 3:25 in the morning the defendant confessed.³¹

The Supreme Court in both *Lynumn* and *Spano* found violations of the Due Process Clause.³² While the police conduct was not nearly as extreme as in *Brown*, *Brooks*, or *Beecher*, the Justices determined that the confessions were involuntary.³³ Lying to the defendants, under the circumstances involved, was coercive and resulted in unconstitutionally obtained confessions.³⁴ The problem, of course, with the use of the voluntariness test in cases such as these is that it is almost impossible to discern any precedential value so that others can rely properly on these opinions. Thus, one can ask quite legitimately whether the result in *Lynumn* would have been different if the deception did not relate to the defendant's children, or if the police officer did not state the matter so directly and callously. Moreover, would Spano's confession have been involuntary if his interrogator had not been a friend,³⁵ or the statement had not been taken in the middle of the night?

26. *Id.* at 531.

27. 360 U.S. 315 (1959).

28. *Id.* at 318-19.

29. *Id.* at 319.

30. *Id.*

31. *Id.*

32. *Lynumn*, 372 U.S. at 537; *Spano*, 360 U.S. at 320.

33. *Lynumn*, 372 U.S. at 534; *Spano*, 360 U.S. at 320.

34. *Lynumn*, 372 U.S. at 534; *Spano*, 360 U.S. at 321-23.

35. The Court relied heavily on the petitioner's will having been overborne by sympathy surrounding his false friend. "Petitioner was apparently unaware of John Gay's famous couplet:

An open foe may prove a curse,

But a pretended friend is worse,

and he yielded to his false friend's entreaties." *Spano*, 360 U.S. at 323. In sharp contrast, the rule in *Miranda* does not depend on the personality of the defendant or the interrogator.

[I]t is irrelevant that Desire was a deputy sheriff. The protections of *Miranda* are afforded to every individual and do not depend on determinations of the

It is almost impossible to identify any precedential standard from the voluntariness cases other than that relating to physical violence.³⁶ After all, the language of the Court's decisions in such cases is hardly illuminating.³⁷ Police officers are advised to avoid actions which induce a confession that is "the product of gross coercion."³⁸ The cases, furthermore, warn government officials not to engage in "shocking display[s] of barbarism."³⁹ The police cannot utilize any action which "breaks the will to conceal or lie [or] even break[s] the will to stand by the truth."⁴⁰

The voluntariness standard is of limited value to the establishment of workable rules for the criminal justice system. By no

individual's awareness of his Fifth Amendment rights. Assessments of "the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with the authorities" do not change the guarantees afforded to the individual defendant.

Desire v. Attorney General, 969 F.2d 802, 805 (9th Cir. 1992) (citations omitted).

36. Certainly, it is not a strict rule that falsehoods by police officers will necessarily make a statement involuntary. The cases are wholly inconsistent. *See, e.g.*, *United States v. Pinto*, 671 F. Supp. 41, 58 (D. Me. 1987) (holding that the defendant's confession was involuntary because an officer falsely promised defendant that he would not go to jail if he confessed); *Sandifer v. State*, 517 So. 2d 646, 648 (Ala. Crim. App. 1987) (holding that even though police falsely told defendant that his co-defendant had implicated him, the confession was still admissible); *State v. Manning*, 506 So. 2d 1094, 1097 (Fla. Dist. Ct. App. 1987) (holding that although defendant was falsely told that medical records showed his molestation of the victim, his confession was admissible because "use of tricks or factual misstatements in and of itself does not render a confession involuntary" because coercion must be involved); *State v. Barner*, 486 N.W.2d 1, 3 (Minn. Ct. App. 1992) (holding "[t]hat police [lying] to a suspect [about finding his fingerprints] does not alone meet any of the tests that require the suppression of confessions"); *State v. C.J.M.*, 409 N.W.2d 857, 861 (Minn. Ct. App. 1987) (holding that the confession was voluntary despite an officer deliberately lying to a defendant about the impact of a blood test that supposedly proved his illegal sexual conduct); *State v. McDermott*, 554 A.2d 1302, 1305-06 (N.H. 1989) (holding that a promise that defendant's confession "would not leave the office" rendered the confession involuntary); *State v. Randle*, 366 S.E.2d 750, 754 (W. Va. 1988) (holding that telling a defendant that his fingerprints were found at the scene of the crime "blatantly misrepresented" the evidence and made his statement involuntary).

37. One commentator argues that the "case-by-case due process approach" is defective in at least two ways. Ogletree, *supra* note 2, at 1832-34. First, this approach is "inadequate for evaluating the substantially different methods of coercion and inducement employed by the police and the actual impact these methods had on a diverse group of suspects." *Id.* at 1833. Second, it "provided the Court with scant opportunity to shape and direct the behavior of law enforcement officers." *Id.* at 1834. I agree with Professor Ogletree's criticism.

38. *Beecher v. Alabama*, 389 U.S. 35, 38 (1967).

39. *Brooks v. Florida*, 389 U.S. 413, 415 (1967).

40. *Watts v. Indiana*, 338 U.S. 49, 60 (1949) (Jackson, J., concurring).

means, however, do I suggest that the standard is dead or that it no longer serves any purpose in our system. It is alive and well, and still being used in cases, though only in those cases in which rather extreme conditions are present.⁴¹ By definition, however, it cannot have broad and effective impact because of the need to engage in factual, case-by-case analysis.

The Due Process Clause was not the only constitutional provision the Supreme Court reviewed in the confession cases. One bright spot was the Sixth Amendment right to counsel. The key case is *Massiah v. United States*.⁴² The defendant was indicted,

41. The test, however, is used with much confusion. See, e.g., *Leon v. State*, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982). In *Leon*, the police officers "threatened and physically abused [the defendant] by twisting his arm behind his back and choking him until he revealed where [the victim] was being held." *Id.* at 202. The court found that the Due Process Clause was not implicated because the purpose of the action was to find the victim and save a life, not to get an incriminating statement. *Id.* at 203-04.

The Supreme Court made things worse with its imprecise opinion in *Colorado v. Connelly*, 479 U.S. 157 (1986), in which the defendant confessed after being advised of his right to remain silent. *Id.* at 160. Experts later determined that he was mentally incompetent and suffered from chronic schizophrenia. *Id.* at 161. There was also a serious question about whether this schizophrenia interfered with the defendant's volitional abilities "making his confession involuntary." *Id.* at 161-62. The Court allowed the confession to be used, emphasizing that the question was not so much voluntariness as it was coercion. *Id.* at 165-67. "[C]oercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause." *Id.* at 167. While *Connelly* does not affect cases in which the police officers take affirmative steps to coerce (physical actions, deceptions, etc.), it shifts the emphasis from the defendant's voluntary actions to the police officer's undue influence.

The confusion on this point is demonstrated by the following exchange between a law professor and a police officer concerning false facts:

"You mean I can lie to him?" he asked.

"Sure," I said. "Tell him you found some fingerprints on the scene and you sent them down to the lab. See what that produces."

There was some danger, [he] thought. If the suspect thought that the cop was faking, the edge might be lost. But in many cases, he told me, a false fact could be very useful in getting a conversation going. "But, are you sure I can do that?" He was still dubious. "Wouldn't it violate his rights?"

"No," I assured him. "Once the suspect freely agrees to talk to you, he has no right to have you tell him the whole truth about the case. And if the lie you tell him is not the sort that is likely to make an innocent person confess, you have nothing to worry about."

UVILLER, *supra* note 6, at 212. The standard enunciated in the passage is particularly noteworthy: the officer can tell all lies to the suspect except those "likely to make an innocent person confess." *Id.*

42. 377 U.S. 201 (1964).

retained a lawyer, and was released on bail.⁴³ Thereafter an undercover federal agent engaged the defendant in a conversation which was taped surreptitiously and which contained incriminating statements made by the defendant.⁴⁴ These statements, the Court held, were obtained in violation of the right to counsel as the criminal prosecution had already been initiated before the interrogation.⁴⁵

The right to counsel approach does not suffer from the fact-specific inquiry problem of the voluntariness approach. The rule is straightforward. If the defendant has been charged, the government may not question him without his lawyer being present, unless the defendant affirmatively waives his right to counsel.⁴⁶ The Sixth Amendment is utilized in some criminal prosecutions in connection with confessions by defendants.⁴⁷ This approach, however, is greatly limited by the careful statements of the Court in *Massiah* recognizing that the criminal prosecution had already been initiated against the defendant in the form of an indictment being returned *before* the police interrogation.⁴⁸ The obvious problem, of course, arises when formal charges are brought *after* the interrogation. The Court thought that it avoided this particular problem in 1964 with its famous and controversial opinion in *Escobedo v. Illinois*.⁴⁹ The opinion, sadly, just made things worse.

43. *Id.* at 201.

44. *Id.*

45. *Id.* at 205-06.

46. The waiver question is a serious and difficult one. In the famous *Christian Burial Speech* case, *Brewer v. Williams*, 430 U.S. 387 (1977), the Court found that the defendant had not effectively waived his right to counsel prior to giving his post-charge confession. Chief Justice Burger, however, could not understand how the waiver could not be present when the confession was given "after no fewer than five warnings of his rights to silence and to counsel." *Id.* at 416 (Burger, C.J., dissenting).

47. In jail cases especially, the Sixth Amendment claim continues to be utilized actively. In these cases, the defendant is incarcerated after formal charges, and another inmate hears incriminating statements from the defendant. The question becomes whether the other inmate "deliberately elicited" these incriminating responses, and did so at the behest of the government. See *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *United States v. Henry*, 447 U.S. 264, 270 (1980).

48. *Massiah*, 377 U.S. at 204. It is not only the indictment which causes the criminal prosecution to be initiated, thus raising the right to counsel under the Sixth Amendment. If the defendant has been arraigned or has received a preliminary hearing, the Sixth Amendment also would apply. See *Moore v. Illinois*, 434 U.S. 220 (1977).

49. 378 U.S. 478 (1964).

Danny Escobedo had not yet been formally charged when he was taken into custody.⁵⁰ The author of the opinion in *Massiah*, Justice Stewart, argued in *Escobedo* that the fact that the defendant had not been charged "ma[de] all the difference."⁵¹ He contended that the Sixth Amendment simply did not apply until "after the initiation of judicial proceedings."⁵² The majority disagreed, and began the opinion by writing broadly of the limitations on the use of confessions. The language of Justice Goldberg is quite striking:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

As Dean Wigmore so wisely said:

"[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby."

This Court also has recognized that "history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence."

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.⁵³

Had the Court left the matter to such broad language and fashioned a specific rule, *Miranda* would never have had to be decided. Such a rule is simple to state: Anytime the defendant is in custody, she must be given an attorney prior to police interrogation. The opinion itself was as unclear as anyone could have imagined. The Court found a violation of the Sixth Amendment where, "as here," the investigation focused on the defendant, the defendant was in

50. *Id.* at 479.

51. *Id.* at 493 (Stewart, J., dissenting).

52. *Id.*

53. *Id.* at 488-89 (emphasis in original) (citations omitted).

custody, the police interrogated the defendant, the defendant requested a lawyer, and the police did not warn of the right to remain silent.⁵⁴ With these limitations, *Escobedo* becomes virtually worthless as a reliable standard. In the two-year period between *Escobedo* and *Miranda*, difficult questions were raised in several cases as to whether *Escobedo* required a defendant to request a lawyer,⁵⁵ or dictated that the state had to provide a lawyer to the indigent defendant.⁵⁶ *Escobedo* provided no guidance and no direction—only confusion. *Miranda* would quickly change that.

III. *MIRANDA* AND BEYOND

The response to *Escobedo* was harsh. The decision offered little to anyone in the criminal justice system. It was a sweeping yet narrow opinion; it was a muddled and confined holding. Indeed, the question after *Escobedo* was not how to follow it, but whether the Court would act quickly to reject the case and substitute something more concrete in its place. Some hoped the Court would simply revert back to a voluntariness analysis, rejecting concerns regarding law enforcement actions which would have to be reviewed on a case-by-case basis.⁵⁷ Others wondered whether the Court

54. *Id.* at 490-91. The Court reiterated its lack of clarity, as if any reiteration was needed: We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, *under the circumstances here*, the accused must be permitted to consult with his lawyer.

Id. at 492 (emphasis added).

55. See, e.g., *State v. Cummings*, 423 P.2d 438, 443-44 (Haw. 1967) (limiting *Escobedo* "to its facts making it mandatory for the suspect to request the assistance of counsel, if the statement is to be excluded"); *State v. Neely*, 398 P.2d 482, 486-87 (Ore. 1965) (holding "that the Sixth Amendment as made obligatory by the Fourteenth Amendment requires that before law enforcement officials can interrogate a person who is the focal suspect of a crime, such person must effectively be informed of his right to assistance of counsel as well as his right to remain silent").

56. See *Faulkner v. United States*, 368 F.2d 528, 529 (4th Cir. 1966) (per curiam) (holding that *Escobedo* did not require "that a person being interviewed in connection with an investigatory inquiry be informed of an indigent defendant's right to court-appointed counsel").

57. Certainly that was the position taken by the dissenters in *Miranda v. Arizona*, 386 U.S. 436 (1966), who strongly criticized "the Court's new constitutional code of rules for confessions." *Id.* at 504 (Harlan, J., dissenting).

would instead reject convictions based on the defendants' own confessions.⁵⁸ The Court took neither route.

My purpose is not to offer an extended analysis of *Miranda*. Much scholarly work over the past twenty-five years has done that job nicely.⁵⁹ Still, before turning to an analysis of the problems *Miranda* raises today—and offering solutions to these problems—it is important to review the thrust of the opinion and consider the specific holding reached.

Two points are central to an understanding of *Miranda*. First, the decision is not based on a view that the actions of the police were sufficiently coercive to raise due process concerns. In none of the cases before the Court⁶⁰ was the confession likely to be struck down under the Due Process Clause. The Supreme Court admitted that it "might not find the defendants' statements to have been involuntary in traditional terms."⁶¹ Second, the decision did not rely seriously on the Sixth Amendment.⁶² Writing for the Court in

58. In his book, *Tempered Zeal*, Professor Uviller noted that some people argued that confessions, as a matter of principle, should not be used. UVILLER, *supra* note 6, at 193-95. "The situation [of unsupervised police interrogation] presents too easy and tempting an opportunity for the natural affinity of interrogation and torture to reassert itself in some form, however subtle." *Id.* at 193. Another ground for caution regarding confessions is police perjury:

When cops lie, detection is apt to be difficult. In many cases, the cop steps up to the plate as the heavy hitter, badge shining, tone official, demeanor cool. Without apparent strain or bravado, the cop on the stand may appear as a modest hero, a competent collector of evidence, a precise narrator of the critical events. The incidents the cop relates are usually known only to one or two other cops, who might coordinate their recollections. Even when possible to procure, contradiction of the cop's version from other witnesses is often weak and flawed by bias. If the defendant decides to offer his story, his patent interest in the outcome usually mars his credibility.

Id. at 112.

59. See *supra* notes 2, 6.

60. Four individual cases were joined in the Supreme Court's *Miranda* decision. *Miranda v. Arizona*, 384 U.S. 436, 436 (1966).

61. *Id.* at 457.

62. At the outset of the opinion, however, the Court appeared to rely on *Escobedo* and reaffirm it:

We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person shall be compelled in any criminal case to be a witness against himself," and that "the accused shall have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing.

Miranda, the Chief Justice made clear that the basis of the holding was the application of the Fifth Amendment privilege against self-incrimination and not the Sixth Amendment right to counsel.⁶³

The majority believed the process of station house interrogation itself may do serious harm to the privilege against self-incrimination.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an *intimate connection between the privilege against self-incrimination and police custodial questioning*.⁶⁴

Once again it should be emphasized that the setting of the interrogation does not necessarily make the statements involuntary.⁶⁵ Still, these governmental actions—taking the defendant into custody and subjecting him to interrogation⁶⁶—place the accused in an environment which is inherently coercive. The Court concluded

Id. at 442. As Justice Harlan correctly pointed out in dissent, however, the Court's reliance on *Escobedo* is misplaced. "[I]t contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo's* primary reliance on the Sixth Amendment." *Id.* at 512 n.9 (Harlan, J., dissenting).

63. *Id.* at 444.

64. *Id.* at 457-58 (emphasis added) (footnote omitted).

65. See *supra* note 61 and accompanying text.

66. The Court found that before the rules were to apply, the defendant had to be both in custody and subjected to interrogation. "By custodial interrogation, [the Court] mean[t] questioning initiated by law enforcement officers after a person ha[d] been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

that these actions, coupled with intense police tactics,⁶⁷ made protections necessary to insure compliance with the privilege.⁶⁸

Virtually every member of the Court agreed that some protections were necessary. Justice Clark wanted the Court to return to a case-by-case analysis, but with a twist. He would have continued to rely on the voluntariness test but would have considered as one factor whether appropriate warnings were given to the suspect.⁶⁹ "In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary."⁷⁰ Justice White opined that if the concern was coercive police interrogation other, more specific—and less intrusive—safeguards could be developed.⁷¹ "Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession."⁷²

In light of *Escobedo* and the confused voluntariness cases, however, the majority in *Miranda* was no longer content to rely on a case-by-case approach. Instead, the majority established a man-

67. The Chief Justice spent a good portion of the opinion discussing improper interrogation practices which he culled from manuals popular in the field. See *id.* at 448-55. Such "non-empirical" reliance drew this sharp response from Justice, and former law enforcement official, Tom Clark:

Nor can I join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports. The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

Id. at 499-500 (Clark, J., dissenting) (footnotes omitted).

68. *Id.* at 478-79.

69. *Id.* at 503 (Clark, J., dissenting).

70. *Id.*

71. *Id.* at 535 (White, J., dissenting).

72. *Id.*

date that warnings must be given, with particular emphasis on the right to have the assistance of counsel and the right to remain silent.⁷³ The accused must be informed of her right to say nothing, and the Court held that the presence of counsel during questioning protected that right.⁷⁴

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.⁷⁵

Of course, it is not sufficient simply to give warnings to the suspect. Once the warnings are given, "the subsequent procedure is clear."⁷⁶ If at any point during the interrogation the suspect indicates that he wishes to terminate the interrogation or wants to talk with a lawyer, all questioning must cease.⁷⁷

73. *Id.* at 478-79.

74. *Id.* at 470.

[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Id.

75. *Id.* at 471-72.

76. *Id.* at 473.

77. *Id.* at 473-74. The language of the Court in this regard seems clear. Unfortunately, later cases have demonstrated that there is some debate as to what the suspect must do to indicate he wishes termination and under what circumstances the police can resume questioning. See *infra* notes 182-214 and accompanying text.

Like *Escobedo*, the *Miranda* decision was subject to great criticism, though sustained for a far longer period. Three arguments need to be mentioned here, for they have an impact on the ultimate problems which have surfaced. The first criticism was most forcefully stated by Justice Harlan, dissenting in *Miranda*. He asserted that the majority opinion "represents poor constitutional law."⁷⁸ He strongly disagreed with the majority as to the difficulties found with the voluntariness test.⁷⁹ For him, the fact that the test became a case-by-case analysis was predictable and healthy.⁸⁰ "Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least."⁸¹ Harlan also refused to share the majority's view that reliance on the Fifth Amendment was "not an innovation in our jurisprudence, but [was] an application of principles long recognized and applied in other settings."⁸² He disagreed with the majority's historical perspective and noted that as a matter of policy, extending the Fifth Amendment to police station confessions "has little to commend itself in the present circumstances."⁸³

I find a good deal of force in Justice Harlan's twin arguments. The difficulty, though, is that the history just before *Miranda* demonstrated the desperate need for a fairly certain rule or direction.⁸⁴ The voluntariness test offered absolutely no guidance, and not just in the "borderland of close cases." Individuals undoubtedly were confessing while failing to understand their basic right to remain silent, their right not to answer questions.

The other two criticisms are essentially two sides of the same coin. One school of thought is that *Miranda* works too well. In the words of Justice Harlan's dissent, the *Miranda* rule will "impair, if [it] will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought

78. *Miranda* 384 U.S. at 504 (Harlan, J., dissenting).

79. *Id.* at 505.

80. *Id.* at 509.

81. *Id.*

82. *Id.* at 442.

83. *Id.* at 510.

84. See *supra* notes 13-56 and accompanying text.

worth the price paid for it.”⁸⁵ While some surveys taken soon after *Miranda* seemed to support this view,⁸⁶ fewer and fewer individuals today argue strenuously that *Miranda* works too well in eliminating confessions which would otherwise have been made.⁸⁷ Moreover, even if sound in theory, there are other constitutional principles at stake in restricting the evidence which would otherwise be admissible at trial. In a recent case in which the Court refused to further limit *Miranda*,⁸⁸ the matter was stated directly

“There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.” But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation’s history.⁸⁹

The other criticism is that *Miranda* does not work nearly well enough. That is, the warnings are given in a very routine, unconvincing fashion and suspects either do not believe, or refuse to believe, that their silence cannot be used against them or that having a lawyer will not hurt their case.⁹⁰ The argument was stated concisely in a short essay in *Newsweek* several years ago.

Others who have studied *Miranda* in a more systematic way say the warnings rarely stop people from confessing. Many suspects try to exonerate themselves in the eyes of the police and end up incriminating themselves instead; others simply don’t grasp that they have a right to remain silent.⁹¹

85. *Miranda*, 384 U.S. at 516 (Harlan, J., dissenting).

86. See Markman, *supra* note 6, at 17-18.

87. This theme is very prominent in Professor Uviller’s book which explores the attitudes of “cops on the beat” toward *Miranda* and the requirements of *Miranda*. See UVILLER, *supra* note 6, at 198-212.

88. *James v. Illinois*, 493 U.S. 307 (1990) (holding that a defendant can be impeached with a prior confession in violation of *Miranda* only if the defendant himself takes the stand and contradicts the earlier statement).

89. *Id.* at 311 (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)).

90. The argument is well developed by Professor Ogletree in his article which is based, to a large extent, on his experience as public defender for the District of Columbia. As a public defender, Ogletree represented hundreds of criminal defendants and supervised other lawyers who represented thousands of clients in criminal cases. See Ogletree, *supra* note 2, at 1827 n.6.

91. Tamar Jacoby, *Fighting Crime by the Rules: Why Cops Like Miranda*, NEWSWEEK, July 18, 1988, at 53.

The criticisms certainly have not gone away, and doubt remains, along with little empirical evidence, as to the degree of impact the reading of the *Miranda* warnings actually has.⁹² Still, the fury regarding the fundamental principle behind *Miranda* has diminished significantly.⁹³ To be sure, virtually every member of the Court over the past decade has expressly reaffirmed *Miranda*, even if not exactly endorsing it.⁹⁴ Moreover, it has become increasingly evident that the principle of *Miranda* has largely given way to a broader theme, one in which Fifth Amendment questions—like other constitutional questions—are answered through a very fact specific, case-by-case approach, reminiscent of the traditional voluntariness test. As indicated above, this development is most unfortunate, for it limits much of the great value of *Miranda*, a hard and clear rule that all can understand. Indeed, the current Chief Justice—one of the harshest critics of *Miranda*—emphasized the importance of such a clear governing rule.

While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the

92. Jacoby notes that Peter Nardulli of the University of Illinois has found that less than 1% of all cases are thrown out because of illegal confessions. Former police lieutenant James Fyfe says that "hardly anybody walks" even when a suspect does not confess or his confession is thrown out in court because of a botched *Miranda* warning, there is usually enough evidence and other testimony to make a case against him." *Id.*

93. The debate, however, has not gone away completely. For a few of the more recent works in the area, see Paul Marcus, *Defending Miranda*, 24 LAND & WATER L. REV. 241 (1988); Stephen J. Markman, *Miranda v. Arizona, A Historical Perspective*, 24 AM. CRIM. L. REV. 193 (1987); see also *supra* note 2.

94. In *New York v. Quarles*, 467 U.S. 649 (1984), Chief Justice Rehnquist noted that *Miranda* "provides 'practical reinforcement' for the Fifth Amendment right." *Id.* at 654 (citation omitted). Former Chief Justice Burger, one of the strongest critics of the opinion, wrote that "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). Former critic Justice O'Connor not only reaffirmed *Miranda* but complained that the majority in *Quarles* was creating an exception that "unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand." *Quarles*, 467 U.S. at 663 (O'Connor, J., concurring in part and dissenting in part). Justice White dissented in *Miranda*. 384 U.S. at 526. Later, he specifically reaffirmed *Miranda* and extended its holding to situations in which the suspect requests counsel. *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). For other statements reaffirming *Miranda*, see *Winthrow v. Williams*, 113 S. Ct. 1745, 1751-55 (1993) (Souter, J.); *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (Kennedy, J.); *Minnick*, 498 U.S. at 159 (Scalia, J., dissenting); *Moran v. Burbine*, 475 U.S. 412, 461-62 (1986) (Stevens, J., dissenting); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (Blackmun, J.).

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 a 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 [ignored] by courts under the guise of [reinterpreting] *Miranda* ⁹⁵

Justices Blackmun and Brennan have made similar statements, writing for the Court. Justice Blackmun has written:

Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for any attorney, *Miranda's* holding has 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. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.⁹⁶

Justice Brennan has remarked: "We recognize here the importance of 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.'"⁹⁷

For this writer, then, it is unfortunate that so many aspects of *Miranda* have become riddled by exceptions, limitations and very particularized factual inquiries. Below I will review what I believe to be the most significant concerns and those most directly related to the law enforcement function. This is hardly, however, an exhaustive list. In addition to the problems to be discussed, other exceptions, limitations, and concerns would include the public

95. *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay).

96. *Fare*, 442 U.S. at 718.

97. *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

safety exception,⁹⁸ the use of confessions for impeachment purposes,⁹⁹ the admissibility of evidence obtained as a result of statements made in violation of *Miranda*,¹⁰⁰ the definition of testimonial responses,¹⁰¹ the impact of consecutive confessions,¹⁰² and the confusing doctrine surrounding the use of silence.¹⁰³ However, other more pressing issues await resolution.

IV REDEFINING THE RULE OF *MIRANDA*

Some would argue that the *Miranda* rule cannot and should not be redefined and made more precise. Instead, it is contended, *Miranda* should be expanded in sweeping fashion. Indeed, one prominent commentator has called for the "Mirandizing" of *Miranda* so that all defendants in custody would have "a nonwaivable right to consult with a lawyer before being interrogated."¹⁰⁴ I am unwilling to go that far. At the outset I note that it is hard to understand how the right to counsel cannot be waived in the context of a custodial interrogation but can be waived in the self-representation cases.¹⁰⁵ I believe that if we are able to return to the fundamentals of *Miranda*, we need instead to limit greatly the exceptions to it, and state the rule with clarity. If such a return can be achieved, many of the present difficulties will be eliminated yet the individ-

98. *New York v. Quarles*, 467 U.S. 649 (1984).

99. Compare *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (statements obtained in violation of *Miranda* can be used to impeach the defendant's testimony if inconsistent with his prior statements) with *James v. Illinois*, 493 U.S. 307, 320 (1990) (statements by the defendant obtained in violation of *Miranda* can be used to impeach only the defendant's testimony and not the testimony of defense witnesses).

100. The Supreme Court has never determined definitively whether *Miranda* covers only the defendant's own statement or also covers the "fruits" of such statements. The Court has implied, however, that it would not apply the "fruit of the poisonous tree" doctrine as broadly in *Miranda* cases as it has in Fourth Amendment cases. See *Oregon v. Elstad*, 470 U.S. 298, 305-09 (1985).

101. *Pennsylvania v. Muniz*, 496 U.S. 582, 603-05 (1990).

102. *Elstad*, 470 U.S. at 318.

103. Compare *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (disallowing the use of silence for impeachment purposes because it occurred after warnings were given and because the warnings implicitly assured that silence would carry no penalty) with *Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980) (allowing the use of silence when it occurred before warnings were given because the "fundamental unfairness present in *Doyle*" was not present).

104. Ogletree, *supra* note 2, at 1842.

105. See, e.g., *Faretta v. California*, 422 U.S. 806 (1975) (holding that lower courts erred in forcing defendant to accept a public defender when he sought to represent himself).

ual suspects will retain the right to make those important decisions which will directly affect them.

A. *The Problem Areas*

1. *Custody*

Escobedo had painted with a wide brush concerning the application of its extremely limited protections. Ultimately, Justice Goldberg applied the law to those who were the *focus* of police investigation.¹⁰⁶ This rule could have been viewed fairly broadly. Not, of course, as broadly as an application to *all* those who are being questioned by police officers. Still, the rule was far greater than mandating the giving of warnings only to those suspects who had been formally arrested or charged. Presumably, many more people will be the focus of a police investigation than ultimately will be subjected to arrest.

In *Miranda*, the Chief Justice rejected the focus doctrine of *Escobedo* by "redefining" the common meaning of the term. The Court held that its holding would apply to anyone who "has been taken into custody or otherwise deprived of his freedom of action in any significant way."¹⁰⁷ In what was surely one of the least honest sentences in the opinion, the Court stated that "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."¹⁰⁸

The cases decided soon after *Miranda* clarified that "custody" did not mean "arrest" so that individuals who had not been formally arrested could still be entitled to the protections offered by the Fifth Amendment. Chief among these cases is *Orozco v. Texas*,¹⁰⁹ in which the defendant was detained in his own board-inghouse bedroom.¹¹⁰ Rejecting the argument that the defendant was in familiar surroundings and so not subjected to the coercive atmosphere present in *Miranda*, the Court asked instead whether the defendant was free to leave.¹¹¹

106. *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964).

107. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

108. *Id.* at 444 n.4.

109. 394 U.S. 324 (1969).

110. *Id.* at 325.

111. *Id.* at 326-27.

All four officers entered the bedroom and began to question petitioner. From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest."

According to the officer's testimony, petitioner was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning. The *Miranda* opinion declared that the warnings were required when the person being interrogated was "in custody at the station or otherwise deprived of his freedom of action in any significant way."¹¹²

Orozco establishes that the Fifth Amendment does not demand that a formal custodial setting be present or that a specific procedure such as an arrest take place.¹¹³ Instead, the question of whether the defendant's freedom has been unduly limited is determinative. Such a standard may seem somewhat broader than that found in *Miranda* itself, in which the Court referred to police custody and the station house setting as being inherently coercive because of the "incommunicado interrogation of individuals in a police-dominated atmosphere."¹¹⁴

In fact, the concept has been considerably narrowed in application by use of the usual case-by-case standard to determine whether custody is present. Two cases are particularly helpful in demonstrating how this narrowing process has taken place. In *Oregon v. Mathiason*,¹¹⁵ the interrogation occurred at the police station.¹¹⁶ The Court determined the accused was not in custody by emphasizing that no proof had been offered that "the questioning took place in a context where respondent's freedom to depart was

112. *Id.* at 325, 327 (quoting *Miranda*, 384 U.S. at 477). In some recent cases, custody has been found when the defendant was questioned in her own home. The issue is whether the police actions are inherently coercive. *See, e.g.,* *United States v. Levinson*, 790 F. Supp. 1477, 1481-82 (D. Nev. 1992).

113. *But cf. Kirby v. Illinois*, 406 U.S. 682, 688-90 (1972) (holding that the Sixth Amendment right to counsel is only applicable upon initiation of an adversarial judicial proceeding against the accused).

114. *Miranda*, 384 U.S. at 445. In support of the position taken in *Orozco*, see *Mathis v. United States*, 391 U.S. 1 (1968), where the defendant was questioned while in prison serving a state sentence. *Id.* Rejecting the dissent's view that *Miranda* should not apply because the interrogation occurred "in familiar surroundings," *id.* at 7 (White, J., dissenting), the Court found the suspect to be in custody, albeit for another offense. *Id.* at 4-5.

115. 429 U.S. 492 (1977).

116. *Id.* at 493-94.

restricted in any way”¹¹⁷ Though Mathiason was certainly a chief suspect in the crime and the “focus” of the investigation, he was not in custody¹¹⁸

The Supreme Court went one step further with its decision in *California v. Beheler*¹¹⁹ The defendant there, like Mathiason, “voluntarily agreed to accompany police to the station house, although the police specifically told Beheler that he was not under arrest.”¹²⁰ Unlike Mathiason, however, Beheler was interviewed just after the crime had been committed, had been drinking earlier in the day, and was emotionally upset.¹²¹ Moreover, “the police had a great deal more information about Beheler before their interview than did the police in *Mathiason*.”¹²² The Court found no custody because there was no “‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”¹²³

This specific factual type inquiry¹²⁴ into custody is most unfortunate. It requires courts in almost all cases not involving formal arrest to consider a host of factors in determining the degree of restraint used by the police. Moreover, for a long time it was not certain which factors were dispositive. For instance, should the judge have looked to the state of mind of the suspect to determine

117. *Id.* at 495.

118. The Court noted that “*Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him ‘in custody.’ It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.” *Id.*

Justice Marshall, in dissent, sharply differed from the majority’s view:

In my view, even if respondent were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings. Respondent was interrogated in “privacy” and in “unfamiliar surroundings,” factors on which *Miranda* places great stress. The investigation had focused on respondent. And respondent was subjected to some of the “deceptive stratagems,” which called forth the *Miranda* decision.

Id. at 498 (Marshall, J., dissenting) (citations omitted).

119. 463 U.S. 1121 (1983).

120. *Id.* at 1122.

121. *Id.* at 1124-25.

122. *Id.* at 1125.

123. *Id.* (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

124. I refer to this as a specific factual type inquiry because numerous particular questions must be raised concerning states of mind, locations, time, type of surroundings, etc. Nevertheless, these determinations are to be made by the court as a matter of law.

whether the *suspect* thought he was free to go, or was the appropriate inquiry made concerning the police officer's intent? That issue is now settled, for unquestionably, the Court uses a reasonable person standard.¹²⁵ Still, one may well ask if the location of the interrogation is utterly irrelevant, or would it sometimes matter that the questioning was conducted in a police interrogation room rather than in the home or office of the suspect?¹²⁶

To note that the law is not definitive with regard to what constitutes "custody" is to engage in substantial understatement. My criticism of the current state of the law, however, goes beyond merely the lack of certainty and reliability I believe that recent history shows that the courts are engaging in a poor process of analysis and asking the wrong question. The courts should not be asking whether, in the given case, the circumstances bear all the

125. In *United States v. Marks*, 603 F.2d 582 (5th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980), the court explained that it utilized four factors in deciding whether an interrogation was custodial: (1) probable cause to arrest, (2) the subjective intent of the interrogators to hold the subject, (3) the subjective belief of the suspect concerning the status of his freedom, and (4) whether the investigation has focused on the suspect. *Id.* at 584.

Later, however, the same court rejected the *Marks* analysis and stated that the question was whether "a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988). On this point the Supreme Court is crystal clear: "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). In *United States v. Phillips*, 812 F.2d 1355 (11th Cir. 1987), the court held:

[I]n order for a court to conclude that a suspect is in custody, it must be evident that, under the totality of the circumstances, a reasonable man in the suspect's position would feel a restraint on his freedom of movement fairly characterized as that "degree associated with a formal arrest" to such extent that he would not feel free to leave.

Id. at 1360. The "totality of circumstances" standard is the prevailing mode of determining whether custody exists, and depends upon many factors such as nature of the setting, number of officers present, restraint upon the suspect, and type of interrogation. *See United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987); *United States v. Joe*, 770 F. Supp. 607, 612 (D.N.M. 1991).

126. *Compare People v. Fischetti*, 264 N.E.2d 191, 193 (Ill. 1970) (finding that the defendant was not in custody during an interrogation at his own home because he was in a very familiar environment and the questioning was not prolonged) with *United States v. Griffin*, 922 F.2d 1343, 1354-55 (8th Cir. 1990) (concluding the defendant was in custody, though he was interrogated in the familiar environment of his own home, because he was not told he could reject a request for an interview, was not informed that he was not under arrest, and was not told that he could refuse to answer questions).

indicia of an arrest. It is the wrong question because it is not the *fact of custody* which is so necessarily and inherently coercive, as the Court in *Miranda* mistakenly determined. No, it is the *fact of interrogation* of a suspect by a law enforcement officer which is so terribly coercive. The fact of interrogation is the key element.

The Court's concern in *Miranda* with the arrest-like situation was far too narrow. Consider this language from the opinion emphasizing the station house setting even in relation to other government locations: "[C]ompulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."¹²⁷

Instead, the Court's aside in *Mathiason*—an aside because the majority there further narrowed the custody test—is far more pertinent. "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."¹²⁸ While the Court in *Mathiason* was wrong to adhere to the rigid requirement of an arrest-like situation, it was right to call attention to the coercion present *whenever* one is suspected of a crime and questioned by a police officer.¹²⁹

The correct rule, one which would adhere far more closely to the spirit of *Miranda*, if not the written words found there, is one which would require warnings anytime law enforcement officials interrogate an individual they suspect of a crime. Lest this proposal be dismissed as absolutely unworkable or completely radical in concept, I hasten to note that this is the precise rule currently in effect in many investigations conducted by various governmental agencies. The United States Department of Justice, as a matter of internal policy, routinely gives to grand jury targets a written "Advice of Rights" form.¹³⁰ This writing informs the individual of the

127. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

128. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

129. Of course, it could be argued that coercion is present whenever a citizen is confronted by a police officer in virtually any setting, even if the citizen is not yet a suspect. See Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 249-50 (1991).

130. 7 DEP'T OF JUSTICE MANUAL, ¶ 9-11.150 (1992).

grand jury function. It advises that person of the right to remain silent as to any matter that might incriminate him and further informs him of the right to confer with an attorney outside the grand jury room.¹³¹ This warning is not constitutionally required,¹³² but was established as a matter of policy.¹³³ Similarly, the Internal Revenue Service instructs its agents on procedures when dealing with a taxpayer who is not in custody.¹³⁴ The agent is told to advise the taxpayer of her rights:

131. *Id.* Attorneys typically are not allowed to appear with clients before the grand jury. FED. R. CRIM. P. 6(d).

132. See *United States v. Washington*, 431 U.S. 181, 186 (1977); *United States v. Mandujano*, 425 U.S. 564, 578-81 (1976).

133. Indeed, the Manual directs that the prosecutor should orally restate the warnings on the record before the grand jury and determine that the witness understands these rights. 7 DEP'T OF JUSTICE MANUAL, *supra* note 130; see also *United States v. Gillespie*, 974 F.2d 796, 798 (7th Cir. 1992).

134. Internal Revenue Service, *Handbook for Special Agents* § 242.132, reprinted in IRVING SCHREIBER & CARMINE SCUDERE, *HOW TO HANDLE TAX AUDIT REQUESTS FOR RULINGS, FRAUD CASES AND OTHER PROCEDURES BEFORE I.R.S. 8331* (1977). As with the Justice Department policy discussed above, the IRS is not constitutionally required to follow this procedure. The Supreme Court, in *Beckwith v. United States*, 425 U.S. 341 (1976), held that the IRS agents did not need to give warnings in connection with the interrogation of a person suspected of criminal income tax violations unless the defendant was in custody. *Id.* at 347.

Although the "focus" of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding. *Miranda* specifically defined "focus," for its purposes, 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." *Miranda*, 384 U.S. at 444 (emphasis added).

The rationale for the IRS practice was explained in a 1967 news release, set out in *United States v. Brod*, 324 F. Supp. 800 (S.D. Tex. 1971):

In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: "As a special agent, I have the function of investigating the possibility of criminal tax fraud."

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent

[U]nder the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of any attorney before responding.¹³⁵

These practices make sense. Any person testifying before a grand jury, and any taxpayer being interviewed in connection with a criminal tax investigation will feel tremendous pressure and may not understand the rights to remain silent and to seek the assistance of counsel. If this principle is correct in these non-custody situations, it is equally correct in the more traditional crime situation such as in the *Beheler* case.¹³⁶

In *Beheler*, the defendant was convicted of aiding and abetting first-degree murder.¹³⁷ Beheler already was viewed by the police as a suspect in the case, when the questioning took place in the station house, and the interview was designed to produce incriminating responses.¹³⁸ In the words of the California court, Beheler "was emotionally distraught."¹³⁹ Surely in such a situation, there is an excellent possibility that the suspect would feel great pressure, and, like the grand jury witness or the IRS' taxpayer, not under-

is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons.

Id. at 803.

135. SCHREIBER & SCUDERE, *supra* note 134, at 8331.

136. *California v. Beheler*, 463 U.S. 1121 (1983).

137. *Id.* at 1122.

138. *Id.* at 1123.

139. *Id.* at 1125.

stand his right to remain silent or his right to seek the assistance of counsel.¹⁴⁰

The first effort, then, to recreate a bright line rule for *Miranda* begins with the requirement of custody. The warnings should be mandated anytime the police interrogate an individual who is either in custody as traditionally defined, or is suspected by the police of having committed a crime.

2. Interrogation

Throughout much of this Article the Supreme Court has been hit with direct—and hopefully telling—criticism, either relating to the subversion of the policies behind *Miranda* or the spotty application of the doctrine. Let us turn now, however, to an area in which the Court has followed faithfully the teachings of *Miranda* and applied the doctrine in a reasonable and even-handed fashion.¹⁴¹ To be sure, I suggest but one alteration to the Court's definition of the key term "interrogation."

The principal opinion defining and applying the term "interrogation" is *Rhode Island v. Innis*.¹⁴² In *Innis*, Justice Stewart, writing for the majority, carefully avoided the two extremes which had been suggested regarding the *Miranda* prerequisite of interrogation. At one end of the spectrum is the notion that the interrogation requirement should be viewed in a very limited fashion. Essentially, pursuant to this standard *Miranda* would be applied only if the suspect was being *questioned* in a traditional sense. The Court quickly rejected this view.¹⁴³ At the other end of the spectrum is the idea that the interrogation requirement should be

140. *Cf. id.* at 1125-26. Although the Court held that *Beheler* did not have to be given warnings, *Beheler* illustrates how great pressure or strain can operate adversely on an interrogee. It also demonstrates how "the police and lower courts continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984).

141. This is not to say that I would necessarily agree with the ultimate conclusion of the Court in a given interrogation case. Indeed, the case under discussion here is one with which I disagree and believe the dissenter's conclusion with regard to interrogation is correct. Nevertheless, the Court's definition is an appropriate one and its resolution one upon which reasonable minds can differ.

142. 446 U.S. 291 (1980).

143. *Id.* at 301. Language in the dissenting opinion suggests that in fact the Court did not reject this view. In the majority opinion, Justice Stewart responded sharply to this language:

viewed in an all-encompassing fashion. That is, if the defendant made a statement while in custody, *Miranda* would apply. Relying heavily on the language and spirit of *Miranda*, the Court also quickly rejected this view:

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted: "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."¹⁴⁴

The Court's ultimate holding is one which fairly reads *Miranda* and also provides guidance to law enforcement officials. The question for the courts will be whether the police took actions "that the police should know are reasonably likely to elicit an incriminating response from the suspect."¹⁴⁵ The standard is an objective one which "focuses primarily upon the perceptions of the suspect, rather than the intent of the police."¹⁴⁶ One may well dispute the application of this doctrine in specific cases,¹⁴⁷ but the key question of what an officer could foresee seems entirely appropriate.

"One of the dissenting opinions seems totally to misapprehend this definition in suggesting that 'it will almost certainly exclude every statement [of the police] that is not punctuated with a question mark.'" *Id.* at 301 n.6.

144. *Id.* at 299-300 (quoting *Miranda*, 384 U.S. at 478). Some states go beyond *Miranda* in this respect. See, e.g., *State v. Jones*, 306 N.E.2d 409, 411 n.1 (Ohio 1974) (interpreting the statutory mandate in Ohio as requiring "that a person arrested or confined be provided facilities with which to obtain counsel" even if not being interrogated).

145. *Innis*, 446 U.S. at 301. The Court's definition here is quite similar to that found in the Sixth Amendment area. See *Brewer v. Williams*, 430 U.S. 387, 397-401 (1977), an opinion also authored by Justice Stewart. Justice Stewart struggled, however, in *Innis* to make clear that the Sixth Amendment definition, while similar, comes from a case involving far different jurisprudential considerations because it deals with the right to counsel. Hence, while the term "interrogation" is the same, the definitions of "interrogation" are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct. *Innis*, 446 U.S. at 300. See generally Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 41-55 (1978).

146. *Innis*, 446 U.S. at 301.

147. I believe Justice Marshall gets the better of the argument concerning the application of this doctrine in *Innis* itself. In dissent, Justice Marshall notes that he is "substantially in agreement with the Court's definition of 'interrogation' within the meaning of *Miranda v. Arizona*." *Id.* at 305 (Marshall, J., dissenting) (citation omitted). In *Innis*, the suspect "was arrested [in the early morning hours], handcuffed, searched, advised of his rights, and

I would only take one short step beyond the Court's holding in *Innis*. Instead of limiting the test to the objective standard, I would ask two additional questions. First, did the officers intend to elicit a response; and second, did the suspect believe she was being interrogated? In many cases answers to all three questions, the Court's and mine, will merge so that there will be little difficulty or difference in application. In some cases, however, where the foreseeability test is not met, but the officers hoped to elicit a response,¹⁴⁸ or the suspect felt as if she were being interrogated, it is just to apply the mandate of *Miranda*. After all, the purpose is to promote the suspect's privilege against self-incrimination. Why not go beyond the objective standard if the police sought an incriminating statement or the suspect believed she was being questioned?¹⁴⁹ Adding this step will insure that the suspect's resulting

placed in the back seat of a patrol car." *Id.* The two officers in the front seat began to talk about the search for a missing gun. The majority characterized these statements as "no more than a few off-hand remarks" which could not reasonably have been expected to elicit a response." *Id.* at 306. Justice Marshall disagreed:

[The police officer's statements] would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to [the other officer]. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.

Id. at 306-07 (Marshall, J., dissenting).

148. In *Innis*, Justice Marshall argued that the police were not engaged in idle chatter which happened to result in an incriminating statement by the suspect. *See id.* The trial judge, however, thought that it was "entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other." *Id.* at 303 n.9.

149. There will likely be few cases in which a police officer sought a statement or a suspect believed that she was being questioned which would not also satisfy the Court's foreseeability test. The majority in *Innis* was correct in noting:

This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

Id. at 301-02 n.7. Of course, suspects might routinely indicate they believed they were being interrogated. Unless one of the other two standards is met, however, it will be the unusual case in which the requirement of interrogation will be met.

statement is voluntary, which is the basis for the Court's holding in *Innis*.¹⁵⁰

3. *The Warnings*

Justice Harlan, dissenting in *Miranda*, complained vigorously about what he called the new "code" for law enforcement created by the majority.¹⁵¹ In terms of what preceded *Miranda*,¹⁵² Justice Harlan had a point. The Court's decision was awfully specific, particularly with regard to the four warnings that had to be given to suspects in custody prior to their interrogation.¹⁵³ The defendant had to be told: (1) "in clear and unequivocal terms that he has the right to remain silent;"¹⁵⁴ (2) "[the first warning] must be accompanied by the explanation that anything said can and will be used against the individual in court;"¹⁵⁵ (3) "[the suspect] must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation;"¹⁵⁶ and (4) "if he is indigent a lawyer will be appointed to represent him."¹⁵⁷ In light of this specificity, one would have thought that at least this part of the "bright line" rule—the warnings—would have survived into the 1990's without requiring further factual inquiries on a case-by-case basis. That hardly has been the case.

The problems arise because some law enforcement officers, although having concluded that they will follow *Miranda*, decide to become creative. They give warnings, but these warnings deviate from those set out above.¹⁵⁸ One might well ask why any sane indi-

150. Justice Stevens, in his separate dissent, takes a slightly different view of the interrogation standard than I do. He contends that the definition "must include any police statement or conduct that has the same purpose or effect as a direct question." *Id.* at 311 (Stevens, J., dissenting) (emphasis added).

151. *Miranda v. Arizona*, 384 U.S. 436, 516-17 (1966) (Harlan, J., dissenting).

152. The traditional approach applied the voluntariness test on a case-by-case basis. See *supra* notes 33-41 and accompanying text.

153. See *Miranda*, 384 U.S. at 467-73.

154. *Id.* at 467-68.

155. *Id.* at 469.

156. *Id.* at 471.

157. *Id.* at 473.

158. *E.g.*, *Duckworth v. Eagon*, 492 U.S. 195 (1989) (regarding form presented to defendant, stating that a lawyer would be appointed "if and when you go to court"); *California v. Prysock*, 453 U.S. 355 (1981) (failing to state explicitly that defendant had the right to an attorney before further questioning).

vidual, having made the decision to give warnings, would not adhere to the language of *Miranda*. If the officers give the "standard" warnings, the law enforcement position is helped enormously.¹⁵⁹ It will be extremely difficult to show later that *Miranda* was violated.¹⁶⁰ The complaint over the past two decades from the law enforcement community, though, has been that the rules of law relating to police work are too confusing, too uncertain. As stated quite graphically by one experienced officer: "It's like the Supreme Court speaks French, the legislatures speak German, and we're the only ones speaking English."¹⁶¹

In *Miranda*, the Chief Justice spoke English; why then don't some police officers respond to that specific language? It is, of course, impossible to determine why some officers choose to give their own version of the warnings. For some it may be a negative reaction to *anything* which comes from the Supreme Court, even something as helpful to them as the *Miranda* warnings. For others it may simply be a mistake in the heat of the moment. Whatever the reason, deviations do occur. Most importantly, however, the police generally *do* respond by giving the warnings, virtually verbatim. In only a relatively few cases do the officers stray from the language of the Court. When they do, however, the resulting problem is severe.

159. With respect to the impact on individual suspects, however, it is far from certain whether the *Miranda* warnings provide great assistance. One police officer is quoted by Professor Uviller as stating "[t]he *Miranda* warnings do not make a particle of difference. It's just plain silly. In the first place, nobody we're interested in talking to believes a word we tell them. Whether it's for their own good or not." UVILLER, *supra* note 6, at 208. Professor Ogletree, with a very different experience, agrees with this analysis:

Although *Miranda* warnings may seem adequate from the detached perspective of a trial or appellate courtroom, in the harsh reality of a police interrogation room, they are woefully ineffective. My own experience as a public defender has been that many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or have an attorney present during questioning. This pattern suggests that *Miranda* warnings as currently delivered by the police are not an effective means of informing suspects both of the existence and extent of their privilege against self-incrimination and of their right to consult with counsel before they make any statements.

Ogletree, *supra* note 2, at 1827-28.

160. This applies except in the cases in which the waiver issue is raised. See *infra* notes 215-48 and accompanying text.

161. Wermiel, *supra* note 12, at 14.

Two Supreme Court cases demonstrate the problem. *California v. Prysock*,¹⁶² involved a horrible murder in which the defendant was the major suspect.¹⁶³ While in custody the suspect 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 and emphasized to the police the ease with which the mandate of the Supreme Court could be satisfied.¹⁶⁶ While recognizing the virtue of *Miranda*'s warnings as "obviat[ing] the need for a case-by-case inquiry,"¹⁶⁷ a majority of the Supreme Court ruled that the exact words of the warnings from the opinion did not have to be used.¹⁶⁸ Moreover, the Court chastised the California judges for their "rigidity".

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 the 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*

162. 453 U.S. 355 (1981).

163. *Id.* at 356.

164. *Id.* at 356-57.

165. *Id.* at 359.

166. *Id.*

[T]he Court of Appeal ruled that these warnings were inadequate because respondent was not explicitly informed of his right to have an attorney appointed before further questioning. The Court of Appeal 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.'"

Id. at 358-59 (second and third alterations in original) (citation omitted) (quoting App. A to Pet. for Cert. at 12, *Prysock* (No. 80-1846)).

167. *Id.* at 359.

168. *Id.*

the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."¹⁶⁹

The majority considered the correct procedure to be 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."¹⁷⁰ Under that inquiry, no constitutional violation was found in *Prysock*.¹⁷¹

The Court used a similar inquiry in *Duckworth v. Eagan*.¹⁷² In *Duckworth*, the police merely informed the suspect that a lawyer would be appointed "if and when you go to court."¹⁷³ Chief Justice Rehnquist, writing for the majority, concluded that the question

169. *Id.* at 359-60 (citations omitted) (quoting *Miranda*, 384 U.S. at 476).

170. *Id.* at 360. For a recent application of the doctrine, see *Oregon v. Quinn*, 831 P.2d 48 (Or. Ct. App. 1992), in which the officer did not advise the suspect that he was entitled to consult with an attorney before questioning and to have counsel present during questioning. *Id.* at 51. The officer only said, "You have the right to an attorney." *Id.* at 50. The court found that the officer's statement, in light of *Prysock*, satisfied *Miranda*. *Id.* at 51, 53. "That advice apprised defendant that he had the right to counsel, right then. It could not mislead him into believing that he *would have* the right to counsel at some future time, nor did it suggest that defendant's right to counsel was conditioned upon any event." *Id.* at 52.

171. *Prysock*, 453 U.S. at 362. Justice Stevens strongly disagreed with the Court's conclusion, relying heavily on the California court's analysis of the warnings and the factual setting for them. *Id.* at 362-66 (Stevens, J., dissenting). The state court had emphasized that the key element missing was that the defendant, a minor, "was not given the crucial information that the services of the free attorney were available *prior to the impending questioning.*" *Id.* at 363 (quoting App. A to Pet. for Cert. at 15, *Prysock* (No. 80-1846)). Justice Stevens concluded that, at a minimum, the record in the case was "sufficiently ambiguous" and 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.

172. 492 U.S. 195 (1989).

173. *Id.* at 198. The police read the defendant the following set of warnings:

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.

Id. at 198 (quoting *Eagan v. Duckworth*, 843 F.2d 1554, 1555-56 (7th Cir. 1988)).

"is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" ¹⁷⁴ The Court found that the essential message was conveyed. ¹⁷⁵ The difficulty with the Court's conclusion is that an accused, while being interrogated at the police station may think that he will not receive a lawyer "until some indeterminate time in the future *after questioning*." ¹⁷⁶ Indeed, it appears quite likely that the "often frightened suspect[] unlettered in the law" ¹⁷⁷ hearing the key "modifying" language might well think he will get a lawyer only when he actually goes to court, not when he is at the police station house. *Miranda* surely requires more than that. ¹⁷⁸

The thrust of the Court's decisions in these cases is hard to grasp. If the point of *Miranda* is to convey to suspects their rights to the assistance of counsel and to silence, why not require the police to follow the warnings as given in the decision? Tell the suspect he can keep quiet, his words will be used against him, and explain "in a straightforward fashion that he has the right to the presence of a lawyer before and during questioning, and that a lawyer will be appointed if he cannot afford one." ¹⁷⁹

To be sure, perhaps the most important feature of *Miranda* is the ease with which the police can satisfy the warnings requirement just by reading the precise warnings stated in the opinion. The Court in *Prysock* decided "no talismanic incantation [is] required to satisfy its strictures." ¹⁸⁰ I think the Court was wrong. It is not inappropriate to require an "incantation," to order that the four warnings of *Miranda* be given in language that is certain and not modified by phrases that have the potential for confusion. Moreover, placing the lower courts on the road to deciphering the impact and discerning the meaning of vague phrases and evaluating the reaction of schooled and unschooled defendants both dis-

174. *Id.* at 203 (alteration in original) (quoting *Prysock*, 453 U.S. at 361).

175. *Id.*

176. *Id.* at 214 (Marshall, J., dissenting).

177. *Id.* at 216.

178. "The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present." *Miranda v. Arizona*, 384 U.S. 436, 473 (1966).

179. *Duckworth*, 492 U.S. at 220 (Marshall, J., dissenting).

180. *Prysock*, 453 U.S. at 359.

courages police compliance with the mandate of *Miranda*¹⁸¹ and creates a fruitless process of fact specific inquiries about the sufficiency of the substitute warnings themselves.

The Court should reject this approach and hold that the *Miranda* warnings, not some reasonable facsimile, are required. No deviation from *Miranda* should be allowed unless the government clearly can demonstrate that the deviation would not lead to confusion regarding the required warnings, a difficult burden to sustain and certainly one that the government could not have sustained in either *Prysock* or *Duckworth*.

4. *The Resumption of Questioning*

We come now to the one area that, perhaps more than any other, best typifies the problems that have arisen when attempting to soften the "rigid" *Miranda* rule. I refer here to the situation in which the defendant initially chooses not to respond to the interrogation but later incriminates himself after the police officers have resumed the interrogation.¹⁸²

181. The result is a case such as *United States v. Tillman*, 963 F.2d 137 (6th Cir. 1992). In that case the officer advised the defendant of all his rights except that anything the defendant said could be used against him in court. *Id.* at 141. The court recognized *Duckworth v. Egan*, but distinguished it, finding that in *Tillman*, the police officer's failure was "a much more troublesome deviation from the traditional warnings." *Id.*

Of all of the elements provided for in *Miranda*, this element is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. The underlying rationale for the *Miranda* warnings is to protect people from being coerced or forced into making self-incriminating statements by the government. By omitting this essential element from the *Miranda* warnings a person may not realize why the right to remain silent is so critical.

Id. In apparent exasperation, the court in *Tillman* went on to suggest that government officers read from a prepared card, "as this reduces the chances for error, assists a police officer in the performance of his duties, and protects the rights of innocent citizens as well as those accused." *Id.* at 141-42.

182. The problem here does not involve the situation in which the defendant himself chooses to resume the interrogation process, which is always permissible. Of course, it can be very difficult in a given case to determine whether the defendant actually resumed the interrogation process, or simply began a somewhat casual conversation. See, for instance, *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), in which after first choosing not to speak, the suspect asked the police officer, "Well, what is going to happen to me now?" *Id.* at 1042. Four members of the Court found that the suspect's question constituted an initiation or resumption of the interrogation process. *Id.* at 1046. Four other Justices disagreed because the defendant did not offer to discuss the actual criminal investigation. *Id.* at 1053 (Mar-

The Supreme Court has identified two situations that can arise in connection with the resumption of questioning. The first occurs when the defendant indicates that he wishes to remain silent. The second occurs when the defendant states that he wishes to speak with counsel before responding to questions. The Court has held that the appropriate rules as to the resumption of questioning in these two situations are quite different, as mandated by *Miranda*.¹⁸³

In *Michigan v. Mosley*,¹⁸⁴ the defendant was arrested, given the *Miranda* warnings, and then asked questions concerning a series of robberies.¹⁸⁵ He told the officer that he did not want to answer any questions about the robberies.¹⁸⁶ At that point, the interrogation stopped.¹⁸⁷ A few hours later a different officer restated the warnings and asked the defendant questions regarding a homicide.¹⁸⁸ The defendant consequently confessed to the killing.¹⁸⁹ The defendant took the position that his confession should have been suppressed because, under *Miranda*, once the defendant asks to remain silent, all questioning must cease.¹⁹⁰ The Court recognized that language in *Miranda* lent support to the notion that the government can never resume questioning:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody in-

shall, J., dissenting). The deciding vote belonged to Justice Powell, who thought that the important question was not who resumed the interrogation process, but rather whether the suspect had voluntarily spoken. *Id.* at 1049 (Powell, J., concurring).

183. As indicated below, while the Court places great significance in the difference between the two requests, it is very unlikely that many defendants can or do see that significance. See *infra* note 204 and accompanying text.

184. 423 U.S. 96 (1975).

185. *Id.* at 97.

186. *Id.*

187. *Id.*

188. *Id.* at 97-98.

189. *Id.* at 96.

190. *Id.* at 100.

interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."¹⁹¹

The majority rejected any "literal" interpretation of this passage,¹⁹² believing that such literalism "would lead to absurd and unintended results."¹⁹³ Instead, the Court found that *Miranda* required a focus on whether in a particular case the defendant's "right to cut off questioning" was "scrupulously honored."¹⁹⁴ Under the circumstances present in the instant case, Justice Stewart concluded that this right had been so honored.¹⁹⁵ In particular, the Court identified four key factors supporting its conclusion present in the case: (1) the police officers immediately stopped the interrogation in response to the defendant's request; (2) they resumed the interrogation "only after the passage of a *significant period* of time;" (3) the defendant was given a fresh set of warnings prior to the resumption of questioning; and (4) the second interro-

191. *Id.* at 100-01 (quoting *Miranda*, 384 U.S. at 473-74).

192. *Id.* at 103.

193. *Id.* at 101.

The passage could be literally read to mean that a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.

It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.

Id. at 101-02.

194. *Id.* at 104.

195. *Id.* at 107.

gation related to a crime that had not been covered in the earlier interrogation.¹⁹⁶

The Court reached a different result in *Edwards v. Arizona*.¹⁹⁷ The *Edwards* opinion was written by Justice White who in *Mosley* had dissented in part.¹⁹⁸ In *Edwards*, White joined the Justices who had voted with the majority in *Mosley* because all members of the Court viewed this case as being quite different from *Mosley*.¹⁹⁹ *Mosley* asked to remain silent in response to custodial interrogation.²⁰⁰ *Edwards* asked to see his lawyer in response to custodial interrogation.²⁰¹ This difference in requests is one of fundamental constitutional significance because once the defendant asks for an attorney, "the interrogation must cease until an attorney is present."²⁰² The language of the Court is very strong:

[A]lthough the accused may himself validly waive his rights and respond to interrogation, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that 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. We further hold that an accused, such as *Edwards*, having expressed his desire to deal with the police only through counsel, is not

196. *Id.* at 106.

197. 451 U.S. 477 (1981).

198. Justice White actually concurred in *Mosley*, but dissented from the reasoning relating to the significant break in time:

The majority seems to say that a statement obtained within some unspecified time after an assertion by an individual of his "right to silence" is always inadmissible, even if it was the result of an informed and voluntary decision—following, for example, a disclosure to such an individual of a piece of information bearing on his waiver decision, which the police had failed to give him prior to his assertion of the privilege, but which they gave him immediately thereafter. Indeed, the majority characterizes as "absurd" any contrary rule.

Mosley, 423 U.S. at 107 (White, J., concurring).

199. On this point, the Court was unanimous. Chief Justice Burger and Justices Powell and Rehnquist concurring in the result in *Edwards*, differed with the majority on various other aspects of the opinion. See *Edwards*, 451 U.S. at 487-92 (Burger, C.J., concurring).

200. *Mosley*, 423 U.S. at 104.

201. *Edwards*, 451 U.S. at 479.

202. *Id.* at 485 (quoting *Miranda*, 384 U.S. at 474).

subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present."²⁰³

The Court's resolution of the issue in *Edwards* is correct. When the defendant asks to see a lawyer, only a meeting with the lawyer will adequately respond to that request. The Court's decision in *Mosley*, however, is highly problematic for at least two reasons. The first is the tremendous importance that the Court attaches to the wording of the request made by Mosley as compared to the one made by Edwards. It is not at all clear that the *suspect* understands the difference between saying "I don't want to talk," and saying "I don't want to talk until I see my lawyer." Certainly the research supports the conclusion that the suspect may well be frightened or confused and is saying anything just to have the police stop questioning him.²⁰⁴

Even if the suspect does understand the difference between the phrases, one properly can question why that fact should be of constitutional significance. If the suspect says that he does not wish to talk, would it lead to "absurd and unintended" results to require the police to terminate the interrogation process and not resume it until the suspect either has a lawyer or initiates the process himself? Not at all, or at least the result would be no more absurd and unintended than that found in *Edwards* where the suspect asked

203. *Id.* at 484-85 (citation and footnote omitted) (quoting *Miranda*, 384 U.S. at 474).

204. See, e.g., UVILLER, *supra* note 6, at 195-97; Ogletree, *supra* note 2, at 1827-29. Though coming to this result from very different experiences and backgrounds, Professors Ogletree and Uviller both cast serious doubt on the impact of the warnings and the degree of understanding by suspects undergoing custodial interrogation. Some recent cases raise the same issue. In one case, Poyner v. Murray, 964 F.2d 1404 (4th Cir. 1992), the suspect asked, "Didn't you tell me I had the right to an attorney?" *Id.* at 1410. The court held that this was not an invocation of the right to a lawyer under *Miranda*. *Id.* at 1412. In contrast, see United States v. Mendoza-Cecelia, 963 F.2d 1467 (11th Cir. 1992), in which the court found that the following statement constituted a request for an attorney: "I don't know if I need a lawyer, maybe I should have one, but I don't know if it would do me any good at this point." *Id.* at 1472.

to see a lawyer. As a matter of policy, the process suggested in *Miranda* makes a good deal of sense in terms of preserving the suspect's privilege against self-incrimination. If the suspect indicates that he wishes to remain silent, the interrogation should not be resumed.

The second reason *Mosley* is problematic is because it is the most narrow and fact specific decision in this area since *Escobedo*,²⁰⁵ offering virtually no guidance to anyone in the criminal justice system. The Court looked to the particular circumstances present in the interrogation of Mosley and concluded that under the circumstances no Fifth Amendment violation had occurred.²⁰⁶ If each of the four factors indicated above must be shown,²⁰⁷ the case has almost no value as precedent or as a model for law enforcement. There will be few cases in which the police immediately stop interrogation, wait a significant period of time, give fresh *Miranda* warnings, and then ask questions about a crime unrelated to the subject of the first interrogation. Surely such cases occur, but it is difficult to imagine that they occur very often.

If each of the four factors need not be present, as some have suggested, then *Mosley* could have some real value.²⁰⁸ Unfortunately, the Court has never revealed the significance of these factors, for it has not dealt with this subject since *Mosley*.²⁰⁹ More-

205. See *supra* notes 49-56 and accompanying text.

206. *Mosley*, 423 U.S. at 107.

207. See *supra* note 196 and accompanying text.

208. See, e.g., *People v. Stander*, 251 N.W.2d 258 (Mich. Ct. App. 1977). In *Stander*, the court applied the *Mosley* doctrine and made the following proposition: "It is now the law that where a person in custody expresses his desire to cut off questioning, a police officer is not prohibited from resuming interrogation 'after the passage of a significant period of time and the provision of a fresh set of warnings.'" *Id.* at 263 (quoting *Mosley*, 423 U.S. at 106-07). Glaringly absent from the court's statement is any reference to the second interrogation being restricted to a crime which had not been the subject of the first interrogation. For additional cases not requiring the presence of all four of the *Mosley* factors, see *United States v. House*, 939 F.2d 659, 668 (8th Cir. 1991); *Kelly v. Lynaugh*, 862 F.2d 1126, 1131 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989); *Groome v. Keeney*, 826 F.2d 883, 886 (9th Cir. 1987). But for cases that require adherence to all four factors, see *Nelson v. Fulcomer*, 911 F.2d 928, 940 (3d Cir. 1990); *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989); *Christopher v. Florida*, 824 F.2d 836, 840-41 (11th Cir. 1987), *cert. denied*, 484 U.S. 1077 (1988).

209. The Supreme Court has decided several cases that deal with the issue of resuming questioning. These cases, however, deal with somewhat collateral questions and do not go to the heart of the resumption issue. See, e.g., *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990)

over, the definitional problems created by the Court in *Mosley* are enormous. In *Mosley*, the Court wrote of the "passage of a significant period of time" between the first interrogation and the second which under the facts constituted a few hours.²¹⁰ Could it be a few minutes? Obviously, it could not be "a momentary cessation,"²¹¹ but how is the officer to know the difference between momentary and significant? Two or three hours is fine, but what about fifteen to twenty minutes, or one hour? Also, the Court focused on the fact that the subsequent questioning regarded a crime that "had not been the subject of the earlier interrogation."²¹² Let us suppose that the same officer asks questions at the later interrogation about a second crime. This was a crime that was in the officer's mind all along, but she delayed asking questions as a matter of interrogation strategy. Would this situation violate *Mosley*? Or, what would happen if the second interrogation is handled by a different officer, but the crime is closely related to the crime which was the basis of the first interrogation?²¹³

One could conjure up many other fact situations exploring the severe problems *Mosley* creates by rejecting a bright line rule such as the one adopted in *Edwards*.²¹⁴ For this reason, and for considerations of policy and practical import, the Court should follow the *Edwards* rule for cases in which either of the two types of requests is made by the suspect. If the suspect is in police custody and is interrogated, all questioning must cease, and cannot be resumed, if the suspect makes a request *either* to see an attorney or to remain silent.

(holding that the protections in *Edwards* were "not terminated or suspended by consultation with counsel" when after speaking with his lawyer, the defendant was questioned again by the police); *Arizona v. Roberson*, 486 U.S. 675 (1988) (barring the use of a statement that had been given after a break in time, even though the questioning was by a different police officer about a different crime, because the defendant indicated that he wished to speak with counsel before being interrogated).

210. *Mosley*, 423 U.S. at 106.

211. *Id.* at 102.

212. *Id.*

213. To be sure, Justice Brennan, in dissent, argued strongly that the first crime covered in *Mosley* was closely related to the second crime. The anonymous tip received by the police officers, which was the sole basis for the arrest, "embraced both the robberies covered in [the first interrogation] and the robbery-murder [covered in the second]." *Id.* at 118-19 (Brennan, J., dissenting).

214. See *supra* notes 197-203 and accompanying text.

5. *Waiver*

In every constitutional context the issue surrounding the waiver of rights has involved, by definition, a weighing of all material factors, that is, a review of the "totality of the circumstances."²¹⁵ In this context, the question is whether "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."²¹⁶ Without a doubt, a trial judge must evaluate many factors in determining what the defendant knew, what she said, what she meant, and whether the statements were made knowingly, intelligently, and freely. A review of two major Supreme Court decisions in this area demonstrates how difficult this determination can be.

In *Connecticut v. Barrett*,²¹⁷ police arrested the defendant and gave him the *Miranda* warnings. The defendant stated that " 'he would not give the police any written statement [without his lawyer being present] but he had no problem in talking about the incident.' "²¹⁸ The Connecticut Supreme Court held that these facts were insufficient to show waiver and further determined that the defendant's demand that his statement not be in writing "was a clear request for the assistance of counsel"²¹⁹ and was "constitutionally effective despite the defendant's willingness to make oral statements."²²⁰ Based on the trial court's finding that the defendant was not "threatened, tricked, or cajoled" into speaking,²²¹ the United States Supreme Court found the waiver valid.²²² The question is a difficult one. As the Supreme Court found, the defendant did indicate a clear willingness to *talk* with the police, although he chose not to commit anything to writing.²²³ Still, one can understand the state judges' lingering belief that the defendant's request

215. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

216. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

217. 479 U.S. 523 (1987).

218. *Id.* at 525 (quoting App. to Pet. for Cert. at 12A).

219. *Id.* at 527 (quoting *State v. Barrett*, 495 A.2d 1044, 1049 (Conn. 1985)).

220. *Id.*

221. *Id.* (quoting *Miranda*, 384 U.S. at 476).

222. *Id.* The problems concerning valid waiver continue. See, e.g., *State v. Adams*, 605 A.2d 1097 (N.J. 1992) (holding that the defendant's oral statement was a knowing, intelligent and voluntary waiver despite defendant's contention that he did not believe the statements could be used against him at trial).

223. *Barrett*, 479 U.S. at 529-30.

for a lawyer indicated that he was fearful as to the consequences of his actions and wanted a lawyer with him.

*Fare v. Michael C.*²²⁴ is another difficult waiver case. After police read *Miranda* warnings to the defendant, a minor, he asked to have his probation officer with him during the questioning.²²⁵ The Court did not find that the defendant's request for his probation officer was an indication of a lack of a waiver.²²⁶ Instead, relying on the traditional totality of circumstances approach, the Court found a valid waiver because the defendant was able to understand his actions and acted in a voluntary fashion.²²⁷ In separate dissenting opinions, Justice Marshall asserted that the defendant's request for the probation officer "signal[ed] a desire to remain silent until contact with the officer [was] made,"²²⁸ and Justice Powell concluded that under the particular circumstances present, no valid waiver could be found: "In the absence of counsel, and having refused to call the probation officer, [the police] nevertheless engaged in protracted interrogation."²²⁹ The dissenters' point is a valid one; the defendant did ask for assistance in response to the interrogation. Yet the majority view is also legitimate; the defendant received his warnings in specific terms and finally said, "Yeah I want to talk to you."²³⁰

The waiver issue is difficult under the best of circumstances. The Supreme Court, however, by rejecting the express waiver requirement, made the matter far more difficult than necessary in a number of close cases. The Court took this step in *North Carolina v. Butler*²³¹ The North Carolina Supreme Court had fashioned a rigid rule in *Miranda* waiver cases: no statement made by a suspect in custody would be allowed into evidence "unless, at the time the statement was made, he explicitly waived the right to the pres-

224. 442 U.S. 707 (1979).

225. *Id.* at 710-11.

226. *Id.* at 719-24. The California court found that the request for the probation officer constituted an invocation of Fifth Amendment rights, a "per se invocation of Fifth Amendment rights in the same way the request for an attorney was found in *Miranda* to be, regardless of what the interrogation otherwise might reveal." *Id.* at 714-15.

227. *Id.* at 726.

228. *Id.* at 732 (Marshall, J., dissenting).

229. *Id.* at 734 (Powell, J., dissenting).

230. *Id.* at 711 (quoting *In re Michael C.*, 579 P.2d 7, 8 (Cal. 1978)).

231. 441 U.S. 369 (1979).

ence of a lawyer."²³² The debate in *Butler* concerned the requirement that the defendant waive his right to counsel explicitly. Butler, in response to custodial interrogation, refused to sign a waiver on the *Miranda* form which police had read to him and stated, "I will talk to you but I am not signing any form."²³³ He then made incriminating statements.²³⁴

The state court refused to consider the totality of circumstances on the waiver question, holding that without the signed waiver, or a specific oral waiver, no statement in response to custodial interrogation could be admitted into evidence.²³⁵ The Supreme Court rejected the requirement of an explicit waiver, concluding that such a requirement would be both overinclusive and underinclusive.²³⁶ The Court believed it would be overinclusive because it would cover statements by a defendant who made an explicit waiver involuntarily.²³⁷ The explicit waiver requirement would be underinclusive because it would not cover statements by a defendant who did not make an explicit waiver, but whose words and actions indicated waiver.²³⁸

The Court in *Butler* undoubtedly was correct in its belief that the express waiver requirement would not solve all of the problems in the waiver area. Its belief that the requirement would not solve a great many other problems, however, was incorrect. As Justice Brennan argued in his dissent, the express waiver requirement would have worked well in *Butler*.²³⁹ The defendant's actions and

232. *Id.* at 370.

233. *Id.* at 371.

234. *Id.*

235. *Id.* at 371-72.

236. *Id.* at 372-73.

237. *See id.* at 372.

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.

Id.

238. *See id.* at 373. "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*

239. *Id.* at 378 (Brennan, J., dissenting) ("The instant case presents a clear example of the need for an express waiver requirement.").

words did not clearly show whether he fully understood his rights and the consequences of talking without signing the waiver form. "[T]here is no reason to believe that his oral statements, which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights."²⁴⁰ An express waiver requirement might have clarified the situation.

Miranda requires some showing of waiver by the prosecution;²⁴¹ the court will not presume a waiver merely from the fact that the defendant responded to the interrogation by making incriminating statements.²⁴² An explicit waiver requirement would force suspects such as *Butler* to be clear and specific as to whether they understood their rights and chose voluntarily to speak. Obviously the suspect can meet this requirement in different ways. The suspect can sign a waiver form²⁴³ or she can state in certain terms that she understands her rights and agrees to speak. This oral relinquishment may demonstrate her waiver, whether the statement is simply witnessed by the interrogating officer, or witnessed by someone else either live or on tape.

The burden on the government to show a knowing and voluntary waiver in *Miranda* cases²⁴⁴ is "great"²⁴⁵ and "heavy."²⁴⁶ The im-

240. *Id.*

241. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

242. In *Tague v. Louisiana*, 444 U.S. 469 (1980), the Supreme Court of Louisiana found that when an arresting officer notifies a person of his *Miranda* rights, he does not have to determine if the suspect understands the rights. Specifically, the court determined that "absent a clear and readily apparent lack [of understanding], it can be presumed that a person has capacity to understand, and the burden is on the one claiming a lack of capacity to show that lack." *Id.* at 470. The Supreme Court summarily reversed, relying on *Butler* for the proposition that "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great." *Id.* at 471 (citing *Butler*, 441 U.S. at 373).

243. The validity of this option depends on whether in fact the defendant can read and understand the written warnings, a point which was much disputed in *Butler*. See *Butler*, 441 U.S. at 378 (Brennan, J., dissenting).

244. The burden is great in other types of waiver cases as well. For a treatment quite similar to that found in the *Miranda* cases, see *Brewer v. Williams*, 430 U.S. 387 (1977). In *Brewer*, the Court considered the waiver issue in terms of the Sixth Amendment right to counsel and determined the proper standard to be applied:

[I]t [is] incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." That statement has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, and that courts indulge in every reasonable presumption against waiver. This strict standard applies

sition of the express waiver requirement would go a long way in many, though not all, cases to insure that the burden is "rightly on [the] shoulders"²⁴⁷ of the government to prove a free relinquishment of rights,²⁴⁸ not on the defendant to disprove it in a battle of assertions with interrogating officers.

V BACK TO A BRIGHT LINE RULE

The principles which have evolved over the past half-century regarding incriminating statements and police interrogation are not of a mere technical nature, designed to obfuscate or complicate that which is inherently simple.²⁴⁹ The principles in this area support one of the most cherished rights in the American criminal justice system, the privilege against self-incrimination. Justice Marshall stated the matter well:

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

equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pre-trial proceedings.

Id. at 404 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

245. *Butler*, 441 U.S. at 373.

246. *Miranda*, 384 U.S. at 475 (1966).

247. *Id.*

248. *Id.* Guidance for law enforcement officials is critical in these cases. In *United States v. Giles*, 967 F.2d 382 (10th Cir. 1992), the defendant asked when he would have an opportunity to talk to an attorney. *Id.* at 384. The police did not view this question as an invocation of Fifth Amendment rights. He was then given his *Miranda* warnings, said nothing further about seeing a lawyer, and confessed. *See id.* at 385-86. The court suppressed the confession, finding no waiver. *Id.* at 386. "Although Mr. Giles did not expressly request an attorney, this statement (his question) could be reasonably construed to be such a request." *Id.* Surely, an express waiver requirement in this case would have resulted in an admissible confession or compliance with the right to counsel. The result in *Giles* was the worst of all possibilities.

249. Alas, the reaction among some law enforcement officers to the *Miranda* requirement is negative, and strongly so. Professor Uviller quotes one angry officer:

Look, if they want us to give them their rights, we'll do it. It doesn't bother me to say the words. I just don't like to see the perp walk because some cop forgot part of it, or because some judge doesn't believe the cop when he testifies that he read the magic words before the questioning began. If you want my candid opinion, I think *Miranda* is just another way for the courts to throw out perfectly good cases.

UVILLER, *supra* note 6, at 209.

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.²⁵⁰

The rule established in the *Miranda* decision provides "‘practical reinforcement’ for the Fifth Amendment right."²⁵¹ It was designed "to insure that the right against compulsory self-incrimination was protected."²⁵² The process of police interrogation triggers concern that the suspect understands her rights and feels at ease in exercising those rights.²⁵³ Without the *Miranda* rule, serious doubts would exist as to both the willingness of law enforcement officials to establish protections,²⁵⁴ and the suspect's ability to invoke constitutional protection.²⁵⁵

Not only are the broad constitutional protection offered by the privilege against self-incrimination and the policy rationale of *Miranda* vital to individual rights, but the rule of *Miranda* itself is vital. Indeed, as the Supreme Court noted, *Miranda* consolidated four cases in order "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."²⁵⁶ To be sure, this hardly is the only area of the law in which lawyers seek clarity and

250. *New York v. Quarles*, 467 U.S. 649, 687 (1984) (Marshall, J., dissenting). For an excellent discussion of the origins and impact of the Fifth Amendment in the *Miranda* area, see *United States v. Kilgroe*, 959 F.2d 802, 804-05 (9th Cir. 1992).

251. *Quarles*, 467 U.S. at 654.

252. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

253. See *Miranda*, 384 U.S. at 461 ("[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.").

254. This view is captured in Uviller's book which discusses current police practices in response to judicial declarations:

A second argument in support of limiting police access to a suspect for purposes of interrogation is best stated in an aphorism by Sir James Fitzjames Stephens who, speaking of the investigative practices of Indian police, commented that they would much prefer to sit in the shade rubbing pepper in some poor devil's eyes than to go mucking about in the hot sun looking for evidence.

UVILLER, *supra* note 6, at 194.

255. Certainly the troubled experience with the case-by-case voluntariness standard offers very limited hope that the Due Process Clause would fill the void. See *supra* notes 16-36 and accompanying text.

256. *Miranda*, 384 U.S. at 441-42.

guidance.²⁵⁷ Undoubtedly, a strict rule, in some criminal cases, will

257. Few areas of the law remain in which lawyers have *not* anxiously sought bright line rules. The list of such rules would be lengthy, ranging from corporate "safe-harbor" rules to IRS regulations to bankruptcy principles. Walter Olson states this point well in his controversial book, *The Litigation Explosion* (with thanks to my colleague Trotter Hardy):

For a very long time the law in this country, and in England before that, showed an overwhelming preference for fixed rules over fuzzy standards at almost every opportunity. Some of these rules have survived more or less intact to our own day. Take the idea of an age of majority. When is someone old enough to get married, or sign a binding contract, or order a drink in a bar? If the answer depends on maturity, it will always be in dispute; some of us are ready for independence at fourteen, others lamentably unready at forty. If the law were fully alive to human realities, it would entertain much litigation on this subject. Instead it plays dead, and promulgates a no-thinking-required rule—count the birthdays—lest it cast perennial suspense over the eligibility of a million bachelors, the validity of a million credit cards, and the retention of a million liquor licenses.

How should we behave on the highway? Presumably we owe our fellow motorists some general duty not to endanger them unreasonably. Fortunately, most accidents are handled under rules of the road that are much more cut and dried than that. One familiar rule holds that if you bump into the driver ahead of you, you pay for the damage, even if he slammed on his brakes for no obvious reason. If courts tried to work out responsibility on a case-by-case basis they'd find it hard to distinguish the occasional innocent rear-car driver from all the tailgaters who'd be clamoring to be let off for the damage they had done. Many more full-blown trials would be held, yet injustice would hardly be avoided. And the simple rule of thumb provides a generally sound maxim for driving: pay more attention to the car in front of you than to the car behind. As a group, drivers benefit.

Why rely on breathalyzer tests to define drunk driving, when some drivers who flunk are less of a menace on the road than others who pass? For that matter, why ban drunk driving as such at all, when what we want to ban is incompetent driving by anyone, drunk or sober? Again, one reason is that we distrust subjectivity on both sides; if every case pits the policeman's bare word against the driver's, there will be much strife but by no means a perfect winnowing of innocent from guilty. So we give the officer a device we hope is simple to use and the motorist a rule we hope is simple to follow (one-drink-an-hour, or whatever).

When does a binding contract come into existence when you are negotiating by mail? In principle, perhaps, when there's a "meeting of the minds." But minds are annoyingly inscrutable. It might seem the minds meet when you resolve to accept the offer, or later when the other guy opens and reads your letter of acceptance. The problem is that afterward you alone know exactly when you made up your mind and he alone knows when he opened the envelope. Relying on either trigger would leave too much room for mistakes or fibs in comparing stories afterward. Hence the law's "mailbox rule," which provides a fairly objective trigger: you're both locked in when you drop your letter of acceptance into a mailbox.

lead to seemingly unjust results. Genuinely guilty individuals will avoid conviction because the court will suppress their otherwise reliable confessions. Evidence indicating that such a result is rare mutes this concern.²⁵⁸ Moreover, this "cost to the truth seeking process of evidentiary exclusion invariably is perceived more tangibly in discrete prosecutions than is the protection of privacy values through deterrence of future police misconduct."²⁵⁹

Over the past twenty years, the key problem with *Miranda* and the interrogation process has not been the *Miranda* rule itself. As former Chief Justice Burger wrote, "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures. . . ."²⁶⁰ The problem is that the Supreme Court, in an effort to aid law enforcement, has attempted to make less "rigid" what was formerly a concrete and readily understandable rule. Today we are left with a broad principle, but one which requires very particularized factual inquiries in application.

We should return to the "bright line" rule of *Miranda*, recognizing that it is the bright line nature of the rule which makes it work reasonably well—but not perfectly—for all participants in the criminal justice system, especially law enforcement officials. In the broadest sense, Justice Harlan dissenting in *Miranda* may have been right, contending that a constitutional "code" of law enforcement conduct is not ideal.²⁶¹ In practical terms, though, a "code" is far better than our current system which requires all participants to make predictions based upon shifting case patterns.

The rule I suggest is simple. It provides guidance and direction. It is faithful to the values enunciated in *Miranda* for it is a bright

WALTER OLSON, *THE LITIGATION EXPLOSION* 138-40 (1991).

258. See Jacoby, *supra* note 91, at 53 (observing that less than one or two percent of all cases are affected because of illegal confessions).

259. *James v. Illinois*, 493 U.S. 307, 319 (1990).

260. *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

261. *Miranda*, 384 U.S. at 504 (Harlan, J., dissenting). Of course, one might well ask about the alternative. See Wermiel, *supra* note 12, at 14 ("A captain told me 25 years ago you just use your head. If you think it's right, you can do it; if you don't, you can't. That used to work, but it doesn't mean a damn anymore.") (quoting a North Carolina police detective).

line which made the Court's decision in *Miranda* so appealing and workable.²⁶² This rule consists of five parts:

(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.

262. These state judges make the point effectively. In *Satter v. Solem*, 434 N.W.2d 725 (S.D. 1989), the court held that:

The suggestion that Satter's previous experience with the criminal justice system excuses the giving of any warning is rather unique. The State, and the dissent in *Satter I*, seem to suggest that there should be some sort of intelligence test. If the suspect has four previous convictions, he is sufficiently knowledgeable of his *Miranda* rights. But what if there are three convictions, two, or only one? Where do we draw the line? More importantly, where do the law enforcement authorities draw the line? They are the ones in the field. The creation of exceptions really does them no favor. Far better to adhere to the bright line rule. After all, it requires no great effort to take out the *Miranda* card, read the subject his rights, and ask the simple questions: Do you understand your rights and do you waive them?

Id. at 727.

The Texas Supreme Court in *McCambridge v. State*, 778 S.W.2d 70 (Tex. 1989), held that:

Establishing a bright line rule relative to when a "critical stage" of the criminal process arises under Art. I, § 10 of the Texas Constitution will have similar beneficial consequences. Further, the creation of a bright line rule results in predictability. In addition, judicial review can be more precise, but, most important, it gives law enforcement authorities the parameters within which they can legally operate. At the present time law enforcement has to speculate whether a stage in the process is critical so as to compel the necessity of counsel. Speculation about one's legal right is a burden law enforcement should not have to carry.

Id. at 76.

In *Saucier v. State*, 562 So. 2d 1238 (Miss. 1990), a dissenting judge argued that:

The bright-line form of the *Miranda-Edwards-Jackson-Roberson* rule is all the more remarkable when so much of today's federal criminal constitutional procedural jurisprudence is presented in the form of balancing tests, cost-benefit analyses, attended often by searches for totalities of circumstances, all of which are but opportunities, if not invitations, to those who would evade and avoid to do precisely that. In sharp contrast the *Roberson* Court noted

We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*. This gain in specificity, which benefits the accused and the state alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes upon law enforcement agencies.

Id. at 1248 (Robertson, J., dissenting) (quoting *Arizona v. Roberson*, 486 U.S. 675, 681-82 (1987)).

(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 officers 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 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.

These proposed rules will not eliminate all of the problems relating to confessions and interrogations. Questions will still exist as to the suspects' understanding, the impact of *Miranda* requirements on law enforcement investigations, and the policies behind *Miranda*. Even this concrete plan will require some factual inquiries, but overall, the rule will provide far more guidance to all and will entail fewer specific fact finding procedures. My suggestions pro-

vide the bright line praised by Justice O'Connor²⁶³ and initiated by Chief Justice Warren more than twenty-five years ago.

263. Justice O'Connor's most recent statement is somewhat less enthusiastic: *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in "custody" has proved to be "a slippery one." And the supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill-defined. *Withrow v. Williams*, 113 S. Ct. 1735, 1764 (1993) (O'Connor, J., dissenting).