

Law and Disorder: The High Court's Hasty Decision in *Miranda* Leaves a Tangled Mess

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INTRODUCTION

This is an essay borne of almost three decades of studying the infamous 1966 U.S. Supreme Court decision, *Miranda v. Arizona*.¹ This is, paradoxically, both the easiest and most difficult task. It is easy because, although *Miranda* was a 100-plus page opinion, there have been at least 1000 articles tailored to most every sentence in that opinion. Fairly it can be queried, “What does this professor have to add?”

Miranda was judicial fiat: at its worst, it was *ultra vires*, it was a usurpation of the legislative function, it was illogical, it was—being complimentary—the second try at handling a social problem. It was verbose, it confused the Sixth Amendment right to counsel² with the Fifth Amendment self-incrimination clause,³ it was filled with dicta that was inexorably eroded from its birth to the present. It changed the long-held belief that the self-incrimination right attached at trial or trial-like proceedings, not in the street. But, at its best, it was idealistic, it attempted to maximize the truth-finding function of trial, it maximized individual dignity and liberty, and it gave law professors a meaningful chance to pontificate and earn tenure. Additionally, it relied on the intrinsic equitable powers of the High Court to fashion appropriate remedies.

Admittedly, the Anglo-American process of common law de-

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

² U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” (emphasis added)).

³ U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

velopment includes the notion that in a judge's role of interpreting the law, he or she, by necessity, *creates* law. Law is not automatically self-effectuating. Yet it is expected that a judge will attempt to follow the original intent of the framers of that law; this is so-called "originalism."⁴ However, not only do evolving notions of decency⁵ mandate judicial balancing and change, but radical population changes, technological advances, and social evolution indicate that strict construction of "originalism" is unworkable—except as a first principle. As a first principle, it checks unbridled judicial caprice. As the only principle, it "freezes" law into a cruel irrelevance.

The High Court should (and still could) correct this self-inflicted wound. It is indisputable that all American courts, including the U.S. Supreme Court, have the power to fashion equitable remedies. But equitable remedies, essentially amounting to unbridled judicial discretion, are a dangerous last resort.

The Framers were not plagued by crime, nor did they have a massive police force. They were aware that uncorroborated confessions were unreliable, and thus the *corpus delicti* rule⁶ was, and still is, part of our common law. The rule precludes convicting an individual based solely on his or her own uncorroborated confession.⁷

The High Court should have, and did, mandate that the self-incrimination clause should apply prior to trial, at the time of arrest. Prior to *Miranda*, pre-trial confessions or admissions had to be "voluntary."⁸ Otherwise, under traditional evidence law, the prejudicial effect would outweigh the probative value. Additionally, involuntariness was interpreted to violate the due process requirements of both the Fifth and the Fourteenth Amendments.⁹ Accordingly, to effectuate this mandate the Court should

⁴ Originalism is defined as "[t]he theory that the U.S. Constitution should be interpreted according to the intent of those who drafted and adopted it." BLACK'S LAW DICTIONARY 1126 (7th ed. 1999).

⁵ Decency is defined as "[t]he state of being proper, as in speech or dress; the quality of being seemly." *Id.* at 413.

⁶ The *corpus delicti* rule is "[t]he doctrine that prohibits a prosecutor from proving the *corpus delicti* based solely on a defendant's extrajudicial statements." *Id.* at 346.

⁷ *Id.*

⁸ *See, e.g., Morales v. New York*, 396 U.S. 102 (1969).

After considering the full record, we do not disturb the determination of the trial court, affirmed by the New York appellate courts, that Morales' confessions were voluntarily given. The trial occurred prior to *Miranda v. Arizona*, and the totality of the circumstances surrounding the confessions shows that the confessions were voluntary, not coerced.

Id. at 104 (citation omitted).

⁹ *See, e.g., Withrow v. Williams*, 507 U.S. 680, 693–94 (1993) (holding that in considering a criminal defendant's claim under the Due Process Clause of the Fourteenth Amendment and whether the defendant's conviction improperly rested on an involuntary

have, and did, require that the arrestee be affirmatively told of this due process right.¹⁰

Then the High Court began an embarrassing set of stumbles. Correctly, it held that the Sixth Amendment right to counsel applied after formal charging in *Massiah*.¹¹ But it stumbled badly in *Escobedo* in holding that the “target” of a criminal investigation must be told of his or her right to counsel whether or not that person is arrested or formally charged.¹² Although *Escobedo* has never been overruled, it has been limited to its facts.¹³

Instead of holding that the Sixth Amendment right to counsel attaches when the suspect is placed in jail or even arrested, which using their parlance, is certainly a “critical stage”¹⁴ in a potential defendant’s criminal—or not—future, the Court created a non-existent aspect of the Fifth Amendment Self-Incrimination Clause. That is, when an individual is under arrest, he or she must affirmatively be told not only of his or her right to remain silent, but also of the right to counsel.¹⁵ The rule proved as im-

confession, courts must look to the totality of circumstances to determine whether a confession was voluntary, including (1) the crucial element of police coercion; (2) the length, location, and continuity of the interrogation; (3) the defendant’s maturity, education, physical condition, and mental health; and (4) the failure of the police to advise the defendant of his or her rights to remain silent and to have counsel present during custodial interrogation).

¹⁰ See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“[T]he privilege [against self-incrimination] is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’” (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964))).

¹¹ *Massiah v. United States*, 377 U.S. 201, 205 (1964).

¹² *Escobedo v. Illinois*, 378 U.S. 478, 485–86 (1964).

[A] Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him.

Id. at 484–85 (quoting *Massiah v. United States*, 377 U.S. 201, 204 (1964)) (internal quotation marks omitted).

¹³ See *United States v. Muzychka*, 725 F.2d 1061, 1066 (3d Cir. 1984).

¹⁴ See, e.g., *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (recognizing a long-standing rule that the Sixth Amendment right to counsel attaches not only at trial, but also at earlier, “critical” stages).

¹⁵ *Miranda*, 384 U.S. at 467–469.

[I]n apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.

. . . .

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.

Id.

practicable as it was ridiculous, and has been riddled with exceptions.¹⁶

The rule should have been that the arrestee be told of his or her right to silence, and that upon jailing, the arrestee be offered counsel, thus moving the Sixth Amendment right to counsel to the pre-trial arena. For the purists, an alternate logical rule would have been a strong presumption of voluntariness if the “rights” were given verbally, and a presumption of involuntariness if they were not given verbally.

Instead, we have volumes of “jigsaw puzzle” law and an encyclopedia of exceptions to *Miranda*. We also have the High Court’s grudging acceptance of a rule that it admits is not truly constitutional. It did this recently in *Dickerson*, which tackled the issue of *Miranda* as a constitutional principle and decided whether the U.S. Congress could “overrule” it.¹⁷

A brief examination of the historical background of the Fifth Amendment Self-Incrimination Clause will be helpful for interpretation. Even in colonial times an inquisitorial, torture-laden,

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

....

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.

Id. at 470.

¹⁶ See, e.g., *New York v. Quarles*, 467 U.S. 649, 655–58 (1984) (establishing a “public safety” exception to the requirement that *Miranda* warnings be given before questioning: for example, if the defendant is in possession of information regarding the location of an unattended gun in a supermarket, or there are other similar exigent circumstances which require protection of the public, the defendant may be questioned without warning and his responses, though incriminating, will be admissible in evidence); *Rhode Island v. Innis*, 446 U.S. 291, 300–03 (1980) (holding that a spontaneous statement made by a defendant while in custody, even though the defendant has not been given *Miranda* warnings or invoked the right to counsel, is admissible in evidence as long as the statement was not given in response to police questioning or other conduct by the police likely to produce an incriminating response); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that a confession obtained in violation of the *Miranda* standards may nonetheless be used for purposes of impeaching the defendant’s testimony: that is, if the defendant takes the stand at trial and the prosecution wishes to introduce his or her confession as a prior inconsistent statement to attack his or her credibility, the *Miranda* holding will not prohibit this); *Colorado v. Connelly*, 479 U.S. 157, 165–67 (1986) (holding that *Miranda*’s requirement for “voluntariness” means only that the suspect reasonably appears to understand what he or she is doing, and is not being coerced into signing the waiver, regardless of whether the suspect may actually have been insane at the time).

¹⁷ See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (“We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.”).

trial-by-ordeal method was not uncommon.¹⁸ Likewise there was hostility to the “*ex officio*” oath. The *ex officio* oath was a badge of infamy on an often exemplary common law. It required that the defendant place his or her hand on a Bible and promise to truthfully answer questions asked of him or her. After this point, incriminating answers were sought and were punishable.¹⁹ Further, there was no right to refuse to answer.²⁰ Perjury, at least in capital cases, was punishable by death.²¹ Sir Edward Coke, the famous Elizabethan English lawyer and judge, placed his career on the line to have the *ex officio* oath ousted from the common law. Coke’s persistence cost him his job, as King James removed Coke from office in 1616.²² The *Lilburne* trial and tragedy, also in the 1600s in England, did much to cement the right against self-incrimination into the common law.²³ There, the rebel writer Lilburne was publicly tortured and tried. He dramatically emphasized the injustice of the *ex officio* oath, and his eloquence and popular support did much to bring the safeguards now embodied in the Self-Incrimination Clause into the English system.²⁴

Another source of the privilege against self-incrimination was the 1689 *Scottish Claim of Rights*.²⁵ It should be noted, however, that the right was not in the *Magna Carta*.²⁶ The right crossed the Atlantic when James Madison, the principal author of the Fifth Amendment, purposefully used broad drafting so as to make the right itself broad.²⁷

Finally, in *Malloy v. Hogan* in 1964, the privilege against self-incrimination was made applicable to the states via the Fourteenth Amendment Due Process Clause.²⁸

¹⁸ LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 346–47 (Ivan R. Dee 1999) (1968).

¹⁹ *Id.* at 46–47, 274.

²⁰ *Id.* at 132–34.

²¹ See *Furman v. Georgia*, 408 U.S. 238, 335 (1972) (Marshall, J., concurring).

²² See Leonard W. Levy, *The Origins of the Fifth Amendment and its Critics*, 19 CARDOZO L. REV. 821, 823 (1997); see also LEVY, *supra* note 18, at 254.

²³ See Sara A. Leahy, Note, *United States v. Balsys: Foreign Prosecution and the Applicability of the Fifth Amendment Privilege Against Self-Incrimination*, 48 DEPAUL L. REV. 987, 991 n.29 (1999). See also LEVY, *supra* note 18, at 282.

²⁴ LEVY, *supra* note 18, at 271–82.

²⁵ See R. Carter Pittman, *Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764 (1935) (“The only constitutional document that recognized [the privilege against self-incrimination] in any form before 1776 is the Scotch Claim of Rights of 1689 . . .”).

²⁶ *Id.*

²⁷ Cf. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 712–13 (1985).

²⁸ See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

MIRANDA AND POLICE INTERROGATION PRIOR TO
FORMAL CHARGING

A. The Voluntariness Standard

Prior to the landmark decision of *Miranda v. Arizona* regarding pre-indictment interrogation and confession, the due process requirement of general “voluntariness” controlled.²⁹ The test for voluntariness is whether the suspect’s will was overborne.³⁰ For example, in 1936 in *Brown v. Mississippi*,³¹ a confession that resulted from obvious torture was overturned.

Similarly, the Court has held that psychological coercion is sufficient to void the admissibility of certain confessions. In *Leyra v. Denno*, the bringing in of a psychiatrist, purportedly to help the defendant with a sinus problem but in fact to gain a confession, was held to violate constitutional requirements for due process.³² Lengthy interrogations and interrogations of the “weak” indicate involuntariness under the Due Process Clause.

Although the due process voluntariness standard has been overshadowed by *Miranda*, it is still relevant if *Miranda* is inapplicable, such as when the suspect is not in custody or is not formally charged. That is, all statements in order to be used against the accused must be voluntary, under the totality of the circumstances.³³

B. *Miranda*—Custodial Interrogation

In the 1960s, the Warren Court realized the potential detrimental effect that a confession or other incriminating statement could have on the accused’s case. The introduction of a confession usually signals guilt to the jury. Moreover, the High Court was not pleased with the state courts’ guarding of defendants’ rights. It therefore strengthened the self-incrimination protection. In early attempts to strengthen the accused’s position when faced with police interrogation, the Court applied the Sixth Amendment right to counsel. The 1964 cases of *Massiah*³⁴ and *Escobedo*³⁵ explain this principle. However, and perhaps illogically, the Court later attacked the problem by applying the Fifth Amendment Self-Incrimination Clause—provided there was custody (meaning arrest).

²⁹ *Miranda v. Arizona*, 384 U.S. 436, 464, 467 (1966).

³⁰ *Watts v. Indiana*, 388 U.S. 49, 53 (1949).

³¹ *Brown v. Mississippi*, 297 U.S. 278, 281–82, 285–87 (1936).

³² *Leyra v. Denno*, 347 U.S. 556, 559–60 (1954).

³³ *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

³⁴ *Massiah v. United States*, 377 U.S. 201, 205–06 (1964).

³⁵ *Escobedo v. Illinois*, 378 U.S. 478, 484–85 (1964).

*Miranda v. Arizona*³⁶ was a set of four cases considered together. It metamorphosed the prior law. Instead of a case-by-case approach, examining voluntariness under the totality of the circumstances, the Court, in effect, created a new confession code. That is, prior to interrogation, suspects in custody must be warned that they have the right to remain silent, that anything they say can be used against them in court, that they have a right to counsel (*not* based on the Sixth Amendment), and that if they cannot afford counsel one will be appointed for them.³⁷ Furthermore, even if the suspect waives his or her rights after being given these warnings, the prosecution must show that the waiver was knowingly and intelligently given.³⁸

Later Supreme Court opinions have limited *Miranda*.³⁹ The following discussion is a systematic approach to analyzing a *Miranda* problem, and proof that the opinion has been so severely eroded as to warrant overruling or modification.

1. Was There Custody?

For *Miranda* to attach, there must be custody. One is in custody when, by a show of police authority, he or she is actually restrained or submits to this show of authority.⁴⁰ An interview with government agents, standing by itself, does not require giving *Miranda* warnings, and thus suppression of subsequent admissions is not proper. Moreover, an interview at the police station is not *per se* custodial.⁴¹

³⁶ 384 U.S. 436, 456–57 (1966).

³⁷ *Id.* at 444.

³⁸ *Id.*

³⁹ See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that pre-custodial traffic stops do not require giving *Miranda* warnings prior to questioning); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (holding that *Miranda* warnings were procedural safeguards of the right against compelled self-incrimination and not themselves protected by the Constitution); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (holding that *Miranda* warnings are prophylactic measures providing “practical reinforcement” for the Fifth Amendment right against compelled self-incrimination and not themselves rights protected by the Constitution).

⁴⁰ *Miranda*, 384 U.S. at 444 (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”).

⁴¹ *Id.* at 478.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred

The case law is clear: Either an arrest or a de facto arrest is custodial, thus requiring that *Miranda* warnings be given prior to interrogation.⁴² A related question is whether a mere “*Terry* stop” also requires that a suspect be given *Miranda* warnings prior to questioning. In *Berkemer v. McCarty*, the Supreme Court ruled that stops, although they are Fourth Amendment “seizures,” do not require the giving of *Miranda* warnings prior to questioning because a stop is both briefer in duration than an arrest and a lesser restraint on freedom.⁴³ It therefore held that custody is to be judged on the objective indicia of arrest—the officer’s belief or intent is irrelevant.⁴⁴ It should be noted in passing that custody for habeas corpus can be satisfied more easily. The author is troubled by this reasoning. If an arrest mandates *Miranda* warnings, a stop, which is almost as intimidating, should also.

2. Was There Interrogation?

Miranda warnings are not required unless there is interrogation (as well as custody). It therefore becomes of great importance to understand what interrogation is. *Rhode Island v. Innis* defined interrogation under *Miranda* as either express questioning or behavior that the police should know is “reasonably likely to elicit an incriminating response.”⁴⁵ The first part of the definition is obvious: Interrogation occurs when there is express questioning. The second part covers the less obvious situation where, for instance, the police use trickery to gain a response. Under the *Innis* test, responses gained via police trickery are insulated from suppression provided that the suspect did not give the *objective* appearance of being weak.⁴⁶ It must be emphasized that this is a solely objective test. Police bad faith is irrelevant.⁴⁷ Thus “playing on” guilt is acceptable—provided that there are not objective indicia of psychological weakness on the part of the suspect. Only when the suspect is young, emotionally frazzled (e.g., in tears) or physically impaired will police trickery amount to in-

by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. With this holding, incidentally, the Court fully abandoned the old *Escobedo* “target of investigation” test for requiring warnings.

⁴² *Id.* at 467–68.

⁴³ *Berkemer*, 468 U.S. at 440.

⁴⁴ *Stansbury v. California*, 511 U.S. 318, 323 (1994).

⁴⁵ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *id.* at 298 (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (quoting *Miranda*, 384 U.S. at 444) (emphasis omitted)).

⁴⁶ *Id.* at 302 n.8.

⁴⁷ *Id.* at 301.

terrogation.⁴⁸

Innis was arrested on charges of murder and robbery.⁴⁹ He invoked his *Miranda* rights. For that reason, police were precluded from interrogating him. On the way to the police station, after his arrest, two officers conversed *to each other* regarding the missing rifle and the danger the rifle posed to the disabled children at the nearby school.⁵⁰ Innis volunteered to lead them to the gun, and the gun was discovered just where Innis indicated. Leading the officers to the gun was incriminating and at least partially testimonial.

The Court held that the officers' behavior did not amount to interrogation.⁵¹ It reasoned that there was obviously no direct questioning, and the police had no knowledge of the suggestibility of this suspect;⁵² therefore there was no interrogation.

3. Were the Warnings Given and Was There a Waiver of *Miranda* Rights?

Obviously, *Miranda* warnings must be given when there is custodial interrogation. Moreover, it is equally clear that there must be a waiver of those rights for a suspect's statements to be admissible against him in the prosecution's case in chief.

The waiver must be voluntary, knowing and intelligent. However, in writing, this test appears far more difficult to meet than in practice. The voluntary aspect does not focus on the "free will" of the suspect. Rather, as set out in *Connelly*, it focuses merely on police overreaching.⁵³ Thus, a person's confession, after literally hearing voices commanding him to confess to a murder, is deemed legally "voluntary," provided the police did not manipulate his weakness. Similarly, equivocation will likely be deemed to be a waiver.⁵⁴

⁴⁸ George E. Dix, *Federal Constitutional Confessional Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 293–94 (1988); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far*, 99 MICH. L. REV. 1168, 1173–74 (2001).

⁴⁹ *Innis*, 446 U.S. at 295.

⁵⁰ *Id.* at 294–95.

⁵¹ *Id.* at 302.

Turning to the facts of the present case, we conclude that the respondent was not 'interrogated' within the meaning of *Miranda*. It is undisputed that the first prong of the definition of 'interrogation' was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Id.

⁵² *Id.* This test should not be confused with the subjective Sixth Amendment test.

⁵³ *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

⁵⁴ *Davis v. United States*, 512 U.S. 452, 459 (1994).

It follows that the “knowing and intelligent” aspect is also relatively easy to meet. In the context of the *Miranda* prophylactic rule, a waiver is “knowing and intelligent” if the suspect is old enough to understand the warnings and is able to understand English.⁵⁵

The above analysis focuses on the initial waiver of *Miranda* rights. However, if the suspect invokes *some or all* of the *Miranda* safeguards, the analysis becomes more complex.

If the suspect invokes only the *Miranda* right to silence, e.g., by saying something like, “I don’t want to talk,” then the police are permitted to resume interrogation after a reasonable period of time.⁵⁶ However, if the suspect invokes *all* of his or her *Miranda* rights by saying something like, “I want a lawyer,” then interrogation must completely cease for this crime *and all crimes, period*.⁵⁷ The reason for this is that the request for a lawyer is tantamount to stating, “I am helpless.”

In this latter situation, where the *Miranda* right to counsel is invoked, only if the suspect initiates further discussion and if the *Miranda* rights are fully waived will suspects’ statements be admissible at criminal trial. The police are not permitted to reopen interrogation after invocation of the *Miranda* right to counsel.⁵⁸

4. Is there an Exception to *Miranda*?

Like the exclusionary rule of the Fourth Amendment, *Miranda* is a “prophylactic rule.”⁵⁹ Via its inherent equitable powers, the U.S. Supreme Court created the rule to prevent the perceived harm of police overreaching and misconduct. Thus, since the High Court has not deemed *Miranda* to be a mandate of the Constitution, it has allowed exceptions to the rule. Although this approach is arguably unprincipled (since if it is not a necessary part of the Constitution, the Supreme Court truly has less of a claim to jurisdiction), the approach does characterize the present law. Thus there have arisen many exceptions to *Miranda*.

⁵⁵ G. Michael Deacon, *Interrogation and Police Practices—Custodial Interrogations—Waiver and Assertion of Miranda Rights*, 81 GEO. L.J., 991, 1000–02 (1993).

⁵⁶ *Michigan v. Mosley*, 423 U.S. 96, 106–07 (1975).

⁵⁷ *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that once a defendant has asserted the *Miranda* right to counsel, officers may not question the defendant until a lawyer is made available to the defendant or until the “[defendant] himself initiates further communication, exchanges, or conversations” with an officer).

⁵⁸ *Id.* at 484–85.

⁵⁹ *Stone v. Powell*, 428 U.S. 465, 479 (1975) (noting that the exclusionary rule is a prophylactic device to deter Fourth Amendment violations); *United States v. Patane*, 542 U.S. 628, 636 (2004) (noting that *Miranda* is a prophylactic rule).

C. Derivative Evidence

Together, *Michigan v. Tucker*⁶⁰ and *Oregon v. Elstad*⁶¹ indicate that unlike suppression in the Fourth Amendment context, derivative evidence of a *Miranda* violation is not to be suppressed absent police bad faith.⁶² Thus, voluntary admissions given during custodial interrogation without *Miranda* warnings do not taint voluntary admissions after *Miranda* warnings have been given—even though such admissions merely repeat the un-Mirandized statements—unless there was police bad faith.⁶³ Similarly, a live witness discovered as a result of admissions made in violation of *Miranda* can testify.⁶⁴ Because there is no derivative evidence suppression requirement under *Miranda*, it follows that there is no need to explain the attenuation, independent source and inevitable discovery doctrines.

D. Form

In *California v. Prysock*⁶⁵ and *Duckworth v. Eagan*,⁶⁶ the warnings were given in a slightly different manner. In the latter case, for example, the suspect was told that no lawyer would be furnished unless and until the suspect were required to go to court—but if a lawyer was desired, questioning would cease.⁶⁷ This is, of course, quite out of sync with the latter two prongs of *Miranda*. Nevertheless, it was held to be acceptable.⁶⁸ In *Colorado v. Spring*, the Court held that the warnings need not in-

⁶⁰ 417 U.S. 433, 444 (1974) (noting that the prophylactic *Miranda* warnings are “not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected”).

⁶¹ 470 U.S. 298 (1985).

⁶² *Id.* at 306–08.

⁶³ *See id.* at 309.

⁶⁴ *Id.* at 308.

⁶⁵ 453 U.S. 355 (1981). In *Prysock*, the defendant was a minor who confessed only after his parents met him at the police station and presumably pressured him to do so.

⁶⁶ *Duckworth v. Eagan*, 492 U.S. 195 (1989). In *Duckworth*,

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed ‘if and when you go to court.’ The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of *Miranda v. Arizona*.

Id. at 197 (citation omitted). However, the Supreme Court disagreed, holding that the “if and when you go to court” language did not suggest that “only those accused who can afford an attorney have the right to have one present before answering any questions,” and it did not “impl[y] that if the accused does not ‘go to court,’ [i.e.] the government does not file charges, the accused is not entitled to [counsel] at all.” *Id.* at 203 (quoting *Eagan v. Duckworth*, 843 F.2d 1554, 1557 (7th Cir. 1988)). Thus the *Miranda* warnings with this additional language were held to be sufficient.

⁶⁷ *Id.* at 198.

⁶⁸ *Id.* at 203.

clude information as to what crime is being investigated.⁶⁹

E. Vicarious Assertion

Moran v. Burbine indicated that *Miranda* rights are the *personal rights* of the suspect, and cannot be vicariously asserted by the suspect's attorney.⁷⁰ In *this case*, the suspect's sister, without the suspect's knowledge, retained counsel for the suspect. The attorney phoned the police station and the police lied to her, saying that they would not interrogate her client. The Court held that this questionable police behavior did not require dismissal.⁷¹

F. Probation

It could be argued that probation is custodial, and that there is interrogation when a probation interview is mandatory. However, the Court has held that *Miranda* warnings are not required for probation interviews.⁷² Although the Court reasoned that such interviews are not custodial, this can be logically categorized as another exception to *Miranda*.

G. Emergency/Public Safety

Miranda warnings need not be given when police ask questions reasonably prompted by a concern for the public safety; suppression is only mandated if the statements were *actually* coerced.⁷³ The test is objective. If there is an imminent exigency, *Miranda* may be dispensed with. As is usually the case, the offi-

⁶⁹ *Colorado v. Spring*, 479 U.S. 564, 577 (1987) (holding that "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege").

⁷⁰ *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) (stating that there is an "elemental and established proposition that the privilege against compulsory self-incrimination is, by hypothesis, a personal one that can only be invoked by the individual whose testimony is being compelled").

⁷¹ *Id.* at 432-34 ("We do not question that on facts more egregious than those presented here police deception might rise to a level of a due process violation . . . [However, w]e hold only that, on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.").

⁷² *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

⁷³ *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

[T]here is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation . . . where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the [public safety exception] should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.

Id.

cers' *actual* intent is irrelevant.⁷⁴

H. Impeachment

Voluntary statements taken in violation of *Miranda* can be used to impeach a defendant who takes the stand.⁷⁵ Interestingly, the original *Miranda* opinion, in dictum, indicated that the defendant's statements could not be used against him *at all*.⁷⁶ At any rate, this exception does not extend to impeaching defense witnesses with the defendant's statements.⁷⁷

I. Terry Stops

In *Terry v. Ohio*, the Court held that a stop is a seizure of the person, and thus technically is custodial.⁷⁸ Nevertheless, as indicated in *Berkemer v. McCarty*, *Miranda* warnings need not be given when there is a stop, and voluntary responses should not be suppressed.⁷⁹ The difficult issue here is in distinguishing a stop from an informal (de facto) arrest. In the latter situation, *Miranda* warnings are required.

J. Interrogation by a Private Party

Similar to Fourth Amendment rights, *Miranda* warnings are required in custodial interrogation only if a police officer or other government agent is performing the interrogation.⁸⁰ They are not mandated for custodial interrogation conducted by private parties.

⁷⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001).

⁷⁵ *Oregon v. Hass*, 420 U.S. 714, 722 (1975).

⁷⁶ *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

Id.

⁷⁷ *James v. Illinois*, 493 U.S. 307, 308–09 (1990).

⁷⁸ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (“[W]hen the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

⁷⁹ 468 U.S. 420, 440 (1984).

⁸⁰ *Miranda*, 384 U.S. at 461 (“We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak.”).

K. Police Trickery

Although the *Miranda* Court was offended by police trickery (e.g., reverse line-up, false accusation or “Mutt & Jeff” (good cop-bad cop) techniques), later Supreme Courts have usually ignored such conduct. In *Michigan v. Mosley*, for example, the Supreme Court held that a false accusation by the police was irrelevant.⁸¹ A similar situation occurred in *Frazier v. Cupp*.⁸² Further, although the Supreme Court disagreed, *Innis* likely also indicates the presence of police trickery.⁸³ Again, it seems that police trickery is acceptable so long as it is not highly egregious.⁸⁴ This analysis may also explain *Moran v. Burbine*, where the police trickery was aimed at the suspect’s attorney.⁸⁵

L. Routine Booking

A suspect’s incriminating statements during routine booking can be used against him, even if the suspect has invoked his *Miranda* rights beforehand. Thus, for example, a slurred response after a request for the suspect’s address is admissible to show that the suspect was intoxicated.⁸⁶

M. Plainclothes Interrogation

Surprisingly, the Supreme Court has held that a suspect in jail who has invoked his *Miranda* rights can be interrogated by a police officer or agent, provided that this person appears *not* to be a police agent. The Court reasoned that the purpose behind *Miranda* was the desire to reduce the intimidation of “official interrogation.”⁸⁷

N. What is “Interrogation?”

The test for whether there was interrogation is not the same

⁸¹ 423 U.S. 96, 104–05, 107 (1975).

⁸² 394 U.S. 731, 735 (1969) (holding that the prosecutor’s inclusion of a summary of testimony in his opening statement, which he expected to receive from a person who had been indicted with the accused and had pleaded guilty, but who later asserted his privilege against self-incrimination when called as a witness by the prosecutor, did not deprive the defendant of his right of confrontation because the court instructed the jury that those statements were not to be regarded as evidence, and that was sufficient to protect the defendant’s constitutional rights).

⁸³ *Rhode Island v. Innis*, 446 U.S. 291, 294–95 (1980).

⁸⁴ The double questioning, once before giving the *Miranda* warnings and once immediately after, was found to violate *Miranda* because it was so egregious. See *Missouri v. Seibert*, 124 S. Ct. 2601, 2613 (2004).

⁸⁵ 475 U.S. 412, 417 (1986) (holding that the police did not act so egregiously as to deprive the defendant of due process when the officers lied to suspect’s counsel, saying that the suspect would *not* be questioned when he, in fact, was).

⁸⁶ *Pennsylvania v. Muniz*, 496 U.S. 582, 590 (1990).

⁸⁷ See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

under the Sixth Amendment as it is under the Fifth Amendment. The Sixth Amendment test queries whether the police “deliberately elicited” an incriminating response.⁸⁸ That is, the focus is on police bad faith. Weakness of the suspect is not required. This is an easier test for the defendant. Under this test, not only is direct questioning precluded (absent a defendant-initiated waiver), but police trickery is also precluded.⁸⁹ Once the accused invokes the Sixth Amendment right to counsel, there can be no waiver of the right unless the defendant initiates further discussion with the police or prosecution.

However, the Sixth Amendment interrogation protection, unlike *Miranda* rights, is only applicable to the crime for which the defendant is formally charged.⁹⁰ Thus, if the defendant is questioned on *unrelated crimes*, the only protections are the Fifth Amendment voluntariness test and *Miranda*—even if he or she has already been indicted for the other crimes.⁹¹

Yet despite all of the above convoluted rules, rationales and exceptions, the High Court held in *Dickerson* that *Miranda*, now long a part of our law, though not mandated by the Constitution, is constitutional law!⁹²

CONCLUSION

What lessons can be learned from the above analysis? Go slowly. Judges should not create law unless there has been ample time to debate the underlying principles of the Constitution. And, if the High Court erred, as it certainly did in *Miranda*, it

⁸⁸ *Massiah v. United States*, 377 U.S. 201, 206 (1964).

⁸⁹ *See generally* *Brewer v. Williams*, 430 U.S. 387 (1977) (holding that a defendant’s right to counsel is violated if the defendant has invoked his right to counsel and police officers use deceptive means to entice the defendant to talk).

⁹⁰ *Moran v. Burbine*, 475 U.S. 412, 431 (1986).

⁹¹ *Arizona v. Roberson*, 486 U.S. 675 (1988) (reaffirming the bright-line rule established in *Edwards*: a suspect who has “expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication” (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981))). However, in *Roberson*, three days elapsed between the unsatisfied request for counsel and the separate-offense interrogation. *Id.* at 686. Under such circumstances, the Court found there to be a serious risk that the mere repetition of the warnings would not overcome the presumption of coercion created by prolonged police custody. *Id.* Furthermore, the fact that it may be in an uncounseled suspect’s interest to know about, and to give a statement concerning, the separate offense does not compel an exception to *Edwards*, since the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel’s advice, and since the police are free to inform the suspect of the facts of the second investigation, as long as they do not interrogate him, and he is free to initiate further communication. *Id.* at 687. *See also* *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (noting that the *Edwards* rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights”).

⁹² *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

should bite the bullet, overrule the case, and create law that is principled and that makes a modicum of sense. To wit, the Sixth Amendment right to counsel should attach at jailing, and giving *Miranda* warnings should set up a rebuttable presumption of voluntariness, and no more.