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FROM THE SUBLIME TO THE RIDICULOUS AND EVERYTHING IN-BETWEEN: FIFTY THINGS YOU MAY OR MAY NOT KNOW ABOUT *MIRANDA V. ARIZONA*

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INTRODUCTION

On June 13, 1966, Chief Justice Earl Warren delivered the opinion in *Miranda v. Arizona*,[1] a case that had been argued before the Court for three successive days earlier that year.[2] Given that timeline, by all mathematical accounts, *Miranda* celebrated its 50th birthday in 2016.[3] According to the AARP website, upon entering the 50s, while "the fine lines and wrinkles" will become "more dramatic," there is nevertheless "[a] more positive outlook" during this decade.[4] As will be discussed throughout this retrospective, *Miranda's* fine lines and wrinkles are well earned and, in fact, its survival to age fifty might well be considered a miracle.

The purpose of this article is to give *Miranda* a proper celebration with a 50-point reflection highlighting some of *Miranda's* ups, downs, and in-betweens. The goal is not to pore over the analytical details of each point

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] The case was argued on February 28th, March 1st and 2nd of 1966, https://www.oyez.org/cases/1965/759.

[3] Because there doesn't appear to be a way to convert "case-law years" into "human years," we'll assume *Miranda* is actually 50 years old.

[4] Beth Howard, *What to Expect in Your 50s*, AARP THE MAGAZINE (Oct. 2012), http://www.aarp.org/health/healthy-living/info-09-2012/what-to-expect-in-your-50s.html.

because most of the topics either already have or certainly could lend themselves to separate lengthy discussions or articles. Instead, the aim is to thoughtfully (and briefly) reflect on the various trials and tribulations of one of the most important cases in our constitutional history. Although the sections follow a rough timeline of the case, the parts within each section are in no particular order. The hope is that by bringing these disparate concepts together in one piece, they will do *Miranda* justice, for as Chief Justice Rehnquist declared, "the warnings have become part of our national culture."[5]

I. THE BACKGROUND

Ernesto Arturo Miranda

The 50-year retrospective should, of course, start at the beginning. Who was Ernesto Miranda and how did he find his place in criminal procedure and national history? Ernesto Arturo Miranda was born on March 9, 1941, in Mesa, Arizona. He was raised in modest circumstances by his father and stepmother. His "school records indicated frequent absences, discipline problems, and academic struggles. He dropped out when he was halfway through ninth grade."[6] At the time of his arrest, he had been in and out of jail for a variety of crimes including attempted rape, armed robbery, and being a 'Peeping Tom.'[7] Subsequent psychiatric diagnoses prior to trial described Miranda as "immature and lacking impulse control," and possibly suffering from "an emotional illness, specifically a chronic, undifferentiated schizophrenic reaction."[8]

The crimes that would eventually propel Miranda's case onto the national stage involved an assault on one victim (whom he robbed) and the rape of another victim. In both instances, he used a knife to threaten his victims, which would later cause police to believe the crimes were committed by the same perpetrator. Miranda became a strong suspect in these cases because, one week after the rape, he drove slowly near the rape victim's home, which allowed the victim's cousin to identify Miranda's car and obtain a partial license plate number before the vehicle sped away.[9]

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[5] *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

[6] Melvin I. Urofsky, 100 AMERICANS MAKING CONSTITUTIONAL HISTORY: A BIOGRAPHICAL HISTORY 140 (C.Q. Press 2004).

[7] *Id.*

[8] *Id.*

[9] Gary L. Stuart, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 5 (The University of Arizona Press 2004) [hereinafter Stuart, MIRANDA].

After identifying Miranda as a possible suspect through vehicle registration records, the police went to his home. Upon encountering the police:

> [Miranda's] dark eyes and heavy brows were furrowed with suspicion but quickly gave way to a quiet smile. Yes, he was Ernesto Arthur Miranda, he told them. He did not seem overly concerned that they were police officers. When [Detective] Young informed him that he did not have to talk to the officers if he did not want to, Miranda told them he did not mind talking. Would he accompany them down to the police station? Sure, he responded.[10]

And so, it began.

Detective Carroll Cooley

Detective Carroll Cooley, known for being patient and methodical, extracted a confession from Miranda.[11] After confronting Miranda with facts about the rape and robbery of the two victims (which Miranda denied), Cooley placed him in a lineup. When the victims hesitated to identify Miranda as the culprit, Cooley decided to resort to trickery.[12] Cooley told Miranda that the witnesses had positively identified him, whereupon Miranda stated, "Well, I guess I'd better tell you about it."[13] And so it was that the first step in a case that would revolutionize the interrogation process was borne of subtle police trickery rather than obvious police brutality. Recalling the case many years later, Cooley stated that the interrogation "wasn't a hostile situation. [Miranda] was mannerly and I was friendly and that's just the way it was. It wasn't a bad situation and we didn't have bright lights or rubber hoses or anything like that."[14]

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[10] Stuart, MIRANDA, *supra* note 9.

[11] *Id.* at 4.

[12] *Id.* at 6 ("Cooley later freely admitted to misleading Miranda about his knowledge of the crimes under investigation but noted that the cordial, sympathetic approach he used in talking to Miranda helped establish a rapport with the suspect. Besides, it was common for officers to engage in a certain amount of deception. Good detectives, for instance, usually implied that they knew more about a case than they actually did").

[13] *Id.*

[14] Interview of Carroll Cooley, *Police History*: *The Miranda Arrest*, YOUTUBE (March 20, 2013), https://www.youtube.com/watch?v=Hy9olwjRL5o.

Miranda's Confession

Miranda's written confession to the crime of rape was short and to the point:

> Seen a girl walking up street stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in car. Got in car without force tied hands and ankles. Drove away for a few mile. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about 1/ 2 (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done but asked her to pray for me.[15]

Miranda also orally confessed to robbery and attempted robbery of two other victims.[16] He eventually stood trial for two of the three crimes, rape and robbery.

The Insanity Defense

One day prior to the start of his robbery trial, Miranda's defense attorney, Alvin Moore, filed a "notice of intention to prove insanity, which notice included both the claim of insanity at the time of the commission of the offense and insanity at the time of the trial."[17] Miranda was examined by two experts who determined that he was able to understand the nature of the proceedings against him and assist in his defense.[18] Therefore, the cases would proceed to trial. During the robbery trial, the issue of Miranda's sanity at the time of the robbery was raised and countered by testimony from the victim as to her opinion regarding his sanity. Miranda later challenged the ability of a lay witness to give testimony on his sanity, and the appellate court concluded that the opinion of a lay witness is admissible on the issue

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[15] Stuart, MIRANDA, *supra* note 9, at 7 (Although Miranda's confession clearly implicated him in potential criminal conduct, his words also suggested a "consent" defense, which was later raised at trial).

[16] *Id.* (Detective Cooley did not want to jeopardize Miranda's impending rape prosecution by having him write out confessions to other unrelated crimes).

[17] State v. Miranda, 401 P.2d 716, 718 (Ariz. 1965) (This late motion caused the trial court to delay the robbery trial and instead hear Miranda's insanity claim on the morning set for trial).

[18] *Id.*

of sanity.[19]

Miranda's Robbery and Rape Trials

At his robbery trial, Miranda was represented by Alvin Moore, "a seventy-three-year-old lawyer in a one-man firm, who had volunteered to accept the judicial assignment of indigent-criminal cases despite the fact that he possessed little experience in criminal law, having spent most of his career in civil court."[20] Nearly everyone involved anticipated that the case would proceed quickly due to Miranda's confession. Notably, Miranda took the stand in his own defense, an unusual move in most criminal cases. Miranda explained that rather than a robbery, the victim voluntarily gave him $8, although he did acknowledge that he put his hand on the victim's thigh and she bit him.[21]

Moore's closing argument focused primarily on the failure of the police to warn Miranda about his rights. Moore argued: "When two officers will take a Mexican boy in a room and interrogate him and not tell him whether he has any rights at all, you think that is fair?"[22] The jury returned quickly with a guilty verdict, and Miranda faced a rape trial the next day.

During the rape trial, Miranda's attorney's ineptitude in such serious criminal matters was once again on display.

> [H]e came across as the inept lawyer he was, and as if to emphasize this, at one point, he called the rape "an unfortunate occurrence." Whether intentional or not, such a woeful understatement, coming at this point in the trial, could only have worked against him and his client. He fared no better in closing and, in fact, compounded the mistake. "You are a young girl," he said. "Do you know the difference between rape and seduction?"[23]

The jury returned a guilty verdict within minutes, no doubt aided by Miranda's confession. The court had delayed sentencing on the robbery conviction until the conclusion of the rape trial. Ernesto Miranda was "sentenced to twenty to thirty years on each count (kidnapping and rape) with the terms to be served concurrently. [He was] also sentenced…to spend twenty to twenty-five years in the Arizona State Penitentiary on the eight-

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[19] *Id.*
[20] Stuart, MIRANDA, *supra* note 9, at 8.
[21] Stuart, MIRANDA, *supra* note 9, at 13.
[22] *Id.* at 14.
[23] *Id.* at 18.

dollar robbery charge. The sentence on the robbery case was to run concurrently with the sentence on the rape case."[24]

Miranda's Appellate Lawyers

The previous section discusses Miranda's trial attorney, Alvin Moore, who was clearly out of his depth in a criminal courtroom. Moore continued representing Miranda as the case progressed to the Arizona Supreme Court. Although Moore's arguments were similarly unsuccessful before Arizona appellate courts, the procedural issues raised during both trials regarding a possible constitutional right to counsel in the interrogation room helped set the stage for Miranda's U.S. Supreme Court appeal.

The job of appealing Miranda's case to the U.S. Supreme Court would not be left to Moore. Instead, the task fell to Robert Corcoran, who, at the time, was working in the Phoenix office of the American Civil Liberties Union. When asked why he got involved with the ACLU and subsequently took on the *Miranda* appeal, Corcoran explained that "he took the ACLU position because many people were not represented in criminal cases in Arizona at the time. 'Some of them had substantial constitutional and legal claims for redress. My main interest was to secure attorneys for as many people as I could. This is how I got involved in the *Miranda* case.'"[25] Corcoran was assisted by "John P. Frank, John J. Flynn, and James Moeller— the three men who would eventually form the 'Miranda Team.'"[26]

Miranda Opinion Speculation

Once the *Miranda* case found its way onto the U.S. Supreme Court's docket, speculation, analysis and perhaps dread about which approach the Court might take dominated public discourse. This pre-opinion commentary, which started with the Court's holding in *Escobedo v. Illinois*, did not escape the Court's attention. Indeed, in the *Miranda* opinion, the Court observed:

> [The Escobedo] case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. A wealth

[24] *Id.* at 22.
[25] Stuart, MIRANDA, *supra* note 9, at 181 n. 63.
[26] *Id.* at 42.

> of scholarly material has been written tracing its ramifications and underpinnings. Police and prosecutor have speculated on its range and desirability. We granted certiorari in [*Miranda*] in order further to explore some facets of the problems thus exposed of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow. [27]

Some of the speculation bordered on hysteria. For example, the Los Angeles Police Chief declared:

> If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd![28]

By contrast, Los Angeles District Attorney Evelle Younger was a bit more sanguine: "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement."[29]

The Miranda Arguments

Although *Miranda* forever revolutionized the interpretation and application of the Fifth Amendment to the Constitution, the case began as a Sixth Amendment case and was briefed to the U.S. Supreme Court as such. Because the Court at the time appeared to be using the Sixth Amendment as a vehicle to expand defendants' rights during trial (*Gideon v. Wainright*[30]) and during interrogation (*Escobedo v. Illinois*[31]), the brief in *Miranda* "argued [that] *Miranda's* reversal was entirely predicated on…the 'full meaning of the Sixth Amendment.'"[32] Accordingly, the questions

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[27] Miranda, *supra* note 1, at 440-42.
[28] Miranda, *supra* note 1, at 441 n. 3.
[29] *Id.*
[30] *Gideon v. Wainright*, 372 U.S. 335 (1963).
[31] *See*, Escobedo, infra note 41 and accompanying text.
[32] Stuart, MIRANDA, *supra* note 9, at 46.

presented to the Court were as follows:

> Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at trial.
> Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.[33]

The shift away from established Sixth Amendment precedent and onto a novel Fifth Amendment approach may have been prompted when Justice Stewart asked if suspects who are the focus of a police investigation have a right to counsel.[34] John Flynn, arguing on behalf of Miranda stated, "if he's rich enough, and if he's educated enough to assert his Fifth Amendment Right, and if he recognizes that he has a Fifth Amendment Right to request counsel."[35]

> And there it was: a bold assertion that the Fifth Amendment, not the Sixth, made Miranda different from its predecessors— Powell, Gideon, and Escobedo. Historically, the right to counsel was addressed, granted, or withheld under the umbrella of the Sixth Amendment, which was exactly what the written briefs in Miranda espoused. Flynn's bold assertion to Justice Stewart may have been the spark that generated the firestorm.[36]

Massiah v. United States

As mentioned above, several Sixth Amendment cases paved the way for the *Miranda* decision. While struggling with how best to protect individuals in the interrogation context, the Sixth Amendment and its right to counsel clause provided the Court with a theoretical launching point. However, before implementing this protective measure, the Court had to first bring the Sixth Amendment out of the courtroom (where it historically protected defendants) and give it authority to protect individuals as they went about their business outside of a courtroom setting.

In *Massiah v. United States*,[37] the petitioner was arrested, arraigned and indicted for possession of cocaine aboard a Navy ship. When one of Massiah's alleged co-conspirators, Colson, turned state's evidence, the

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[33] *Id*. at 47.
[34] Stuart, MIRANDA, *supra* note 9, at 55.
[35] *Id.*
[36] *Id.* at 55-56.
[37] *Massiah v. United States*, 377 U.S. 201 (1964).

government seized the opportunity to have Colson obtain incriminating evidence from Massiah. Accordingly:

> On the evening of November 19, 1959, Colson and [Massiah] held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to [Massiah], the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. [Massiah] made several incriminating statements during the course of this conversation.[38]

After securing incriminating statements from Massiah in this manner, the government sought to utilize them by introducing the testimony of the agent who overheard the conversation. Upon reviewing the facts, the Court, relying upon *Spano v. New York*, determined "that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[39] The Court went on to hold that Massiah had been denied the basic protections of the Sixth Amendment when officers deliberately elicited incriminating statements from him through the use of an undercover agent in the absence of counsel to which he was entitled.[40]

Escobedo v. Illinois

While *Massiah* made strides in bringing the Sixth Amendment out of the courtroom, *Escobedo v. Illinois*[41] brought the Court a bit closer to using the Sixth Amendment to protect individuals in the interrogation context. Escobedo was at once bold, but also very limited in its reach. In Escobedo, the petitioner was arrested and taken to police headquarters on suspicion of fatally shooting his brother-in-law. En route to the station, in response to police statements about his guilt, Escobedo stated that he wanted the advice

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[38] *Massiah*, *surpa* note 37, at 203.

[39] *Id.* at 204 (quoting *Spano v. New York*, 360 U.S. 315, 360 (1959)).

[40] Massiah, *supra* note 37, at 206 (The Court further opined that "if such a rule is to have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent").

[41] *Escobedo v. Illinois*, 378 U.S. 478 (1964).

of counsel before making any statements to the police. Despite requests from both Escobedo and his lawyer, they were not allowed to confer. Instead, Escobedo was subjected to an interrogation during which he made incriminating statements.[42]

Factually, *Escobedo* differed from *Massiah* in that Escobedo had not yet been indicted. The Court noted, however, that "in the context of this case, that fact should make no difference."[43] Thus, the Court, relying upon the protections of the Sixth Amendment right to counsel, determined that:

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment," …and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[44]

With this very specific resolution, the Court affirmatively brought the Sixth Amendment out of the courtroom and into the interrogation room, a revolutionary approach to Sixth Amendment jurisprudence that certainly did not escape criticism. Anticipating a major point of disagreement, the Court observed, "It is argued that, if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.'"[45] However, the Court pointed to the fact that so many confessions are obtained at this stage as evidence that lawyers are needed, and if the Sixth Amendment is to have any efficacy at trial, then it must be applicable at the outset when it can best help accused persons.[46]

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[42] *Id.* at 479-482.
[43] *Id.* at 485.
[44] *Escobedo*, *supra* note 41, at 490-91.
[45] *Id.* at 488.
[46] *Id.*

The Voluntariness Doctrine

While the Sixth Amendment emerged as protection for persons interrogated on the federal level, the Due Process Clause of the Fourteenth Amendment was the avenue by which the Court ensured the voluntariness of confessions on the state level. The case of *Brown v. Mississippi*[47] is perhaps one of the most egregious examples of nefarious police tactics implemented in pursuit of confessions. The facts in *Brown* are brutal and disturbing, but suffice to say that the authorities beat and tortured three black men to obtain their confessions to a murder. The defendants were taken to trial, convicted and sentenced to death solely on the strength of those so-called confessions.[48] In determining that the confessions were obtained in violation of due process of law, the Court concluded that: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[49]

After the *Brown* case, the Court continued to employ a due process test when ascertaining the voluntariness of confessions on the state level. This test involved analyzing a "totality of the circumstances" that took into account a series of factors to determine if a confession was voluntary. Those factors included the characteristics of the accused person as well as the behavior of law enforcement during the encounter.[50] According to the Court, "[the voluntariness] cases refined the test into an inquiry that examine[d] whether a defendant's will was overborne by the circumstances surrounding the giving of a confession."[51] Because the voluntariness doctrine examines factors specific to each case, the outcomes are necessarily limited to the facts of the cases that produced them.

After using the Fourteenth Amendment Voluntariness Doctrine in approximately 30 state cases, the Court redirected its focus to another

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[47] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[48] *Brown*, *supra* note 47 at 282-84 (The time period from the discovery of the crime to the imposition of the death penalty was a period of eight days, March 30 - April 6, 1934).

[49] *Id.* at 286.

[50] See, e.g. *Lynum v. Illinois*, 372 U.S. 528 (1963) (Threats made by police to take defendant's children away while encircling her in a small apartment took advantage of the fact that defendant had no prior experience with law enforcement and no way to measure the accuracy of police threats); See also, *Haynes v. Washington*, 373 U.S. 503 (1963) (Defendant was held in incommunicado detention for several days and told that he could call his wife or attorney only if he confessed his guilt).

[51] *Dickerson*, supra note 5, at 434.

amendment. That shift in perspective heralded the approach of *Miranda*.

Fifth Amendment

The Fifth Amendment privilege against compelled self-incrimination is a hallmark of the adversarial system of justice. In *Bram v. United States*,[52] the Court examined whether a confession in federal court was admissible using the Fifth Amendment. The accused in *Bram* was suspected of committing a homicide while on board a ship from Boston to South America. While awaiting charges, Bram was stripped of his clothing and questioned by a detective. The "questioning" in this case took the form of the detective telling Bram that someone else witnessed him committing the crime (the implication being that Bram should confess to the crime). Bram responded by saying that the witness could not have seen him from the witness' vantage point. Unfortunately for Bram, this was not quite the "I didn't do it" statement that would have been more helpful to him.[53]

The Court, analyzing whether Bram's statement was voluntary under the Fifth Amendment, articulated the test as follows:

> The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent.[54]

With that pronouncement, the Court concluded that Bram's statement could not have been voluntary because the interrogator's statement about a witness seeing Bram commit the crime compelled Bram to speak. According to the Court, Bram "would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby."[55]

The standard used to assess voluntariness in Bram and in the federal courts was widely regarded as stricter (and more favorable to defendants)

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[52] *Bram v. United States*, 168 U.S. 532 (1897).
[53] *Bram*, *supra* note at 539.
[54] *Id.* at 549.
[55] *Id.* at 563.

than the Voluntariness Doctrine because instead of relying upon a set of factors that would necessarily vary with the facts of individual cases, the Bram standard focused on improper influences that might have compelled the accused person to speak. Perhaps it was time to share this stricter standard with the states.

Malloy v. Hogan

The defendant in *Malloy* was arrested and subsequently pleaded guilty to a gambling related crime. After his conviction, he was ordered to testify during an official inquiry into gambling activities in the county. The petitioner refused to give testimony on the grounds that it might incriminate him (a claim that arose under the Fifth Amendment to the Constitution). Malloy was imprisoned for his refusal and the state court concluded that "the Fifth Amendment's privilege against self-incrimination was not available to a witness in a state proceeding, that the Fourteenth Amendment extended no privilege to him, and that the petitioner had not properly invoked the privilege available under the Connecticut Constitution."[56]

On appeal to the United States Supreme Court, Malloy's argument set the stage for the Court to determine if the privilege against compelled self-incrimination under the Fifth Amendment was applicable to the states through the Fourteenth Amendment. The Court noted that since the time of *Brown v. Mississippi*, many state courts had shifted away from the Voluntariness Doctrine and observed that "today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897 [in *Bram*]."[57] The Court concluded that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement -- the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty…for such silence."[58] With the Fifth Amendment privilege against compelled self-incrimination now applicable to the states through the Due Process Clause, *Miranda v. Arizona* was on the horizon.

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[56] *Malloy v. Hogan*, 378 U.S 1, 3 (1964).
[57] *Id.* at 7.
[58] *Id.* at 8.

II. THE CASE

The Warren Court

Opining that the *Warren* court embarked upon a criminal procedure revolution would hardly be considered an overstatement. The depth and breadth of the Court's impact on criminal procedure cannot be encapsulated in one brief section of this *Miranda* retrospective. Suffice to say that the Court's actions in the criminal procedure area were heralded by some, but excoriated by many. For example, once the Miranda opinion was issued, Vigo County (Indiana) Prosecuting Attorney Ralph Berry sent a scathing letter to Justice Brennan containing the following paragraph:

> Insofar as I am concerned, your decision will do nothing but permit rapists, persons molesting minor children, murderers, robbers and burglars to have an opportunity to escape any punishment for their crimes. I feel certain that the old-time anarchists of fifty years ago would feel that you were helping to achieve their ultimate goals. Law enforcement and the rights of organized society are no longer desirable apparently in your opinion.[59]

Others sought to express their disgust by displaying signs calling for the impeachment of Chief Justice Warren and sending postcards decrying the Court's "Pro-Communist Pro-Criminal" decisions.[60]

Thus, in the wake of the *Miranda* opinion, revulsion and ominous prognostications seemed to carry the day in many quarters, and the *Warren* court suffered the brunt of this outrage. Of course, none of the extreme predictions materialized and *Miranda* would eventually become a routine part of police practice despite its revolutionary genesis. But first, nearly every revolution sparks a counter-revolution. Law and order candidate Richard Nixon was waiting in the wings to tackle the *Warren* Court and *Miranda*.[61]

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[59] Ralph Berry, Letter to William J. Brennan (1966), *Miranda v. Arizona: The Rights to Justice*, Library of Congress, https://www.loc.gov/law/help/digitized-books/miranda-v-arizona/miranda-documents.php.

[60] Postcard "Save Our Republic: Impeach Earl Warren" (1966), *Miranda v. Arizona: The Rights to Justice*, Library of Congress, https://www.loc.gov/law/help/digitized-books/miranda-v-arizona/miranda-documents.php.

[61] See *infra* note 116 and accompanying text.

J. Edgar Hoover and the FBI

In what might appear to be somewhat of a twist, J. Edgar Hoover as FBI Director supported the *Miranda* warnings. In a letter to Solicitor General Thurgood Marshall in March 1966, Hoover responded to several questions raised by Justice Fortas regarding the FBI's practice of warning suspects.[62] Hoover explained in the letter that "[t]he standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court."[63] The letter also explained that if a suspect wished to speak with counsel, then the interview is terminated and agents advise arrested persons of the right to free counsel if they cannot afford to pay.[64]

Of course, the overriding question is why would FBI Director Hoover approve of an interrogation process that might encourage suspects to invoke their rights and hamper the FBI's ability to obtain confessions? Well, it seems that in practice, losing confessions was not a pressing concern at all.

> Since at least the mid-1940s, [Hoover] had required FBI agents to advise suspects of their privilege to remain silent and to have an attorney present during any questioning. The goal, Hoover argued in a 1952 Iowa Law Review article, was to balance the "basic civil liberties of the individual" with the need to "protect the security of the nation." And there was one more thing: The FBI's long experience with its proto-Miranda warning had taught that, warning or no, suspects were going to talk.[65]

Thurgood Marshall, Solicitor General

At the time of *Miranda*, Thurgood Marshall was Solicitor General of

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[62] J. Edgar Hoover, Memorandum to Solicitor General (1966), *Miranda v. Arizona: Rights to Justice*, Library of Congress, https://www.loc.gov/law/help/digitized-books/miranda-v-arizona/miranda-documents.php, (this letter is also reproduced in full in the Miranda opinion; See Miranda, *supra* note 1, at 484).

[63] Miranda, *supra* note 1, at 484.

[64] Miranda, *supra* note 1, at 485-86.

[65] Richard Willing, *The Right to Remain Silent, brought to you by J. Edgar Hoover and the FBI*, WASH. POST, June 10, 2016, https://www.washingtonpost.com/posteverything/wp/2016/06/10/cops-hated-miranda-warnings-but-the-fbi-helped-create-them/.

the United States. Marshall was perhaps best known for his advocacy in *Brown v. Board of Education* and numerous other civil rights cases before assuming his government post. Despite his stellar credentials as a civil rights attorney, as Solicitor General, the task fell on Marshall to argue *against* the warnings and the right to counsel. The following colloquy that took place during the oral argument in *Miranda* is illustrative of Marshall's perhaps uncomfortable advocacy on behalf of the government:

> **Earl Warren:**
> As I read your brief, the Government's position is that as a matter of constitutional right neither a warning of counsel nor a warning of the right to remain silent is a requirement but that absent either one of those warnings, those are factors that could be taken into account on judging voluntariness and that the ultimate constitutional issue in these cases is whether or not the admission or statement or confession was voluntary.
>
> **Thurgood Marshall:**
> That's how exactly --
>
> **Earl Warren:**
> Now, you're not receding from that or on anything you've said?
>
> **Thurgood Marshall:**
> Not in the least, not in the least. We also say that for practical matter, the warning is better to be given but it's not required. I have not receded at all.
>
> **Earl Warren:**
> I didn't understood you had.
>
> **Thurgood Marshall**
> No sir.[66]

[66] Oral Argument at 1:05:00, *Miranda v. Arizona*, March 1, 1966, https://www.oyez.org/cases/1965/759. (Marshall's entire argument before the Court is worth a listen for its engaging and sometimes confusing back-and-forth with the Justices regarding what happens to an indigent suspect who asks for counsel when the state is unable to fulfill that request. Marshall's position was that there was no constitutional right to counsel and, therefore, if the state didn't provide an attorney, it was not denying the suspect a cognizable right).

Miranda's Cert Memorandum

As noted above, Escobedo was considered the pre-cursor to *Miranda* in the sense that it provided suspects with some rights in the interrogation context, albeit under the Sixth Amendment. In the "Cert Memo"[67] summarizing *Miranda*, the case was described as "another case presenting an Escobedo issue, and may be an excellent case to take for the purpose of resolving the conflict between various jurisdictions as to the meaning of Escobedo."[68] Moreover, the case was described as good to consider for a number of reasons, including the fact that "there is no possibility of anyone seriously arguing that this [Petitioner] clearly knew of his rights, since he is ill-educated and apparently mentally unstable."[69]

Miranda's Three Companion Cases

The *Miranda* case was actually a conglomeration of several cases that presented similar issues but slightly different facts. The three cases decided along with Miranda were:

Vignera v. New York: In this case, the petitioner was arrested in connection with a robbery and questioned without being advised of his right to counsel. Vignera orally confessed to the robbery. Later, Vignera was identified by eyewitnesses and provided a transcribed confession. During Vignera's trial, the judge specifically instructed the jury that the law in New York did not invalidate confessions because the police failed to warn the defendant of any rights. The Court in Miranda reversed Vignera's conviction because "he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present…."[70]

Westover v. United States: This case involved an accused person questioned sequentially by state and federal authorities. Westover was initially arrested and interrogated about two local robberies in Kansas City. He denied involvement but was nevertheless subjected to additional rounds

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[67] A Cert Memo is drafted by one of the U.S. Supreme Court law clerks, who summarizes the case and provides "an initial recommendation as to whether the Court should review the case." Supreme Court Procedure, SCOTUSblog, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/.

[68] Jerome B. Falk, Cert Memo (1965), *Miranda v. Arizona*: The Rights to Justice, Library of Congress online at https://www.loc.gov/law/help/digitized-books/miranda-v-arizona/miranda-documents.php.

[69] *Id.*

[70] Miranda, *supra* note 1, at 493-94.

of questioning by local law enforcement. There is no record that local police ever gave Westover any warnings and when they concluded their interrogations, they turned him over to the FBI for another round of questioning about a separate robbery in California.

Although the FBI contended that they warned Westover that he didn't have to answer any questions and that he had a right to counsel, the Court in Miranda was not persuaded. The Court reversed, concluding that, "the FBI interrogation was conducted immediately following the state interrogation in the same police station -- in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances, the giving of warnings alone was not sufficient to protect the privilege."[71]

California v. Stewart: The petitioner was suspected in a series of purse-snatching robberies, one of which resulted in the death of the victim. After being identified, Stewart was arrested and interrogated on nine different occasions over five days. There was no evidence that he was advised of his rights during any of the interrogations. At trial, his confession was offered as evidence and Stewart was convicted of robbery and murder and sentenced to death. The Supreme Court of California reversed, holding that Stewart should have been advised of his right to remain silent and his right to counsel, and that "it would not presume in the face of a silent record that the police advised Stewart of his rights."[72] The Court agreed, observing that "[i]n dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record."[73]

Opinion 5-4 and Retroactivity

The fact that *Miranda* was narrowly decided in a 5-4 opinion perhaps foretold its uncertain footing, and invited immediate challenges to its constitutionality. However, a more pressing concern at the time was whether the holding would be applied retroactively. In criminal law, retroactivity can have a strong "upset the apple cart" effect when new laws

[71] *Id.* at 496-97.
[72] Miranda, *supra* note 1, at 498.
[73] *Id.* at 498-99.

or standards are developed requiring courts to possibly reconsider cases in which defendants have been convicted under prior precedent. Would *Miranda* be one of those cases?

"In general, the Court has refused to give retroactive effect to decisions that represent a 'clear break with the past' by overruling prior decisions or announcing a new rule of law. In such cases, the Court has said, the police were justified in relying on the old standards."[74] In *Johnson v. New Jersey*, the Court squarely confronted the issue of whether *Miranda* (and *Escobedo*) should be given retroactive effect.[75] Weighing the possibility of retroactivity, the Court determined that it must "look to the purpose of… new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda*."[76]

After stressing that retroactivity doesn't depend upon the value of the constitutional guarantee or the particular constitutional amendment, the Court concluded that "while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the non-retroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."[77] Moreover, a retroactive application "would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."[78] Accordingly, the Court determined that *Miranda* and *Escobedo* would not be applied retroactively and "should apply only to cases commenced after those decisions were announced."[79]

Miranda's Amici Curiae

Three parties were allowed leave to file amicus curiae briefs and/or argue before the Court in *Miranda*. Telford Taylor argued for the State of New York, Duane Nedrud argued the case for the National District

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[74] Linda Greenhouse, *Court Denies Retroactive Use of 5th Amendment Protection*, N.Y. TIMES, (March 1, 1984), http://www.nytimes.com/1984/03/01/us/court-denies-retroactive-use-of-5th-amendment-protection.html.

[75] *Johnson v. New Jersey*, 384 U.S. 719 (1966).

[76] *Id.* at 727.

[77] *Johnson*, *supra* note 75, at 730.

[78] *Id.* at 731.

[79] *Id.* at 733.

Attorneys Association and Anthony Amsterdam et al. filed a brief on behalf of the American Civil Liberties Union.

Telford spent most of his oral argument time arguing against a requirement that counsel be provided to suspects pre-arraignment.[80] He noted that:

> On the basis of historical interpretation, I think one would be hard-put to it to find any basis for finding the right to counsel at the pre-arraignment stage much less the right to be furnished counsel if you are indigent. And therefore it seems to me the stronger arguments for the claim advanced here is not the historical basis, but the common consensus basis. And it is on that basis that I was suggesting, Mr. Justice Fortas, that we -- we don't have the Gideon situation here at all. This Court is being asked to enunciate a rule for which there is no basis in the prevalent practice.[81]

Meanwhile, Duane Nedrud had a lively exchange with Chief Justice Warren regarding the "menace" of defense attorneys:

> **Duane Nedrud**: Mr. Chief Justice, a lawyer must in our system of justice, must attempt to free the defendant. This is his job.
>
> **Earl Warren:** Because it's his professional duty to raise any defenses the man has.
>
> **Duane R. Nedrud:** Yes sir.
>
> **Earl Warren:** Do you think in doing that, he is a menace to our administration of justice?
>
> **Duane R. Nedrud:** I think that he is not a menace at the trial level. He is not a menace per se but he is in doing his duty is going to prevent a confession from being obtained.
>
> **Earl Warren:** When does he cease being a menace?
>
> **Duane R. Nedrud:** Mr. Chief Justice, I did not say he was a

[80] Oral Argument at 1;02:00, *Miranda v. Arizona*, 384 U.S. 436 (1966), https://www.oyez.org/cases/1965/759.

[81] *Id.*

menace. I --[82]

Police Manuals

Of note in *Miranda* is that the Court did not have to rely upon rumor, hearsay or apocryphal stories about the psychological tactics being employed by law enforcement in interrogation rooms. The Court simply referred to actual police manuals documenting the various approaches police officers should use when confronting suspects during interrogations.[83] The Court summed up these tactics as follows:

> In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.[84]

The fact that these psychological approaches were subtle and well entrenched parts of police practice, likely led the Court to determine that a categorical approach to warnings was the only way to give suspects a "fighting chance" in the interrogation room. Of course, police manuals and tactics did not disappear post-*Miranda*. Instead, they simply incorporated the need to read the *Miranda* warnings and developed further "work-arounds."[85]

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[82] Oral Argument at 00:08:00, *Miranda v. Arizona*, 384 U.S. 436 (1966), https://www.oyez.org/cases/1965/759 (the ACLU, as amicus curiae, urged reversal in Case Nos 759 (*Miranda*), 760 (*Vignera*), and 761 (*Westover*) and affirmance in Case No. 584 (*Stewart*)).

[83] *Miranda, supra* note 1, at 448-455.

[84] *Miranda, supra* note 1, at 455.

[85] See, e.g., *Missouri v. Siebert, infra* note 145 and accompanying text (police manuals articulating a "question first, Mirandize later" policy).

The Wickersham Report

In addition to police manuals, the Court also discussed the factual studies of police lawlessness undertaken by the Wickersham Commission in 1931, several decades before the *Miranda* opinion.[86] The Commission's Report on Lawlessness in Law Enforcement:

> concluded that [t]he third degree that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions is widespread. Specific tactics included protracted questioning, threats and methods of intimidation, physical brutality, illegal detention, and refusal to allow access of counsel to suspects. The report declared unequivocally that the third degree is a secret and illegal practice.[87]

Despite identifying verifiable problems that undermined the credibility of policing and convictions obtained as a result of these tactics, the Report did not put forth any workable solutions to overcome documented police oppression. Instead, the "report conclude[d] that law cannot really solve the problem of lawlessness and that the solution ultimately depends on the will of the community. This, in effect, represents a good government or concerned citizen approach to the problem."[88] No one could have known at the time that the findings of the Wickersham Commission would play a co-starring role in one of the most important Supreme Court precedents in history.

Mutt & Jeff /Good Cop, Bad Cop

One of the means for encouraging reluctant suspects to speak that persists even today has various monikers. Sometimes it's referred to as the "Mutt & Jeff" routine, but it is also widely known as the "Good Cop, Bad Cop" approach. As the latter name suggests, the suspect is questioned by two police officers, with one officer adopting an abrasive (sometimes

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[86] *Miranda*, *supra* note 1, at 445; Samuel Walker, Records of the Wickersham Commission on Law Observance and Enforcement, vi (1997) [hereinafter "Wickersham Report"] (The Wickersham Commission was, among other things, a "scientific study of crime and the administration of justice [that could] help to solve both a general social problem and a specific political problem for [President Hoover] and his party"), http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamCommPt1.pdf.

[87] Wickersham Report, *supra* note 86, at ix.

[88] *Id.* at x.

violent) attitude while the other officer attempts to befriend the suspect and subtly persuade him to confess in order to avoid the wrath of "Bad Cop's" continuing anger and aggression.

A variation on this theme was carried out in the case of *Spano v. New York*.[89] According to the Court, petitioner "was a foreign-born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school and the record indicates that he had a history of emotional instability."[90] After being indicted for murder, petitioner voluntarily surrendered with his attorney who had advised petitioner not to answer any questions. Shortly after being left in the custody of officers, petitioner was "persistent[ly] and continuous[ly]" questioned by at least fifteen law enforcement officers over the course of eight hours. When the officers met with petitioner's steadfast refusal to speak, they decided to play on petitioner's sympathies by using an old friend, Officer Bruno.[91]

According to the Court:

> The use of Bruno, characterized in this Court by counsel for the State as a 'childhood friend' of petitioner's, is another factor which deserves mention in the totality of the situation. Bruno's was the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Petitioner was apparently unaware of John Gay's famous couplet: 'An open foe may prove a curse, But a pretended friend is worse,' and he yielded to his false friend's entreaties.[92]

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[89] *Spano v. New York*, 360 U.S. 315 (1959).
[90] *Id.* at 321-22.
[91] *Id.* at 317-18.
[92] *Spano*, *supra* note 89, at 323.

The Warnings

To avoid the possibility of confusion, the Court made the *Miranda* warnings very clear. Indeed, the language of the modern-day warnings is essentially a verbatim statement of what the Court determined was minimally required 50 years ago.

To begin, suspects must be told in "unequivocal terms" that they have a right to remain silent.[93] According to the Court, stating this right at the outset accomplishes three goals. First, it makes suspects aware that such a right exists. Second, it levels the playing field and decreases the inherent pressure in the interrogation room because suspects know they don't have to speak. Finally, by explaining the right, law enforcement officers signal to suspects that they are "prepared to recognize [the] privilege should [suspects] choose to exercise it."[94]

Next, the suspect must be told of the consequences of forgoing the right, i.e., that anything he says can and will be used against him. In addition to advising the suspect that he is not among friends, "[t]his warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."[95]

Suspects must then be told that they have the right to speak with an attorney.

> The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.[96]

Finally, the Court held that financial means should play no role in determining whether a person has the advice of counsel to assist him. According to the Court, '[t]he need for counsel in order to protect the

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[93] Miranda, *supra* note 1, at 467-68.
[94] *Id.* at 468.
[95] Miranda, *supra* note 1, at 469.
[96] *Id.* at 470.

privilege exists for the indigent as well as the affluent.'[97]

Custody & Interrogation Prerequisites

The *Miranda* warnings do not apply every time a person has an encounter with the police. Instead, there are two prerequisites: the suspect must be in custody *and* the police must interrogate him.[98] If the police are simply in the presence of a person who is in custody, then *Miranda* warnings are not necessary. Similarly, if individuals are not in custody, officers may interrogate them without the need for Miranda warnings. Thus, the definitions of custody and interrogation take on extraordinary importance, and the outcomes can mean the difference between admissible and inadmissible statements.

Several subsequent cases have discussed what is meant by "custody," although none provides a definitive answer. Instead, the cases seem to rely upon a series of factors to guide courts' determinations on the custody issue. For example, in *Oregon v. Mathiason*, the Court determined that when a suspect "voluntarily [came] to the police station, where he was immediately informed that he was not under arrest [and] [a]t the close of a 1/2-hour interview, [he] did in fact leave the police station without hindrance," the suspect was not in custody "or otherwise deprived of his freedom of action in any significant way."[99]

A similar factor based analysis occurred in the case of *Yarborough v. Alvarado*.[100] In *Alvarado*, a juvenile was brought to the police station by his parents for questioning about a murder. The Court examined all of the factors surrounding his arrival at the station, the questioning process and his departure, and agreed with the state court's determination that Alvarado was not in custody. The Court noted that the test for custody is "based on a how a reasonable person in the suspect's situation would perceive his circumstances."[101] To wit:

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would

[97] *Id.* at 472.

[98] *Id.* at 444 (In *Miranda*, the Court framed this standard 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").

[99] *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

[100] *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

[101] *Id.* at 662.

> a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.[102]

As for the second part of the "custodial interrogation" standard, in *Miranda*, the Court defined interrogation as "questioning initiated by law enforcement officers…."[103] Later, the Court in *Rhode Island v. Innis* weighed in on police interrogation tactics that might not necessarily look like direct questioning, but could nevertheless result in suspects feeling compelled to speak.[104] To combat these tactics, the Court concluded:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.[105]

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[102] *Id.* at 653; *Id.* at 664 (the Court further explained that when applying this objective test, "fair-minded jurists could disagree over whether Alvarado was in custody").

[103] Miranda, *supra* note 1, at 444.

[104] *Rhode Island v. Innis*, 446 U.S. 291 (1980).

[105] *Innis*, *supra* note 104 at 300-02.

The Fifth Amendment Right to Counsel

By specifically requiring a warning that suspects are entitled to counsel before and during a police interrogation, the Court created a new Fifth Amendment right to counsel. Anticipating that this new right would have practical consequences, the Court observed, "[t]his does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."[106]

The Right to Remain Silent

The right to remain silent is one of the hallmarks of the adversarial system of justice and one of the central tenets of *Miranda*. Recognizing the significance of this Fifth Amendment based right, the Court declared that it would never assume a person to know this right because:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to ensure that the individual knows he is free to exercise the privilege at that point in time.[107]

Draft of the Miranda Opinion

A draft of the *Miranda* opinion maintained as part of Justice Tom Clark's papers provides fascinating insight into the Court's thinking as the opinion evolved into what was announced in June of 1966. For example,

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[106] *Id.* at 474.

[107] *Innis*, *supra* note 104 at 468-69.

the "constitutional straitjacket" language that ultimately stirred much of the controversy regarding Congress' ability to supersede *Miranda* was not originally in the majority opinion.[108] The language "unless other fully effective means are devised to inform accused" was underscored and the marginalia next to it stated "leaves door open, slightly."[109] Indeed. Adjacent to a sentence in the draft that stated "the records do not evince overt physical coercion or patent psychological ploys" in *Miranda*, Justice Clark remarked in the margins, "Oh, come now!"[110] Finally, demonstrating a concern for good taste, the phrase "legal eunuch" was declared "clever, but in bad taste" and removed.[111]

III. THE AFTERMATH

Ernesto Miranda – The Retrial

After the decision in *Miranda v. Arizona*, Ernesto Miranda was retried and convicted without the use of his now unconstitutional confessions.[112] He was sentenced to 20-30 years (concurrently) for the rape and robbery and was paroled in December 1972.[113] After a brief entrepreneurial endeavor selling autographed *Miranda* cards for $1.50, further arrests and an additional stint in prison, Miranda was stabbed to death during a fight in 1976.[114] No one ever went to jail for the crime.[115]

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[108] The Papers of Justice Tom C. Clark, Draft Opinion in *Miranda* Case delivered by Chief Justice Warren 29, https://tarltonapps.law.utexas.edu/clark/view_doc.php?id=a194-01-02&page=29. [hereinafter "Justice Clark Papers"]. (Specifically, the following sentences were not part of the original draft: "Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws"); Miranda, *supra* note 1, at 467.

[109] Justice Clark Papers, *supra* note 108, at 6.

[110] *Id.* at 19.

[111] *Id.* at 23.

[112] *Rape Retrial Jury Convicts Miranda Again*, Chicago Tribune, Feb. 25, 1967. http://archives.chicagotribune.com/1967/02/25/page/19/article/rape-retrial-jury-convicts-miranda-again (Although Miranda's confession wasn't used, his common-law wife took the stand to tell of a jailhouse visit she had with Miranda during which he admitted to raping the victim).

[113] Stuart, MIRANDA, *supra* note 9, at 94-95.

[114] *Id.* at 95.

[115] *Id.* at 99.

Richard Nixon and Law and Order

Richard Nixon's disdain for the Warren Court and its criminal procedure revolution were a centerpiece of his campaign for the presidency in 1968. He was elected as a "law and order" candidate and set about reshaping the Court accordingly. Nixon articulated his vision for the country and the judicial system:

> There is little question that our judicial and legal system provides more safeguards against the concoction of an innocent man than any other legal system on earth. We should view this accomplishment with pride, and we must preserve it. But the first responsibility of government and a primary responsibility of the judicial system is to guarantee to each citizen his primary civil right--the right to be protected from domestic violence. In recent years our system has failed dismally in this responsibility--and it cannot redeem itself by pointing to the conscientious manner in which it treats suspected criminals. . .
>
> Any system that fashions its safe-guards for the innocent so broadly and haphazardly that they also provide haven from punishment for uncounted thousands of the guilty is a failure--an indictment, not an adornment, of a free society. No need is more urgent today than the need to strengthen the peace forces as against the criminal forces that are at large in America.[116]

William H. Rehnquist

Although he would not be appointed to the Court until 1971 (five years after *Miranda*), William Hubbs Rehnquist was already making his mark by establishing himself as a very harsh critic of *Miranda*. Indeed, "[w]hen he took his seat as an associate justice on Jan. 7, 1972, the dominant theme in discussions about the Supreme Court was law and order. President Nixon was a harsh critic of the criminal procedure decisions of the Warren Court and correctly discerned that he would have an ally in Assistant Attorney General Rehnquist."[117] As President Nixon took office on his "law and

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[116] Richard Nixon, "What has Happened to America?", READER'S DIGEST, October 1967, http://college.cengage.com/history/ayers_primary_sources/nixon_1967.htm.

[117] Linda Greenhouse, *William H. Rehnquist, Chief Justice of the Supreme Court, is*

order" platform and sought to reign in the perceived Warren Court excesses, no one seemed more suited to the task on the Court than Rehnquist, who "had spent much of his career at the Department of Justice…bashing *Miranda*."[118] This article will return to Rehnquist later to discuss his pivotal (and perhaps surprising) role in seeing *Miranda* through to its 50th birthday and beyond.

18 U.S.C Section 3501

In 1968, taking the Court up on its invitation in *Miranda* to develop effective alternatives to the warnings, Congress effectively overruled *Miranda* with 18 U.S.C. Sec. 3501 and reinstated a totality of the circumstances voluntariness test.[119] The statute states in pertinent part:

> (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 had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.[120]

Despite the timeliness of its enactment and its obvious significance to

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Dead at 80, N.Y. TIMES, (Sept. 4, 2005), http://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html?_r=0.

[118] Michael Bobelian, *Examining Rehnquist's Legacy,* FORBES, (July 29, 2013), http://www.forbes.com/sites/michaelbobelian/2013/07/29/examining-rehnquists-legacy/#58571a1a177c.

[119] 18 U.S.C. § 3501(1968).

[120] 18 U.S.C. § 3501(1968).

the "law and order" movement of the day, the statute was "an emperor with no clothes" and it was largely ignored for many years. Then, *Dickerson v. United States* came along.[121]

Public Safety Exception

One of the most notable exceptions to the *Miranda* warning was established in *New York v. Quarles*.[122] In *Quarles*, after the victim of a rape described her assailant, the police cornered Quarles in a store and handcuffed him. Prior to reading *Miranda* warnings, they questioned him about a gun that had been used during the crime. In response to the questioning, Quarles told the officers "the gun is over there."[123] Quarles was clearly in custody when asked a question that was likely to incriminate him. Because he was not given *Miranda* warnings, Quarles argued that his statement about the gun (as well as the gun itself) should be inadmissible. The government argued that the "exigencies of the situation justified Officer Kraft's failure to read respondent his *Miranda* rights until after he had located the gun."[124]

The Court agreed that a public safety exception to *Miranda* is permissible "[i]n a kaleidoscopic situation…where spontaneity rather than adherence to a police manual is necessarily the order of the day…."[125] The Court reasoned that:

> [I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that

[121] See Dickerson, *supra* note 5, at 443.
[122] *New York v. Quarles*, 467 U.S. 649 (1984).
[123] *Id.* at 652.
[124] *Id.* at 653.
[125] *Quarles*, *supra* note 122 at 656.

> further danger to the public did not result from the concealment of the gun in a public area.[126]

Quarles represented one of the first instances in which the Court used a cost/benefit analysis to determine the proper scope and application of the *Miranda* warnings. Unfortunately, this would not be the last time such a balancing would occur.[127]

Fruit of the Poisonous Tree Doctrine

Generally speaking, the fruit of the poisonous tree doctrine posits that evidence gleaned from a constitutional violation may not be used by the government in criminal trials. This prohibition includes primary evidence of the violation as well as any derivative or secondary evidence. Because *Miranda* was subsequently cast as a prophylactic rule designed to protect the Fifth Amendment, a violation of *Miranda* was not deemed to be a constitutional violation. Therefore, when officers simply violate the provisions of *Miranda* without also compelling or coercing a suspect to speak, that violation will not taint subsequent evidence.[128] The non-application of the fruit of the poisonous tree doctrine to *Miranda* violations persists despite the Court's determination in *Dickerson v. United States* that *Miranda* announced a constitutional principle.[129]

Dickerson v. United States

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[126] *Id.* at 657.

[127] *Id.* at 658-59 (The Court in Quarles also allowed wide latitude for police officers to determine when the costs would outweigh the benefits. According to the Court, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect").

[128] See, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974) (holding that the failure to advise Tucker that he would be provided counsel if indigent did not taint evidence from a third party witness whom Tucker identified during the interrogation); See also *Oregon v. Elstad*, 470 U.S. 298 (1985) (holding that the failure to give Miranda warnings before custodial interrogation did not taint subsequent confession given at the police station after a reading of the Miranda warnings); See also *United States v. Patane*, 542 U.S. 630 (2004) (holding that failure to continue reading Miranda warnings after suspect said he knew his rights did not taint physical evidence gleaned from an unwarned but voluntary statement).

[129] *Dickerson, supra* note 5, at 441 ("Our decision in [Elstad] - refusing to apply the traditional "fruits" doctrine developed in Fourth Amendment cases-does not prove that Miranda is a non-constitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment").

Dickerson v. United States in many respects represented the "showdown" between those who regarded *Miranda* as a prophylactic rule that could be superseded by legislation and those who considered it a constitutional principle. Given the tenor of the largely conservative leaning Court and the many exceptions and restrictions placed on *Miranda* since 1966, it seemed that *Miranda's* days were numbered. Therefore, the 7-2 opinion upholding *Miranda's* constitutional underpinnings surprised many.

The precise question before the Court was whether 18 U.S.C. §3501 superseded *Miranda* (which, of course, was the intent of the statute when it was passed in 1968). According to the Court, the decision in *Dickerson* "[turned] on whether the Miranda Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[130] While the Court acknowledged that there was significant precedent that could lead one to believe that *Miranda* lacked a constitutional basis, it nevertheless determined that *Miranda* was indeed constitutional for at least three reasons. First, because *Miranda* had been applied to state courts and "with respect to proceedings in state courts, our 'authority is limited to enforcing the commands of the United States Constitution.'"[131] Next, the *Miranda* Court itself stated several times that it was announcing a constitutional standard.[132] Third, subsequent Courts also referred to *Miranda's* constitutional underpinnings.[133] The Court also explained that the numerous exceptions to *Miranda* do not defeat its constitutional status, but merely illustrate that "no constitutional rule is immutable."[134]

With *Dickerson*, the showdown was over and *Miranda* prevailed. Of course, like every U.S. Supreme Court opinion, *Dickerson* is steeped in legal analysis and reasoning. Yet, what may have ultimately cemented *Miranda's* position in the annals of criminal procedure is simply the fact that it had staying power. The Court declared "[w]hether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."[135]

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[130] *Id.* at 437.
[131] *Id.* at 438.
[132] *Dickerson, supra* note 5, at 439.
[133] *Id.* at 440.
[134] *Id.* at 441.
[135] *Id.* at 443.

Justice Rehnquist's Role (Again)

As mentioned above, Justice Rehnquist's ascension to the Court was based in no small part on his criticisms of *Miranda* and his readiness to overrule it. He got to work right away by diminishing it as a constitutional principle in the case of *Michigan v. Tucker.*[136] However, during Rehnquist's tenure on the Court, *Miranda* seemingly became "workable" in the eyes of many as a result of numerous limitations placed on it by the Court. This led Chief Justice Rehnquist, the perhaps surprising author of *Dickerson v. United States,* to declare:

> *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings…we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.[137]

Without a doubt, former President Nixon would have been alarmed that *Miranda* was still around, much less given a continuing legacy in American criminal procedure by Chief Justice Rehnquist, the man nominated to the Court by Nixon to eradicate *Miranda*.

Justice Scalia

It is fair to say that Justice Antonin Scalia was no friend of *Miranda*. In fact, he practically begged for a case in which the Court could review and likely overturn the precedent.[138] When that time arrived in the case of *Dickerson v. United States*, Scalia, rather than writing a majority opinion that would send Miranda to the resting place of overturned precedent, ended up writing a scathing dissent.[139] In that dissent, Scalia criticized the Court for, among other things, playing semantics and failing to clearly state that

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[136] See *Tucker, supra* note 129 and accompanying text.

[137] *Dickerson, supra* note 5, at 443-44.

[138] See, e.g., *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) ("The point is whether our continuing refusal to consider [18 U.S.C. § 3501] is consistent with the Third Branch's obligation to decide according to the law. I think it is not").

[139] *Dickerson, supra* note 5, at 444 (Scalia, J., dissenting).

Miranda is constitutional. Scalia's anger was so potent that he declared at the end of his opinion that, despite *Dickerson*, he would continue to follow 18 U.S.C. §3501 until it was repealed.[140] However, having lost this war, Scalia continued fighting battles to limit *Miranda's* reach.[141]

Impeachment Evidence

Statements obtained in violation of the procedural requirements of *Miranda* may nevertheless be used to impeach defendants.[142] In *Harris v. New York*, the defendant's voluntary statements gleaned in violation of *Miranda* were used to impeach his credibility on cross-examination. The Court determined that while such statements could not be used during the prosecutor's case-in-chief, when the defendant chooses to take the stand, different rules apply. To wit:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.[143]

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[140] *Id.* at 465 (there is no evidence that Scalia overtly followed through on his threat during his remaining time on the Court and 18 U.S.C. § 3501 remains on the books).

[141] See, e.g., Maryland v. Shatzer, 559 U.S. 98 (2010) (Scalia, writing for the majority, placed a 14-day limitation on the protection of the *Miranda* right to counsel once it has been invoked. Before Shatzer, there had been no limitation on how long the right protected suspects).

[142] *Harris v. New York*, 401 U.S. 222 (1971).

[143] *Harris* at 225-26 (The Court was careful to note that "[p]etitioner makes no claim that the statements made to police were coerced or involuntary" for such a claim would have taken the statements out of the realm of *Miranda* and into Fifth Amendment territory).

Missouri v. Siebert

The case of *Missouri v. Siebert*[144] was perhaps inevitable after the *Dickerson* case in which the Court, despite referring to *Miranda* as a constitutional rule, nevertheless continued the fruit of the poisonous tree doctrine exception established in *Oregon v. Elstad*.[145] In *Siebert*, the Court considered whether an intentionally designed "question first, *Mirandize* later" policy was permissible under the Fifth Amendment and *Miranda*.

According to the Court,

> [t]he technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked.[146]

Essentially, officers would bring a suspect into a custodial setting, intentionally omit *Miranda* warnings and ask questions designed to elicit incriminating responses. Once a confession was gleaned, then officers would provide *Miranda* warnings and proceed to have the suspect "confirm" all of the details of the previous confession. Of course, the officer was well aware that the first confession would be inadmissible due to procedural *Miranda* violations, but the second confession would likely be admitted if there was evidence that it was given knowingly, intelligently and voluntarily after a *Miranda* waiver.

Upon reviewing this tactic, the Court determined that the process used in *Siebert* effectively functioned as one continuous interrogation (despite the short break) rendering the *Miranda* warnings given "midstream" ineffective. The Court concluded:

> The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.

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[144] *Missouri v. Siebert*, 542 U.S. 600 (2004).

[145] See Elstad, *supra* note 128 and accompanying text.

[146] *Seibert*, *supra* note 144, at 609 (Such a tactic was reminiscent of the formalized police maneuvering and strategizing that led to the Court's opinion in *Miranda*).

> It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.[147]

In a parting shot, Justice Souter warned "[s]trategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."[148]

United States v. Patane

Another important post-*Dickerson* case is *United States v. Patane*.[149] In *Patane*, the Court considered whether in light of *Miranda's* new "status" as a constitutional rule, derivative physical evidence should be excluded after a violation of *Miranda*. The *Miranda* violation occurred in Patane when police officers failed to complete a reading of *Miranda* warnings after *Patane* stated that he knew his rights.[150] As a result of *Patane's* statements, officers discovered a weapon in his residence. Because the gun was the product of a statement made in violation of *Miranda*, the Court was squarely

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[147] *Id.* at 616-17.

[148] *Id.* at 617. Justice Kennedy, who concurred in the *Siebert* plurality opinion on the narrowest grounds, concluded:

> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

[149] *United States v. Patane*, 542 U.S. 630 (2004).

[150] *Id.* at 635 (Recall that the *Miranda* Court stated that the warnings should be read and no presumption would be made about whether a suspect knew the rights); See *supra* note 107 and accompanying text.

presented with the issue of whether *Miranda's* new status would work as a constitutional violation or whether it would still work as a prophylactic rule when it came to application of the fruit of the poisonous tree doctrine.

Despite the Court's pronouncement in *Dickerson* that *Miranda* is a constitutional rule, the Court in *Patane* concluded that *Miranda* is nevertheless still "a prophylactic employed to protect against violations of the Self-Incrimination Clause."[151] The Court sounded a familiar pre-*Dickerson* theme that *Miranda* necessarily sweeps more broadly than the Self-Incrimination Clause of the Fifth Amendment in that *Miranda* violations could exclude voluntary statements. Therefore, "the Miranda rule 'does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted….'"[152] In short, the Court concluded that a violation of *Miranda's* prophylactic rule is "cured" when that statement is disallowed at trial. But, "because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements," the application of the fruit of the poisonous tree doctrine is unwarranted.[153]

The *Patane* case thus completed the fruit of the poisonous tree doctrine trilogy in which the Court held that violations of *Miranda's* prophylactic rules would not lead to exclusion of witness testimony,[154] the suspect's own subsequent statements[155] and physical evidence.[156]

Sixth Amendment Confusion

When the Supreme Court created the Fifth Amendment right to counsel in *Miranda*, it set up the potential for confusion with the already firmly established Sixth Amendment right to counsel.[157] Obvious differences between the two rights included the fact that the Sixth Amendment attached only after the initiation of adversarial judicial proceedings, while the Fifth Amendment right to counsel had to be invoked during a custodial interrogation.

While there are a number of cases that trace the scope of each right, the Court in *Montejo v. Louisiana* appeared to merge the rights in such a way

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[151] *Patane*, *supra* note 149, at 636.

[152] *Id.* at 639.

[153] *Id.* at 643.

[154] *See Tucker, supra* note 128 and accompanying text.

[155] *See Elstad, supra* note 128 and accompanying text.

[156] *See Patane, supra* note 149 and accompanying text.

[157] Recall that *Miranda* itself was originally briefed as a Sixth Amendment case. See *supra* note 33 and accompanying text.

that the confusion has been greatly reduced.[158] In *Montejo*, the Court determined that the Sixth Amendment, once attached, no longer served as an absolute shield against subsequent police contact in the form of casual conversation or custodial interrogations. The Court reasoned that rather than have the Sixth Amendment out of the courtroom creating havoc and confusion, it was best to let the Fifth Amendment (Miranda) right to counsel serve as protection for suspects in the interrogation context.[159] Therefore, any person whether pre- or post- indictment who is casually approached by a police officer may simply walk away and choose not to speak. Anyone who is placed in a custodial interrogation may invoke the Fifth Amendment right to counsel in order to cut of police questioning.[160] The Sixth Amendment no longer serves as a barrier to police officers approaching suspects or defendants who have undergone an adversarial judicial proceeding. Instead, the Fifth Amendment right to counsel will protect those individuals in the critical instance of a custodial interrogation.[161]

Invoking Miranda

The Court in *Miranda* stated unequivocally:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an

[158] *Montejo v. Louisiana,* 556 U.S. 778 (2009).

[159] *Id.* at 794 ("Under *Miranda's* prophylactic protection of the right against compelled self-incrimination, any suspect subject to a custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right").

[160] *Id.*

[161] *See Massiah*, *supra* note 37 and accompanying text (*Montejo* proceeds on the assumption that suspects and defendants will know when they are being approached by a police officer and act accordingly. However, *Montejo* did not address the *Massiah* situation of a post-indictment defendant who is approached by a wired informant or an undercover officer).

> opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.[162]

These statements made two premises clear. First, that suspects had the burden of invoking the newly created *Miranda* rights and, second, that police officers were required to acknowledge a valid invocation of those rights. What the Court did not clarify, however, was which words were necessary to invoke *Miranda*, i.e. what did a suspect have to say/do to convey to an officer that she wanted to avail herself of the *Miranda* protections? That analysis was left to subsequent courts.

For example, in *Davis v. United States*, after more than an hour of questioning by police about a murder, the defendant said, "Maybe I should talk to a lawyer."[163] The officers attempted to clarify whether Davis was requesting a lawyer and he ultimately stated that he did not want a lawyer.[164] When Davis moved to suppress the statements made after his "Maybe I should talk to a lawyer" statement, the Court confronted the issue of whether this statement invoked the *Miranda* right to counsel and required the officers to cut off questioning.

The Court, recognizing that a standard was necessary to guide officers and to assist with issues of proof, held that "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'"[165] Therefore, if "reference to an attorney…is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," then there is no requirement that the officers cease questioning.[166]

The Court further noted that when a suspect makes an equivocal or ambiguous statement, officers might take steps to clarify the statement as happened in *Davis*. The Court, however, stopped short of making such clarification a requirement, while acknowledging that such a practice might nevertheless "minimize the chance of a confession being suppressed due to subsequent judicial second guessing as to the meaning of the suspect's statement regarding counsel."[167]

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[162] Miranda, *supra* note 1 at 473-74.
[163] *Davis, supra* note 138 at 455.
[164] *Id.*
[165] *Davis, supra* note at 459.
[166] *Id.*
[167] *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (The Court in *Berghuis v.*

Waiving Miranda

The Court in *Miranda* established specific standards for waiver of rights under the Fifth Amendment. First, the Court made clear that it "has always set high standards of proof for the waiver of constitutional rights, and…[re-asserted those] standards as applied to in-custody interrogation."[168] Next, the Court determined that waiver rests squarely on the shoulders of the government because it is "responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation…."[169] Finally, the Court concluded that a "valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[170] Instead, the "record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[171] In sum, a suspect must know the law (i.e. her Fifth Amendment rights), understand the consequences of invoking or waiving those rights, and do so voluntarily (i.e. free from any governmental coercion).

As the previous section outlines, the Court has determined that suspects must speak in order to invoke rights under *Miranda*. By contrast, the Court decided that waiver of the rights does not necessarily require that a defendant do so explicitly. According to the Court, Miranda "does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford."[172] Therefore, "Miranda rights can…be waived through means less formal than a typical waiver on the record in a courtroom."[173]

Thompkins similarly concluded that a request to remain silent must be made by speaking unambiguously, explaining that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*").

[168] Miranda, *supra* note 1, at 475.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Berghuis, supra* note 167, at 385.

[173] *Id.*

Pre-Miranda Silence

A suspect's silence in the face of questioning in a non-custodial context may be used as evidence against him. In *Salinas v. Texas*, the petitioner, who was suspected in a recent shooting, voluntarily accompanied officers to the police station to answer questions about the shooting.[174] During the interview, "petitioner answered the officer's questions. But when asked whether his shotgun 'would match the shells recovered at the scene of the murder,' petitioner declined to answer. Instead, petitioner '[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.' After a few moments of silence, the officer asked additional questions, which petitioner answered.[175] Salinas' reaction to the officer's question was subsequently used against him at trial.

The Court determined that because Salinas was not in a custodial interrogation setting, the circumstances of his police questioning were outside the scope of *Miranda* and, therefore, he was not deprived of the right to invoke *Miranda*. Further, because suspects cannot invoke *Miranda* by remaining silent, Petitioner's silence in this case could not be considered an invocation of his Fifth Amendment privilege. According to the Court:

> To be sure, someone might decline to answer a police officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner alone knew why he did not answer the officer's question, and it was therefore his "burden . . . to make a timely assertion of the privilege."[176]

IV. COMPARATIVE APPROACHES

England

Viewers of British crime procedurals may have heard a warning that seems similar to *Miranda*, yet different. Before questioning in England, suspects are cautioned as follows: "You do not have to say anything. But, it

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[174] *Salinas v. Texas*, 570 U.S. ___, 133 S.Ct. 2174 (2013).
[175] *Id.* at 2178.
[176] *Id.* at 2182.

may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."[177] The warning is similar to *Miranda*, but very different in the sense that silence may be used against an individual under certain circumstances. Pursuant to Section 34 of the Criminal Justice and Public Order Act 1994:

> **34 Effect of accused's failure to mention facts when questioned or charged.**
>
> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
> (a) *at any time before he was charged with the offence*, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
> (b) *on being charged with the offence or officially informed that he might be prosecuted for it*, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—
>
> …
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.[178]

To understand the application of these principles, assume a factual situation in which the police are called to a home and find a suspect standing over the deceased with a knife in his hands. Upon questioning the suspect under caution, the suspect declines to say anything to police as is his right. If at trial the defendant elects to proceed with a self-defense claim, the prosecutor may comment on the fact that at the time of questioning in the

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[177] *Being Arrested: Your Rights*, GOV. UK. (Sept. 23, 2016), https://www.gov.uk/arrested-your-rights/when-youre-arrested.

[178] The National Archives. Criminal Justice and Public Order Act of 1994, c. 33, Part III, Section 34, http://www.legislation.gov.uk/ukpga/1994/33/section/34.

home, the defendant failed to mention that he acted in self-defense. Importantly, a defendant cannot be convicted on silence alone, but the jury may consider it as relevant evidence after the prosecutor has presented overwhelming evidence of the defendant's guilt.[179]

France

In France, a person suspected of a crime may be placed in a special form of police custody known as a *garde à vue* (preliminary police custody) for purposes of interrogation. During this detention, which lasts for 24 hours (or longer under certain circumstances), suspects must be told that they have the right to consult privately with an attorney and to have an attorney present during any police questioning in order "for the right to a fair trial to be real and concrete."[180] In addition, suspects have the right to remain silent.[181] These relatively new standards represent a departure from the previous rights available during a *garde à vue*. Prior to 2011, suspects only had limited access to an attorney, counsel could not participate in the actual interrogation and there was no right to remain silent.

Not surprisingly, these new standards have caused some consternation in France, provoking a police union to criticize "allowing lawyers to attend the questioning of suspects, accusing some of them of thinking they were appearing in American TV series."[182]

V. MIRANDA IN POP CULTURE

Dragnet

Sergeant Joe Friday:

Now you listen to me, you gutter-mouth punk. I've dealt with

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[179] See, e.g., *Murray v. United Kingdom*, Eur. Ct H. R., 41/1994/488/570, February 8, 1996 ("The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if evidence against the accused 'calls' for an explanation which the accused ought to be in a position to give that a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty"), http://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:[%22695857%22],%22itemid%22:[%22001-57980%22]%7D.

[180] *France: Reform of Police Custody*, Global Legal Monitor, (May 24, 2011), http://www.loc.gov/law/foreign-news/article/france-reform-of-police-custody/.

[181] *Id.*

[182] Angelique Chrisafis, *French Reform of Custody Rules 'Chaotic' say Police*, The Guardian, (Apr. 18, 2011).

> *you before, and every time I did, it took me a month to wash off the filth.*
>
> …
>
> *They advised you of your constitutional rights before you opened your mouth. Now you're trying to tell us you didn't understand. Well, you're a liar. You understood what your rights were then just as you understand now! Somewhere in the last forty hours while you were rattling around in the bucket you got the word. You know that 62 Cal.2d 338 states that you be advised of your right to remain silent and as you must thoroughly understand and waive that right, because if you don't any confession you make is inadmissible as testimony in a court of law. Forty hours ago you confessed to what you did to that little girl. That was the truth. Now you sit here and tell us that you didn't understand your rights, that's a lie! Like every hoodlum since Cain up through Capone, you've learned to hide behind some quirk in the law.*[183]

In the foregoing monologue, Sergeant Friday berates a suspect who gave a confession and then waffled by stating that he didn't understand his rights. Notably, this quote is from the 1966 Dragnet TV movie that was not broadcast until 1969 (three years after Miranda). Friday refers to a California Supreme Court opinion, *People v. Dorado*, which examined the admissibility of confessions.[184] The California court ultimately concluded that Dorado's confessions should be excluded, reasoning as follows:

> Although we accept the finding of the trial court that the confessions of defendant were not obtained by coercion, we have concluded that they should not have been admitted into evidence under recent rulings of the United States Supreme Court. In a long series of cases that court has been troubled by confessions obtained without protection of counsel; this historic concern of the court culminated in two recent decisions: *Massiah v. United States*…and *Escobedo v. Illinois*…. Since we must faithfully discharge our duty to apply to the instant case the Constitution of the United States as interpreted by the Supreme Court of the United States, we

[183] *Dragnet 1966* (Universal Studios: Universal Television, 1969) (transcribed at https://en.wikiquote.org/wiki/Dragnet).

[184] *People v. Dorado*, 62 Cal.2d 338 (1965).

must follow these recent decisions.[185]

Despite Friday's seeming disdain for the *Miranda* rights, the Dragnet series helped shepherd *Miranda* into the national consciousness. Indeed, "[i]t was Mr. Webb as the deadpan Sgt. Joe Friday in "Dragnet," who did much to make the routine warning given by police to suspects part of the national culture, which it has become as Justice Rehnquist wrote in his majority opinion [in Dickerson]."[186]

21 Jump Street

In contrast to the seriousness of the Dragnet series, the *Miranda* warnings are often the butt of jokes in movies and TV programs. For example, the hapless detectives from "21 Jump Street" are forced to explain why they didn't read Miranda warnings to a suspect who has been freed as a result of their blunder:

> Jenko: I did read him his rights. I did a version of that.
>
> Deputy Chief Hardy: Do you even know the Miranda rights?
>
> Jenko: Yes.
>
> Deputy Chief Hardy: Let's hear them then.
>
> Jenko: You got a lot of stuff do, you don't… You got a lot of…

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[185] *Id.* at 345. The *Dorado* case was cited favorably in the *Miranda* opinion:

> As the California Supreme Court has aptly put it:
>
> > Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request, and, by such failure, demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it. *Miranda, supra* note 1, at 471 (quoting People v. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal. Rptr. 169, 177-78 (1965) (Tobriner, J)).

[186] Todd S. Purdum, *The Nation; Miranda as a Pop Culture Icon*, N.Y. TIMES, (July 2, 2000), http://www.nytimes.com/2000/07/02/weekinreview/the-nation-miranda-as-a-pop-culture-icon.html.

> Deputy Chief Hardy: No, go ahead. You goin' anywhere, Schmidt? We have time.
>
> Schmidt: I have a thing, but I can probably push it back.
>
> Deputy Chief Hardy: Go ahead. It's four declamatory sentences followed by a question, for a total of fifty-seven words.
>
> Jenko: Okay. Uh…it's… Look it obviously starts with; 'You have the right to remain silent.' I know you heard this before. And then um…like uh…
>
> [Schmidt whispers to Jenko]
> Schmidt: You have the right to an attorney.
>
> Jenko: Oh, right! You have the right to…remain an attorney. And…
>
> Deputy Chief Hardy: Did you say that you have the right to be an attorney?
>
> Schmidt: You do have the right to be an attorney, if you want to.[187]

Dirty Harry

In 1971, a mere five years after *Miranda* was decided, Clint Eastwood in his seminal role as Officer Harry Callahan in "Dirty Harry," dramatically illustrated how police were grappling with the new constraints within the interrogation process. In one particular scene, Harry is confronted by the District Attorney, who pointedly explains to him that he is not allowed to break down doors and torture suspects to obtain evidence. The District Attorney asks Harry if he's heard of *Escobedo*, *Miranda*, and the Fourth Amendment, which evokes a sneer from Harry.

After explaining to Harry that all of the evidence obtained in violation of the suspect's rights can't be used against him and that the suspect will go free as a result of Harry's constitutional violations, the following colloquy

[187] *21 Jump Street*, (Columbia Pictures 2012); See also, 21 Jump Street, Best Movie Quote – Miranda Rights (2012), https://youtu.be/55EKix7sHAo.

occurs:

> Harry Callahan: Are you trying to tell me that ballistics can't match the bullet up to this rifle?
>
> District Attorney Rothko: It does not matter what ballistics can do. This rifle might make a nice souvenir. But it's inadmissible as evidence.
>
> Harry Callahan: And who says that?
>
> District Attorney Rothko: It's the law.
>
> Harry Callahan: Well, then the law is crazy.[188]

Columbo

By 1991, the Miranda warnings had become firmly entrenched in police procedure. Yet, the apparently bumbling Lieutenant Columbo seemed in need of a "crib sheet" to remember all of them. In one episode, he stands close to a suspect who had been arrested and reads from a well-worn piece of paper in a conversational tone:

> "You have the right to remain silent. [Turns to look at the suspect] You know anything that you say, they can hold that against ya. You have the right to retain a lawyer. You have the right…[pulls paper closer to eyes as if he can't clearly see the words] what in the hell is that?"[189]

CONCLUSION

I come to praise Miranda, not to bury it.[190]

Born of necessity to combat abuses in the interrogation room, *Miranda* has endured 50 years of attacks, exceptions, limitations, compromises and

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[188] *Dirty Harry* (Warner Bros. 1971); See also Dirty Harry Movie Clip – "The Law's Crazy" (1971), https://youtu.be/kh62SjGdI0s.

[189] *Columbo: "Columbo and the Murder of a Rock Star*" (Universal Television broadcast Apr. 29, 1991); See also, Columbo is Reading the *Miranda* Rights to the Suspect, https://vk.com/video-59394388_168065686?list=c14f59159284822181.

[190] A slight adaptation of the famous line in Shakespeare's Julius Caesar: "I come to bury Caesar, not to praise him." William Shakespeare, *Julius Caesar,* Act 3, Scene II.

a final broadside assault on its constitutional validity. Its legacy is one of both protector of rights in the interrogation room and gatekeeper to reliable prosecutions. At the time *Miranda* was announced, Chief Justice Warren explained: "We start here…with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized…."[191] While that sentiment was certainly debatable in 1966, it is a most apt description of the 50-year-old *Miranda* precedent today. Here's to another 50 years!

[191] Miranda, *supra* note 1, at 442.