1977

Miranda v. Arizona: The Law Today

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Repository Citation
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MIRANDA V. ARIZONA — THE LAW TODAY*
Captain Frederic I. Lederer **

I. INTRODUCTION

You have the right to remain silent; anything you say may be used against you at trial; you have a right to consult with a lawyer and to have a lawyer present during this interrogation and if you cannot afford a lawyer one will be appointed for you.

Thus speaks the Supreme Court in Miranda v. Arizona,1 surely one of the Court’s most controversial decisions in criminal law, and one almost certain to be modified by the Court in the near future. The decision is complex and will be discussed at length later. However, it is important to note at this point that the decision in Miranda supplied an affirmative duty on the part of police desiring to conduct custodial interrogations to warn an accused of his right to remain silent and of a right to counsel at interrogations far broader than had ever existed before the decision. Contrary to some impressions, the basic nature of Miranda was far from unpredictable — what was unusual was the specificity found within the opinion and the strictness with which it had to be applied to be of value.

The history of the Supreme Court’s dealings with the confession problem is a story of partially futile attempts to find a tool with which to control improper police conduct. In the development of the contemporary law of confessions, the tool the Court ultimately seized was the right to counsel. This right was considered, if not the perfect tool, at least far better than its nearest competitors. The first decision of nationwide scope was Massiah v. United States,2 finding a sixth amendment right to counsel at post-indictment inter-

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*The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

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1 384 U.S. 436 (1966). The warnings listed represent only one variation of those in general use, and do not include the required waiver questions.

2 377 U.S. 201 (1964). The Court had previously been disturbed by police interference.
rogations when the defendant had retained counsel. Massiah was followed in a few months by Escobedo v. Illinois.

Within the military service, a requirement for counsel warnings has been in effect since at least the 1967 decision of the Court of Military Appeals in the case of United States v. Tempia.

II. ESCOBEDO V. ILLINOIS

On January 19, 1960, Danny Escobedo's brother-in-law was fatally shot. Escobedo was arrested, interrogated and released the next day. On January 30th an accomplice turned state's evidence, and Escobedo was arrested and taken to the police station. During the ride to the station house Escobedo refused to answer questions, stating that he wanted advice from his lawyer.

Notified by the mother of a friend, Escobedo's lawyer arrived at the station house soon after Escobedo. Despite his best efforts, in which he spoke to virtually every policeman in the area including the chief of police, the lawyer was refused permission to speak with his client until questioning was completed. Escobedo repeatedly requested permission to see his counsel. Confronted with an accusation that his accomplice had blamed the crime on him, Escobedo admitted participation in the crime. At trial Escobedo's motions to suppress the statements were overruled. The Supreme Court reversed on right-to-counsel grounds. Through Mr. Justice Goldberg,

\[378\text{ U.S. 478 (1964).}\]

the Court reasoned that when Escobedo was refused the right to see his lawyer he had become an accused and the purpose of the interrogation was to “get him.” According to Mr. Justice Goldberg, “it would exalt form over substance to make right to counsel, under these circumstances, depend on whether at the time of interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.” Thus, the Court’s prior decision in *Massiah* was extended to the *Escobedo* fact pattern.

The decision was otherwise buttressed by stating that for the right to counsel at trial to have any meaning counsel would be necessary at pretrial interrogation, for otherwise the conviction would already have been assured. Interrogation was thus a “critical stage.” The holding of the case was stated thusly:

Where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting inculpatory statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment . . . .

Surely a more limited decision could scarcely have been imagined. Yet Mr. Justice White, dissenting, viewed the decision more expansively, stating that “[a]t the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.” As time proved, Justice White’s prediction was remarkably accurate. Taken at his word, however, Justice Goldberg’s decision was limited to cases in which a defendant was made aware of his right to remain silent and requested and was refused access to his counsel. A warning of the right to counsel was not required. Further, for *Escobedo* to apply, the investigation had to have “focused” on the accused who had also to have been taken into custody. The definition of focus was left open.

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6 *Id.* at 485.
7 *Id.* at 486.
9 *Id.* at 490-91.
10 *Id.* at 495.
11 *Id.*
Ultimately, Escobedo, a limited decision when taken at its word, proved of limited value.\textsuperscript{12} Far more important was the use of the decision as a stepping stone to what Justice White feared was likely, the case of Miranda v. Arizona.

III. MIRANDA V. ARIZONA \textsuperscript{13}

The Supreme Court's decision in Escobedo v. Illinois \textsuperscript{14} left the law of confessions in uncertainty. While the decision itself had been narrow and virtually limited to the facts of the case, potential for broad expansion was clearly evident. Deeply concerned by the need to predict the Supreme Court's ultimate interpretation of the fifth amendment, the organized bar struggled to delimit the final boundaries of the Escobedo decision.\textsuperscript{15} Foremost among the questions left by Escobedo were:

When did a suspect who desired to see retained counsel have a right to see him?

Did a suspect who desired counsel during or before interrogation but who lacked the funds to retain one have a right to have one appointed free of charge?

Did government interrogators have to affirmatively warn suspects of their right to counsel prior to interrogation?

The questions left by Escobedo were almost solely ones relating to a right to counsel. At stake was the suspect's right to consult

\textsuperscript{12} Taken literally, the opinion was of little consequence. However, the case rapidly came to be viewed as prescribing a right to counsel whenever an investiga·

\textsuperscript{13} 384 U.S. 436 (1966).

\textsuperscript{14} 378 U.S. 478 (1964).

with a lawyer prior to or during a custodial interrogation. The right to counsel became the focal point of the problem because of the Court's belief that the police-dominated atmosphere surrounding most interrogations could be offset only by the presence of a lawyer whose sole responsibility was to the suspect. Ultimately of course the post-Escobedo issues reached the Supreme Court.

The vehicle which the Court chose to resolve the Escobedo problems was Miranda, consolidated with three other cases, all of which raised related fifth amendment and confession problems. While it is beyond the scope of this article to discuss the individual cases, it is important to point out that as a group they included most of the factual variations important to an attempted definitive resolution of the Escobedo issues. Both state and federal cases were included; warnings of one type or another had been given in some cases but not in others. Similarly, while the relief requested in each case was identical, the reversal of a conviction, or the affirmation of a reversal, the legal arguments raised by the various defendants varied from a limited reliance on the due process voluntariness doctrine to a claim that the Constitution required automatic assignment of counsel before a custodial interrogation could yield admissible evidence. In almost all the cases the defendants placed their primary reliance on the fifth amendment right against self-incrimination, arguing that the right to counsel was essential to a realistic exercise of the privilege.

17 Miranda, Vignera, and Stewart were state cases, while Westover was a federal case. In Miranda, the accused was suspected of rape and kidnapping. After a lineup in which Miranda was identified, he was interrogated without prior warnings for about thirty minutes after which he confessed. Prior to trial, a court-ordered psychiatric examination found Miranda to be an immature 23-year-old with an 8th grade education, with a prior record and a sociopathic personality disorder or disturbance since an early age. The written confession ultimately signed by Miranda contained a paragraph stating that it was given voluntarily and with knowledge that it could be used against him. At trial the defense counsel objected to its admission on the grounds that the defendant had not had a right to counsel at the time of his arrest.

Vignera was arrested for armed robbery of a dress shop. He confessed to police after arrest and after a successful lineup. Subsequently, Vignera made a full confession again to an assistant district attorney. This confession, recorded by a stenographer, was admitted against Vignera at trial over defense objection.

In Stewart, the defendant was charged with robbery and murder. Stewart was questioned after a successful search of his house. He made a number of admissions during three days of questioning. On the fifth day of questioning he admitted the robbery of the murder victim, although not the murder or the other robberies he
Perhaps the best and most comprehensive argument was made by the American Civil Liberties Union appearing as *amicus curiae*: 18

The protection of the Fifth Amendment privilege afforded by the presence of counsel in police custodial interrogation designed to elicit a confession has been spelled out in other briefs in this case, is well known to this Court, and therefore, can be here quickly summarized. These include giving an effective warning of the suspect’s privilege “to remain silent unless he chooses to speak in the unfettered exercise of his will”; providing someone in whom the subject can confide and who is a contact between the subject and the outside world; assuring that if the subject chooses to tell his story, he does so in a way that conveys his intended meaning; and providing an outside observer to the interrogation proceedings.

Obviously an effective warning of the privilege is a keystone of its effective enforcement. It is equally clear that there is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence. As discussed above, it is a prime function of police custodial incommunicado interrogation to tear a subject away from all things on which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim. Not only is counsel a person outside the police force, he is one who can meet the accomplished police interrogator on a level of at least partial equality. By training and experience he should not be afraid to stand up to unrestrained governmental power. He is someone in whom the subject can freely confide. It is his

was charged with. The statements were apparently made without warnings and without a request for counsel. They were received into evidence against Stewart. After the California Supreme Court reversed the conviction for failure to supply counsel, utilizing the expansive reading of *Escobedo*, People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), the State of California appealed. The defense reply appears to have argued reliance on due process voluntariness as well as right to counsel.

Westover was arrested by Kansas City police on suspicion of robbery and was then held for the FBI because of possible involvement in two California robberies. The FBI interrogated Westover in the Kansas City jail after the local police had completed their own questioning. Westover was first advised by the FBI that he had the right to remain silent, that anything he said could be used against him in a court of law, and that he had the right to consult with an attorney. Westover then confessed. He made similar statements with corrections the day after and was finally arraigned on federal charges eleven days after the initial state arrest. At the Supreme Court the defense claimed that Westover should have been actually supplied with counsel. Further, the delay in arraignment was attacked. See J. Medalie, From *Escobedo* to *Miranda*: The Anatomy of a Supreme Court Decision 31-42 (1966).

job to be a whole-hearted advocate for the subject with no conflicting interests in this regard.

In order to make effective the privilege against self-incrimination it is also necessary to ensure that if a person desires to tell his story he is allowed to do so in a way that conveys his intended meaning. A police interrogator, however, is basically an accomplished cross-examiner who is trained to allude to a particular piece of incriminating evidence but then to "be on guard to shut off immediately any explanation the subject may start to offer at that time." Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination...19

Appeals to the sixth amendment right to counsel, though present, were rare. Just as the claims made by the convicted defendants were quite varied in scope, so too did the positions taken by the counsel for the state and federal prosecution vary widely, ranging from an outright denial of any right to counsel or warnings to the comparatively mild position taken by then Solicitor General Marshall 20 in which he conceded the right to counsel at interrogations but denied the need to warn suspects of the existence of that right. 21 Government counsel were united in their concern for the possible consequences to law enforcement that might flow from an absolute right to counsel at interrogations. 22

19 Id.
20 Now Mr. Justice Thurgood Marshall of the Supreme Court.
21 See, J. MEDALIE, supra note 17, at 133-34, 140. Marshall believed that a defendant had a right to see his own counsel but that the Government was not required to appoint a lawyer for an accused without counsel. While he supported the concept of warnings as a matter of policy or procedure, he denied that the Constitution required such warnings.

Note that official transcripts of Supreme Court arguments are not available. However, in view of the importance of Miranda and its associated cases, a private transcript was made by the Institute of Criminal Law and Procedure of the Georgetown University Law Center, portions of which are reprinted in J. MEDALIE, supra note 17, at 77-188, and in Y. KAMISAR, W. LaFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 531-39 (4th ed. 1974) (hereinafter cited as KAMISAR).

22 Counsel asserted that the consequences of such a right would be severe. On the one hand it was assumed that it would be impossible to supply the number of lawyers needed, and on the other that defense counsel would automatically tell their clients to remain silent. Any way that the prosecution viewed the situation, the usefulness of interrogation would be nil. It is interesting to compare these dire predictions with the actual results of Miranda; it appears that most suspects routinely waive their rights to counsel and to remain silent.
The Supreme Court's decision became of course even more controversial than its earlier decision in Escobedo. The Court announced a prospective rule 23 that required police desiring to conduct a custodial interrogation to warn a suspect of his right to remain silent and his right to have and consult with a lawyer at the interrogation. In the oft quoted critical passage of the majority opinion, Chief Justice Warren stated:

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.24

Although a definitive analysis of the Miranda decision is beyond the scope of this work, it can be suggested that the Court’s decision flows smoothly from its earlier voluntariness decisions. One can only presume that incommunicado custodial police interrogation

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24 384 U.S. at 444-45 (footnotes omitted).
tends to be inherently coercive\(^{25}\) and accordingly must be compensated for through the giving of an explanation of a suspect's rights and through the extension of a right to a lawyer at the interrogation. The Court drew such a conclusion relying upon the fact, as it viewed it, that modern custodial interrogation is psychologically rather than physically oriented. The right to counsel then was the "protective device to dispel the compelling atmosphere of the interrogation."\(^{26}\) The Court also noted that without protections during pretrial interrogation, all the safeguards supplied at trial would become empty formalities.\(^{27}\)

The holding of the *Miranda* decision can thus be viewed as an extension of the voluntariness doctrine. The critical parts of the decision extend the right to counsel to custodial interrogations,\(^{28}\) require that the suspect in such a setting be informed of his rights, and require an affirmative waiver before questioning can take place. Having once recognized not only the right of a suspect to consult with a lawyer at an interrogation, but the desirability of such representation, the Court was faced with problems of equal protection. Those who were wealthy enough to have counsel would receive not only full information as to their right to remain silent but also tactical advice and assistance and the psychological support the Court deemed vital to overcome the coercive station house atmosphere. Those too poor to have counsel would automatically be placed in a far more vulnerable and dangerous position.

Faced with a dichotomy in result based solely on economic factors, the Court chose not to regard the presence of counsel on behalf of those who could afford them as a lucky gratuitous assist but rather a basic dilemma which could be resolved only by granting the right to counsel to all regardless of indigency. Thus the core of the

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\(^{25}\) The Supreme Court has consistently held that police custody and questioning are not "inherently coercive" so as to render a statement involuntary. See *Bram v. United States*, 168 U.S. 532, 556-58 (1897). However, *Miranda* leaves the reader with the unmistakable impression that the Court finally held otherwise. Certainly it is not the type of "inherent coercion" that makes all statements involuntary, for spontaneous statements are admissible without warnings of counsel, and the *Miranda* rights can be waived despite custodial circumstances. Accordingly, the term "inherently coercive" is used here in an attempt to describe accurately the Court's reasoning despite clear restrictions on the ultimate utility of the expression.

\(^{26}\) *Id.* at 465.\(^{27}\) *Id.* at 466, citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1964).

\(^{28}\) If, after being warned, the suspect requests counsel and counsel is unavailable, the police may not question him. The police always have the option of making counsel available or not interrogating.
Miranda decision is its affirmative extension of the right to counsel to all suspects subjected to custodial interrogation. The rights warnings required by the opinion not only directly implement the right against self-incrimination by informing suspects of its existence, but also support the right via the warning that the suspect may have counsel present to assist him regardless of possible poverty.

Perhaps as important as the Court's holding, however, is the additional language which accompanies it. The Court did not announce hard and fast rules; it expressly recognized the possibility of superior safeguards being created for custodial questioning of suspects.29 Having done so, it simply stated that until such safeguards were developed by a jurisdiction, the right to counsel, accompanied by its warnings, was to be given before resulting evidence could be admissible at trial.30

IV. OBJECTIONS TO MIRANDA

Criticism of Miranda has taken many forms, not the least of which has been a broadside attack on the decision's entire holding. Perhaps best expressed by Mr. Justice Harlan's dissent,31 such a view finds the expansion of the right to counsel to interrogations to be both unfounded in precedent and necessity.

Justice Harlan took issue with the majority's attempt to eliminate all possibilities of coercion in its attempt to create what he viewed as a utopian conception of voluntariness.32 Justice Harlan viewed some form of pressure as inherent in interrogation and felt that unacceptable forms of pressure could easily be dealt with via the Court's earlier voluntariness precedents. Showing a keen degree of insight, he also questioned the validity of the waiver allowed by Miranda, asking how such a waiver could be voluntary when the right to counsel itself had been extended to cope with what was viewed as inherent coercion. Similarly, he asked how spontaneous statements uttered in a custodial setting could be considered voluntary when the answer to the simplest question, unaccompanied by the required waiver, would be inadmissible.

29 384 U.S. at 467. Note that the Court later classified the warning requirements of Miranda as only “prophylactic rules developed to protect” the right against self-incrimination. Michigan v. Tucker, 417 U.S. 433, 439 (1974).
30 It now seems apparent that the Court is preparing to modify the Miranda warning requirement.
31 384 U.S. 436, 504 (Harlan, J. dissenting, joined by Stewart and White, J.J.).
32 Id. at 505. Mr. Justice Harlan also questioned the application of the privilege against self-incrimination in the police station house, claiming that historically the privilege had been inapplicable to “extra-legal confessions.” Id. at 510.
Justice Harlan, like many others, also assumed that a lawyer present during an interrogation would normally advise his client to remain silent. Accordingly, he felt that the Miranda opinion would substantially interfere with necessary police investigation without adequate justification. While the recognition of a right to counsel at interrogations was the heart of Miranda, its requirement that a suspect be warned of his rights to counsel and to remain silent were also questioned.

The majority opinion referred to the experience of a number of agencies 33 and foreign jurisdictions 34 which utilized rights warnings. While the FBI, military, and English experiences all appeared relevant, only one 35 of the jurisdictions utilized a right to counsel at interrogations 36 and accordingly the experience of those jurisdictions had at best limited validity for general American application. The English 37 Judges' Rules, cited by the Court, did require that

33 The Court cited with approval the warnings required by the Federal Bureau of Investigation pursuant to departmental instruction, and the warnings required to be given in the military prior to criminal investigation, Uniform Code of Military Justice art. 31(b), 10 U.S.C. § 831(b) (1970) [hereinafter cited as UCMJ]. 384 U.S. at 483-85, 489.
34 The Court referred to safeguards found at the time in England, Scotland, India, and Ceylon. 384 U.S. 496, 486-89. See note 37 infra.
35 While the FBI gave a right to counsel warning, it did not include the right to obtain counsel for indigents until counsel was granted by a judge and it did not include the affirmative waiver apparently required by Miranda. 384 U.S. 436, 521.
36 While the right to counsel, apparently based on sixth amendment considerations, had been evolving in the military, see United States v. Wimberley, 16 C.M.A. 3, 36 C.M.R. 159 (1966), the cases cited by the Supreme Court, 384 U.S. at 489 n.63, only recognized that a suspect who requested a lawyer had to be allowed to consult with an attorney. Thus, military experience supplied minimal support for the Court's holding as to counsel warnings. The statutory military rights warnings did not include a right to counsel. See generally, Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1 (1976). However, the statutory warnings had not caused any great difficulty in military police investigations.
37 As presently promulgated, the Judges' Rules state:

JUDGES' RULES

These Rules do not affect the principles

(a) That citizens have a duty to help a police officer to discover and apprehend offenders.
(b) That police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station;
(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the progress of investigation or the administration of justice by his doing so;
(d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should, without delay cause that person to be charged or informed that he may be prosecuted for the offence;
suspects be informed of their right to remain silent but not only lacked a right to counsel but were and are enforced at the discretion of the trial judge who may choose to admit evidence seized in violation of the Rules.

Accordingly, the Miranda warnings requirements had to be regarded as experimental and possibly dangerous to society. Even now it is difficult to judge how effective the warning requirements

\[(e)\] That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

The principle set out in paragraph (e) above is overriding and applicable in all cases. Within that principle the following Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence. The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which every questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

\[i]i\]f a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to
are. Of course there is every logical justification to require that suspects be warned of their right to remain silent if only because the fifth amendment privilege would seem a useless formality if suspects are not made aware of its existence.

Another objection to the Miranda decision has been that the Court seemingly abandoned its judicial role and functioned as a legislature. Certainly the specificity of its holding makes such a criticism highly telling. Yet the objection ignores the central issue. The Court certainly has the constitutional responsibility to interpret the Constitution. Arguably it may also have increased responsibility

say: if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following—

“T. I __________ wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.”

(c) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(d) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following—

“I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.”

(e) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

(f) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following Certificate at the end of the statement—

“I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.”

V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III (e).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

Home Office Circular No. 31/1954, App. A, Judges’ Rules and Administrative Directions to the Police (London, 1964) [hereinafter cited as Judges’ Rules]. Note that the Administrative Directions have been omitted.

See section XIII, infra.
in the area of the administration of justice. The Court had been confronted with decades of coerced confessions. Faced with the perception that abuse of individual rights had taken a new and more difficult-to-detect turn—that psychological coercion was now superseding physical brutality—the Court chose the only instrument it could find to cope with its constitutional responsibilities. Further, it recognized the possibility of alternative forms of protection for the individual’s right against self-incrimination and expressly noted that its decision was not meant to be the only acceptable solution.

While the long term vitality of Miranda is questionable, it not only is the law at present but also is highly likely to remain important if not determinative in the future. Accordingly, the remainder of this chapter is devoted to an analysis of the Miranda decision as it has been interpreted by the courts of the United States.

V. THE MIRANDA REQUIREMENTS,
A FRAMEWORK FOR ANALYSIS

Despite the Supreme Court’s unusual attempt to be specific in the Miranda holding, the Court left open a substantial number of questions dealing with the application of its decision. Not only was there some doubt as to the exact nature of the warnings required, but more importantly it was unclear when the warnings had to be given. After all, the Court had used the words “custodial interrogation,” words open to some debate. Was the question of an arresting officer on the street the type of “interrogation” that the Court had meant to include within Miranda’s ambit? What test was to be used to determine the presence of custody? Was it a subjective test—and if so, was it the suspect’s or policeman’s view that was to be determinative—or an objective one? What manner of waiver was to be required? Was the case to be applied in a relaxed fashion or perhaps in a hyper-technical one? Further, what obligations did the decision place on the police when a suspect exercised his rights to remain silent? Could he be asked to reconsider and was any violation fatal in all ways to resulting evidence? These and other questions flowed from Miranda.

In order to analyze best the contemporary interpretation of Miranda, the following questions will be addressed in turn:

What warnings must be given?
Who must give warnings?

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39 Id.
Who must receive warnings?
When must warnings be given?
How is the Miranda waiver obtained?
What is the effect of exercising one’s Miranda rights?

VI. THE MIRANDA WARNINGS

At first impression, the Court would seem to have been more than adequately specific in its rendition of the warnings required by Miranda. The Court’s language states: “the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” 40 Later in the opinion, the Court makes it clear that the latter warning means not only that the suspect has a right to consult with an attorney, but that “if he is indigent a lawyer will be appointed to represent him.” 41 Beyond this the opinion is silent.

Despite the seeming clarity of the Miranda requirements, numerous courts have been compelled to interpret the validity of variations on the Miranda commandments. Most of these cases would appear to have been concerned with the right-to-counsel warning although a respectable number of cases exist considering the other warnings and suggesting that still further warnings may be necessary.

A. THE RIGHT TO COUNSEL

Miranda requires that a suspect entitled to warnings be warned that he has a right to have an attorney present during the interrogation and that if he cannot afford an attorney one will be appointed for him. 42 Failure to advise a suspect of his right to free counsel is usually considered noncompliance with Miranda 43 and fatal to the admissibility of any resulting statement. 44

While the use of the word “attorney” rather than “lawyer” has

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41 Id. at 473.
42 Id.
43 See United States v. Cullinan, 396 F. Supp. 516 (N.D. Ill. 1975); People v. Hermance, 35 N.Y. 2d 915, 324 N.E. 2d 357, 324 N.Y.S.2d (1974). Note Batteaste v. State, _ Ala. App. _, 331 So. 2d 832 (Ct. Crim. App. 1975), holding that the warning that if the suspect cannot afford a lawyer, one will be appointed for him need not include the specific statement that such a lawyer will be “free of charge.”
been controverted, there appears little general objection to the use of the term attorney. Far more important has been the question of exactly when the right to counsel attaches in relation to the warning given by the police to the suspect. The suspect has a right to consult with counsel before interrogation and to have counsel present during the interrogation. No interrogation may take place if the suspect wants a lawyer until counsel is supplied.

A number of courts have determined that the failure to advise suspects of their right to consult with counsel prior to interrogation does not constitute error when the right to have counsel present during the interrogation is made clear. Presumably the right to consult with counsel is subsumed in the general right to counsel in most courts.

Cases in which the police warning has suggested that the right to counsel might attach at some substantially later time have proven far more troublesome. In the usual case the suspect is either advised that a court will appoint counsel if needed or, "We have no way of giving you a lawyer if you cannot afford one, but one may be appointed for you, if you wish, if and when you go to court." As the accused has both an absolute right to remain silent and the right to have counsel present to assist during any interrogation to which the suspect voluntarily consents, such a warning means only that a suspect desiring appointed counsel cannot be interrogated until counsel is available. In short, the only option that is foreclosed is that of making an "immediate" statement with the assistance of counsel.

However, the usual warning that refers to a future right to counsel is confusing at best and creates a substantial risk of leading a suspect to believe that no effective right to appointed counsel exists at the interrogation. The courts are divided completely insofar as the propriety of admitting statements obtained after warning indicating that counsel is not immediately available. Although final

interesting decision, see United States v. Cullinan, 396 F. Supp. 516 at 518 (N.D. Ill. 1976), holding that failure to warn a suspect of his right to free counsel in the event of indigency would be harmless if the prosecution could present adequate proof of the suspect's ability to afford to retain counsel.


46 Grennier v. State, 70 Wis. 2d 204, 214, 234 N.W.2d 316, 321 (1975).

resolution of the issue awaits future decisions, a trend towards acceptance of statements given after warnings of this kind seems to be developing. It is interesting to note that while the American Law Institute's Model Code of Pre-Arraignment Procedure expressly recognizes a warning that counsel will be appointed at a later time, it does so in an unusually clear and forthright manner that should cure most of the defects surrounding the present formulations.

B. THE RIGHT TO REMAIN SILENT

Perhaps the most important Miranda warning is that the suspect "has the right to remain silent, and that any statement he does make may be used as evidence against him." The basic warning itself is simple and difficult to abuse. However, a number of formulations have been used by various jurisdictions to explain the right to remain silent. No specific phrasing seems required so long as the right to remain silent is sufficiently communicated to the accused. Occasionally police efforts to suggest that the suspect may refrain from incriminating himself but may not remain silent, or that the suspect may be charged with misprision of felony if he is not involved and remains silent, are improper and will result in suppression of any resulting statement.

48 See Schade v. State, 512 P.2d 907 (Alas. 1973) (police officer was only telling the truth); United States v. Rawls, 322 A.2d 903 (D.C. 1974); State v. Maluf, 50 Hawaii 428, 539 P.2d 1200 (1975); Arnold v. State, 548 P.2d 659 (Okla. 1976); Grennier v. State, 70 Wis. 2d 204, 234 N.W.2d 316 (1975). But see Hock v. State, ___ Ark. ___, 531 S.W.2d 701 (1976) (warning valid on the facts of the case but would be invalid for indigents); People v. Buckler, 39 N.Y.2d 895, 352 N.E.2d 553, 386 N.Y.S.2d 396 (1976). A number of courts have accepted statements using these warnings but have done so with deep concern. See Grennier, supra.

49 No law enforcement officer shall question an arrested person after he has been brought to the police station or otherwise attempt to induce him to make a statement unless he has been advised by the station officer in plain understandable language that if he wishes to consult a lawyer or to have a lawyer present during questioning, but is unable to obtain one, he will not be questioned until a lawyer has been provided for him, such advice shall also include information on how he may arrange to have a lawyer so provided.

50 See Commonwealth v. Spriggs, 463 Pa. 375, ___, 344 A.2d 880, 882-83 (1975) (warning that "you have the right to refuse to answer questions asked of you while you are in custody . . ." was sufficient to convey the right to remain silent despite the failure to use the word "statement").

C. THE CONSEQUENCES OF MAKING A STATEMENT

Under the Miranda formulation, an interrogator must advise his suspect that any statement made “may be used as evidence against him.” Variations of the warning have used “will,” “could,” or “might” in place of the word “may” in the warning. Stating that any comments “will be used against you” certainly provides the suspect with the strongest warning. However, it fails to take into account the possibility that the evidence might be used for the accused. Paralleling the Miranda formulation, the English Judges’ Rules provide that an interrogating constable must tell a suspect that anything he may say “may be put into writing and given in evidence.” Telling the American suspect that his statement might be used for him may, however, be considered an improper inducement which will render a statement involuntary.

D. OTHER WARNINGS

While Miranda set forth a number of required rights warnings, defense counsel have frequently argued that given cases require a number of additional warnings not specifically spelled out in the decision.

Perhaps the most common additional warning said by the defense to be required is that the suspect who has chosen to make a statement may choose to change his mind at any time and remain silent. While there is no doubt that the suspect may indeed invoke the right to remain silent at any time during interrogation, Miranda does not require that suspects be advised of that right to terminate an interview, so long as their decision to stop talking is respected; accordingly, the courts have almost unanimously denied the defense claim that such a warning is required.

54 See generally Kamisar supra note 21, at 570-71.
55 JUDGES’ RULES, supra note 37, Rules II, III & IV.
56 See Kamisar supra note 21, at 570-71 for a discussion of this issue.
58 Id. at 444–45, 457–70, 473–74.
Perhaps more important is the occasional defense claim that the suspect should be notified of sufficient facts to allow him to make an intelligent decision insofar as waiver is concerned. At a minimum, some counsel have argued, the suspect should be told of the nature of the offense of which he is suspected. Others have argued that surrounding circumstances should be disclosed, such as whether the crime is a felony or misdemeanor; or whether a victim has died or been seriously injured. If evidence indicates that the suspect has been able to make a knowing and intelligent waiver, most courts have held that information as to either the nature of the offense or of surrounding circumstances is not required.

While it seems unreasonable to require the police to give a complete briefing to a suspect prior to requesting a statement, there would appear to be no reason not to require the police to warn a suspect of the basic nature of the offense of which he is suspected. Such an approach has been in use in the military since 1951 and has not proven detrimental to investigation.

An additional warning that has been discussed by a number of noted commentators is the statement that the silence of an accused will not be used against him. In the light of recent Supreme Court decisions, that warning would now be legally true as admission of evidence of a warned witness' silence at trial is concerned. However, as Professors Kamisar, LaFave, and Israel point out, the accused's silence may well have detrimental effects in-

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60 See U.C.M.J. art. 31(b), requiring that a suspect be advised of the nature of the offense of which he is suspected. The warning need not be overly specific or technical (e.g., "you are suspected of killing Smith" is enough). Miller v. State, 335 N.E.2d 206 (1975).

61 See State v. Kenner, 290 So. 2d 299 (1974) (defendant was not entitled to be warned that he was confessing to a felony); People v. Lewis, 43 App. Div. 2d 989, 352 N.Y.S.2d 248 (1974) (defendant was not entitled to be warned that the rape victim had died); State v. Owen, 13 Wash. App. 146, 149, 534 P.2d 123, 125 (1975) (general nature of charges against defendant are required). But see People v. Prude, 33 Ill. App. 2d 410, 415-17, 336 N.E.2d 348, 352-54 (1975) (juvenile suspects should have been warned of the possibility of trial for murder in normal adult courts); Harris v. Commonwealth, 29 Crim. L. Rep. 2529 (Va. March 4, 1977) (interrogator was not required to warn juvenile that he might be prosecuted as an adult).

62 See note 60 supra; see generally Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1 (1976).

63 See note 56 supra.


65 See note 56 supra.
sofar as police decision making is concerned. Despite this, and inasmuch as most suspects feel a psychological necessity to speak (the underlying assumption of *Miranda*), one would think that a warning that the suspect’s silence may not be used against him at trial would be desirable. It would at least minimize the inherent compulsion that *Miranda* deals with. However, such a warning does not appear to be required at this time and it would seem most unlikely that the Supreme Court would even consider extending *Miranda*.

VII. WHEN ARE *MIRANDA* WARNINGS REQUIRED?

For purposes of analysis the *Miranda* rule may be stated thusly: Warnings are required whenever a law enforcement agent subjects a suspect to custodial interrogation. The key terms are law enforcement agent, suspect, and custodial interrogation. It is critically important, however, to keep in mind that *Miranda* by definition applies only to those forms of communication protected by the fifth amendment privilege against self-incrimination. Thus, a number of actions that would appear to be “incriminating” in terms of consequence are not within *Miranda*’s ambit. Examples of unprotected actions include the taking of handwriting and voice exemplars, bodily fluids, and obtaining consent to search. Similarly, compelled psychiatric examinations normally will not require *Miranda* warnings. For analytical purposes, these unprotected actions can best be viewed as not coming within the definition of “interrogation” for *Miranda* purposes.

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66 See People v. Henderson, Mich. App. 246 N.W. 2d 72, 74 (1974) (*Miranda* warnings held unnecessary when obtaining voice samples, as voice exemplars are unprotected by the fifth amendment).
67 Schmerber v. California, 384 U.S. 757 (1967) (bodily fluids not protected by the right against self-incrimination).
68 Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (*Miranda* warnings or warning of the right to refuse to give consent are not required for a valid consent search).
69 At present the majority rule is that an accused intending to raise a defense of insanity can be compelled to submit to a government psychiatric examination. The defendant in such a case is said to have impliedly waived his privilege to the extent necessary to allow the examination and to allow the examining psychiatrist to testify at trial as to his conclusions. *Miranda* warnings are thus inappropriate. For a reappraisal of this view, see Comment, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 Colum. J.L. & Soc. Prob. 403 (1975).
70 Note that matters protected by the privilege may still escape *Miranda* because of other circumstances. See State v. Gwaltney, N.C. App. 228 S.E.2d 764
A. WHO MUST GIVE MIRANDA WARNINGS?

The Miranda warnings were designed to offset the psychological coercion assumed to be inherent in custodial questioning by law enforcement agents. Generally, the cases have required police officers, prosecutors, and law enforcement agents with official status to give warnings, and exempted private citizens from the warning requirements. Part-time police and private security guards pose some difficulty. The primary question appears to be the existence of status as a local, state or federal officer. Thus, cases involving private guards will frequently require a determination of the guard’s arrest powers under local law. As one commentator has stated, the private citizen exception to Miranda will generally not apply to citizens acting as police agents. While police officers must give warnings before conducting custodial interrogations, under-

(1976) (accident report questions did not require Miranda warnings because the questions were investigatory rather than accusatory and thus were not within the scope of Miranda).

72 See, e.g., Reno v. State, ___ Ala. App. ___ , 337 So.2d 122 (Ct. Crim. App. 1976) (company officer); Commonwealth v. Mahnke, ___ Mass. ___ , 335 N.E.2d 660 (1974) (vigilante group of private citizens were not required to give warnings to suspect subjected to custodial interrogation); Brown v. State, ___ Miss. ___ , 293 So.2d 425 (1974) (jail cell questioning by victim’s mother did not require Miranda warnings when the conversation was not instigated by the police).
73 Official status or a significant police connection will require warnings. Compare Tarnef v. State, 512 P.2d 923 (Alas. 1973) (private arson investigator who was a former police officer and who worked closely with the police and considered himself part of the “team” was required to give warnings); and Allen v. State, 52 Ala. App. 66, 297 So.2d 391 (Ala. Crim. App.), cert. denied, 292 Ala. 707, 297 So.2d 399 (1974) (interrogator who had occasionally acted as a part-time deputy sheriff in the past had sufficient connections with the sheriff that warnings should have been given) with United States v. Delay, 500 F.2d 1360 (8th Cir. 1974) (although interrogating newsmen had acted as a part-time unpaid deputy sheriff, his past activities had been restricted to acting as a photographer, press secretary, or helping to search for drowning victims; accordingly, he was not a law enforcement agent for Miranda purposes).
74 J. ZAGEL, supra note 72, at ___.
75 Citizens acting as police agents may have to give warnings. Compare People v. Baugh, 19 Ill. App. 3d 448, 311 N.E.2d 607 (1975) (victim’s attorney who questioned suspect in police custody was acting as a police agent and he should have given Miranda warnings) with State v. Jensen, 11 Ariz. 490, 531 P.2d 531 (1975) (prisoners who obtained a statement from cellmate were not “plants” and could testify to statements made by the accused). Note that a person investigating misconduct who is not a law enforcement agent may not have to give warnings despite holding an official position. See In re Brendan H, 82 Misc. 2d 473 (Schenectady Fam. Ct. 1975) (school principal investigating school misconduct not required to give warnings to students in the absence of police connection).
cover agents are usually exempted from the warning requirement simply because undercover work normally does not involve custodial interrogation.\textsuperscript{77}

There are, of course, a number of persons likely to question a suspect as part of the law enforcement process who are not themselves law enforcement agents. Cases involving clerical personnel should be analyzed in terms of the status of the clerk, the purpose of the questioning, and the general policies served by \textit{Miranda}. Government psychiatrists performing competency examinations, particularly examinations in response to sanity defenses, should theoretically present a problem, as the information gained from the suspect may well be used against him. However, inasmuch as the courts have nearly unanimously held that a suspect raising a sanity defense must consent to a government examination,\textsuperscript{78} there would

\textsuperscript{77}If one were to be concerned only with questions of fairness there would appear to be some question why undercover agents should be allowed to question suspects without warnings when uniformed officers would be prevented from doing so. However, this avoids the rationale for \textit{Miranda}. Undercover agents questioning suspects in a noncustodial setting by definition do not create the type of coercive atmosphere found in a police station.

\textsuperscript{78}There has been general implicit acceptance that compelled psychiatric examination of this kind, usually on pain of preventing the defense from presenting all or part of its evidence on sanity, involves the types of coercion that allows the privilege to be invoked. However, the courts have distinguished the situation from the usual attempt to obtain incriminating testimony by concentrating on the intent and justification behind the examination. The overwhelming majority rule in the United States today is that when a defendant intends to raise a sanity defense he has impliedly waived in part his privilege against self-incrimination. See \textit{FED. R. CRIM. P.} 12.2(c); \textit{United States v. Jines}, No. 76-1102 (8th Cir. filed 1976); \textit{United States v. Cohen}, 530 F.2d 43 (5th Cir. 1976); \textit{Karrtetter v. Cardwell}, 526 F.2d 1144 (9th Cir. 1976); \textit{United States v. Barrera}, 486 F.2d 338, 338-39 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974); \textit{United States v. Mathen}, 480 F.2d 1234, 1236 (9th Cir. 1972); \textit{United States v. Bohle}, 445 F.2d 64 (7th Cir. 1971); \textit{United States v. Albright}, 388 F.2d 719 (4th Cir. 1968); \textit{United States v. Babidge}, 18 C.M.A. 327, 40 C.M.R. 39 (1969); \textit{United States v. Thulemeyer}, 538 F.2d 441 (Colo. 1975); \textit{Noyes v. State}, 516 P.2d 1368 (Okla. 1973). See generally Aronson, \textit{Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?}, 26 STAN. L. REV. 55 (1973); Danforth, \textit{Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination}, 19 RUT. L. REV. 489 (1966); Lederer, \textit{Rights Warnings in the Military}, 72 MIL. L. REV. 1 (1976); \textit{Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination}, 82 HARV. L. REV. 648 (1969). Under the decisions, the defendant must submit to a government psychiatrist (who need not give \textit{Miranda} warnings) but who will not be allowed to testify at trial to any specific incriminating remarks made during the interview and must limit himself to his conclusions on the issue of sanity. See \textit{United States v. Bohle}, 445 F.2d 54, 66-67 (7th Cir. 1976). Note that Virginia allows a coerced examination as long as the defendant is not forced to answer questions regarding the of-
appear to be no reason for warnings to be given.\textsuperscript{79}

Foreign police have not been required to give Miranda warnings\textsuperscript{80} when interrogating an American suspect if only because the United States cannot compel foreign jurisdictions to comply with American law. Clearly the prophylactic function served by Miranda domestically is irrelevant in foreign jurisdictions with their own legal rules. This is not, however, to suggest that Miranda should not apply to foreign investigations which are conducted in conjunction with American authorities and are simply part and parcel of an American investigation.\textsuperscript{81} American efforts to circumvent the Miranda requirements are to be discouraged. However, this approach creates a substantial risk of deterring American prosecution and leaving the American accused in the hands of foreign authorities. The balance is yet to be struck.

\section*{B. SUSPECT}

While it is possible to have a custodial interrogation of a person who is not a suspect,\textsuperscript{82} by the very nature of American law the number of custodial interrogations of nonsuspects will be extremely low. After all, if a person is not a suspect, what justification will the

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\textsuperscript{79} Where no right to remain silent exists there can be no reason for warning of its existence. However, the right to counsel at psychiatric examinations is not totally foreclosed and in those few jurisdictions recognizing a limited right to counsel some form of rights warning would seem appropriate.

\textsuperscript{80} See United States v. Mundt, 508 F.2d 904, 907 (10th Cir. 1974) (Miranda warnings were not required in Peruvian investigation despite American participation in absence of American officers playing a "substantial role in events leading to the arrest").

\textsuperscript{81} See Cranford v. Rodriguez, 512 F.2d 890 (10th Cir. 1975) (Mexican police acting on behalf of New Mexico police should have given Miranda warnings).

\textsuperscript{82} A person in custody for one offense might be questioned merely as a witness to a second. Assuming that the questions relating to the second offense could not in any way touch on the first, a rather abstract and unlikely situation in view of the possibility of derivative evidence and the use of any information gained for impeachment and related uses, by implication Miranda would not appear to apply, as its purpose was to protect suspects from questioning. Note that the fact of custody is the determining feature for a suspect. It is unimportant that he is in custody for another offense so long as he is a suspect. See Mathis v. United States, 391 U.S. 1 (1968).
authorities have to hold him in custody? Thus, normally, and in con­
trast to the statutory warning requirements 83 of military criminal
law, the threshold question will often be whether the person ques­
tioned was in custody and not whether he was a suspect. The cases
frequently exhibit in this regard an ambiguous use of the word
“focus.” While courts often attempt to determine if an investigation
has “focused” on an individual to determine whether he was in cus­
tody at the time of questioning, the same question is also asked to
determine whether the person questioned was truly a suspect at the
time of interrogation. The two separate criteria for Miranda appli­
cation are thus frequently merged, and careful analysis may be
needed to distinguish a court’s true holding.

C. CUSTODY

Miranda's use of the expression “custodial interrogation” is de­
ceptively simplistic. The case defines it 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.” 84 The problems engendered by this formulation can be
grouped into two areas—the test to be applied in defining custody,
and the determination of the presence of custody once a test has
been arrived at.

The difficulty in arriving at a test is caused by Miranda's basic
premise. If the warnings are to cope with psychological coercion felt
by the suspect, the test at least arguably should be a subjective one
that seeks to determine whether the suspect believed himself to be
in custody. While such an approach may most fully implement
Miranda's apparent intent, it may unreasonably open the door to
perjury by the defendant. Similarly, the test makes determinative
the suspect's perhaps unreasonable view of the situation. While
there is much to be said for requiring warnings whenever a doubtful
situation may exist, it was clearly not the intent of the Court in
Miranda to foreclose all police questioning without warnings; and
this could easily be the result of a purely subjective test.

An alternative test that was chosen by some jurisdictions after

83 The statutory military rights warnings, 10 U.S.C. § 831(b) (1970), apply, for
example, whenever a suspect or accused is to be questioned without any require­
ment that the individual be in custody. Determination of whether a person was in
fact a suspect becomes in the military a question of fact.
84 384 U.S. 436, 444 (1966). Note that in the deleted footnote which follows the
quote, the Court stated, “This is what we meant in Escobedo when we spoke of an
investigation which had focused on an accused.”
Miranda was that of the police officer's view of the situation. This subjective test eliminated unreasonable perceptions of the accused but substituted the perhaps unreasonable view of the police officer.

If the purely subjective tests are to be discarded, one is left with variations on an objective test. Two major variants seem possible: whether the defendant was in fact in custody—a purely objective test; and, bearing in mind the accused's age, intellect, experience, physical condition, and so forth, whether he reasonably believed that he was in fact in custody. This latter version has the advantage of taking into account the very factors that Miranda and its predecessors considered important.

The extent to which a jurisdiction may utilize any specific test is difficult to determine because of the necessity for a case-by-case approach and because of a tendency to use ambiguous language in decisions. A plurality of American jurisdictions seemingly using a single test appear to employ one or another type of objective standard to determine the presence of custody.

Many jurisdictions choose to use what they characterize as a “focus” test. Deriving its origins from Escobedo v. Illinois, this test in its purest sense (one seldom applied) attempts to determine whether the individual questioned was in fact the “focus” or central point of the investigation. The focus test, as a definitional test for

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85 This test led to the question of the interrogating officer: “Would you have let the defendant leave?” No jurisdiction uses this test alone today.


89 See note 84 supra. It seems likely that the Supreme Court was attempting through Miranda’s footnote 4 to bring Escobedo into line with Miranda. While it may be possible to do so, the attempt is difficult at best and Miranda is better viewed as having created a new test for when warnings are required.
custody, has apparently been disavowed by the Supreme Court.\textsuperscript{90} Cleansed, however, of its confusion with custody, focus remains a viable test to determine whether a person questioned was in fact a suspect,\textsuperscript{91} and it may well be that use of the term that explains the frequent reference to focus in many of the opinions.

Following focus in popularity, is the variety-of-factors approach.\textsuperscript{92} Perhaps best characterized by the fifth circuit's formulation, this test seeks to determine custody through a four-part approach: whether the police had probable cause to arrest the suspect; whether it was the officer's intent to hold the suspect in custody; whether the suspect believed that he was not free to leave; whether the investigation had focused on the suspect.\textsuperscript{93} This approach allows the court to handle on an individual basis each case in which a formal arrest is lacking. While phrased in many fashions, many opinions in this area appear to follow a multi-factor approach leading to the distinct possibility that no majority rule exists in the nation today insofar as a specific definitional test for custody is concerned.

Regardless of the test adopted, the court in any specific case must determine whether the interrogated defendant was in custody. This is without question a matter totally dependent upon the facts of the case. Factors which have been considered important in this determination include the place of interrogation;\textsuperscript{94} when the questioning

\textsuperscript{90}Beckwith v. United States, 425 U.S. 341 (1976). In Beckwith, a case involving the failure of IRS special agents to give warnings to the suspect whom they interviewed in a private home, the Court did concede the possibility that "necustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where the 'behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' " 425 U.S. at 347-48 (citation omitted). While the failure to give warnings in such a case would be relevant, it would not be fatal.

\textsuperscript{91}See Steigler v. Anderson, 369 F. Supp. 1286 (D. Del. 1973) (questioning of family member whose relatives had died in an arson related fire were not part of an investigation which had focused on him); State v. Martin, 277 Minn. 470, 212 N.W. 2d 847 (1973) (police simply wanted to know why defendant was in vacant apartment); State v. Bennett, 36 Utah 2d 343, 517 P.2d 1029 (1973) (sheriff asked prisoner what had happened to fellow prisoner lying in a pool of blood; incriminatory answer came from nonsuspect (no focus)).

\textsuperscript{92}See Steigler v. Anderson, 369 F. Supp. 1286 (D. Del. 1973) (questioning of family member whose relatives had died in an arson related fire were not part of an investigation which had focused on him); State v. Martin, 277 Minn. 470, 212 N.W. 2d 847 (1973) (police simply wanted to know why defendant was in vacant apartment); State v. Bennett, 36 Utah 2d 343, 517 P.2d 1029 (1973) (sheriff asked prisoner what had happened to fellow prisoner lying in a pool of blood; incriminatory answer came from nonsuspect (no focus)).


\textsuperscript{94}See United States v. Carollo, 507 F.2d 50, 52 (5th Cir. 1975); Brown v. Beto, 468 F.2d 1284 (5th Cir. 1972).

\textsuperscript{95}While a custodial interrogation may take place in the suspect's home, see Orozco
took place; persons present, and the existence or absence of a formal arrest; use of weapons or other physical restraint; whether the interview was initiated by the suspect or police; whether the suspect attended the interview voluntarily; whether the suspect was or felt free to leave the interrogation, and the length and nature of the interrogation itself. The mere fact that a person has been questioned by the police does not in and of itself create a custodial interrogation. Accordingly, all the factors listed above may be relevant in determining whether custody existed for purposes.

The language of Miranda in speaking of any "significant" interference with the suspect's freedom of action is the key to the determination of custody. When the suspect has been formally arrested and brought to the police station house the determination is usually simple. Generally, it is only when the defendant has been questioned without an arrest, and usually outside the station house, that the numerous factors discussed above become critical.

D. INTERROGATION—THE HEART OF MIRANDA

The Miranda warnings are designed to protect against coercive interrogation. The meaning of "interrogation" has tended, however,
to become a term of art and defies easy definition. In its usual sense, interrogation for *Miranda* purposes refers to police questioning designed to elicit a response from a suspect. More than simple questioning is included, however. Any statement or action designed to elicit an incriminating response will be considered interrogation.\(^{101}\) Whether a statement or physical act will indeed be considered interrogation will be determined on the facts of each individual case.\(^{102}\)

Clearly exempted from *Miranda's* definition of interrogation, however, are volunteered or spontaneous statements.\(^{103}\) If a suspect should initiate a statement or should respond to entirely neutral or innocuous questioning or statements with an incriminating comment, the comment is admissible\(^ {104}\) and the police need not

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\(^{101}\)See Blackmon v. Blackledge, 396 F. Supp. 296, 299 (W.D.N.C. 1975) (confronting defendant suddenly after four hours of police interrogation with witness who accused him of murder was a form of interrogation requiring warnings). Some courts have held confrontations not to be interrogations.

\(^{102}\)Police *statements* or actions are likely to be found to be noninterrogative. See United States v. Raines, 536 F.2d 796 (8th Cir. 1976) (police remark to suspect that a search warrant would be applied for after arrest was not an interrogation, and suspect’s subsequent admission and surrender of evidence was not in violation of *Miranda*); United States v. Martin, 511 F.2d 148 (8th Cir. 1975) (police comment to defendant during search that they had arrived a day or so late to search was not an interrogation and the defendant’s resulting admission was acceptable in evidence); People v. Mangum, ___ Colo. ___, 539 P.2d 120 (1976) (police statement to suspect that electronic equipment had had its serial number obliterated was not interrogation just as officer’s greeting of the suspect was not); State v. Burton, 22 N.C. App. 559, 207 S.E.2d 344 (1974) (officer’s act of handing white hat discovered at the scene of the crime to the defendant at the police station was not interrogation; defendant’s acknowledgement of ownership did not violate *Miranda*). *But see* People v. Paulin, 61 Misc. 2d 289, 305 N.Y.S.2d 607 (Sup. Ct.), aff’d, 33 App. Div. 2d 105, 308 N.Y.S.2d 883, aff’d, 25 N.Y.2d 445, 255 N.E.2d 164, 366 N.Y.S.2d 929 (1969) (police statements concerning victim’s death held to be interrogation). See also Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287 (1977) (police transporting murder defendant emphasized to him the terrible weather and the fact that his victim’s body was abandoned in it without Christian burial; the Court found this to be interrogation).

\(^{103}\)See Garcia v. State, ___ Ind. App. 2d ___, 304 N.E.2d 812 (1973) (statement by rape suspect: “It wasn’t rape, it was assault with a friendly weapon” was admissible without warnings); State v. Hobson, ___ Minn. ___, 244 N.W.2d 654 (1976) (defendant refused to leave the police station without “his” gun; volunteered statement held admissible to establish possession of stolen weapon); Commonwealth v. Boone, ___ Pa. ___, 364 A.2d 898 (1976) (defendant asked policeman if he had heard what had happened; after his negative reply he told defendant they were going to the homicide division; she then admitted stabbing); State v. Valez, 30 Utah 2d 54, 513 F.2d 422 (1973) (as officer began to read the warnings to the defendant he volunteered: “You don’t have to ask, I shot her.”). See generally J. ZAGEL, supra note 72 at 37-40.

interrupt the statement with *Miranda* warnings. Further it appears probable, although the issue has not yet been finally resolved, that once a spontaneous statement begins the police may seek to have it continue or to flesh it out with neutral questioning.

The spontaneous statement exception to *Miranda* is difficult theoretically. If *Miranda* presumes that the psychological coercion of custody requires an offsetting warning, the same coercive atmosphere would seem to compel a suspect to make volunteered statements to seek police approval. Removing volunteered statements from *Miranda*’s coverage is thus inconsistent with its basic rationale. However, the exception appears to be too well accepted to be modified at this stage.

*Miranda* and its related cases dealt primarily with station house interrogations or their equivalent. Thus, the extent to which its comparatively broad holding involving custodial interrogations involved non-station-house questioning was unclear. It is now apparent that questioning a suspect in police custody will generally trigger the warning requirements regardless of the location of the questioning. However, a number of types of street encounter are not covered by *Miranda*.

*Miranda* expressly recognized the need for police investigation: “General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding.”

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(deputy sheriff attempted to quiet a prisoner and had a neutral conversation with him; prisoner’s volunteered statement that “he was going to con them like a snake and charm his way out . . .” was not obtained in violation of *Miranda*). Note that the nature of the statement made to the suspect will be of critical importance in determining whether it constitutes interrogation. See notes 101 & 102 supra.


See United States v. Pauldino, 487 F.2d 127 (10th Cir. 1973) (police request for bill of sale for vehicle was proper after arrested suspect volunteered the statement that he had a bill of sale for the vehicle); United States v. Vogel, 18 C.M.A. 160, 39 C.M.R. 160 (1968). Whether questions are sufficiently neutral or have become improper interrogation must be determined from the individual facts of each case. State v. Taylor, 549 A.2d 11 (Me. 1975) (police man’s question, “What do you mean?” held to be a neutral question following defendant’s initiated statement, and reply was not in violation of *Miranda*); Commonwealth v. Yount, __ Pa. __, 314 A.2d 242 (1974) (defendant entered police station and announced that the police were looking for him; police questioning to determine why, and subsequently who had been his homicide victim, was proper).

*Miranda* resolves the conflict by defining volunteered statements as those made “voluntarily without any compelling influences.” 384 U.S. at 478. Query, whether this statement applies to a volunteered admission made after station house detention?

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have envisaged a general investigation which lacked an identifiable suspect. The numerous cases in this area seem to break down into three major groups: those in which a known suspect did not exist at the time of questioning (e.g., the investigation had not yet “focused” on the individual questioned or perhaps a violation of law was not yet clear);\(^{110}\) those in which a suspect may have been known, but custody was lacking;\(^{111}\) and those in which both a suspect and custody existed but police questioning was held to have been general investigation and not within the \textit{Miranda} definition of interrogation.\(^{112}\)

While there is some reason to doubt the propriety of the last-mentioned group of cases, the Supreme Court has in the years since \textit{Miranda} evinced a hostility both to the case itself and to its application outside the station house.\(^{113}\) Accordingly, this limit on \textit{Miranda}'s scope may not be appropriate despite some question as to \textit{Miranda}'s original meaning.

Similar to this last group of cases are the cases in which a suspect has been surprised in the commission of an offense by the police and is questioned, usually after he is taken into custody. A number of courts have approved questioning without warnings in such a situation, reasoning that \textit{Miranda} was never meant to apply to on-the-scene questioning. Presumably the courts involved believe that the coercive atmosphere of the station house is lacking in such circum-


\(^{111}\)See State v. Shepardson, 184 Neb. 646, 235 N.W.2d 218, 223 (1976) (vehicle registration check led to officer's noting marijuana seeds; questioning prior to formal arrest didn't require warnings); \textit{cf.} Gedicks v. State, 22 Wis. 74, 214 N.W.2d 569 (1974) (defendant's I.D. checked by policeman to determine his reason to be on university grounds).

\(^{112}\)See Owens v. United States, 340 A.2d 821 (D.C. App. 1975) (burglar was caught at the scene and handcuffed; his incriminating reply (made one or two seconds after the apprehension) to policeman's question of what he was doing on the roof was admissible as warnings were not required); State v. Henson, ___ Ore. App. ___, 541 P.2d 1085 (1975) (vehicle stop resulted in questioning about a hit and run; \textit{Miranda} warnings held not to have been required despite fact that officer removed defendant's car keys and directed him to remain in the vehicle).

stances. Additionally, a number of decisions have mentioned the possibility that the suspect is in fact innocent and simply found in inculminating circumstances which can be cleared up quickly through limited police questioning. The propriety of such reasoning is questionable considering Miranda’s intent.

There is general agreement that law enforcement officers may ask questions of suspects without Miranda warnings when the questions are motivated by safety considerations.115 “While life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent. It is inconceivable that the Miranda court or the framers of the Constitution envisioned such admonishments first be given under [the urgent circumstances involved].” 116 While presumably the suspects in these cases retain their right to remain silent, the cases suggest that safety overcomes the Miranda rationale which dealt with a lesser priority.

A large number of courts have held that traffic offenses constitute an exception to Miranda.117 Generally, such stops will be noncustodial in any event. However, the rationale for excluding traffic stops seems to be that they are common events that are to be expected by most citizens; that the usual traffic violation is not the sort of crime Miranda dealt with; and that traffic questioning fits the general investigatory exception to Miranda.118 While this may be appropriate for simple driving violations, the same rule has occasionally been applied to drunken driving and more serious offenses.119 These cases tend to blend into those which hold that Miranda is inapplicable to misdemeanors.120 In view of the substantial punishments

115 See United States v. Castellano, 500 F.2d 325 (5th Cir. 1974) (en banc) (FBI agent participating in a gambling raid asked the defendant whether he had any weapons; the resulting seizure of illegal weapons was not in violation of Miranda); Norman v. State, 302 So.2d 254, 258 (Miss. 1974) (questions to group which had fired at the police were motivated by safety and were not inquisitorial interrogation).
117 See Clay v. Riddle, 541 F.2d 466 (4th Cir. 1976) (defendant questioned after arrest for drunken driving during which he threatened police officers with a gun; Miranda held inapplicable); State v. Bowen, 336 A.2d 228 (Del. Super. 1973) (Miranda held inapplicable to motor vehicle cases); State v. Cupp, 36 Ohio App. 2d 224, 304 N.E.2d 598 (1973) (Miranda inapplicable to questions accompanying arrest for drunken driving). But see State v. Lawson, 285 N.C.2d 329, 204 S.E.2d 843 (1974) (Miranda held applicable to traffic violations).
118 Cf. J. ZAGEL, supra note 72 at 34-35.
119 See note 117 supra.
for such offenses, one must question the legitimacy of limiting \textit{Miranda} in such a fashion. If \textit{Miranda} itself is correctly decided, how can a court accept improperly obtained statements just because the maximum sentence involved will be “no more” than a year in jail?

Any arrest requires a formal processing of the defendant, usually known as “booking.” Whether through formal booking or other administrative questioning, information is occasionally obtained which is incriminating and which proves harmful to the accused at trial.\footnote{\textit{Id.}} Four of five federal circuit courts of appeal that had considered the issue by the close of 1976 had held \textit{Miranda} inapplicable to preliminary or administrative questions.\footnote{\textit{Id.}} The rationale involved appears to be that the data is normally nonincriminating, is essential to an efficient criminal justice process, and constitutes \textit{noninvestigative} questioning.

As suggested by one commentator,\footnote{\textit{Id.}} there is limited Supreme Court authority to support this view. In \textit{California v. Byers},\footnote{\textit{Id.}} the Court upheld a state reporting system which required drivers involved in accidents to stop and leave names and addresses. Clearly the Court found a limited infringement on the driver’s privilege against self-incrimination to be appropriate.\footnote{\textit{Id.}} The same reasoning

\footnote{\textit{See} United States \textit{ex rel. Hines v. LaVelle}, 521 F.2d 1109 (2d Cir. 1975) (information gained through informal police administrative questioning while defendant was being transported to the station house proved important in identifying suspect as rapist).}

\footnote{The Courts of Appeal for the Second, Fifth, Eighth, and Ninth Circuits have held such questioning to be proper without warnings while the District of Columbia Circuit has allowed questioning but rejected its results from use in evidence at trial. \textit{Note, The Applicability of Miranda to the Police Booking Process}, 1976 Duke L.J. 574, 576 (1976), and cases cited therein.}

\footnote{\textit{Id.} at 585-86.}

\footnote{\textit{Id.} at 424 (1971).}

\footnote{\textit{Id.} at 420 U.S. 424 (1971).}

\footnote{\textit{Id.} at 579 (1970), and cases cited therein.}

\footnote{\textit{Id.}}
may be applicable here. On the other hand, Byers dealt with a situation believed to be inherently noncriminal. While the preliminary information supplied during the booking process should normally be nonincriminating, it is part and parcel of the criminal justice process and is like either to yield incriminating information directly, or to supply leads to the prosecution. It may be that the proper compromise is to allow the questioning but to immunize the defendant from any use of the information gained through it.

The Supreme Court has expressly held Miranda inapplicable to grand jury proceedings in United States v. Mandujano. The Court stated that Miranda's concern was with custodial interrogation and "simply did not perceive judicial inquiries and custodial interrogation as equivalents." The Court also stated that the right against self-incrimination at a grand jury was somewhat more limited for a witness than the privilege available to an accused being questioned by the police, that no right to counsel existed at grand juries, and that accordingly the Miranda warnings would be inappropriate. By implication, general custom, and in the military by

appears in part to be true. However, in Byers, the set of reporting was not necessarily incriminating, while prior reporting requirements that were overturned were almost equivalent to conviction. The Court actually utilized a balancing test, attempting to balance the rights of the individual with the rights of society, i.e.,

Tension between the State's demands for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other. . . .

Note also the Court's approach in fourth amendment cases, e.g., California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). It seems clear that in the case of reporting requirements, the individual's rights have been limited and that, so long as a proper purpose is involved and the result of the report is not inherently incriminating, the requirement will be upheld. As Byers indicates, the probability of incrimination is relevant. The Government may not avoid the problem by using forfeiture proceedings rather than a criminal prosecution, United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971), although civil tax proceedings are possible. But compare Widdis v. United States, 385 F. Supp. 1015 (D. Alas. 1974), with Jensen v. United States, 29 A.F.T.R.2d 116 (Colo. 1972). The alternative is to find that the privilege is applicable but that, to sustain the reporting requirement, neither the information divulged nor derivative information can be used as a prosecution. The Court in Byers rejected this alternative, finding that it would place an insurmountable burden on the prosecution. Following Mr. Justice Harlan's dissent in Byers, the Virginia Supreme Court has sustained a state reporting requirement, despite a real threat of self-incrimination, because of an overriding state interest. Banks v. Commonwealth, 217 Va. 527, 230 S.E.2d 256 (1976). See also Commonwealth v. Columbia Investment Corp., 487 Pa. 366, 325 A.2d 289 (1974).

126 425 U.S. 564 (1976). 127 Id. at 579.

126 425 U.S. at 579.
there is no necessity for a trial judge to stop a witness at trial who may incriminate himself and to warn him of his right to remain silent. It is important to note that although there is no legal duty to warn a witness of his right against self-incrimination at a grand jury proceeding or trial, warnings may be given.

By its very nature Miranda was intended to deal with criminal interrogations. Its purpose was to give meaning to the fifth amendment right against self-incrimination. By definition, an administrative consequence cannot be criminal. Accordingly, interrogations which cannot result in criminal prosecutions are not interrogations within the scope of Miranda. The dividing line between criminal and administrative consequence is thin at times, and it can be difficult in the absence of judicial decision to predict Miranda’s applicability.

129 See Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 140a(2), stating that a judge need not warn a witness at trial of his right to remain silent but that he may do so.

130 See United States v. Jacobs, No. 75-1319 (2d Cir. filed Dec. 30, 1976), suppressing the grand jury testimony of a perjury defendant for failure to warn her during the proceedings that she was a “target” of the investigation. In reaching its decision, the court exercised its supervisory powers while concurring in the Supreme Court’s decision in Mandujano. The Court noted that it had been the practice within its circuit for twenty years for United States Attorneys to warn putative defendants of their status; the failure of a strike force prosecutor in the circuit to do so resulted, in the court’s opinion, in unequal protection of the law and required suppression to enforce conformity within the circuit. Despite Jacobs, the Supreme Court has held, as a matter of constitutional law, that even putative defendants need not be warned of their right to remain silent. United States v. Wong, 45 U.S.L.W. 4464 (U.S. 1977) (No.74-838). The Court’s decision may ultimately prove of little consequence as increasing support appears to exist for legislation that would grant witnesses the right to counsel when appearing before a grand jury. See ABA Section on Criminal Justice, Criminal Justice 5 (Winter 1977).

131 Incrimination may refer to a consequence of an act (such as a criminal conviction), or to an act (a testimonial utterance) leading to a consequence. The clearest form of incrimination is a judicially imposed criminal conviction. The extent to which consequences other than a criminal conviction may constitute incrimination is unclear. In the past the Supreme Court has tended to look at the actual consequence of a proceeding and its intent, rather than at its label, to define incrimination. Thus, juvenile proceedings were generally found to be “criminal.” In re Gault, 387 U.S. 1 (1967). However, the Court may be retreating.

In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court allowed prison officials to draw an inference of guilt from the silence of Palmigiano in a prison discipline proceeding. As the Court found that the State of Rhode Island had not attempted to make use of his silence at a criminal proceeding distinct from the disciplinary proceeding, it found that the adverse inference was justifiable. Since Palmigiano was “sentenced” to thirty days in punitive segregation and a downgrading in classification, somewhat obviously the Court found the consequence of restricted lib-
This has been particularly true with Internal Revenue Service investigations. The transition between administrative tax investigation and criminal tax evasion investigation is difficult to pinpoint, despite the IRS use of intelligence division agents for tax evasion.

erty not to be the equivalent of "incrimination." The Court appears to be looking at the social purpose served by the proceeding rather than either its label or consequence. Thus, a form of increased deprivation of liberty becomes noncriminal. The case is more than a little surprising because at the time of his hearing Palmigiano had not been granted immunity and could have been prosecuted. Palmigiano's offense was "inciting a disturbance and disruption of prison operations, which might have resulted in a riot." 425 U.S. at 312. Thus the possibility of later proceedings would seem to have been real and substantial. Despite this the Court simply found that proceedings had not in fact taken place, making the case a strange and perhaps important anomaly, for in the past the question had been one of possibility and not of hindsight. The Court did note that Palmigiano's silence was only one piece of evidence considered at the hearing, implying that a disposition based only on his silence might be improper.

In a case even more disturbing than Baxier v. Palmigiano, the Supreme Court found military summary courts-martial, which can impose a sentence of thirty days confinement at hard labor, to be similar to parole revocation hearings and not criminal convictions requiring counsel for the accused. Middendorf v. Henry, 425 U.S. 25 (1976). Clearly the Court is not troubling itself over a mere deprivation of liberty. Were it not for the provisions of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 831, it would seem likely that the Court would also have removed the right against self-incrimination from service personnel receiving summary courts-martial.

While civil liability per se does not constitute incrimination, a civil penalty having a punitive intent may. See generally 8 WIGMORE, EVIDENCE §§ 2256-57 (McNaughton ed., 1961). There is an historic precedent for equating some civil actions with criminal sanctions. See Boyd v. United States, 116 U.S. 616, 634-35 (1885), holding that:

As, therefore, suits for penalties and forfeitures, incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

(in rem action).

Distinguishing between penalties that are quasi-criminal in nature is difficult. See People v. Superior Court, 12 Cal. 3d 421, 115 Cal. Rptr. 812, 523 P.2d 716 (1974), finding that authorization to award exemplary damages in a civil action does not expose the defendant to criminal sanctions against which he is protected by the privilege against self-incrimination. Deportation is not equivalent to incrimination. See Woody v. Immigration & Naturalization Service, 385 U.S. 276 (1966); Abel v. United States, 362 U.S. 217 (1960); Chavez-Ray v. Immigration & Naturalization Service, 619 F.2d 387 (7th Cir. 1975).

Loss of livelihood generally does not appear to be a relevant consequence although disbarment may. Cf. Gardner v. Broderick, 392 U.S. 273 (1968) (policeman may be dismissed if he fails to answer specific questions narrowly directed towards his duties and despite failure to grant immunity). But see ex rel. Vining v. Florida REC, 251 So. 2d 497 (Fla. 1972), finding that deprivation of livelihood may be penal in nature, and that, where license revocation or suspension is the possible result, compelling of testimony is a violation of the self-incrimination clauses of the United States and Florida constitutions.
cases. The Supreme Court has refused to apply Miranda to noncustodial tax investigations. 132

While most tax investigations are noncustodial, the same is not true of deportation proceedings. However, as deportation is viewed as a noncriminal consequence, Miranda does not apply to deportation interrogations. 133 Investigations which are primarily administrative may not require warnings despite the possibility of later criminal prosecution. 134 As prison discipline proceedings have been deter-

Disbarment has proven vexatious. In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court reversed Spevack's disbarment for invoking the privilege when he was subpoenaed to produce financial records. While there is authority for believing that disbarment is quasi-criminal in nature despite its public service function, see In re Buffalo, 390 U.S. 544, 550 (1968), most states have continued to treat it as civil in nature. See Segretti v. State Bar of California, 15 Cal. 3d 878, 126 Cal. Rptr. 793, 544 P.2d 929 (1976) ("the purpose of disciplinary proceedings against attorneys is not to punish but rather to protect the court and public from the official ministrations of persons unfit to practice," 544 P.2d at 933); Maryland State Bar Ass'n v. Sugerman, 273 Md. 306, 329 A.2d 1 (1974). See generally Note, Self-Incrimination: Privilege, Immunity and Comment in Bar Disciplinary Proceedings, 72 Mich. L. Rev. 84 (1973); Chilingirian, State Disbarment Proceedings and the Privilege Against Self-Incrimination, 18 Buffalo L. Rev. 489 (1969).

Far more difficult to resolve than even the complex issues mentioned above is "treatment." Prior to In re Gault, it was believed that juveniles were unable to assert the right against self-incrimination because their proceedings were beneficial in nature and designed for corrective purposes rather than for punishment. Thus they were "non-criminal." While Gault has bestowed the privilege on juvenile proceedings, the rationale of beneficial "treatment" remains. Thus in one case a student suspected of smoking in violation of school rules was held not entitled to Miranda warnings because "the purpose of most school-house rules is to find facts ... relating to special maladjustments of the child with a view toward correcting it [sic]." Doe v. New Mexico, 88 N.M. 347, 540 P.2d 827 (Ct. App. Rev. 1975); dissent is at 542 P.2d 834 (1975). As the student was interrogated for forty minutes and ultimately confessed to smoking marihuana, the case seems far from a simple violation of school rules.

The same theory is used to justify denying the privilege to those who will be committed to mental institutions rather than prisons. See Williams v. Director, Patuxent Institution, 276 Md. 272, 347 A.2d 179, cert. denied, ___ U.S. ___ (1976) (defective delinquent treatment is not criminal in nature); Aronson, Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?, 26 Stan. L. Rev. 55 (1973).

It would seem clear that the dividing line between a punitive consequence and legitimate treatment is rather fine. So too is the line between criminal conviction and state initiated loss of livelihood. While it seems unlikely that the Supreme Court will expand the definition of "incrimination" in the future, it and the state courts will presumably have to draw a more understandable line between those consequences which are incriminating and those which are not.

133 See Chen v. Immigration and Naturalization Service, 537 F.2d 566 (1st Cir. 1976).
134 Cf. United States v. Harris, 381 F. Supp. 1086 (E.D. Pa. 1974) (officer at airport checkpoint did not have to warn suspect of his rights after being warned that
mined to be administrative in nature.\textsuperscript{135} Miranda warnings appear to be unnecessary in the course of such proceedings.\textsuperscript{136}

\section*{VIII. WARNING SUSPECTS}

Miranda does not require any specific method of warning a suspect, and the actual method used by law enforcement agents varies by jurisdiction and individual agent. Perhaps the most common method is the oral warning in which the police warn their suspects of their rights orally either from memory or by reading from a rights warning card of one type or another.\textsuperscript{137}

Because oral warnings are susceptible both to error and to subsequent litigation at trial, many police use previously prepared warning forms in lieu of or in conjunction with oral warnings.\textsuperscript{138} Normally a suspect will be handed such a form, told to read it, and asked to acknowledge in writing receipt of his rights warnings. Frequently, the warning portions of the form will be combined with a waiver portion which will provide space for a suspect to either exercise his rights or to waive them. Use of written waiver forms tends to moot many of the usual errors that may accompany oral warnings if only because the form itself is admissible in evidence at trial while the officer who gives oral warnings is subject to cross-examination as to their content.

Written warnings and waiver certificates are not, of course, conclusive on the issue of Miranda compliance, for the suspect may misunderstand the written notice, feel compelled by the circumstances of the situation, or be motivated to waive his rights by other information given by the interrogating officers.\textsuperscript{140} However, the

\begin{itemize}
\item the suspect had a gun inside his bag. \textit{See generally} cases cited at notes 109-114 \textit{supra} and accompanying text.
\item Baxter \textit{v.} Palmigiano, 425 U.S. 308 (1976).
\item \textit{Id.} at 315.
\item Warning cards are in widespread use. \textit{See State \textit{v.} Attebery}, 110 Ariz. 354, 519 P.2d 53 (1974) (defendant was asked to read the card, then the police officer read to the defendant, and then the defendant signed the card after answering the officer's questions relating to his rights); Breedlove \textit{v.} State, 516 P.2d 553 (1973) (officer read the card to the suspect and then asked him if he understood each of the rights).
\item Written explanation of rights will be sufficient if the suspect can read and understand them. They need not be supplemented by oral explanation. \textit{See State \textit{v.} McNeal}, \textit{La.} \textit{So.2d} \textit{So.2d} (1976) (18 Crim. L. Rep. (BNA) 2524 (Feb. 23, 1976)).
\item When the warning form has a waiver portion it is not unknown for unscrupulous police officers to tell suspects that signing the waiver portion of the form
\end{itemize}
written format does place the prosecution in a better tactical position than does an oral warning.

IX. WAIVING THE MIRANDA RIGHTS

A. THE WAIVER FRAMEWORK

A suspect may not be subjected to custodial interrogation unless he waives his right to remain silent and his right to counsel. To be effective the waiver must be "made voluntarily, knowingly and intelligently." Thus, in the absence of a "spontaneous" statement volunteered by the suspect, the burden is on the police to obtain a valid Miranda waiver before interrogation may take place. In the words of Miranda:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

It is apparent that there is no need for a suspect to exercise affirmatively his right to remain silent. Rather, he must waive his privilege in order to make a statement. The right to counsel must, however, be affirmatively exercised.

144 While the suspect need not affirmatively exercise his right to remain silent, there are numerous cases attempting to determine whether a suspect has in fact exercised his privilege to remain silent, in whole or in part. See United States v. Marchildon, 519 F.2d 337, 343 (8th Cir. 1975) (defendant's response to police request to inform meant only that suspect wouldn't talk about his sources of supply, not that he wished to remain silent). As suspects are wont to make comments when asked if they wish to make a statement, the courts are faced with an endless variety of factual settings which must be individually analyzed to determine whether the suspect was attempting to stop the interrogation.

145 While a suspect who does not waive his rights to counsel must be given a
consultation 146 or to some specific limited use, 147 in the absence of the suspect's express permission to allow it to continue, a request for a lawyer will stop interrogation completely. 148

The ideal form of waiver would consist of a proper rights warning followed by three questions: "Do you understand your rights? Do you want a lawyer? Do you wish to make a statement?" 149 An answer of yes to the first and third questions and a negative to the second create a proper waiver. However, such an express waiver is rare. Most cases dealt with in the courts 150 appear to involve alleged waivers in which either the suspect stated that he understood his rights and then proceeded to answer police questions, 151 or went immediately from the warnings to the interrogation. 152 Faced with this situation the courts have generally accepted implied waivers 153 when convinced of their existence. Of course, in doing so the courts must weigh all of the surrounding circumstances, for the waiver must be voluntary.

It is important to distinguish between cases in which the suspect spontaneously began making a statement after receiving warn-

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147 See People v. Madison, 56 Ill. 2d 476, 309 N.E.2d 11 (1974) (defendant's statement that he would give a statement but not sign it until a public defender was present held not to prevent interrogation as it was not a request for counsel).
149 This form of express waiver is in use in the Army, for example. See Dept of the Army Form 3881, Rights Warning/Waiver Certificate. Note that a defective warning will usually render any waiver a nullity.
150 It must be remembered that perfect waivers are seldom litigated. Thus, it can be presumed that numerous express waivers are obtained by police, but that those cases involving implied waiver are apt to be challenged.

145
ings and those in which he began answering questions after receiving warnings. In the first situation, the statement is voluntary and spontaneous and waiver is virtually automatic; in the second, waiver must be found from the circumstances. Presence of the suspect’s attorney at the interrogation is persuasive, if not absolute proof, of waiver and will usually serve to do away with the need for either waiver and/or warnings.

A recurring problem is that of the suspect who refuses to sign a written waiver. The courts have consistently held that the mere refusal to sign such a waiver does not make a subsequent statement involuntary. On the other hand, it may be strong evidence of the suspect’s desire not to waive his rights and may consequently result in a finding of nonwaiver. A related problem is the suspect who makes an oral statement but refuses to make a written one. While such a refusal may mean only that the suspect has gotten “cold feet,” it may also indicate a mistaken belief that Miranda bars oral statements from use in court but not written ones. In such a case, the oral statement will be inadmissible because of a basic misunderstanding of the Miranda rights.

B. KNOWING AND VOLUNTARY WAIVER

A valid Miranda waiver presupposes that the suspect involved is aware of and understands his Miranda rights. A defect in the warnings may thus make waiver impossible. Just as the warnings

154 Errors in warnings can frequently be cured by spontaneous statements from the suspect, for it is a rare case in which such a statement is found to have been an improper product of coercive circumstances.

155 See White v. State, 294 Ala. 265, 314 So.2d 857 (1975). See generally J. Zagel, supra note 72, at 58-65. While warnings in such a case may be unnecessary, as Mr. Zagel suggests, they are well advised to moot future claims of error.


159 Miranda expressly rejects the possibility that warnings may be omitted because the suspect may have prior knowledge of his rights. “[w]hatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise his privileges at that point in time.” 384 U.S. 436, 468-69 (1966). Note that the suspect who persistently interferes with a police attempt to warn him of his rights by claiming prior knowledge may be held to his statement if
must be properly communicated, so too must the suspect comprehend them and the effects of waiver. Should the suspect lack the ability to understand the rights or to make an intelligent waiver decision, a waiver will be void. Thus, in any given case, questions relating to the suspect’s intelligence, physical and mental condition, and the circumstances surrounding the waiver will be highly relevant. To a large extent the determination of the voluntariness of the waiver subsumes the traditional common law determination of the voluntariness of a confession. Miranda explicitly bars the use of threats, trickery, and cajolery to obtain waivers although trickery that does not overbear the will of the suspect may be acceptable after a valid waiver.

C. STATE AND MILITARY RESTRICTIONS ON WAIVER

Many of the states have formulated their own statutory or judge-made restrictions on waiver of the Miranda rights. Perhaps the most interesting rule can be found in New York, which has
held 165 that a suspect who has obtained counsel cannot waive his right to counsel at an interrogation unless an affirmative waiver is made in the presence of the attorney. Somewhat obviously the New York rule tends to prevent lawyerless interrogations after counsel has entered the scene. Such a rule prevents law enforcement agents from nullifying the right to counsel. 166 A counterpart is found in military law.

A number of states have created special restrictions on obtaining statements from juveniles, often requiring the presence of family members or an attorney before the Miranda rights can be waived. 167 Because of the diversity of state rules, statutes, and interpretations, it is essential in any state case to scrutinize state law carefully when determining what is necessary for a valid waiver.168

D. SHOWING WAIVER AT TRIAL

Prior to Miranda the primary issue surrounding a confession or admission was the voluntariness of the statement offered in evidence. While this voluntariness doctrine remains, Miranda has had the pragmatic effect of merging the traditional voluntariness inquiry into the Miranda waiver determination. As the waiver question takes into account all of the questions that usually surround the voluntariness inquiry, a finding of a valid waiver normally dictates a finding that the statement itself was made voluntarily. Consequently, the issue to be litigated is the validity of the Miranda waiver. The procedures and burdens that usually accompany the traditional voluntariness inquiry normally apply to the Miranda waiver inquiry.169

166 Interestingly, the Court of Military Appeals has held that interrogations of military personnel who have obtained counsel cannot take place unless counsel has been previously notified and given an opportunity to attend the interrogation. United States v. McOmber, 24 C.M.A. 207, 51 C.M.R. 452 (1976). McOmber was the product of a number of cases in which military interrogators obtained statements, after proper warnings and waivers, from defendants in the absence of their defense counsel.
167 See Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972) (child’s parents or guardians must be informed of the Miranda rights and child must be allowed to consult with parents or guardians or attorney before waiver can take place); In re F.G., 511 S.W.2d 370, 373-74 (Tex. Ct. Civ. App. 1974) (Texas Family Code held to require attorney’s concurrence before juvenile can waive privilege against self-incrimination). See also Hall v. State, ___ Ind. ___, 346 N.E.2d 584 (1976).
168 See Hogan v. State, 330 So. 2d 557 (Fla. App. 1976) (state statute, Fla. R. Crim. P. 3.111(d) (4), required written waiver of counsel in the presence of two attesting witnesses; failure to so waive held nonprejudicial, however).
169 See generally Lederer, The Law of Confessions—The Voluntariness Doctrine,
Once the issue is raised, the burden is on the government to prove, usually by a preponderance of the evidence,\textsuperscript{170} that applicable rights warnings were given and that a valid waiver was obtained. Normally, this is done via testimony of the officer who gave the warnings and obtained the waiver, or of a witness to the event, although a written warning and waiver form may be used. Some courts will allow a police officer to testify that he read the warnings from a standard card that he carried, rather than requiring that he testify to the specific warnings from memory.\textsuperscript{171} Others will reject such a procedure in the absence of the doctrine of past recollection recorded. The mere statement, "I read his rights to him," is insufficient.\textsuperscript{172}

A written rights waiver certificate is admissible when the proper foundation is laid.\textsuperscript{173} The defense will usually attempt to show an incomplete or confusing warning and either nonwaiver or a misunderstood waiver by the defendant. Because much of the usual litigation surrounding a waiver concerns what actually happened, interrogators are well advised to record their session on tape or videotape.\textsuperscript{174} Similarly, when doubt exists as to what actually occurred, a defense counsel should, where local procedure permits, request that the judge make special findings as to the actual facts surrounding the warnings and alleged waiver.\textsuperscript{175}
X. NOTICE TO COUNSEL OF INTERROGATIONS

Law enforcement agents have frequently questioned suspects known to have had counsel. When, as is often the case, the suspects in question waive their Miranda rights and make statements in the absence of their attorneys, the defense counsel have little alternative other than to allege at trial that either Miranda has been violated or that the attorney-client privilege has been infringed.

To date, at least two jurisdictions have fashioned rules to prevent such conduct. New York has interpreted its state constitution to make waiver of the Miranda rights impossible once counsel has been obtained unless waiver takes place in the presence of the attorney.176 The Court of Military Appeals has construed the Uniform Code of Military Justice to require that when interrogators know that a suspect has counsel they must give that counsel notice of the planned interrogation and adequate opportunity to attend.177

However, overwhelmingly, the majority rule, both federal178 and state,179 is that the police need not warn counsel of an impending interrogation of their clients. Further, most courts have held that a suspect who has previously invoked his right to counsel may later waive it in the absence of counsel.180 A number of courts have, however, while sustaining the legality of questioning without notice to counsel, raised significant ethical questions about its propriety181—particularly when the questioning is done by a prosecutor.182

Evans, supra, with United States v. Gardner, 516 F.2d 334 (7th Cir. 1975). Specific factual findings do not appear to be required. However, the defense would be wise in many cases to attempt to obtain them.


178 Moore v. Wolff, 495 F.2d 35 (8th Cir. 1974); United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973) (and cases cited therein). But see United States v. Flores-Catulio, --- F.2d --- (9th Cir. 1976) (19 Crim. L. Rep. 2405, Sept. 14, 1976) (defendant who had invoked her right to counsel could not waive that right later without the assistance of counsel).


180 See generally section XI infra.


182 See the cases collected at United States v. Masullo, 489 F.2d 217, 223 n.3 (2d Cir. 1973).
XI. THE EFFECTS OF INVOKING MIRANDA—
COMPLIANCE
AND NONCOMPLIANCE

A. INVOKING MIRANDA

As has been previously discussed,\(^\text{182}\) the Court in *Miranda* created a framework which prevents a statement from being obtained during a custodial interrogation unless a valid waiver of rights has been obtained from the suspect. Although it is clear from *Miranda* that a nonwaiver is to be considered an affirmative exercise of the *Miranda* rights, the theoretical rule can be difficult to apply to the facts of an individual case, particularly when most courts recognize implied waivers.

The clearest invocation of *Miranda* is a suspect’s affirmative refusal to speak, accompanied by a request for a lawyer. In such a case, the police are duty bound to cease interrogation\(^\text{184}\) and to obtain counsel.\(^\text{185}\) Either a refusal to speak or a request for counsel, unless qualified in some matter, will stop questioning. However, it is possible for a qualified exercise of rights to be made. A suspect may refuse to discuss a specific topic but remain willing to talk about other matters; the suspect may wish counsel but only at a later time; discussion at the moment may be rejected in favor of a later statement. Accordingly, each case must be looked at closely to determine to what extent the *Miranda* rights have actually been exercised. To the extent to which they have actually been invoked, the police must comply and/or cease interrogation.

B. NONCOMPLIANCE WITH MIRANDA

The price of noncompliance with *Miranda* is simple—exclusion of the resulting evidence from trial. Subject to the effects of statutory attempts to overrule *Miranda*,\(^\text{186}\) the case requires that the product of a *Miranda* violation and its derivative evidence be excluded from trial.\(^\text{187}\) One significant exception to this exclusionary rule exists.

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\(^{182}\) Section IX *supra.*

\(^{183}\) The extent to which interrogation may be resumed after the suspect has refused to make a statement is unclear and is discussed in section XI, part C, *infra.*

\(^{185}\) However, the police may opt simply to discontinue the interrogation. This is not to suggest that the police may arbitrarily refuse to supply counsel, but if counsel is in fact unavailable, the police may choose to notify counsel and discontinue questioning. See section VI, part A, *supra.*


\(^{187}\) 384 U.S. 436, 479 (1966): “*N*o evidence obtained as a result of interrogation...
The Supreme Court has expressly approved the use of evidence obtained in violation of *Miranda* for impeachment purposes.\(^{188}\)

This limited inroad on the exclusionary rule results from an increasing Supreme Court dissatisfaction with the exclusionary rule generally and *Miranda* specifically. By allowing such evidence to be used for impeachment, the Court has expressly countenanced police violation of *Miranda* (and perhaps more importantly has encouraged it), for now the Court has given an interrogator who has been stymied by a suspect's refusal to talk, a reason to attempt to overcome his assertion of his right to remain silent.\(^{189}\) Perhaps for this reason, a number of jurisdictions have declined to follow the Supreme Court's lead and have expressly rejected the impeachment exception to the *Miranda* exclusionary rule.\(^{190}\)

### C. MULTIPLE INTERROGATIONS

Multiple interrogations present three significant problems: the degree to which proper warnings and waiver at one interrogation persist and extend to a later interrogation; the extent to which a defective warning or waiver at an interrogation may taint a subsequent interrogation; and whether an individual who exercises his *Miranda* rights at one interrogation may be questioned again at a later time. Each question will be examined separately.

The degree to which proper *Miranda* warnings and waiver may


persist and excuse the absence of warnings and waiver (or perhaps more importantly an incomplete or improper waiver) at a subsequent interrogation is unclear and is usually addressed on a case-by-case basis by the courts. If the time period between interrogations is short and the multiple interrogations can be characterized as one continuous interrogation or a single transaction, the lack of warnings at the later interrogation will be harmless. However, what defines a "continuous interrogation," or otherwise justifies waiving warnings at a second or later interrogation, depends solely upon the facts of each case and the approach of the individual court. Because a delay between waiver and interrogation or between successive interrogations may easily taint a statement, warnings should be given and a new waiver obtained at each interrogation to moot possible error and exclusion.

The extent to which an improperly obtained statement may taint further interrogations despite an otherwise proper Miranda waiver is a difficult question to determine in the absence of the specific facts of a given case. The law recognizes that any of the many factors that could render a statement involuntary may well have continued effect—enough effect to render a later statement involuntary. The mere knowledge that a statement has already been given

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191 See United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974) (the ultimate question is only: "Did the defendant with full knowledge of his legal rights, knowingly and intentionally relinquish them?"); United States v. Schultz, 19 C.M.R. 311, 41 C.M.R. 311 (1970) (7-hour delay did not affect "single continuous interrogation"); Gregg v. State, 228 Ga. 117, 210 S.E.2d 659 (1974) (14 hours between waiver and final statement did taint statement); State v. Myers, 246 A.2d 500, 503 (Me. 1968) (17-hour period between warnings and statement did not vitiate warnings when defendant was reminded at the interrogation of the warnings previously given and he acknowledged them); State v. Rehn, 86 N.M. 291, 523 P.2d 26 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974) (two sets of warnings were sufficient; third set was unnecessary in view of the short delay); State v. Meznorn, 288 N.C. 417, 434-35, 219 S.E.2d 201, 212 (1975) (20-30 minute delay between interrogations did not affect prior warnings).

192 See United States v. Weston, 51 C.M.R. 868 (A.F.C.M.R. 1976) (120-day delay and different offenses required new waiver); United States v. Boster, 38 C.M.R. 681 (A.B.R. 1968) (two interrogation sessions found separate and distinct); State v. White, 288 N.C. 44, 52, 215 S.E.2d 557, 562 (1975) (a number of hours' delay between statement required a new warning and waiver when the second interrogation took place at a new location and under different circumstances); Commonwealth v. Wideman, 460 Pa. 690, ----, 334 A.2d 584, 589 (1975) (12-hour delay between initial waiver and confession required a new set of warnings when the interrogation was broken a number of times and the suspect was allowed to sleep for a period).

193 Incomplete warnings, erroneous warnings, failure to comply with an attempted exercise of the right against self-incrimination or the right to counsel, physical coercion, threats, inducements and psychological coercion, to name the more usual violations.
may be considered a major factor in a suspect's decision to make a subsequent statement.\footnote{194}

On the other hand, it is equally apparent that many of the errors that can cause a statement to be inadmissible may either be exceedingly minor in scope and of little continued effect, or may be adequately counterbalanced by rights warnings and circumstances. The courts have generally treated these cases on a case-by-case basis, looking carefully at the unique facts of each to determine the probability that the impropriety of the first interrogation was overcome by procedures used in the later one.\footnote{195}

The burden to show voluntariness remains with the prosecution, which must show the later statement to have been obtained in full compliance with\footnote{Miranda} and the voluntariness doctrine. The burden may be difficult to meet under these conditions. The courts have apparently treated cases involving only Miranda violations at the earlier interrogation somewhat more leniently than cases involving violations of the pre-Miranda voluntariness doctrine.\footnote{196} In all such cases involving a later custodial interrogation,\footnote{197} proper warnings must be given and a proper waiver obtained. If this is done and the prosecution can show that any prior taint has been dissipated\footnote{198} by time, special warnings, or circumstances, the statement is apt to be admissible.\footnote{199}

Statements involving physical coercion, threats or un-

\footnote{194} The suspect may believe that the "cat is out of the bag" and he has nothing to lose by confessing further.

\footnote{195} The courts have generally rejected the theory that the "cat is out of the bag" rationale requires suppression of all subsequent statements unless perhaps the suspect is told that his prior statement is inadmissible. See Tanner v. Vincent, F.2d \_, \_, 19 Crim. L. Rep. 2509 (2d Cir. Aug. 27, 1976) (and cases cited therein). However, the inadmissibility of the first statement is a factor that must be considered when weighing the admissibility of the later statement. See State v. Silver, 288 N.C. 709, 213 S.E.2d 247 (1975).

\footnote{196} See United States v. Toral, 536 F.2d 893 (9th Cir. 1976) (where first interrogation had little that was inherently coercive and was defective almost exclusively because of the police failure to give warnings, the later statement was untainted). See generally C. McCormick, Evidence § 167 (2d ed. 1972).

\footnote{197} While Miranda warnings only apply to custodial interrogation, it would seem only logical that an inadmissible statement could taint a subsequent statement obtained during noncustodial interrogation. However, the balancing test usually applied would likely make it easier for the prosecution to meet its burden in such a case.

\footnote{198} An exploitation of the first statement will likely render the second inadmissible. Similarly, a statement by the accused to the effect that "I wouldn't tell you this if I hadn't talked to you yesterday" will probably doom the statement if the prior statement had been inadmissible.

\footnote{199} See Tanner v. Vincent, F.2d \_, 19 Crim. L. Rep. 2509 (2d Cir. 1976); People v. Linwood, 30 Ill. App. 3d 454, 333 N.E.2d 520 (1975); State v. Davis, La. \_, 336 So. 2d 805 (1976); State v. Dakota, 300 Minn. 12, 217 N.W.2d 748
lawful inducement will be more difficult to salvage.\footnote{While not required,\footnote{interrogators attempting to repair an improperly obtained statement should not only give the usual warnings but should notify the suspect that the earlier statement should be considered inadmissible at court, in order to moot later litigation.\footnote{By far the most difficult question in this area is whether a suspect's exercise of his \textit{Miranda} rights prevents questioning at a later time. Clearly, competing considerations are involved. \textit{Miranda} expressly required that questioning must stop as soon as a suspect invokes his rights.\footnote{To allow repetitive attempts at interrogation can only be regarded as a wearing away of the \textit{Miranda} armor, even if \textit{Miranda} warnings are given during each attempt.}}}}

Violations of the traditional voluntariness doctrine are deemed more likely to have substantial long term effect than the failure to give the prophylactic \textit{Miranda} warnings. Arguably this is correct if one views the station house or custodial interrogation atmosphere as less coercive than intentional affirmative misconduct. Similarly, threats, inducements, and so forth will usually be the results of intentional misconduct, while most \textit{Miranda} violations may be unintentional. Under such circumstances the public policy behind the exclusionary rule should be applied differently, as the probability of deterring police misconduct will differ. For a different justification of different treatment, see C. McCormick, \textit{Evidence} 345 (2d ed. 1972).\footnote{See Tanner v. Vincent, ___ F.2d ___ , 19 Crim. L. Rep. 2509 (2d Cir. 1976); State v. Dakota, 300 Minn. 12, 16, 217 N.W. 2d 748, 751 (1974).} 204

In 1975, the Supreme Court in deciding \textit{Michigan v. Mosley}\footnote{423 U.S. 96 (1975), hereinafter cited as \textit{Mosley}.} attempted to resolve the problem but left the area in near hopeless confusion. Richard Mosley was arrested in Detroit in connection with a series of robberies. He was brought to the police department where he was advised of his rights, after which he affirmatively re-


Violations of the traditional voluntariness doctrine are deemed more likely to have substantial long term effect than the failure to give the prophylactic \textit{Miranda} warnings. Arguably this is correct if one views the station house or custodial interrogation atmosphere as less coercive than intentional affirmative misconduct. Similarly, threats, inducements, and so forth will usually be the results of intentional misconduct, while most \textit{Miranda} violations may be unintentional. Under such circumstances the public policy behind the exclusionary rule should be applied differently, as the probability of deterring police misconduct will differ. For a different justification of different treatment, see C. McCormick, \textit{Evidence} 345 (2d ed. 1972).\footnote{See Tanner v. Vincent, ___ F.2d ___ , 19 Crim. L. Rep. 2509 (2d Cir. 1976); State v. Dakota, 300 Minn. 12, 16, 217 N.W. 2d 748, 751 (1974).} 202

\textit{Michigan v. Mosley}\footnote{423 U.S. 96 (1975), hereinafter cited as \textit{Mosley}.}
fused to answer any questions about the robberies. A few hours later, a different detective approached Mosley in his cell, gave proper warnings, and questioned him about a homicide. Mosely admitted participation.

The majority of the Court held that Mosely's Miranda rights had not been violated in that the first interrogation had stopped immediately when he refused to answer questions, and the second session pertained to an entirely different offense. The majority appears to have highlighted the fact that while Mosley exercised his privilege against self-incrimination, he did not request counsel.

Justices Brennan and Marshall, dissenting, pointed out that the homicide was in fact connected with the robberies, as Mosley had been arrested only after a "tip" that concerned both offenses, and that not only had the interrogations been connected, but that Mosley's refusal to discuss the robberies should have been construed to have included the homicide. More importantly, the dissenters criticized, properly it would seem, the majority's holding that so long as a refusal to talk was "scrupulously honored" interrogation could resume at some later time. Not only did such a test seem to further erode Miranda, but it created a test without meaning, for no indication of time limit between interrogations appears in the opinion. Justices Brennan and Marshall suggested that subsequent interrogation should be prohibited until counsel was appointed and present or until the accused was arraigned.

Thus, at present the police may attempt to question a suspect who has previously asserted his right against self-incrimination so long as they honored the original refusal to talk and so long as some unknown time period existed between the two interrogations. Further, the Court has arguably ruled only on a subsequent interrogation for an offense unrelated to the first interrogation, although the Court's ultimate direction appears clear. It is, however, important to note that the majority in Mosley highlighted the fact that Mosley had not affirmatively requested counsel, suggesting strongly to the

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205 It is interesting to note that Mr. Justice White, concurring, stated: "... I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now." 423 U.S. at 168.
206 423 U.S. at 104.
207 423 U.S. at 111.
208 Id. at 114-15. For further discussion see Note, 21 VILL. L. REV. 761 (1976-77).
209 Compare Mosley with Miranda, 384 U.S. at 473-74.
210 423 U.S. at 116.
reader that a request for counsel might block subsequent interrogation until counsel was obtained. Such a rule would find some precedent in the decisions of a number of lower courts.

At present the state of the law may be summarized thusly: It is clearly constitutional to request a statement, after proper warnings and waiver, of a suspect who has previously refused to make a statement about a different offense, if there has been an "appreciable" delay between interrogations and if the circumstances do not seem coercive. It is probably proper to attempt a later interrogation involving the same offense that the suspect originally refused to discuss so long as his original refusal to talk was "scrupulously honored." It is also clear that the Court has rejected the notion that Miranda expressly forbids renewal of interrogation. All other questions, particularly those cases in which the suspect did in fact request counsel, are left open for later decision.

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211 Id. at 104, note 10: [Miranda] "directed that 'the interrogation must cease until an attorney is present 'only' if the individual states that he wants an attorney." However, the Supreme Court in Brewer v. Williams, ___ U.S. ___, 45 U.S.L.W. 4287, 4292 (1977) appears to accept the proposition that a defendant may always waive his right to counsel although it is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" [citations omitted]. Thus, it seems that a defendant may be questioned a second time even though at the first session he requested counsel. For the second session to yield an admissible statement, however, in the absence of counsel, the accused must intentionally and knowingly give up the right to counsel—arguably from Brewer's context a higher standard than normally used in Miranda cases.

212 See United States v. Clark, 489 F.2d 802 (4th Cir. 1975).


215 While some courts have held that a request for counsel prevents later interrogation until counsel has been obtained and present, see United States v. Flores-Cavillo, ___ F.2d ___, 19 Crim. L. Rep. 2405 (9th Cir. July 14, 1976); People v. Parnell, 31 Ill. App. 3d 588, 350 N.E.2d 27 (1975); Commonwealth v. Orton, ___ Mass App. Ct. ___, 355 N.E.2d 925, 927 (1976); Buckingham v. State, ___ Tenn. App. ___, 540 S.W.2d 660 (Tenn. Crim. App.), cert denied, ___ Tenn. ___, ___ S.W.2d ___. (1976). See also Brown v. United States, 359 A.2d 600 (D.C. Ct. App. 1976) (interrogating detective was unaware of suspect's prior request for counsel, statement was admissible). See also n.210 supra, discussing Brewer v. Williams, ___ U.S. ___ (1977).
Believing that *Miranda* was a major impediment to effective law enforcement, police, prosecutors, and much of the nation's more vocal citizenry greeted the decision with outrage that has cooled only slightly with time. The national displeasure resulted in a Congressional attempt to overrule *Miranda* by statute which President Johnson signed into law as part of the Omnibus Crime Control and Safe Streets Act of 1968. Insofar as *Miranda* was concerned, the statute attempted to replace the *Miranda* exclusionary rule that required suppression of a statement obtained without proper *Miranda* warnings and waiver, with a pre-*Miranda* voluntariness test.

At the time of its enactment, the "Post-Miranda Act" was considered unlikely to affect *Miranda* directly, as *Miranda* was considered a decision resulting from constitutional interpretation and beyond statutory control. Accordingly, while other sections of the

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217 18 U.S.C § 3501(b) (1970):

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant was advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

218 Despite some argument that Congress should have acted to limit the federal courts' jurisdiction to review on appeal, a finding that a confession was voluntary in the § 3501 sense, see [1968] U.S. Code Cong. & Ad. News 2139-2150, Congress seems to have abandoned its attempt to expressly limit federal jurisdiction, and there seems to have been significant doubt that the statute could actually affect *Miranda*. See Gandara, supra note 216, at 311-18; O. Stephens, supra note 216, at 142-46. Professor Stephens suggests at page 145 that the statutory effort to limit *Miranda* may have been intended to signal the Supreme Court that it had gone too far and should reconsider *Miranda* and its general approach in criminal matters.
The statute had effect,219 the Miranda portion tended to be ignored.220 However, the Supreme Court's clear dislike for Miranda has resulted in a significant shift in the potential importance of the statute.

In Michigan v. Tucker,221 the Supreme Court apparently found that Miranda lacked constitutional dimension and served only as "prophylactic rules." 222 While there is surely every reason to believe that the Warren Court had not intended to set the Miranda decision in concrete for all time,223 Miranda was clearly a decision of constitutional dimension. With the Court's present view, however, it seems possible that the "Post-Miranda Act" could be found by the Court to have preempted the Court's "nonconstitutionally required" Miranda framework.

Although the Supreme Court had not had the occasion to construe the legality and effect of the "Post-Miranda Act" by the early part of 1977, some courts had begun to apply it to prevent exclusion of statements that would have been suppressed under Miranda.224 While at present Miranda governs, the long term effect of the statutory attempt to overrule it is unknown and cannot be dismissed as clearly ineffective.

XIII. MIRANDA'S FUTURE

Miranda has been with us since 1966. Although it seems unlikely that it will ever pass from the legal scene completely, it would take an incurable optimist to predict its continued vitality in even its present form by 1980. The Supreme Court has consistently 225

219 The sections attempting to overrule the Courts' decisions in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), were apparently successful.

220 See Gandara, supra note 216, at 311-13, indicating that federal law enforcement agents have adhered to Miranda and that many of the United States Attorneys did not urge § 3501 on Federal District Courts to save confessions, although the Southern District of New York "had invoked section 3501 in several cases . . . " Gandara at 312.


222 Id. at 486.

223 Miranda expressly recognized that other effective techniques might be developed which could replace the warnings. 384 U.S. 436, 467 (1966).

224 See United States v. Crocker, 510 F.2d 1129, 1138-1139 (10th Cir. 1975) which states,

"We have held that voluntariness is the sole constitutional requisite governing the admission of a confession in evidence. . . . We believe that Michigan v. Tucker, although not involving the provisions of § 3501, supra, did, in effect, adopt and uphold the constitutionality of the provisions thereof.

510 F.2d at 1137 (citations omitted).

225 But see Doyle v. Ohio, 426 U.S. 610 (1976); and United States v. Hale, 422
undercut its stepchild and has clearly made preparations for its eventual demise. Congress has attempted to overrule it, and many of the subordinate federal and state courts have made a point of distinguishing between statements inadmissible under the voluntariness doctrine and statements obtained "only" in violation of Miranda. The outpouring of sentiment that accompanies every case taken by the Supreme Court that might be used as a vehicle to further hasten Miranda's end indicates that much of the nation continues to reject the case.

Perhaps the most interesting thing about the continued resistance to Miranda is that there seems little empirical evidence to substantiate the many claims made on behalf of its opponents. While clearly Miranda has educated police to a functional knowledge of the fifth amendment privilege and has made a change in interrogation

U.S. 171 (1975), holding that the silence of a suspect after having received Miranda warnings may not be admitted at trial for impeachment purposes. Arguably these cases involve the basic exercise of the self-incrimination privilege rather than Miranda itself. To penalize for silence after having warned a suspect of his right to remain silent, would appear destructive of the privilege.


229 If, ... (Miranda's) impact is seen largely in terms of the educational purposes served by many Supreme Court rulings, Miranda can be accorded great importance. Regardless of his estimate
procedures, the studies of *Miranda*’s actual effects on law enforcement suggest that those effects have been minimal.\(^\text{230}\)

*Miranda*’s effects should be analyzed from two perspectives—the degree to which it has hindered law enforcement by preventing confessions or related benefits,\(^\text{231}\) and the degree to which it has truly proven to be a protection against the “inherent coercion of the station house.” In both cases *Miranda*’s actual effects appear to have been minimal. While it has not hurt law enforcement seriously, neither has it particularly improved the lot of the suspect.\(^\text{232}\)

Should this be the case, why has *Miranda* encountered so much resistance? While the evidence suggests minimal actual effect, there can be no question that *Miranda* is perceived as having reduced the number of statements made and consequently the overall conviction and case clearance rate. Thus, the popular belief does not correspond with the reality. Further, a number of the studies have indicated that while police may know the rules, they are frequently unaware of *Miranda*’s policy intent and its background. Thus, lack of education is a significant factor in the opposition to the case.\(^\text{233}\)

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of the decision, each officer whom we interviewed displayed at least rudimentary knowledge of

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\(^{231}\) One commentator found that police in one city felt that *Miranda* had adverse effects “in five areas: (1) in the outcome of formal interrogations, (2) in the collateral functions of interrogation [i.e., implication of accomplices, solving other crimes, recovery of stolen property, and clearing suspects], (3) in the amount of stolen property recovered, (4) in their conviction rate, and (5) in their clearance rate.” Witt, n.230, supra at 322.

\(^{232}\) See Griffith, n.230 supra. The problem with *Miranda* as a remedy for psychological coercion is that the warnings, even if properly given, do not appear to act to diminish the underlying compulsion to cooperate and are, therefore, valueless. Equally important is the perception of many familiar with police work that the warnings are given in such a rapid and/or ritualistic fashion, or with use of voice intonations that either threaten or embarrass the suspect, that they are effectively nullified.

\(^{233}\) On the Thursday following the Supreme Court’s decision in Oregon v. Mathiason, n.226 supra, the editorial page of the Washington Post carried a stri-
is particularly important, for *Miranda* has become a symbol—an overly simplistic symbol—in the minds of many who view it as a token of "liberal" support for the rights of criminals in preference to support for the forces of law and order needed for the continued survival of society.

Perhaps in reaction, many of those who support the case view it as one of the truly basic guarantees of freedom in contemporary civilization, neglecting to note the probability that it has failed to accomplish its primary purpose. Viewed as a symbol—a symbol that has never been truly comprehended by most of the country—*Miranda*'s problems may be explained, for *Miranda* is a handy tool for police and public who feel abandoned by the judicial process, and who look for simplistic explanations for the crime problem. After all, it is easier to blame the courts for coddling criminals, using *Miranda* as an example of such anti-social interference, than to come to grips with the incredibly complicated causation underlying the ongoing crime rate. Regardless of the reality, however, and regardless of the reasons, there can be little doubt that *Miranda* lacks the minimum consensus needed for the continued effective survival of a Supreme Court decision.

What then of *Miranda*? It seems highly likely that a procedural mechanism similar to 18 U.S.C. § 3501 or to the American Law Institute's Model Code of Pre-Arraignment Procedure will be...
adopted. Under such a mechanism, rights warnings would continue to be required in one form or another, and requested counsel would still have to be supplied, but the result of a good faith mistake or omission would not necessarily be fatal to the resulting evidence's admissibility. In short, the “new” test to be applied for suppression will likely be a variant of the “old” voluntariness test. Should this be the case, *Miranda* will never be overruled; it will simply be emasculated.

choice whether to make a statement or otherwise cooperate.”). Where the Model Code differs radically from *Miranda* is in the result of a violation of its requirements. Unlike the near total *Miranda* exclusion, the Model Code requires suppression only if the violation was either in violation of the Constitution or “substantial.” § 150.3(1). “Substantial” violations include those which were “gross, wilful and prejudicial to the accused,” § 150.3(2)(a), those “of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement,” § 150.3(2)(b), and those in which “the violation created a significant risk that an incriminating statement may have been untrue,” § 150.3(2)(c). Section 150.3(3) sets forth criteria to be used in determining whether a violation not covered by § 150.3(2), *supra*, is “substantial.” The Model Code expressly provides that notwithstanding a violation of its requirements, consultation with counsel between the time of violation and the time of making the statement makes the violation “nonsubstantial.” If the primary evidence is to be excluded under the Code, so too will be derivative evidence unless inevitable discovery can be shown and exclusion is not necessary to protect compliance with the Code, § 150.4. For a brief summary of the Model Code see Vorenberg, *A.L.I. Approves Model Code of Pre-Arraignment Procedure*, 61 A.B.A.J. 1212 (1975).