

# **CRIMINAL PROCEDURE**

**THIRD EDITION**



**MATTHEW  
LIPPMAN**



## 8

INTERROGATIONS  
AND CONFESSIONS**Did the police constitutionally obtain the defendant's confession to murder?**

Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices."

**Learning Objectives**

1. Know the role of confessions in the criminal investigation process, the potential challenges and problems presented by confessions, and the explanations for false confessions.
2. Understand the due process test for confessions and the strengths and weaknesses of this approach.
3. Know the legal standards established in *McNabb v. United States* and in *Mallory v. United States*.
4. State the holding in *Escobedo v. Illinois*.
5. Appreciate the protections provided by the Fifth Amendment right against self-incrimination and what is protected by the Fifth Amendment and what is not protected.
6. Know how *Miranda v. Arizona* protects the Fifth Amendment rights of individuals in police custody.
7. List the factors to be considered in determining whether an individual is subjected to custodial interrogation.
8. Define the public safety exception.
9. Know how the *Miranda* rights are to be read and the requirements for invoking the *Miranda* rights.
10. State the test for the waiver of the *Miranda* rights. Explain explicit and implicit waiver.
11. Define question first and warn later.
12. Know the legal tests for a waiver following invocation of the *Miranda* rights.
13. Appreciate the test for interrogation and why it matters whether a confession is the product of police interrogation.
14. Know the application of the Sixth Amendment right to counsel.



## INTRODUCTION

### Interrogations

The writings of the late Professor Fred Inbau of Northwestern University continue to have a significant influence on the tactics and strategy of police interrogations. Professor Inbau argued throughout his career that detective novels, films, and television had misled the public into believing that the police solve most crimes by relying on scientific evidence or eyewitness testimony. He pointed out that in a significant number of cases, this type of evidence is unavailable, and the police are forced to rely on **confessions**.

Professor Inbau illustrates the importance of confessions by pointing to the hypothetical example of discovering the dead body of a female who appears to have been the victim of a criminal assault. There is no indication of a forced entry into her home, and the police investigation fails to yield DNA, fingerprints, clothing fibers, or witnesses. Law enforcement officers question everyone who may have had a motive to kill the victim, including the victim's angry former husband and her brother-in-law, who had accumulated large gambling debts and owed the victim money. The brother-in-law eventually tires under skillful police questioning and confesses. This example, according to Inbau, illustrates three important points concerning the importance of confessions (Inbau, 1961):

- Many criminal cases can be solved only through confessions or through information obtained from other individuals.
- Suspects often will not admit their guilt unless subjected to lengthy interrogations by the police.
- Successful police questioning requires sophisticated interrogation techniques that may be considered trickery or manipulative in ordinary police interactions with the public.

Inbau's argument is nicely echoed by Supreme Court Justice Antonin Scalia's remark that "even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected" (*Minnick v. Mississippi*, 498 U.S. 146, 166–167 [1990]). It often is overlooked that in addition to speeding the conviction and punishment of the guilty, confessions can help to exonerate the innocent without subjecting these individuals to the time and expense of a lengthy criminal investigation and trial. There also is the practical consideration that the **admission** of criminal guilt is an important step in an offender's acceptance of responsibility and commitment to rehabilitation (Dressler & Michaels, 2006, p. 418).

There is no reliable data that clearly establish the percentage of cases in which interrogations play a central role in establishing a defendant's guilt. We can only note that jurors credit confessions with a great deal of importance in the determination of a defendant's guilt or innocence. In summary, confessions play an important role in the criminal justice process for several reasons.

- **Crime detection.** Confessions help the police solve crimes where there is an absence of scientific evidence and witnesses.
- **Accountability.** Acknowledging guilt is a significant step toward rehabilitation.
- **Efficiency.** Confessions facilitate both criminal convictions of the guilty and exoneration of the innocent.

Confessions also present potential challenges and problems for the criminal justice system.

- **Abuse.** The police may be tempted to employ physical abuse and psychological coercion to extract confessions. Abusive conduct is encouraged by the practice of incommunicado police interrogation—the carrying out of interrogations in police stations without the presence of defense lawyers or judicial supervision.
- **Fair procedures.** A reliance on pretrial confessions to establish a suspect's guilt is contrary to the principle that guilt is to be established beyond a reasonable doubt through the adversarial process in a courtroom.
- **Reliability.** There is the danger that a conviction will be based on a false confession.
- **Inequality.** Uneducated and disadvantaged suspects and individuals lacking self-confidence may be particularly vulnerable to manipulation and trickery. On the other hand, the wealthy and educated are more likely to possess the self-confidence and understanding to refuse to talk to the police and are more likely to be able to afford a lawyer.



The threat of **false confessions** and convictions has been of particular concern. This calls into question the adequacy of the protections that are made available to defendants in the criminal justice process and is pointed to by critics as illustrating the lack of fairness in the criminal justice process.

## False Confessions

Individuals isolated in interrogation rooms have been known to make false confessions, even in instances in which the police did not pressure or manipulate suspects and treated suspects in a balanced and respectful fashion.

On April 19, 1989, a twenty-eight-year-old jogger was viciously attacked and raped in Central Park in New York City. Five African American and Latino teenagers ranging in age from fourteen to sixteen who had been arrested for muggings in the park that night confessed and the following year were convicted in two separate trials. Four of the five made videotaped **statements** with parents or relatives present. Typical was one young man's description that "Raymond had her arms, and Steve had her legs. He spread it out. And Antron got on top, took her panties off." A second confessed that "I grabbed one arm, some other kid grabbed one arm, and we grabbed her legs and stuff. Then we all took turns getting on her, getting on top of her." One suspect went so far as to reenact how he pulled off her running pants.

The young men claimed in court that they had been pressured into the confessions. The jurors at the two trials nevertheless convicted the defendants. The massive publicity surrounding the case may have influenced the jurors to overlook the inconsistencies in the defendants' accounts and to disregard the fact that only a few hairs on one of the defendants linked the juveniles to the rape. In 2002, Matias Reyes, who was serving over thirty years for murder and four rapes, confessed to the Central Park rape, and his DNA was found to match that of the perpetrator. On December 19, 2002, the convictions of the five men were vacated. The five men settled a civil suit against New York City for \$41 million in 2014.

How is this possible? A number of factors in the Central Park jogger case combined to create the danger of a false confession:

- **Police bias.** The police were under intense pressure to solve the crime and quickly concluded that the suspects must be guilty and focused on obtaining confessions.
- **Age and intelligence.** Several of the young suspects may have been tricked into confessing. Two had IQs below 90 and may have failed to understand the meaning of a confession.
- **Misleading remarks and false evidence.** Some of the young men claimed that they had been told that they would be permitted to go home if they confessed. One suspect reportedly was told that his fingerprints had been found at the crime scene, another was informed that the others had implicated him, and others were told that hairs linked one of the young men to the crime.
- **Lengthy interrogations.** The young men confessed after being interrogated for more than twenty-eight hours.

How frequent are false confessions? Professors Steve Drizen and Richard Leo documented 125 proven false confessions between 1971 and 2002. The good news is that the criminal justice system responded by detecting two-thirds of these confessions prior to trial. On the other hand, forty-four of the defendants were sentenced to at least ten years in prison, and nine of these defendants were sentenced to death. This is not an overwhelming number of false convictions, but even a small number of false convictions are "too many" (Drizen & Leo, 2004). Psychologists tell us that there are three types of false confessors (Kassin & Gudjonsson, 2005):

- **Voluntary false confessors.** Suspects provide false confessions out of a desire for publicity or because they feel guilty about a past crime or are mentally challenged.
- **Compliant false confessors.** Suspects confess in order to obtain a benefit such as the avoidance of abuse or mistreatment or to receive favorable consideration at sentencing. This might range from a lighter sentence to imprisonment in an institution nearby to an offender's family.
- **Internalized false confessors.** Suspects accept the police version of the facts or fail a lie detector test and come to believe that they actually committed the crime.

False confessions are a small percentage of all confessions obtained by the police. These confessions, however, may result in conviction of the innocent and undermine respect for the entire criminal justice system. Consider the case of Eddie Joe Lloyd, a resident of a mental institution, who contacted the police in 1984 with



suggestions on how to solve the rape and murder of a sixteen-year-old Michigan girl. The police were convinced that Lloyd was the perpetrator and persuaded the heavily medicated Lloyd that if he confessed, this would lead the real killer to relax and lower his guard and would lead to the killer's apprehension. The police allegedly fed Lloyd information to strengthen the credibility of his confession. Lloyd was pardoned in 2002 after spending seventeen years in prison when a DNA test indicated that he could not have been responsible for the crime.

In the United States, we believe that it is better for ten guilty people to go free than for an innocent individual to be criminally condemned. This is no mere academic concern. A conviction based on a false confession shakes confidence in the integrity of the criminal justice system. Courts have struggled to balance the need for confessions against the need for procedures that will guard against a miscarriage of justice. As you read this chapter, pay particular attention to how the U.S. Supreme Court has attempted to balance these twin concerns.

### Three Constitutional Limitations on Police Interrogations

The judiciary has relied on three constitutional provisions to ensure that confessions are the product of fair procedures.

**Fourteenth Amendment Due Process Clause.** As we have seen, there is a danger that the pressures of the interrogation process may lead to false confessions. The poor, uneducated, and mentally challenged are particularly vulnerable to trickery and manipulation. Former Supreme Court Justice Arthur Goldberg observed that history teaches that “a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation” (*Escobedo v. Illinois*, 378 U.S. 478, 488–489 [1964]).

In the 1930s, the Supreme Court began to rely on the Fourteenth Amendment Due Process Clause to ensure that confessions obtained by state law enforcement officials were voluntary and were not the product of psychological or physical abuse. The Due Process Clause provides that “[n]o state shall . . . deprive any person of life, liberty, or property without due process of law” and continues to be employed by courts to ensure that confessions are voluntary. An involuntary confession violates an individual's *liberty* to make a voluntary choice whether to confess and ultimately may lead to imprisonment and to a loss of liberty.

**Fifth Amendment Self-Incrimination Clause.** Herbert Packer (1968) notes that in the American *accusatorial system* of criminal procedure, the burden is on the prosecution to establish guilt beyond a reasonable doubt at trial, and the defendant may not be compelled to testify against himself or herself. This is distinguished from an *inquisitorial system* of criminal procedure in which the defendant does not enjoy the privilege against self-incrimination and must answer questions posed by the judge, who typically interrogates witnesses. The drafters of the U.S. Constitution were familiar with the English **Star Chamber**, a special court established by the English king in the fifteenth century that was charged with prosecuting and punishing political and religious dissidents. This inquisitorial tribunal employed torture and abuse to extract confessions and was authorized to hand out any punishment short of death. The reign of terror was effectively ended by Puritan John Lilburne who, in 1637, defied the chamber's order that he confess to spreading dissident religious views. Lilburne was fined, pilloried, whipped, and imprisoned in leg irons in solitary confinement. Parliament ordered his release in 1640, and the House of Lords subsequently vacated Lilburne's sentence, noting that it was “illegal . . . unjust . . . [and] against the liberty of the subject and law of the land” (Levy, 1968, pp. 272–291).

The right against self-incrimination was viewed as sufficiently important that eight of the original American states included provisions that no one may be “compelled in any criminal case to be a witness against himself,” and the right against self-incrimination subsequently was included in the Fifth Amendment to the U.S. Constitution.

In 1966, in *Miranda v. Arizona*, the U.S. Supreme Court concluded that the inherently coercive environment of incommunicado police interrogation overwhelmed individuals' ability to assert their right against self-incrimination. The Supreme Court responded by interpreting the Self-Incrimination Clause requirement that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself” to require the police to read individuals the *Miranda* rights prior to police interrogation (*Miranda v. Arizona*, 384 U.S. 436 [1966]).

The Supreme Court later held that the Sixth Amendment right to counsel protects individuals subjected to interrogation following the “initiation of proceedings against them.”

**Sixth Amendment Right to Counsel.** The U.S. Supreme Court supplemented the *Miranda* judgment in a series of cases that held that once the government has taken formal steps to prosecute an individual, he or she possesses a Sixth Amendment right to counsel. At this point, it is clear that the government is determined to prosecute, and the Supreme Court ruled that the police are prohibited by the Sixth Amendment from circumventing the



trial process and establishing a suspect's guilt through extrajudicial interrogation. The Court explained that the right to an attorney cannot be limited to the trial itself because the denial of access to a lawyer at this early stage of the prosecutorial process may seal the defendant's fate and reduce the trial into a "mere formality" (*Brewer v. Williams*, 430 U.S. 387, 398 [1977]).

Your goal in this chapter should be to learn the strengths and weaknesses of and differences between the three constitutional approaches to interrogations. Pay attention to the judiciary's effort to strike a balance between the need for confessions and the rights of suspects. Consider whether the pendulum has swung too far toward law enforcement or has swung too far toward the protection of defendants or whether a proper balance has been struck. One final point: Keep three terms in mind as you read this chapter. The text, at times, uses these terms interchangeably, but they have distinct meanings.

*Admissions.* An individual admits a fact that tends to establish guilt, such as his or her presence at the shooting scene. An admission when combined with other facts may lead to a criminal conviction.

*Confessions.* An individual acknowledges the commission of a crime in response to police questioning or may voluntarily approach the police and admit to the crime.

*Statements.* An oral or written declaration to the police in which an individual may assert his or her innocence.

## DUE PROCESS

### The Voluntariness Test

Between 1936 and 1966, the U.S. Supreme Court held over thirty confessions obtained by state and local police unconstitutional and inadmissible at trial under the **Fourteenth Amendment due process voluntariness test**.

The *voluntariness test* can be traced to the English common law. Eighteenth-century English common law judges declared that confessions were inadmissible into evidence if they had been extracted through the threat or application of force, through a false promise not to prosecute, or through a promise of lenient treatment. Confessions obtained by a threat or promise of favorable treatment were thought to be unreliable and might result in the conviction of innocent individuals. There was no easy method to determine whether a confession was true or false, and English courts employed the shorthand test of asking whether the defendant's statement was voluntary or involuntary (*Rex v. Warickshall*, 168 Eng. Rep. 234, 235 [K.B. 1783]).

In 1884, the U.S. Supreme Court adopted the English rule and announced that as a matter of the law of evidence, confessions were inadmissible in federal courts if obtained by police tactics that were sufficiently coercive such that the assumption that "one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases" (*Hopt v. Utah*, 110 U.S. 574 [1884]).

In 1897, the Supreme Court, in *Bram v. United States*, held that the Fifth Amendment privilege against self-incrimination provides the same protections as the English common law and that the Fifth Amendment prohibits the use of involuntary confessions against defendants. The holding in *Bram* was applicable only to the federal government because it was based on the Fifth Amendment, which the Supreme Court did not declare to be applicable to the states until 1964 in *Malloy v. Hogan* (*Bram v. United States*, 168 U.S. 532 [1897]).

State courts generally also followed the voluntariness test. There, however, was a significant gap between the law on the books and the law in practice. The Wickersham Commission established by President Herbert Hoover to investigate the administration of criminal justice in the United States reported in 1931 that there was widespread use of the **third degree** by the police to extract confessions.

The *third degree* is illustrated by *Beecher v. Alabama*, which was the subject of two decisions by the U.S. Supreme Court. Beecher was fleeing the Tennessee police across an open field when he was shot in the leg. The chief of police jammed a loaded pistol against Beecher's face while another officer pointed a rifle at the side of Beecher's head. The police chief threatened to kill Beecher, who was an African American, unless he confessed to the rape and murder of a "white woman." The other officer then fired his rifle next to Beecher's ear, and Beecher confessed. Beecher was taken to the hospital and received an injection to ease the pain that he was suffering as a result of most of the bone having been blown out of his leg. He then was instructed to sign extradition papers to Alabama or face a "white mob" that was determined to kill him. By the time Beecher arrived in Alabama five days later, his leg had become swollen, and he was in immense pain. He required morphine every four hours, and the leg ultimately was amputated. Two Alabama investigators interrogated Beecher in the prison hospital, and the medical assistant instructed him to cooperate with the authorities. Numb from the morphine, feverish,



and in intense pain, Beecher signed two statements. The U.S. Supreme Court overturned Beecher's confession and conviction (*Beecher v. Alabama*, 389 U.S. 35 [1967]). Three months later, Beecher was again prosecuted in Alabama, and an oral confession that he allegedly made to a doctor while under the influence of morphine in the Tennessee hospital was used as the basis for his conviction and death sentence. Should the Supreme Court affirm or reverse Beecher's second conviction? The Supreme Court held that "realistic appraisal of the circumstances of this case compels the conclusion that this petitioner's [confession was] the product of gross coercion. Under the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand" (*Beecher v. Alabama*, 408 U.S. 234, 247 [1972]).

The U.S. Supreme Court's condemnation of the third degree in *Beecher* was based on the precedents established in a series of Supreme Court decisions, beginning with *Brown v. Mississippi* in 1936.

## Due Process and State Courts

The Supreme Court held in *Brown v. Mississippi* that the use of confessions at trial that have been obtained through physical coercion violate suspects' fundamental rights and constitute a violation of the Due Process Clause of the Fourteenth Amendment. The Court explained that reliance on unreliable confessions creates the risk that innocent individuals will be condemned to lengthy terms of imprisonment or death (*Brown v. Mississippi*, 297 U.S. 278 [1936]).

In *Brown*, three African American males were convicted of murder in Mississippi solely based on their confessions. Defendant Ellington had been confronted by a deputy sheriff and by a mob of white men who accused him of murder. He denied the crime and was hanged by a rope from the limb of a tree, let down, and then strung up once again. Ellington continued to deny his guilt, and he was tied to a tree, whipped, and then released. He later was arrested and severely whipped while being transported to jail and, when threatened with additional beatings, signed a confession dictated by the sheriff. Defendants Brown and Shields also were arrested, stripped, and beaten with leather straps with inlaid metal buckles. Chief Justice of the U.S. Supreme Court Charles Evans Hughes observed that the trial transcript read "more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened and constitutional government" (282).

The Supreme Court, in reversing the defendants' convictions, held that the Due Process Clause requires that the treatment of suspects "shall be consistent with the fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions." The Court observed that it would be difficult to conceive of methods "more revolting to the sense of justice than those taken to procure [these] confessions. . . . The rack and torture chamber may not be substituted for the witness stand" (316).

The Supreme Court in *Brown* concluded that Mississippi authorities had conspired to extract a coerced and untruthful confession. The Court's decision was a clear message that the government bears the burden of establishing individuals' guilt in the courtroom beyond a reasonable doubt and that government authorities may not coerce individuals into involuntarily providing evidence of their own guilt. The cost to the government of police tactics that violate the Due Process Clause is the exclusion of confessions from the prosecutor's case-in-chief at trial.

In 1944, in *Ashcraft v. Tennessee*, the Supreme Court extended the protection of the Due Process Clause to include psychological coercion. Ashcraft confessed to soliciting the murder of his wife after having been detained and subjected to **incommunicado interrogation** for thirty-six hours by teams of police officers and lawyers. The Supreme Court concluded that Ashcraft's confession was the product of a coercive set of circumstances that overwhelmed his ability to exercise a rational choice and observed that the "efficiency of the rack and the thumb-screw" is now matched by equally effective techniques of psychological persuasion (*Ashcraft v. Tennessee*, 322 U.S. 143 [1944]). In *Chambers v. Florida*, the Supreme Court concluded that a group of young African Americans had been subjected to "protracted questioning . . . calculated to break the stoutest nerves and the strongest resistance. . . . To permit human lives to be forfeited upon confessions thus obtained would make . . . due process . . . a meaningless symbol" (*Chambers v. Florida*, 309 U.S. 227, 238–240 [1948]).

The Supreme Court held that the confessions in *Brown* and *Ashcraft* were the product of police coercion and were in violation of the Due Process Clause. The Court's application of the voluntariness test in these cases prevented innocent individuals from being convicted on the basis of *coerced and false confessions*. *Reliable or trustworthy confessions* are not the only goal of the voluntariness test. In *Blackburn v. Alabama*, the Supreme Court explained that the due process approach is designed to achieve a "complex of values" (*Blackburn v. Alabama*, 361 U.S. 199, 207 [1960]). We now briefly examine three interrelated goals in addition to trustworthiness that the Supreme Court identified as underlying the voluntariness test.

## Fundamental Fairness

The Supreme Court pronounced in *Lisenba v. California*, in 1941, that the aim of the voluntariness test is not only to exclude false confessions but also to ensure **fundamental fairness** in the methods used to obtain



confessions. Justice Owen Roberts noted that it would be contrary to due process to employ threats, promises, or torture in the courtroom to induce an individual to testify against himself and a “case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence” (*Lisenba v. California*, 314 U.S. 219 [1941]). This type of abusive behavior, according to Justice Roberts, undermines respect for the criminal justice system.

## Police Methods

The **police methods test** is based on “deep-rooted feeling that the police must obey the law while enforcing the law. . . . [I]n the end, life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves” (*Spano v. New York*, 360 U.S. 315, 320–321 [1959]).

This approach was first articulated in *Watts v. Indiana* in 1949. In *Watts*, the police interrogated Watts for five consecutive evenings and deprived him of sufficient sleep and food. Watts also was not taken before a judge for a formal charge and was not advised of his constitutional rights, as required under Indiana law. The U.S. Supreme Court ruled that Watts’s confession was unconstitutionally obtained and held that the Due Process Clause “bars police procedures which violate the basic notions of our accusatorial mode of prosecuting crime . . . [and stressed that] brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case” (*Watts v. Indiana*, 338 U.S. 49, 54 [1949]).

## Involuntary Confessions

A fourth purpose behind the due process approach is the exclusion of **involuntary confessions** that result from mental disabilities or drugs administered by the police and are not the product of a *rational intellect and free will*. In *Townsend v. Sain*, defendant Charles Townsend was arrested in connection with a robbery and murder. The nineteen-year-old Townsend had been addicted to narcotics since age fifteen and was under the influence of heroin at the time of his arrest. Townsend complained during his interrogation that he was suffering from withdrawal and asked for a dose of narcotics. A doctor injected Townsend with a combination of phenobarbital and hyoscine. This alleviated Townsend’s symptoms, and he agreed to talk to the police, confessed within twenty-five minutes, and signed a statement the next day. Townsend soon thereafter experienced additional discomfort, and he was given a tablet of phenobarbital and again confessed several hours later (*Townsend v. Sain*, 372 U.S. 293 [1963]).

Following Townsend’s conviction, it was revealed that the police were unaware that hyoscine possessed the property of truth serum and that the combination of the drugs administered to Townsend adversely affected his ability to think clearly. The U.S. Supreme Court ruled that “[i]t is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of truth serum. . . . Any questioning by police officers which in fact produces a confession which is not the product of a free intellect renders the confession inadmissible” (308–309).

## The Four Purposes of the Voluntariness Test

In summary, the due process voluntariness test is designed to achieve four interrelated purposes.

**Trustworthiness.** Confessions that result from physical or psychological coercion run the risk that a defendant confessed to avoid or to halt abuse. Statements made under such threats are unreliable and may be false. In *Payne v. Arkansas*, a nineteen-year-old African American defendant accused of murder was subjected to incommunicado interrogation for three days and confessed following the sheriff’s threat to turn him over to a white mob. The Supreme Court ruled that the confession was “coerced and did not constitute an ‘expression of free choice’” (*Payne v. Arkansas*, 356 U.S. 560, 560 [1958]).

**Fundamental fairness.** The use of an involuntary confession against a defendant is fundamentally unfair and compromises the integrity of the courtroom. In *White v. Texas*, White, an illiterate African American farmhand, was illegally detained and taken to the home of the brother-in-law of a rape victim. There, he found fifteen or sixteen other African American suspects who also were being illegally detained without charge or access to a lawyer. White then was taken to the jail where he was detained for six or seven days and was removed at night, taken to the woods, and interrogated. He ultimately signed a confession after having been interrogated most of the night. The Supreme Court ruled that due process prohibits condemning an accused to death through such practices (*White v. Texas*, 310 U.S. 530 [1940]).

**Offensive police methods.** Confessions in violation of the Due Process Clause are the product of police tactics that are offensive to fundamental values. In *Lynnum v. Illinois*, the defendant confessed after three police officers



threatened that she would lose her children unless she cooperated and signed a confession. The Supreme Court observed that isolated and inexperienced defendants had “no reason not to believe that the police had ample power to carry out their threats” (*Lynumn v. Illinois*, 372 U.S. 528, 534 [1963]).

*Free will and rational choice.* Confessions violate due process if they are the product of drugs administered by the police or of a suspect’s psychological disabilities and if they do not result from free will or rational choice. In *Blackburn v. Alabama*, a “mentally incompetent” defendant confessed after having been interrogated for eight or nine hours in a small room filled with police officers. Shortly thereafter, he was evaluated as legally insane. Four years later, Blackburn was declared mentally competent and was prosecuted and convicted of robbery. The Supreme Court held that the chance of Blackburn’s four-year-old confession having been the product of “rational choice and free will” was “remote” and that the confession’s introduction into evidence was a flagrant abuse of due process (*Blackburn v. Alabama*, 361 U.S. 199, 208 [1960]).

The voluntariness test is based on the controversial proposition that an involuntary confession should be excluded from evidence, regardless of whether the confession is true or false. We outline in the next section the factors considered by judges in determining whether a confession is voluntary or is the product of coercion.

## Voluntariness

The Supreme Court has held that to be admissible into evidence, a confession must have been made freely, voluntarily, and without compulsion or inducement of any sort. A confession violates due process and is excluded from evidence that involves the following:

*Coercion.* The police or government officials subject the defendant to physical or psychological coercion.

*Will to resist.* The coercion overcomes the will of an individual to resist.

We have seen examples of coercive conduct in the cases discussed in this section. How do courts determine whether there was coercion and whether the coercion overcame a defendant’s will to resist? The determination as to whether a confession is involuntary is based on the totality of the circumstances surrounding a confession (*Haynes v. Washington*, 373 U.S. 503, 533–534 [1963]). The prosecution bears the burden of establishing voluntariness by a “preponderance of the evidence” (*Lego v. Twomey*, 404 U.S. 477 [1972]). In evaluating the totality of the circumstances, courts consider a number of factors.

*Physical abuse.* Physical abuse and threats of abuse by the police or angry crowds.

*Psychological abuse and manipulation.* Threats, rewards, or trickery inducing a suspect to confess.

*Interrogation.* The length, time, and place of questioning and the number of police officers involved.

*Attorney.* A refusal to permit a suspect to consult with an attorney, friends, or family.

*Defendant.* The age, education, and mental and emotional development of the defendant.

*Procedural regularity.* A failure by the police to follow proper legal procedures, including the *Miranda* warning.

*Necessity.* The police are provided greater flexibility in interrogation when attempting to solve a crime or exonerate a defendant than when they already possess evidence of a defendant’s guilt.

*Spano v. New York* illustrates the totality-of-the-circumstances approach to determining whether a confession is voluntary or involuntary. In *Spano*, the U.S. Supreme Court held that the defendant’s “will was overborne by official pressure, fatigue and sympathy falsely aroused.” The Court’s conclusion was based on a number of factors (*Spano v. New York*, 360 U.S. 315, 323 [1959]):

*Psychological abuse.* The police employed a childhood friend to play on the defendant’s sympathy.

*Interrogation.* The defendant was questioned for eight hours at night by fourteen officers, and his confession was written down by a skilled and aggressive prosecutor.



*Attorney.* The police disregarded the defendant's refusal to speak on the advice of counsel and ignored his request to contact his lawyer.

*Defendant.* The defendant was twenty-five years of age and never before had been subjected to custodial arrest or to police interrogation. He had not completed high school and had a psychological disability.

*Procedural regularity.* The police failed to immediately bring the defendant before a judge and instead subjected him to interrogation.

*Necessity.* The police already possessed eyewitnesses to the shooting and were engaged in securing the evidence required to convict the defendant rather than in identifying the individual responsible for the crime.

## Criticism of the Due Process Test

The due process test is subject to several criticisms.

*Standards.* There are no clear guidelines for the police concerning what conduct is permissible and what conduct is impermissible.

*Evidence.* The defendant and the police may offer radically different versions of the defendant's treatment during the interrogation. Judges find it difficult to reconstruct what actually occurred.

*Litigation.* The lack of definite standards encourages legal appeals and increases the caseloads of state and federal courts.

## The Due Process Test Today

Keep in mind as you continue to read this chapter that an involuntary confession violates due process of law and is inadmissible into evidence, even in those instances in which a defendant may have been read his or her *Miranda* rights. Two recent cases illustrate the U.S. Supreme Court's continuing reliance on the due process, voluntariness test:

*Mincey v. Arizona.* Mincey, while in intensive care in the hospital, was interrogated by a police detective who informed him that he was under arrest for murder. Mincey's requests for a lawyer were disregarded, and the detective continued the interrogation. The suspect was unable to talk because of a tube in his mouth and responded by writing down his answers. The Supreme Court determined that Mincey was "weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne" and that his confession had been obtained in violation of due process of law. The Court stressed that an involuntary confession may not be used at trial for any purpose whatsoever (*Mincey v. Arizona*, 437 U.S. 385, 401–402 [1978]).

*Arizona v. Fulminante.* Fulminante was incarcerated on federal firearms charges and established a friendship with Sarivola, a paid federal informant who was serving a sixty-day sentence for extortion and posing as an organized crime figure. Sarivola was instructed to obtain information regarding Fulminante's possible involvement in the murder of his young daughter. Sarivola offered to protect Fulminante from the other inmates who allegedly disliked "child killers" on the condition that Fulminante tell him what happened to his daughter. Fulminante admitted sexually assaulting and shooting his daughter in the head. Sarivola later testified at Fulminante's murder trial. The Supreme Court examined the totality of circumstances and concluded that the confession was involuntary. The Court reasoned that Fulminante was a child murderer whose fear of physical retaliation led him to confide in Sarivola. Fulminante, according to the Court, felt particularly susceptible to physical retaliation because he possessed a slight build and, while previously incarcerated, could not cope with the pressures of imprisonment and in the past had been admitted to a psychiatric institution (*Arizona v. Fulminante*, 499 U.S. 279 [1991]).

In the next case in the text, *Colorado v. Connelly*, the U.S. Supreme Court addresses whether the prosecution's use of a confession against a defendant who claimed to have been directed by God to confess constitutes a violation of the Due Process Clause. Do you agree with the decision in *Connelly*?



## Legal Equation

Voluntariness or due process test	=	Confession is made freely, voluntarily, and without compulsion or inducement.
Confession is inadmissible	=	Police or government officials subject an individual to physical or psychological coercion
	+	Coercion overcomes the will of an individual to resist as determined by a totality of the circumstances.

## Was the defendant's confession involuntary?

### **Colorado v. Connelly**, 479 U.S. 157 (1986), Rehnquist, C.J.

#### Facts

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was in uniform, working in an off-duty capacity in downtown Denver. Respondent Francis Connelly approached Officer Anderson and, without any prompting, stated that he had murdered someone and wanted to talk about it. . . . Understandably bewildered by this confession, Officer Anderson asked respondent several questions. Connelly denied that he had been drinking, denied that he had been taking any drugs, and stated that, in the past, he had been a patient in several mental hospitals. Officer Anderson again told Connelly that he was under no obligation to say anything. Connelly replied that it was "all right," and that he would talk to Officer Anderson because his conscience had been bothering him. To Officer Anderson, respondent appeared to understand fully the nature of his acts.

Shortly thereafter, Homicide Detective Stephen Antuna arrived. Connelly was again advised of his rights . . . and Detective Antuna asked him "what he had on his mind." Respondent answered that he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young girl whom he had killed in Denver sometime during November 1982. Respondent was taken to police headquarters, and a search of police records revealed that the body of an unidentified female had been found in April 1983. Respondent openly detailed his story to Detective Antuna and Sergeant Thomas Haney, and readily agreed to take the officers to the scene of the killing. Under Connelly's sole direction, the two officers and respondent proceeded in a police vehicle to the location of the crime. Respondent pointed out the exact location of the murder. Throughout this episode, Detective Antuna perceived no indication whatsoever that respondent was suffering from any kind of mental illness.

Respondent was held overnight. During an interview with the public defender's office the following morning, he became visibly disoriented. He began giving confused answers to questions, and for the first time, stated that "voices" had told him to come to Denver and that he had followed the directions of these voices in confessing. Respondent was sent to a state hospital for evaluation. He was initially found incompetent to assist in his own defense. By March 1984, however, the doctors evaluating respondent determined that he was competent to proceed to trial. At a preliminary hearing, respondent moved to suppress all of his statements. Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices." Dr. Metzner further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when Officer Anderson and Detective Antuna advised him that he need not speak. Dr. Metzner admitted that the "voices" could in reality be Connelly's interpretation of his own



guilt, but explained that in his opinion, Connelly's psychosis motivated his confession.

### Issue

On the basis of this evidence, the Colorado trial court decided that respondent's statements must be suppressed because they were "involuntary." The court ruled that a confession is admissible only if it is a product of the defendant's rational intellect and "free will." Although the court found that the police had done nothing wrong or coercive in securing respondent's confession, Connelly's illness destroyed his volition and compelled him to confess. . . . Accordingly, respondent's initial statements and his custodial confession were suppressed. The Colorado Supreme Court affirmed. In that court's view, the proper test for admissibility is whether the statements are "the product of a rational intellect and a free will." Indeed, "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." . . .

### Reasoning

The cases considered by this Court over the fifty years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition

of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."

The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision. . . . The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. . . . The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. . . . Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained. . . . A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum. . . .

### Holding

We hold that coercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent's statements and their admission into evidence constitute no violation of that clause.

### Questions for Discussion

1. Summarize the holding of the Supreme Court in *Connelly*.
2. In their dissenting opinions, Justices Brennan and Marshall argued that the use of a mentally challenged person's involuntary confession is contrary to the notion of fundamental fairness embodied in the Due Process Clause. Do you agree with this argument? Is there a justified concern over the truthfulness of Connelly's confession?
3. Is there a difference between the cause of Connelly's confession and the cause of a confession that results from a sense of guilt or shame?
4. As a defense lawyer, what argument would you make in your next "confession case" if the Supreme Court had ruled that Connelly's confession was inadmissible on the grounds that God had directed him to confess?
5. The decision in *Connelly* suggests that a judge may exercise his or her discretion and exclude a confession that is unreliable from evidence. As a trial court judge, would you prohibit the prosecution from introducing Connelly's confession at trial?
6. *Problems in policing*. As a police officer, how should the due process test influence your tactics in the interrogation of suspects?



### You Decide



**8.1** The defendant, Frazier, was arrested and interrogated for slightly over an hour and signed a written confession to murder. Prior to the interrogation, he was informed of his right to an attorney. Frazier then was asked where he was on the night of the homicide. He admitted that he was with his cousin Jerry Lee Rawls. The officer then lied and told Frazier that Rawls had been brought in and had confessed. The officer also sympathetically suggested that the male victim had started the fight by making sexual advances

toward Frazier. Frazier then began to talk. He hesitated and stated that he better get a lawyer before proceeding with the interview to avoid getting into even more trouble. The officer replied, "You can't be in any more trouble than you are in now," and the questioning continued. Frazier subsequently signed a written confession. Would you admit the confession into evidence under the due process test? Should limitations be placed on police misrepresentation of the facts during interrogation? What if the police had misrepresented that they had DNA evidence linking Frazier to the killing? See *Frazier v. Cupp*, 394 U.S. 731 (1969).

*You can find the answer by referring to the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).*

## THE MCNABB–MALLORY RULE

The police justifiably complained that the due process test left them with limited guidance. How many police could interrogate a defendant? For how long? Could they advise a defendant that they already possessed some evidence suggesting that he or she was guilty? Were they required to allow a defendant to consult with an attorney? Defendants who felt that their confessions had been coerced were forced to spend time and money appealing the introduction of their confessions at trial.

The U.S. Supreme Court responded by attempting to develop clearer guidelines for the police. In *McNabb v. United States* and *Mallory v. United States*, the Court required federal law enforcement officials to immediately bring suspects before a judicial officer. Confessions obtained in violation of this rule were inadmissible in federal court. This "bright-line" rule for the admissibility of confessions ultimately failed to make a significant impact on police practices.

In 1943, in *McNabb*, three residents of the mountains of Appalachia were convicted of murdering a federal revenue agent who was investigating the McNabb family's rumored illegal whiskey operation. The defendants were arrested at night, incarcerated in a barren cell, and questioned continually over the course of two days without being brought before a court to determine whether the evidence justified their detention. The defendants appealed on the grounds that the confessions had been obtained in violation of their Fifth Amendment rights (*McNabb v. United States*, 318 U.S. 332 [1943]).

The Supreme Court relied on its inherent supervisory authority over the federal courts to reverse the defendants' convictions. The Court pointed out that existing congressional statutes explicitly required federal officers to immediately bring arrestees before a magistrate or judge and demonstrate a legal justification for the arrest. Justice Felix Frankfurter held that the defendants' confessions had been secured through "flagrant disregard" of the law and that their convictions "cannot be allowed to stand without making the courts themselves accomplices in willful disobedience to the law." Congress had not explicitly prohibited the introduction into evidence of confessions obtained without first taking defendants before a federal official, but the failure to exclude such statements from evidence would stultify the policy established by Congress (345).

In 1957, in *Mallory v. United States*, the Supreme Court affirmed the decision in *McNabb*. The Court, however, based its decision on Rule 5(a) of the Federal Rules of Criminal Procedure, adopted three years following *McNabb*. Rule 5(a) is binding on federal courts and requires that federal officers making an arrest shall "take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." Mallory's confession to a rape charge was obtained after nearly eight hours of interrogation, and only then was he formally charged before a judge. The Supreme Court threw out Mallory's confession and explained that the police may not arrest and interrogate a defendant and then decide whether there is probable cause to charge him or her with a crime (*Mallory v. United States*, 354 U.S. 449 [1957]).

The *McNabb–Mallory* rule focused on the length of delay between an arrest and a suspect's initial appearance before a magistrate. This differed from the due process test that examined whether the totality of the circumstances indicated that a confession had been coerced. Critics of *McNabb–Mallory* objected that the Supreme



Court was impeding the conviction of criminals and argued that there was no reason to exclude a voluntary confession merely because the confession had been obtained without promptly presenting a defendant before a federal magistrate. Congress responded by passing the Omnibus Crime Control and Safe Streets Act of 1968, which specifies that a voluntary confession “shall not be inadmissible solely because of delay” in bringing an individual before a judicial official “if such confession was made or given by such person within six hours immediately following his arrest or other detention.” The six-hour limitation “shall not apply in any case in which the delay . . . is found . . . to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer” (18 U.S.C. § 3501(a), (b)).

The *McNabb–Mallory* decisions today are of greater historical than practical significance. Federal courts generally consider unreasonable delay to be one of several factors to be considered in evaluating the voluntariness of a defendant’s confession. The U.S. Supreme Court has now clarified that § 3501 is not required to be followed by the U.S. Constitution and is not applicable to the states (*United States v. Alvarez-Sanchez*, 511 U.S. 350 [1994]). Most state courts, in any event, have refused to follow the *McNabb–Mallory* approach and merely view the failure to present a detainee for arraignment to be one of many factors to be considered in evaluating whether the totality of the circumstances indicates that a confession was coerced.

## ESCOBEDO V. ILLINOIS

In 1964, in *Escobedo v. Illinois*, the U.S. Supreme Court took an additional step to clarify police procedures and to protect suspects when it extended the Sixth Amendment right to counsel to individuals subjected to police interrogation by state as well as federal law enforcement officers.

There were indications in several of the earlier cases decided under the Due Process Clause that four members of the Supreme Court viewed access to a lawyer as fundamental to protecting defendants during police interrogation. These justices, although they were unable to attract an additional vote to constitute a majority, would have excluded confessions from evidence in cases in which the police refused to provide a defendant access to a lawyer. Justice William Douglas observed in *Spano v. New York* that the failure to extend the right to a lawyer to pretrial interrogation meant that the “secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights” (*Spano v. New York*, 360 U.S. 315, 326 [1959]).

Consider two examples of the division between the Supreme Court judges on whether a denial of access to an attorney was a violation of due process that should result in the exclusion of a confession from the prosecution’s case-in-chief.

*Crooker v. California*. The petitioner confessed to murdering his lover and appealed that although he had voluntarily confessed, the police had denied him due process by rejecting his request for a lawyer. A majority of the Supreme Court held that requiring that defendants be provided access to an attorney would have a “devastating effect” on interrogations because the impact would be to “preclude police questioning . . . until the accused was afforded opportunity to call his attorney.” Four judges dissented on the grounds that access to an attorney during pretrial interrogation following an arrest was essential to the protection of a defendant’s right at trial (*Crooker v. California*, 357 U.S. 433 [1958]).

*Cicenia v. Lagay*. Cicenia’s lawyer appeared at the police station and was denied access to Cicenia. Cicenia subsequently asked and was denied the opportunity to meet with his lawyer while being questioned by the police. The U.S. Supreme Court affirmed the petitioner’s murder conviction and rejected the argument that due process required that local law enforcement officers inform suspects of their constitutional right to confer with an attorney. The dissenting judges, once again, argued for recognition of the due process right of access to a lawyer during pretrial interrogation (*Cicenia v. Lagay*, 350 U.S. 925 [1958]).

*Massiah v. United States*. *Massiah* was the breakthrough decision that extended the Sixth Amendment right to an attorney to individuals subjected to pretrial interrogation. *Massiah* and *Colson* were indicted for violating federal narcotics laws and were released on bail. *Colson* was persuaded to cooperate with the government and agreed to the installation of a radio transmitter under the front seat of his automobile. He engaged *Massiah* in a conversation, and at trial, an FBI agent testified regarding the conversation that he had overheard. Justice Potter Stewart held that after *Massiah* had been indicted and was entitled to a lawyer and to the determination of his guilt before a judge and jury, he had been improperly subjected to an extrajudicial, police-orchestrated proceeding designed to obtain incriminating statements (*Massiah v. United States*, 377 U.S. 201 [1964]).

*Massiah* provided the foundation for the Supreme Court decision in *Escobedo v. Illinois*. The petitioner, Danny Escobedo, a twenty-two-year-old Hispanic, was arrested for the murder of his brother-in-law. Escobedo was interrogated for fifteen hours, refused to make a statement, and was released on the order of a court. He was rearrested



eleven days later, and on the way to police headquarters, Escobedo was told by the police that he had been named by DiGerlando, a suspected accomplice, as “[t]he one who shot” the deceased. Escobedo responded by requesting permission to consult with his lawyer (*Escobedo v. Illinois*, 378 U.S. 478 [1964]).

During Escobedo’s interrogation by the police, he repeatedly asked and was denied permission to speak with his lawyer, who he was told “didn’t want to see him.” In fact, Escobedo’s lawyer appeared shortly after Escobedo’s arrival at the police headquarters and was denied access to his client. At one point, Escobedo and his lawyer came into eye contact with one another. The police confronted Escobedo, who was handcuffed, kept standing, nervous, and suffering from a lack of sleep, with DiGerlando. Escobedo responded by exclaiming, “I didn’t shoot Manuel, you did it.” Escobedo then made a series of incriminating remarks, implicating himself in the crime. The Supreme Court of Illinois determined that the refusal to permit Escobedo to see his lawyer did not change the fact that he voluntarily confessed to the murder.

Justice Arthur Goldberg wrote the opinion for the U.S. Supreme Court and held that Escobedo was entitled to be informed of his right to silence and counsel under the Sixth Amendment to the Constitution. As a result, his statement had been unconstitutionally obtained and had been improperly introduced by the prosecution at trial.

The significance of *Escobedo* is that the decision extended the Sixth Amendment right to a lawyer, established in *Massiah*, to the period prior to indictment. Justice Goldberg reasoned that this was the point at which most confessions were elicited, and a failure to provide access to an attorney at this stage would render legal representation at trial meaningless. Goldberg recognized that any competent lawyer would undoubtedly instruct his or her client not to talk to the police and that affording defendants the right to counsel prior to their formal indictment likely would impede interrogations and prevent the police from gathering the required evidence to prosecute crimes. Justice Goldberg nevertheless explained that the Constitution strikes a balance in favor of the accused’s right against self-incrimination when weighed against the interests of society in eliciting a confession. Goldberg went on to observe that history teaches that a criminal justice system that “comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation” (489).

*Escobedo* was based on the belief that informing defendants of their right to silence and of their right to the presence of a lawyer would protect suspects against uninformed and involuntary confessions. An attorney undoubtedly would have advised Escobedo that admitting his complicity in the murder would result in criminal liability for the killing.

Two years later, in *Miranda v. Arizona*, the Supreme Court abandoned the Sixth Amendment analysis and extended the Fifth Amendment right against self-incrimination to the interrogation of criminal suspects. The Supreme Court would later look back on *Escobedo* and observe that the decision set the stage for *Miranda*. In 1972, in *Kirby v. Illinois*, Justice Lewis Powell explained that the underlying impact of *Escobedo* was “not to vindicate the constitutional right to counsel as such, but, like *Miranda*, to guarantee full effectuation of the privilege against self-incrimination” (*Kirby v. Illinois*, 406 U.S. 682, 689 [1972]). *Miranda v. Arizona* was the next step in the comprehensive constitutional regulation of police interrogations. We first need to understand the Fifth Amendment right against self-incrimination.

## THE RIGHT AGAINST SELF-INCRIMINATION

The Self-Incrimination Clause of the Fifth Amendment to the U.S. Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” This constitutional right was extended to the states in *Malloy v. Hogan* in which the U.S. Supreme Court held that the Fifth Amendment’s prohibition on compulsory self-incrimination is incorporated into the Fourteenth Amendment and is applicable against the states. Justice William Brennan observed that the state and federal governments are “constitutionally compelled to establish guilt by evidence independently and freely secured, and may not, by coercion prove a charge against an accused out of his own mouth” (*Malloy v. Hogan*, 378 U.S. 1, 6 [1964]).

In other words, *you do not have to answer questions that may tend to incriminate you, and your failure to respond cannot be used against you in a criminal proceeding.* Why do we have a right that works to the advantage of guilty individuals by allowing them to withhold evidence from prosecuting authorities? This right was a reaction to procedures in religious courts and in the politically repressive Star Chamber in sixteenth-century England. These tribunals placed the burden on individuals to answer questions and to prove that they were not heretics or political dissidents. Justice Goldberg provided several reasons for the right against self-incrimination, a right that he stated “reflects many of our fundamental values and most noble aspirations” (*Murphy v. Waterfront Commission*, 378 U.S. 52, 55 [1964]). In considering these points, ask yourself whether we should have a right against self-incrimination.



- **Cruel trilemma.** Individuals should not be compelled to choose between “self-accusation, perjury or contempt.” The law, in other words, should not place an individual in the position of making the unhappy choice between admitting guilt or denying guilt and facing a perjury charge for false testimony or refusing to speak and being held in contempt of court for failing to cooperate with the judicial process.
- **Coercion.** The fear that coercion and force will be used to compel individuals to incriminate themselves.
- **Adversarial system.** We have an adversarial rather than inquisitorial legal system. The accused is not required to establish his or her innocence; the state has the burden of proving guilt beyond a reasonable doubt.
- **Privacy.** An individual should not be forced to disclose information to the government.

Information is *incriminating* if there is a “substantial” and “real” threat that the information may lead to a criminal charge or establish a link in the chain of evidence that may result in a criminal prosecution. The U.S. Supreme Court in 2004 dismissed a defendant’s challenge to a “stop-and-identify” statute on the grounds that the defendant did not possess “any articulated real and appreciable fear that his name would be used to incriminate him, or that it ‘would furnish a link in the chain of evidence needed to prosecute’ him. . . . Answer[ing] a request to disclose a name is likely to be so insignificant . . . as to be incriminating only in unusual circumstances” (*Hibel v. Sixth Judicial Court*, 542 U.S. 177 [2004]).

The second point to remember is that the privilege against self-incrimination is violated when the incriminating information is used against an individual in a legal proceeding. In *Chavez v. Martinez*, the defendant was shot by a police officer and was questioned by the officer while he was in intense pain in a hospital. Chavez admitted during the interrogation that he had taken the officer’s pistol from his holster and pointed the weapon at him. Chavez filed a civil action for damages against the officer for violating his right against self-incrimination. The Supreme Court ruled that Martinez was never made a “witness” against himself because his statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to “the cruel trilemma of self-accusation, perjury or contempt” (*Chavez v. Martinez*, 538 U.S. 760 [2003]).

The third point is that the requirement that you may not be *compelled* to be a witness against yourself is satisfied when you are *required* to answer questions asked by the government. In *Hoffman v. United States*, the Supreme Court upheld the right of an organized crime figure to refuse to answer questions regarding his employment and associates before a grand jury investigating frauds perpetrated against the government. The Supreme Court observed that the “immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime” (*Hoffman v. United States*, 341 U.S. 479, 485 [1951]). On the other hand, there is no compulsion when a driver arrested for drunk driving is *offered the choice* of either submitting to a simple and relatively painless blood-alcohol test or having his or her refusal to do so used against him or her in court (*South Dakota v. Neville*, 459 U.S. 553 [1983]).

Finally, the prohibition against being compelled to be a witness against oneself is limited to **testimonial evidence**, or evidence that is communicative in character. What does this mean? The Supreme Court explained the testimonial or communicative requirement in *Doe v. United States*. The Court stated that the government is prohibited from compelling you to make a factual statement, forcing you to disclose information that connects you to a criminal offense, or requiring you to share your private thoughts or beliefs with the government. The Supreme Court has noted that the privilege against self-incrimination encompasses trial testimony, oral confessions to the police, and personal documents. On the other hand, there is no privilege against self-incrimination where the government compels you to provide nontestimonial evidence. Judges have held that **nontestimonial evidence** includes voice and handwriting exemplars, fingerprints, participation in a lineup, the police requiring you to try on clothes or to walk in a straight line, hair and urine samples, the withdrawing of blood, the examination of scars and tattoos, and the taking of photos. This evidence may be used against you in a criminal proceeding, and your failure to cooperate in these procedures may be introduced at trial to establish your guilt. You also will be held in contempt of court if you refuse to provide this type of physical or nontestimonial evidence (*Doe v. United States*, 487 U.S. 201 [1988]).

You no doubt have a puzzled look on your face because the line between testimonial or communicative and nontestimonial or physical evidence does not appear to be crystal clear. You are correct. Consider *Pennsylvania v. Muniz*. Muniz was arrested for driving while intoxicated. He was taken to a “booking center,” and his subsequent interrogation by the police was recorded. Muniz was first asked his name, address, height, weight, eye color, date of birth, and current age. His response was slow and slurred. These questions asked for routine information and were not incriminating. The police officer then asked Muniz whether he knew the date of his sixth birthday. Muniz replied, “No, I don’t.”



Was Muniz's answer to the sixth-birthday question admissible in evidence? The Supreme Court held in a 5-to-4 ruling that this question called for a *testimonial response* that violated Muniz's right against self-incrimination and that his response was inadmissible in evidence. The question confronted Muniz with the unhappy situation of choosing either self-incrimination or perjury. Muniz, according to Justice Brennan, either could admit that he did not know the date of his sixth birthday or could answer untruthfully and report a date of birth that he knew was inaccurate. His answer in either case would indicate that Muniz's mental state was impaired by alcohol. The Supreme Court majority reasoned that either alternative would be the equivalent of Muniz's admitting that he was too intoxicated to answer the question accurately.

Eight justices also held for different reasons that Muniz's slurred speech in answering the booking questions was admissible to establish that he was inebriated. Four of these justices explained that Muniz's slurred speech was nontestimonial and demonstrated Muniz's lack of "muscular coordination" in forming his words and that this related to Muniz's physical act of speaking rather than to the words that he was speaking. As a result, the slurred speech was nontestimonial rather than testimonial evidence, did not violate Muniz's right against self-incrimination, and was properly introduced into evidence. Is this distinction persuasive (*Pennsylvania v. Muniz*, 496 U.S. 582 [1990])?

The next case in the text, *Schmerber v. California*, asks you to decide whether the courts' distinction between testimonial and nontestimonial evidence makes sense.

### Legal Equation

Privilege against self-incrimination	=	Compulsion
	+	Criminal case
	=	Witness against yourself
	+	Reveal testimonial evidence.

### *Did the involuntary withdrawal of the petitioner's blood violate his right against self-incrimination?*

#### ***Schmerber v. California*, 384 U.S. 757 (1966), Brennan, J.**

#### Facts

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.

Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road, and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment. [Petitioner was] arrested at [the] hospital while receiving treatment for injuries suffered in [the] accident involving the automobile that he had apparently been driving. At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital.

The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that in that circumstance, the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate



Department of the California Superior Court rejected these contentions and affirmed the conviction. . . . We affirm.

### Issue

*Malloy v. Hogan* . . . held that the 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. We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner’s privilege.

### Reasoning

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood, the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer’s direction to the physician to administer the test over petitioner’s objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled “to be a witness against himself.”

The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the “inviolability of the human personality.” Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused “by its own independent labors.”

However, the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through “the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege 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.’” The leading case in this Court is *Holt v. United States*, 218 U.S. 245 [1910]. There the question was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that

compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument as “based upon an extravagant extension of the Fifth Amendment,” and went on to say, “The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.”

Both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling “communications” or “testimony,” but that compulsion which makes a suspect or accused the source of “real or physical evidence” does not violate it.

### Holding

In the present case, however, no . . . problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner’s testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner’s testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds. . . .

### Dissenting, *Black, J.*, joined by *Douglas, J.*

The Court admits that “the State compelled [petitioner] to submit to an attempt to discover evidence [in his blood] that might be [and was] used to prosecute him for a criminal offense.” To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. . . . It seems to me that the compulsory extraction of petitioner’s blood for analysis so that the person who analyzed it could give evidence to convict him had both a “testimonial” and a “communicative nature.” The sole purpose



of this project which proved to be successful was to obtain “testimony” from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly “communicative” in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk. . . .

How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of “testimony” taken from petitioner when the result of the test was offered as testimony, was

considered by the jury as testimony, and the jury’s verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights’ safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court’s holding. . . .

### Questions for Discussion

1. What is the holding of the Supreme Court in *Schmerber*? Is Justice Brennan’s decision consistent or inconsistent with the purposes of the privilege against self-incrimination?
2. Summarize the argument of the dissenting judges.
3. How would you rule in this case?
4. Does the extraction of DNA evidence from a suspect in a criminal case violate an individual’s right against self-incrimination?
5. *Problems in policing*. Explain why it is important to understand the difference between testimonial and nontestimonial evidence in regard to self-incrimination. Give some examples of nontestimonial evidence.

## MIRANDA V. ARIZONA

In 1966, in *Miranda v. Arizona*, a five-judge majority of the U.S. Supreme Court held that the prosecution may not use statements stemming from the custodial interrogation absent procedural safeguards to protect a defendant’s Fifth Amendment privilege against self-incrimination. The Court majority concluded that absent a three-part *Miranda* warning, the “inherently coercive” pressures of police interrogation had been proven to overwhelm individuals’ capacity to exercise their right against self-incrimination, and no confession given under these conditions “can truly be the product of a suspect’s free choice.”

What were these coercive pressures? According to the Court, individuals held in detention were isolated from friends, family, and lawyers in unfamiliar surroundings and were subject to sophisticated psychological tactics, manipulation, and trickery designed to wear down their resistance. The Court pointed to police manuals instructing officers to engage in tactics such as displaying confidence in a suspect’s guilt, minimizing the seriousness of the offense, wearing down individuals through continuous interrogation, and using the “Mutt and Jeff” strategy in which one officer berates a suspect and the other gains the suspect’s trust by playing the part of his or her protector. The “false lineup” involves placing a suspect in a lineup and using fictitious witnesses to identify the suspect as the perpetrator. In another scenario, fictitious witnesses identify the defendant as the perpetrator of a previously undisclosed serious crime, and the defendant panics and confesses to the offense under investigation.

Before you begin to read the *Miranda* decision, you may find it interesting to learn about Ernesto Miranda, the individual whose name is attached to one of the most important U.S. Supreme Court decisions in recent history. Miranda was in constant trouble as a young man and committed a felony car theft in 1954 while in the eighth grade. This arrest was followed by a string of convictions and brief detentions for burglary, attempted rape and assault, curfew violations, “Peeping Tom” activities, and car theft. In 1959, Miranda was sentenced to a year in prison and, following his release, seemingly settled down and found a regular job, moved in with a woman, and fathered a child. In 1963, Miranda reverted to his previous pattern of criminal behavior and kidnapped and raped eighteen-year-old “Jane Doe.” The victim identified him in a lineup, and his car had been seen in the neighborhood of the attack. Miranda confessed in less than two hours and was convicted and sentenced to not less than twenty nor more than thirty years in prison. Miranda’s conviction was affirmed by the Arizona Supreme Court, and his lawyers appealed to the U.S. Supreme Court.

In reading *Miranda v. Arizona*, pay attention to the procedural protections the Supreme Court requires that the police provide a suspect. Why are these specific protections required?



## Was Miranda's confession admissible at trial?

### *Miranda v. Arizona*, 384 U.S. 436 (1966), Warren, C.J.

#### Facts

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There, he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity, and "with full knowledge of my legal rights, understanding any statement I make may be used against me." At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel.

Miranda was found guilty of kidnapping and rape. He was sentenced to twenty to thirty years imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. . . . The Court emphasized the fact that Miranda did not specifically request counsel. . . .

#### Issue

The constitutional issue we decide . . . is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each of the four cases before the Court, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights. . . .

#### Reasoning

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and

applied in other settings. We have undertaken a thorough reexamination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. . . .

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930s, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. . . . [However] we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. Interrogation still takes place in privacy. . . . A valuable source of information about present police practices . . . may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. . . . [T]he setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into 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. . . .

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In *Miranda v. Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In *Vignera v. New York*, the defendant



made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In *Westover v. United States*, the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in *California v. Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement. . . . The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

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

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. 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 . . . cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery. . . .

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled

to incriminate themselves. We have concluded that without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

## Holding

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. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. . . . In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. . . .

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.

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. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. . . .

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . . [T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness.



With a lawyer present, the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. . . . 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. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.

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

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. . . . The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. . . .

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other

than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody 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 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.

This 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. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person’s Fifth Amendment privilege so long as they do not question him during that time.

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

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances, the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation. . . .

General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law



enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. . . . 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 by the Fifth Amendment, and their admissibility is not affected by our holding today.

Over the years, the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay. . . . The practice of the FBI can readily be emulated by state and local enforcement agencies. . . . The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. . . . There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. . . .

### Dissenting, *Clark, J.*

Rather than employing the arbitrary Fifth Amendment rule which the Court lays down, I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which . . . are effective instruments in protecting persons in police custody. In this way, we would not be acting in the dark nor in one full sweep change the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. . . .

### Dissenting, *White, J.,* joined by *Harlan, J.,* and *Stewart, J.*

The proposition that the privilege against self-incrimination forbids in custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. . . . [T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy. . . .

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. . . . [T]he rule announced today [is] a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty, and to increase the number of trials. . . . [I]t is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is . . . every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence, will now under this new version of the Fifth Amendment, either not be tried at all or acquitted if the State's evidence, minus the confession, is put to the test of litigation. . . . [W]here probable cause exists to arrest several suspects, . . . it will often be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate . . . in all criminal cases, regardless of the severity of the crime or the circumstances involved. . . . It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping, those involving the national security, [and] some organized crime situations. . . .

#### Questions for Discussion

1. Outline the *Miranda* rule. Explain the purpose of the required warnings.
2. Why did the Supreme Court base *Miranda* on the Fifth rather than the Sixth Amendment?
3. Do the *Miranda* warnings adequately counteract the pressure that the majority describes as inherent in custodial interrogation?
4. Compare and contrast the requirements of the due process voluntariness test and the *Miranda* rule.
5. Are you persuaded by the arguments of the dissent? Is the majority distrustful of confessions as alleged by the defense?
6. Is it realistic to expect defendants to invoke their *Miranda* rights and for the police to fully follow the requirements of the *Miranda* ruling?
7. *Problems in policing*. What is required of police officers under the *Miranda* rule?



## Cases and Comments

1. **Miranda.** Miranda was retried for kidnapping and rape. The twenty-one-year-old Jane Doe testified against him but, on cross-examination, admitted that she was unable to positively identify Miranda as the perpetrator. Miranda's common law wife, however, came forward and testified that Miranda had confided in her that he had committed the kidnapping and rape and that he had asked her to tell Doe that he would marry her if she would drop the charges. Miranda then asked his wife to show Doe their baby daughter and to ask her to drop the charges so that the baby could be with her father. Miranda was once again convicted and was sentenced to serve twenty to thirty years in prison. In 1972, at the age of thirty, Miranda was paroled. He was returned to prison when he was found with a gun and illegal drugs in violation of the terms of his parole. Miranda was released in 1975 and sold autographed "Miranda warning cards" to raise money. In January 1976, while drinking and playing cards, he got involved in a bar fight and was stabbed to death. You can read about the *Miranda* case in Baker (1983).

2. **Interrogation Techniques.** Saul M. Kassin and Gisli H. Gudjonsson are two of the most prominent psychologists working in the area of interrogation and confessions. The two scholars found that a number of suspects waive their *Miranda* rights because of an inability to fully comprehend the warnings. This may result from youth, a lack of intelligence or education, or an inability to understand their rights. Some commentators suggest that individuals who lack confidence or who are inexperienced in the criminal justice process also may have a difficult time asserting their rights in the presence of the police.

Individuals who waive their rights may confront sophisticated police interrogation tactics. Kassin and Gudjonsson (2005) find that police interrogation techniques result in confessions from roughly 42 percent of individuals subjected to police interrogation. They write that the police are advised to conduct interrogations in a small, sparsely furnished room in order to isolate the suspect and to make him or her uncomfortable and feel cramped and confined. The police are taught to align themselves with the suspect by justifying or excusing the crime. This, for example, might entail portraying the act as understandable under the circumstances. The police also are instructed to stress that the victim's behavior contributed to the crime and to minimize the seriousness of the suspect's actions. Another tactic is to display a certainty in the suspect's guilt and to immediately interrupt and challenge the suspect's denial of guilt

or claim that he or she acted out of self-defense. The police also are instructed to encourage the suspect to unburden his or her guilt and to provide a written or oral account of the crime. Kassin and Gudjonsson observe that although most people confess for a variety of reasons, the most powerful factor is the suspect's belief that the police have evidence implicating him or her in the crime, such as fingerprint, hair, or blood evidence.

*Miller v. Fenton* is a leading case on police interrogation tactics. Frank Miller was a suspect in a murder, and he accompanied the police to a state police barracks. He was read and waived his *Miranda* rights. The issue was whether Detective Boyce had employed tactics during the fifty-three-minute interrogation that "were sufficiently manipulative to overbear the will of a person with [the defendant's] characteristics." The majority concluded that Miller's confession was voluntary "under the circumstances."

Miller was thirty-two, had some high school education, and previously had served time in prison. During the interrogation, Boyce falsely told Miller that the deceased was alive, hoping that the possibility that the victim would identify Miller as the assailant would persuade him to confess to the crime and to "cut a deal." Boyce, having met with no success, arranged to receive a phone call during the interrogation and announced with mock surprise that the victim had just died. Boyce, with apparent concern, then sympathetically related that he knew that Miller suffered from mental problems and that Boyce would like to ensure that Miller received psychological help. Boyce next stressed that Miller was "not responsible" or a "criminal," that the death must be "eating you up," that "you've got to come forward," and that he wanted to help Miller "unburden his inner tensions." Roughly one hour passed before Miller confessed and collapsed in a robot-like state onto the floor and was taken to the hospital.

The two-judge majority indicated that Boyce's interrogation "did not produce psychological pressure strong enough to overbear the will of a mature, experienced man [like Miller] who was suffering from no mental or physical illness and was interrogated for less than an hour at a police station close to home." Judge Gibbons, in dissent, criticized the majority for adopting a test that asked the court to speculate on the impact of Boyce's "promises and lies" on Miller. Gibbons, instead, argued that when the police resort to promises of psychological help and assure suspects that they will not be punished, the confession should be ruled inadmissible. Do you agree with the two-judge majority or with Judge Gibbons? See *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986).



### You Decide



**8.2** Robert L. Brown was charged in a Louisiana court with unlawful possession of heroin. He was convicted and sentenced to ten years in prison. Brown was apprehended when he unsuccessfully attempted to flee from a police raid of a drug house. He was advised that he had a right to speak or remain silent, that anything he said might be used against him, and that he had a right to counsel. During the reading of the *Miranda* warnings, Brown proclaimed, “I know all that.” Brown then confessed that he used narcotics and, in fact, had injected earlier in the day.

A federal district court pointed out that Brown was not told that he had the right to have an attorney present if he decided to make a statement and that he was not told that a lawyer would be appointed to represent him in the event that he lacked funds. One of the arresting officers also testified that he did not afford the defendant “any opportunity to procure a lawyer.” Did Brown’s statement that “I know all that” constitute a waiver of Brown’s right to receive the full *Miranda* warnings? Cite language from the *Miranda* decision in support of your answer. See *Brown v. Heyd*, 277 F. Supp. 899 (E.D. La. 1967).

*You can find the answer by referring to the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).*

### Legal Equation

Fifth Amendment privilege against self-incrimination and police interrogation

- = The prosecution may not use inculpatory or exculpatory statements stemming from custodial interrogation of the defendant unless it demonstrates use of procedural safeguards effective to secure privilege against self-incrimination
- + Custodial interrogation is questioning initiated by law enforcement officers after an individual has been taken into custody or deprived of his or her freedom of action in a significant way
- + Prior to any questions, the suspect must be clearly and unequivocally informed that he or she has the right to remain silent, that any statement he or she makes may be used as evidence against him or her, and that he or she has the right to the presence of an attorney, appointed or retained
- + The *Miranda* decision also provides that the defendant may voluntarily, knowingly, and intelligently waive any or all of these rights; the fact that a defendant answers some questions does not prohibit a defendant from invoking his or her right to silence or to a lawyer
- + A heavy burden rests on the prosecution to prove that a defendant waived his or her right against self-incrimination and/or the right to a lawyer; silence does not constitute a waiver, and a defendant who invokes his or her right to silence is not subject to additional interrogation
- + A defendant who invokes his or her right to a lawyer may not be questioned outside the presence of the attorney
- + A prosecutor may not penalize a defendant’s invocation of his or her right against self-incrimination by commenting on the invocation of this right at trial
- + Statements in violation of *Miranda* may not be introduced into evidence.



## Miranda and the Constitution

*Miranda*, as we have seen, supplemented the due process voluntariness test by requiring that the police read suspects subjected to custodial interrogation the *Miranda* warnings. The decision in *Miranda* sparked a wave of criticism, and in 1968, the U.S. Congress took the aggressive step of passing legislation that required federal judges to apply the voluntariness test. The Omnibus Crime Control and Safe Streets Act provided that a confession shall be admissible as evidence in federal court if it is “voluntarily given.” The act listed a number of factors that judges were to consider in determining whether a confession was voluntary.

In 2000, in *Dickerson v. United States*, Chief Justice William Rehnquist, who himself had been a constant critic of *Miranda*, held that *Miranda* was a “constitutional decision” that is required by the Fifth Amendment to ensure that detainees are able to exercise their right against self-incrimination in the inherently coercive atmosphere of custodial interrogation. This is an important statement because laws passed by Congress are required to conform to the U.S. Constitution, in this instance, the Fifth Amendment. Congress accordingly lacked authority to instruct the judiciary to disregard the requirements of *Miranda* and to rely solely on the voluntariness test. Justice Rehnquist also stressed that *Miranda* has become “embedded in routine police practice to the point where the warnings have become part of our national culture” (*Dickerson v. United States*, 530 U.S. 428 [2000]). We now will examine the central elements of the *Miranda* rule:

- custodial interrogation,
- public safety exception,
- three-part warning,
- invocation of *Miranda* rights,
- interrogation, and
- waiver of and right to counsel.

In reading this section of the chapter, you will see that although the Supreme Court affirmed the constitutional status of the *Miranda* decision, the requirements of *Miranda* are constantly being adjusted in an effort to balance *Miranda*'s protection of suspects against society's interest in obtaining confessions. As you read on, ask yourself whether the *Miranda* warnings provide adequate protection for defendants. In the alternative, does *Miranda* handcuff the police? In addition, consider whether the *Miranda* rules are too complex to be easily absorbed by police, lawyers, and judges. We start by examining custodial interrogation.

## CUSTODIAL INTERROGATION

The *Miranda* warnings are triggered when an individual is in custody and interrogated. The *Miranda* decision defines **custodial interrogation** as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way.” In *Beckwith v. United States*, the Supreme Court clarified that a *focus* by law enforcement on an individual is not sufficient to require the reading of the *Miranda* rights. In *Beckwith*, two Internal Revenue Service (IRS) agents interviewed Beckwith for three hours in a private home; the conversation was described by one of the agents as “friendly” and “relaxed.” The Supreme Court held that being the focus of an investigation does not involve the inherently coercive pressures that *Miranda* described as inherent in incommunicado custodial interrogation (*Beckwith v. United States*, 425 U.S. 341 [1976]).

What, then, is meant by custodial interrogation? *Miranda* stated that it is not considered custody, and the *Miranda* warnings are not required when the police engage in general questioning at a crime scene or other general investigative questioning of potential witnesses. The *Miranda* warnings also need not be given to an individual who voluntarily enters a police station and wishes to confess to a crime or to a person who voluntarily calls the police to offer a confession or other statement. On the other hand, the *Miranda* warnings are required when an individual is subjected to a custodial arrest and to interrogation. At this point, an individual is under the control of the police and likely will be subjected to incommunicado interrogation in an isolated and unfamiliar environment.

The challenge is to determine at what point, short of being informed that he or she is under custodial arrest, an individual is exposed to pressures that are the “functional equivalent of custodial arrest” and the *Miranda* rights must be read. What if you are walking home and are stopped by the police late at night and they ask what you are doing in the neighborhood? This has important consequences for law enforcement. Requiring *Miranda*



warnings whenever an officer comes in contact with a citizen would impede questioning. This might make sense because every citizen interaction with an officer is somewhat intimidating and coercive. On the other hand, requiring a clearly coercive environment before the *Miranda* warnings must be given would limit the *Miranda* warnings to a narrow set of circumstances. How does the Supreme Court resolve these considerations? At what point short of a custodial arrest are the *Miranda* warnings required?

The Supreme Court adopted an “objective test” for custodial interrogation that requires judges to evaluate the totality of the circumstances. In *Stansbury v. California*, the Supreme Court held that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned” (*Stansbury v. California*, 511 U.S. 318, 323 [1994]).

Custodial interrogation is not based solely on the seriousness of the crime for which you have been stopped and questioned or based simply on the location of the interrogation. Custody is based on whether, in the totality of the circumstances, a reasonable person would believe that he or she is subjected to formal arrest or to police custody to a degree associated with a formal arrest (i.e., the functional equivalent of formal arrest).

Courts typically ask whether a reasonable person would feel free to leave. In evaluating the totality of circumstances, judges consider a number of factors. Remember, no single factor is crucial in determining whether a reasonable person would believe that he or she is subject to custodial interrogation (not free to leave). The factors to be considered include the following:

- The number of police officers
- Whether the officer tells the individual that he or she is free to leave or not free to leave
- The length and intensity of the questioning
- Whether the officer employs physical force to restrain the individual
- Whether the stop is in public or in private
- The location of the interrogation
- Whether a reasonable person would believe that the stop would be brief or whether the stop would result in a custodial arrest
- Whether the individual is in familiar or unfamiliar surroundings
- Whether the suspect is permitted to leave following the interrogation

The totality-of-the-circumstances test means that custody is determined on a case-by-case basis. Consider the Supreme Court decisions in the following cases.

**Home.** In *Orozco v. Texas*, the Supreme Court held that the defendant was subjected to custodial interrogation when four police officers entered his bedroom at 4:00 A.M. to interrogate him regarding a shooting (*Orozco v. Texas*, 394 U.S. 324 [1969]).

**Parole interview.** Murphy, a probationer, agreed to meet his probation officer regarding his “treatment plan” and, during the meeting, admitted that he had committed a rape and murder. The Supreme Court found that Murphy was familiar both with the surroundings and with his probation officer and that he was not physically restrained and could have left at any time. The possibility that terminating the meeting would lead to revocation of probation, in the view of the Court, was not comparable to the pressure on a criminal suspect who is not free to walk away from interrogation by the police (*Minnesota v. Murphy*, 465 U.S. 420 [1984]).

**Police station.** In *Oregon v. Mathiason*, Carl Mathiason, a parolee, voluntarily appeared at the police station at the request of an officer. Mathiason confessed after the officer stated that he believed that the suspect was involved in a recent burglary, falsely told Mathiason that his fingerprints had been discovered at the scene of the crime, and explained that truthfulness would possibly be considered in mitigation at sentencing. The Supreme Court determined that there was no custodial interrogation because the defendant voluntarily came to the station house, was informed that he was not under arrest, and left following the interview (*Oregon v. Mathiason*, 429 U.S. 492 [1977]).

**Prison.** In *Howes v. Fields*, the Supreme Court held that whether the questioning of an inmate who is “removed from the general prison population” and interrogated about “events that occurred outside the prison” is custodial depends on the totality of circumstances. The Court stressed that there was no “categorical rule” that the interrogation of an inmate “always” is custodial. The objective circumstances of the interrogation



were consistent with an interrogation environment in which a reasonable person would “have felt free to terminate the interview and leave.” Fields was escorted by a corrections officer to a conference room where he was questioned for between five and seven hours by two sheriff’s deputies about his alleged sexual molestation of a twelve-year-old boy. Fields was informed that he could leave and return to his cell at any time, was not physically restrained or threatened, was interrogated in a well-lit conference room, was offered food and water, and the door was occasionally left open. An inmate does not suffer the fear and anxiety of an individual who is arrested and feels isolated and alone in an alien environment, will not be persuaded to confess to obtain his or her release, and is aware that his interrogators do not have the authority to prolong his or her detention (*Howes v. Fields*, 132 S. Ct. 1181, 565 U.S. \_\_\_ [2012]).

**Traffic stop.** In *Berkemer v. McCarty*, McCarty was stopped by Highway Patrol Officer Williams who observed McCarty’s automobile weaving in and out of a lane. Williams observed that McCarty experienced difficulty with his balance when he exited the vehicle and concluded that he would charge him with a traffic arrest and take him into custody. McCarty was unable to successfully complete a field sobriety test and, in response to questions, admitted that he had consumed several beers and had smoked marijuana. McCarty was taken into custody without being read his *Miranda* rights, and he made several additional incriminating statements. McCarty was subsequently convicted of the first-degree misdemeanor of operating a motor vehicle while under the influence of drugs or alcohol. McCarty appealed and argued that he was in custody when pulled over by Officer Williams and should have been read his *Miranda* rights.

The Supreme Court rejected the argument that the *Miranda* warnings are required only for felonies. The Court nonetheless ruled that McCarty was not in custody when initially required to pull over, ruling that a traffic stop normally does not exert pressures that significantly impair an individual’s exercise of his or her Fifth Amendment right against self-incrimination. Traffic stops presumably are brief and public and typically are not police dominated. The Supreme Court also held that between the initial stop and the custodial arrest, McCarty was not subject to constraints “comparable” to formal arrest. During this relatively short period, Williams did not communicate his intent to arrest McCarty, and his unarticulated plan was considered to have little relevance to the question of custody. The relevant inquiry in determining whether an individual is in custody is how a reasonable person in the suspect’s situation would understand his or her situation. Would a reasonable person feel free to leave (not in custody), or would a reasonable person feel that his or her freedom of movement was restricted (custody)? In this case, a single police officer asked a limited number of questions and requested that McCarty perform a field sobriety test. The Supreme Court held that McCarty was not subjected to the “functional equivalent of formal arrest” (*Berkemer v. McCarty*, 468 U.S. 420 [1984]).

In *Yarborough v. Alvarado*, Michael Alvarado’s parents responded to a police request to bring their eighteen-year-old son to the police station. Alvarado’s parents waited in the lobby while he was interviewed by Officer Cheryl Comstock. Comstock assured Alvarado’s parents that the interview was not going to be “long.” Comstock did not give Alvarado the *Miranda* warnings. Alvarado, when interrogated, admitted helping Paul Soto steal a truck and stated that he had helped conceal the murder weapon following Soto’s killing of the driver. Comstock, throughout the two-hour interview, focused on Soto’s crimes rather than on Alvarado’s role in the killing, and Alvarado was not threatened with arrest or prosecution. At the end of the interview, Comstock twice asked Alvarado if he needed to take a bathroom break. Following the interview Alvarado was released to return home with his parents.

The Supreme Court recognized that although this was a “close case,” the state court had acted reasonably in deciding that Alvarado had not been subjected to custodial interrogation. The Court held that whether Alvarado “would have felt that he was at liberty to terminate the interrogation and leave” was to be evaluated based on an objective test and that an individual’s age and inexperience was not to be considered. In dissent, Justice Breyer and three other justices argued that Alvarado’s age was “relevant” to determining whether a “reasonable person in Alvarado’s position [would] have felt free . . . to get up and walk out of the . . . station house.” According to the dissenting judges, it was not persuasive to evaluate Alvarado on the same standard as a “middle-aged gentleman, well-versed in police practices” (*Yarborough v. Alvarado*, 541 U.S. 652 [2004]).

In 2011, in *J.D.B. v. North Carolina*, the next case in the text, the U.S. Supreme Court reversed course and held that the age of a juvenile subjected to police questioning is “relevant to the custody analysis” of *Miranda v. Arizona*. The Court stressed that “it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.” The Court held that “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature” of the test for custodial interrogation (*J.D.B. v. North Carolina*, 131 S. Ct. 2394, 564 U.S. \_\_\_ [2011]).



You will find *Illinois v. Perkins and Howes v. Fields* on the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).



## Legal Equation

Custody	=	Custodial arrest or functional equivalent of custodial arrest.
Functional equivalent of custodial arrest	=	A reasonable person
	+	Considering the totality of the circumstances
	+	Would believe that he or she is in police custody to a degree associated with a formal arrest (is not free to leave).

## Should the police have read the *Miranda* rights to 13-year-old J.D.B.?

### *J.D.B. v. North Carolina*, 564 U.S. \_\_\_\_ (2011), *Sotomayor, J.*

#### Issue

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.

#### Facts

Petitioner J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina, when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour. This was the second time that police had questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother—his legal guardian—as well as his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and had been seen in J.D.B.'s possession.

Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and parent contact information from school records,

neither the police officers nor the school administrators contacted J.D.B.'s grandmother. The uniformed officer interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room. Questioning began with small talk—discussion of sports and J.D.B.'s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to “do the right thing,” warning J.D.B. that “the truth always comes out in the end.”

Eventually, J.D.B. asked whether he would “still be in trouble” if he returned the “stuff.” In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going to court” regardless. (“[W]hat’s done is done[;] now you need to help yourself by making it right.”) DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.” After learning



of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the school day, J.D.B. was allowed to leave to catch the bus home.

Two juvenile petitions were filed against J.D.B., each alleging one count of breaking and entering and one count of larceny. J.D.B.'s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J.D.B. had been "interrogated by police in a custodial setting without being afforded *Miranda* warning[s]," and because his statements were involuntary under the totality of the circumstances test. After a suppression hearing at which DiCostanzo and J.D.B. testified, the trial court denied the motion, deciding that J.D.B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J.D.B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J.D.B. delinquent. A divided panel of the North Carolina Court of Appeals affirmed. The North Carolina Supreme Court held, over two dissents, that J.D.B. was not in custody when he confessed, "declin[ing] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police." We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age.

## Reasoning

By its very nature, custodial police interrogation entails "inherently compelling pressures." Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect must be warned that he has a right to remain

silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed. And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a "prerequisite" to the statement's admissibility as evidence in the Government's case in chief, that the defendant "voluntarily, knowingly and intelligently" waived his rights.

Because these measures protect the individual against the coercive nature of custodial interrogation, they are required "only where there has been such a restriction on a person's freedom as to render him in custody." As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation? and second, given those circumstances, would a reasonable person have felt he or she was 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?

Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to examine all of the circumstances surrounding the interrogation, including any circumstance that would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. On the other hand, the subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. The test, in other words, involves no consideration of the "actual mindset" of the particular suspect subjected to police questioning.

The benefit of the objective custody analysis is that it is designed to give clear guidance to the police. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind. . . . Officers are not required to "make guesses" as to circumstances "unknowable" to them at the time, and officers are under no duty "to consider . . . contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights."



The State contends that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis. A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge. Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. [N]o matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject. Describing no one child in particular, these observations restate what any parent knows—indeed, what any person knows—about children generally. Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court's own generalizations, the legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

As this discussion establishes, our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them, nor to "anticipat[e] the frailties or idiosyncrasies" of the particular suspect whom they question. The same wide basis of community experience that

makes it possible, as an objective matter, to determine what is to be expected of children in other contexts . . . likewise makes it possible to know what to expect of children subjected to police questioning. In other words, a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. *Alvarado*, holds, for instance, that a suspect's prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. Because the effect in any given case would be "contingent [on the] psycholog[y]" of the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis. A child's age, however, is different. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are most susceptible to influence, and outside pressures—considering age in the custody analysis in no way involves a determination of how youth "subjectively affect[s] the mindset" of any particular child. In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age. This case is a prime example. Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker?

To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances. Indeed, although the dissent suggests that concerns "regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned in school," the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without



asking whether the person “questioned in school” is a “minor,” the coercive effect of the schoolhouse setting is unknowable. . . .

[W]e hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore. The State offers numerous reasons that courts must blind themselves to a juvenile defendant’s age. None is persuasive. . . . Relying on our statements that the objective custody test is “designed to give clear guidance to the police,” the State next argues that a child’s age must be excluded from the analysis in order to preserve clarity. Similarly, the dissent insists that the clarity of the custody analysis will be destroyed unless a “one-size-fits-all reasonable-person test” applies. In reality, however, ignoring a juvenile defendant’s age will often make the inquiry more artificial, and thus only add confusion. And in any event, a child’s age, when known or apparent, is hardly an obscure factor to assess. . . . Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. . . . The same is true of judges, including those whose childhoods have long since passed. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult. Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. But we have rejected that “more easily administered line,” recognizing that it would simply “enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.”

Finally, the State and the dissent suggest that excluding age from the custody analysis comes at no cost to juveniles’ constitutional rights because the due process voluntariness test. . . . accounts for a child’s youth. To be sure, that test permits consideration of a child’s age, and it erects its own barrier to admission of a defendant’s inculpatory statements at trial. But *Miranda*’s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. “[R]eliance on the traditional totality-of-the-circumstances test raise[s] a risk of overlooking an involuntary custodial confession.” To hold, as the State requests, that a child’s age

is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.

## Holding

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.’s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

## Dissenting, *Alito, J.*, joined by *Roberts, C.J., Scalia, J., and Thomas, J.*

The Court’s decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases. And today’s holding is not needed to protect the constitutional rights of minors who are questioned by the police. *Miranda*’s prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect’s actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda*’s principal strengths—“the ease and clarity of its application” by law enforcement officials and courts. A key contributor to this clarity, at least up until now, has been *Miranda*’s objective reasonable-person test for determining custody.

*Miranda*’s custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement. When this custodial threshold is reached, *Miranda* warnings must precede police questioning. But in the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined. . . . A vulnerable defendant can still turn to the constitutional rule against actual coercion and contend that his confession was extracted against his will.

Today’s decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person



test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. . . .

No less than other facets of *Miranda*, the threshold requirement that the suspect be in “custody” is “designed to give clear guidance to the police.” Custody under *Miranda* attaches where there is a “formal arrest” or a “restraint on freedom of movement” akin to formal arrest. This standard is “objective” and turns on how a hypothetical “reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” . . .

Relevant factors have included such things as where the questioning occurred, how long it lasted, what was said, any physical restraints placed on the suspect’s movement, and whether the suspect was allowed to leave when the questioning was through. The totality of these circumstances—the external circumstances, that is, of the interrogation itself—is what has mattered in this Court’s cases. Personal characteristics of suspects have consistently been rejected or ignored as irrelevant under a one-size-fits-all reasonable-person standard. . . . The Court’s rationale for importing age into the custody standard is that minors tend to lack adults’ “capacity to exercise mature judgment” and that failing to account for that “reality” will leave some minors unprotected under *Miranda* in situations where they perceive themselves to be confined.

I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult. As the Court notes, our pre-*Miranda* cases were particularly attuned to this “reality” in applying the constitutional requirement of voluntariness in fact. It is no less a “reality,” however, that many persons over the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person. Yet the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants.

Indeed, it has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules, including the same custody requirement, as those who are unusually resistant to police pressure. “[O]nly relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” *Miranda*’s rigid standards are both overinclusive and underinclusive. They are overinclusive to the extent that they provide a windfall to the most hardened and savvy of suspects, who often have no need for *Miranda*’s protections. “[N]o amount of circumstantial evidence that the person may have been aware of his rights can overcome *Miranda*’s requirements.” And *Miranda*’s requirements are underinclusive to the extent that they fail to account for “frailties,” “idiosyncrasies,” and other

individualized considerations that might cause a person to bend more easily during a confrontation with the police. Members of this Court have seen this rigidity as a major weakness in *Miranda*’s “code of rules for confessions.” “[T]he rigidity of [*Miranda*’s] prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court.” But if it is, then the weakness is an inescapable consequence of the *Miranda* Court’s decision to supplement the more holistic voluntariness requirement with a one-size-fits-all prophylactic rule.

That is undoubtedly why this Court’s *Miranda* cases have never before mentioned “the suspect’s age” or any other individualized consideration in applying the custody standard. And unless the *Miranda* custody rule is now to be radically transformed into one that takes into account the wide range of individual characteristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different from these other personal characteristics. Why, for example, is age different from intelligence? Suppose that an officer, upon going to a school to question a student, is told by the principal that the student has an I.Q. of 75 and is in a special-education class. Are those facts more or less important than the student’s age in determining whether he or she “felt . . . at liberty to terminate the interrogation and leave”? An I.Q. score, like age, is more than just a number. And an individual’s intelligence can also yield “conclusions” similar to those “we have drawn ourselves” in cases far afield of *Miranda*.

How about the suspect’s cultural background? Suppose the police learn (or should have learned) that a suspect they wish to question is a recent immigrant from a country in which dire consequences often befall any person who dares to attempt to cut short any meeting with the police. Is this really less relevant than the fact that a suspect is a month or so away from his 18th birthday? The defendant’s education is another personal characteristic that may generate “conclusions about behavior and perception.” Under today’s decision, why should police officers and courts “blind themselves,” to the fact that a suspect has “only a fifth-grade education”? Alternatively, what if the police know or should know that the suspect is “a college-educated man with law school training”? How are these individual considerations meaningfully different from age in their “relationship to a reasonable person’s understanding of his freedom of action”? The Court proclaims that “[a] child’s age . . . is different,” but the basis for this . . . is dubious. I have little doubt that today’s decision will soon be cited by defendants—and perhaps by prosecutors as well—for the proposition that all manner of other individual characteristics should be treated like age and taken into account in the *Miranda* custody calculus. Indeed, there are already lower court decisions that take this approach.



In time, the Court will have to confront these issues, and it will be faced with a difficult choice. It may choose to distinguish today's decision and adhere to the arbitrary proclamation that "age . . . is different." Or it may choose to extend today's holding and, in doing so, further undermine the very rationale for the *Miranda* regime.

If the Court chooses the latter course, then a core virtue of *Miranda*—the "ease and clarity of its application"—will be lost. The clarity of *Miranda's* requirements "has been thought to outweigh the burdens that the decision . . . imposes." However, even today's more limited departure from *Miranda's* one-size-fits-all reasonable-person test will produce the very consequences that prompted the *Miranda* Court to abandon exclusive reliance on the voluntariness test in the first place: The Court's test will be hard for the police to follow, and it will be hard for judges to apply.

When, as here, the interrogation takes place in school, the inquiry may be relatively simple. But not all police questioning of minors takes place in schools. In many cases, courts will presumably have to make findings as to whether a particular suspect had a sufficiently youthful look to alert a reasonable officer to the possibility that the suspect was under 18, or whether a reasonable officer would have recognized that a suspect's I.D. was a fake. The inquiry will be both "time-consuming and disruptive" for the police

and the courts. It will also be made all the more complicated by the fact that a suspect's dress and manner will often be different when the issue is litigated in court than it was at the time of the interrogation.

Even after courts clear this initial hurdle, further problems will likely emerge as judges attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be. Consider, for example, a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old. . . . The Court's answer to these difficulties is to state that "no imaginative powers, knowledge of developmental psychology, [or] training in cognitive science" will be necessary. Judges "simply need the common sense," the Court assures, "to know that a 7-year-old is not a 13-year-old and neither is an adult." It is obvious, however, that application of the Court's new rule demands much more than this. . . . Today's opinion contains not a word of actual guidance as to how judges are supposed to go about making that determination.

The Court rests its decision to inject personal characteristics into the *Miranda* custody inquiry on the principle that judges applying *Miranda* cannot "blind themselves to . . . commonsense reality." But . . . bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.

### Questions for Discussion

1. Explain in your own words how the holding of *J.D.B.* modifies the test for custodial interrogation.
2. Why does Justice Sotomayor argue that a juvenile's age should be considered in determining whether a suspect would feel free to terminate the interrogation and leave?
3. Why does the dissent argue that there is a benefit in employing an objective test in determining whether the *Miranda* warnings are to be given to a suspect? What are the dissent's criticisms of the majority decision in *J.D.B.*? Do you agree that the certainty of the *Miranda* rule is being undermined by the Court's decision?
4. As a judge, how would you decide *J.D.B.*?
5. *Problems in policing.* Write a brief set of guidelines instructing police officers how they can lawfully interrogate a suspect at the station house without being required to read the *Miranda* rights. For instance, in some jurisdictions, the police will inform suspects who voluntarily come to police headquarters that they are not under arrest and are free to leave. This reinforces that the interrogation is a voluntary encounter and that the *Miranda* rights are not required to be read. This is often referred to as the *Beheler* warning, based on the tactics employed in *California v. Beheler* (463 U.S. 1121 [1983]).

### You Decide



**8.3** Marcus Dannon Owens was convicted of child abuse resulting in the death of his stepson Kevonte Davis and second-degree murder. His wife Kenesha Davis testified that when Marcus

picked her up from work Kevonte "had his eyes closed, was foaming at the mouth, had cold hands," and was

"moaning like he was in pain." Kenesha and Marcus took Kevonte to the hospital, where he died after unsuccessful efforts to revive him. The doctors concluded that Kevonte "sustained severe trauma on the level of a serious car accident or a falling off a building of several stories." Several of the staff members noted that Owens's explanation of Kevonte's activities during the day was inconsistent with the "extent of his injuries." The police



interviewed Owens at 6:30 p.m. for ten to fifteen minutes in the playroom of the hospital's pediatric ward where he was taking care of Kevonte's older brother Dacquan. Owens, when asked how Kevonte suffered such heavy bruising, blamed Kevonte's fighting with his brother Dacquan. The conversation ended when Owens left the room. The detectives at this point considered him an accessory to murder. Two hours later, the detectives approached Owens in the hospital parking lot and asked him to come inside for an interview. Owens voluntarily returned to the hospital and did not object to the audiotaping of the interview. The two detectives talked with Owens in an empty room in the pediatric ward nearby to the playroom where the first interview was

conducted. The detectives either before or after the second interview took possession of Owens's car keys. The interview lasted between twenty and thirty minutes, and the police asked "pointed questions" before Owens ended the conversation. At the conclusion of the interview, Owens asked whether "there [was] anything else before I go?" An officer replied that "[y]ou can leave at any time; we're not holding you in here anymore." Owens responded, "All right. See you tomorrow." He was arrested two days later. Was the trial court correct in holding that Owens had not subjected to custodial interrogation and that the police were not required to give Owens the *Miranda* warnings? See *Owens v. State*, 924 A.2d 1072 (Md. App. 2007).

*You can find the answer by referring to the Student Study Site, [edge.sagepub.com/lippmancp3e](http://edge.sagepub.com/lippmancp3e).*

## THE PUBLIC SAFETY EXCEPTION

In *New York v. Quarles*, the U.S. Supreme Court recognized a **public safety exception** to *Miranda*. This exception permits the police to ask questions reasonably prompted by a concern with public safety without first advising a suspect of his or her *Miranda* rights. The Supreme Court explained that a reasonable concern with the safety of the police or the public outweighs the interest in protecting a suspect's right against self-incrimination. This "narrow exception" requires that questions be directed at public safety rather than guilt or innocence. Coerced and involuntary statements are not admissible under the public safety rule. Reliance on the public safety exception requires that the following steps be satisfied (*New York v. Quarles*, 467 U.S. 649 [1984]).

- **Reasonableness.** There must be a reasonable need to protect the police or the public. The exception does not depend on the officer's subjective motivation.
- **Threat.** There must be a reasonable belief that the threat is immediate.
- **Questions.** Questions must be prompted by a reasonable concern for public safety and must be directed at public safety rather than guilt or innocence.
- **Coercion.** The statements may not be the product of police compulsion that overcomes the suspect's will to resist.

*New York v. Quarles* broadly defines public safety and offers no clear guidance to lower court judges and the police. A police officer who concludes that there is a threat to public safety and who fails to administer the *Miranda* warnings may find that the trial judge disagrees and orders the confession excluded from evidence. The lack of a clear definition of public safety also runs the risk that courts will broadly interpret the public safety exception. In *United States v. Reyes*, the police arrested a narcotics dealer who an informant reported might be armed. Reyes, when asked by the arresting officer whether he had "anything in his pocket that could harm the officer," responded that he had a gun. The officer removed the firearm and repeated the question. Reyes stated that there were drugs in his car. The federal court of appeals ruled that the officer's question was directed at public safety and that the drugs were properly admitted into evidence at Reyes's trial, but the court warned of the "inherent risk that the public safety exception might be distorted into a general rule" that individuals arrested on narcotics charges could be questioned in every instance prior to reading the *Miranda* rights (*United States v. Reyes*, 533 F.3d 148, 155 [2d Cir. 2003]).

In *United States v. Newton*, police officers received a complaint from Newton's mother that Newton, a parolee, had threatened to kill her and her husband. She reported that Newton was



*Illinois v. Perkins*, 496 U.S. 292 (1990), which you will find on the Student Study Site, discusses whether the use of government informants in prison constitutes custodial interrogation.



staying in their apartment and reportedly kept a gun in a shoe box by the door. The police entered the apartment and handcuffed Newton without advising him of his *Miranda* rights. An officer asked whether Newton had any contraband in the apartment, and Newton replied, “only what is in the box.” The police seized a .22 caliber automatic pistol. The Second Circuit Court of Appeals held that the question fell within the public safety exception based on the officers’ knowledge that Newton possessed a gun and had recently threatened to kill two people. Although Newton was handcuffed, his girlfriend was in the apartment and might have handed Newton the gun. The officer’s question concerning “contraband” could include material not presenting immediate safety concerns, but the appellate court noted that Newton clearly understood this to include weapons. The Second Circuit stressed that the police could not be expected to closely edit their questions when conducting an arrest (*United States v. Newton*, 369 F.3d 659 [2d Cir. 2004]).

The federal government has taken the position that the *Miranda* warnings need not be issued to suspected terrorists such as Boston Marathon bomber Dzhokhar A. Tsarnaev because their interrogations fall under the public safety exception. The policy states that “such interrogation might include, for example, questions about possible impending or coordinated terrorist attacks; the location, nature and threat posed by weapons that might post an imminent danger to the public; and the identities, locations and activities or intentions of accomplices who may be plotting additional imminent attacks.”

You can find *New York v. Quarles* on the Student Study Site. Do the facts in *Quarles* support the claim that the public safety was endangered? Consider the argument of the dissent questioning whether law enforcement requires a public safety exception to *Miranda*. Are questions directed at public safety also relevant for a suspect’s guilt or innocence?

### Legal Equation

Public safety exception	=	A reasonable need to protect the police or the public
	+	A reasonable belief that the threat is immediate
	+	Questions must be prompted by a reasonable concern for public safety and directed at public safety rather than guilt or innocence
	+	The statements may not be the product of police compulsion that overcomes the suspect’s will to resist.

#### You Decide



**8.4** Terrell L. Strozier was convicted of possession of heroin and claimed that the trial court had improperly admitted his incriminating statement under the public safety exception to the *Miranda* rule. Strozier was driving erratically and rolled through a stop sign. An officer observed Strozier’s driving and ran the license number and found that the vehicle was stolen. When the vehicle stopped in front of a residence, the officer ordered Strozier and the passenger to remain in the car until backup arrived. At this point, Strozier was ordered out of the car at gunpoint, handcuffed, and subjected to a pat-down search. Officer Roy McGill before conducting

the frisk asked Strozier if he had “anything on [him] I need to know about? Anything that might stick me?” Strozier responded that “he had a plastic bag with some brown stuff in it in his pocket.” McGill seized the bag from Strozier’s pocket and, based on his experience, concluded that the bag contained heroin. McGill placed Strozier in his cruiser and read him his *Miranda* rights. Strozier stated that he understood his rights and that he was willing to talk to McGill and told McGill that he did not use needles and thought he could trade the heroin for marijuana and for crack cocaine. As a judge, would you admit Strozier’s statement to Officer McGill into evidence under the public safety exception? See *State v. Strozier*, 876 N.E.2d 1304 (Ohio App. 2007).

*You will find the answer by referring to the Student Study Site, [edge.sagepub.com/lippmanpc3e](http://edge.sagepub.com/lippmanpc3e).*



## THE MIRANDA WARNINGS

The three-part **Miranda warnings** inform suspects of their Fifth Amendment rights and the consequences of waiving these rights. These warnings require that the police inform individuals of the right to remain silent, that anything they say may be used against them, and of their right to an attorney, retained or appointed. The *Miranda* judgment specifies that the rights are to be recited in “clear and unequivocal terms” and that a suspect should be “clearly informed” of his or her rights. At this point, you might want to review the Supreme Court’s explanation as to why the police are required to read *Miranda* rights to suspects.

These rights may be communicated to a suspect verbally, or a suspect may be asked to read the rights for himself or herself. In practice, the police typically employ both approaches. How should the rights be read to a suspect? As a judge, you might take the position that the rights must be read as set forth in the *Miranda* decision. On the other hand, you might take the position that a suspect’s rights can be effectively communicated without using the precise language of the *Miranda* judgment. This would be a practical recognition that an officer in the field may not have access to a *Miranda* card or may inadvertently depart from the required warnings. What are the costs and benefits of these alternative approaches?

The Supreme Court has provided broad guidance to the police on how to recite the *Miranda* warnings. *Miranda is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect.*

In 1981, in *California v. Prysock*, Police Sergeant Byrd told the suspect, Randall Prysock, that he had “the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning.” Prysock then was informed that as a juvenile, he had the right to have his “parents present, which they are.” Sergeant Byrd completed the warnings on Randall’s right to a lawyer by advising Prysock that “you have the right to have a lawyer appointed to represent you at no cost to yourself.” Mrs. Prysock stated that she “didn’t understand,” inquired if her son “could still have an attorney at a later time if he gave a statement now without one,” and agreed that Randall would talk to the Sergeant (*California v. Prysock*, 453 U.S. 355, 356, 357 [1981]).

The outcome of this case centered on the meaning of the term *represent*. Does this mean that a lawyer would be appointed to represent Prysock at trial while Prysock would have to pay for an attorney before that time? Did Sergeant Byrd contribute to the confusion by giving two separate warnings regarding the right to a lawyer and using the term *represent* rather than the term *consult*, which is the term used in the *Miranda* decision? The U.S. Supreme Court majority ruled that the “rigidity” of *Miranda* does not extend to the precise formulation of the warnings given a criminal defendant. The judges noted that the *Miranda* judgment indicates that “no talismanic incantation” was required to satisfy its strictures. Three dissenting judges argued that Sergeant Byrd’s warnings did not adequately inform Prysock of his rights and that “a lawyer appointed to represent you” could reasonably have been understood by Mrs. Prysock to refer to a lawyer at trial.

If *Miranda* is not a *talismanic incantation*, how much flexibility is permitted? At what point are the rights so inadequately and incoherently read that a suspect is not fully and effectively informed of his or her rights? In *Duckworth v. Eagan*, the defendant was arrested for an attempted murder and was informed that he had the right to the advice and presence of a lawyer, “even if you cannot afford to hire one.” Eagan then was told that “we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.” The police officer then stated that Eagan had the right to answer or not to answer questions and that he had “the right to stop answering at any time until you’ve talked to a lawyer.” The Supreme Court pointed out that the “if and when language” merely provided the defendant with the additional information that in Indiana, lawyers are appointed at the defendant’s initial appearance in court and that if he requested an appointed attorney, the police would not question him until a lawyer was present (*Duckworth v. Eagan*, 492 U.S. 195 [1989]).

The Supreme Court stressed that the warnings in their totality satisfied *Miranda* and, most important, that Eagan was informed of his immediate right to a lawyer and right to refuse to answer questions until a lawyer was present. The test was whether the warnings *reasonably conveyed the Miranda rights*. The Supreme Court majority stressed that judges should not closely examine every word of the *Miranda* warnings as if “construing a will or defining the terms of an easement.” The four dissenting judges observed that the “if and when you go to court” language would reasonably lead a suspect to believe that a lawyer would not be appointed until “some indeterminate time in the future after questioning.” Justice Marshall noted that an unsophisticated suspect might be understandably confused and decide to talk to the police in an “effort to extricate himself from his predicament.”

In both *Prysock* and *Duckworth*, the warnings in their totality were held to satisfy the requirements of *Miranda*. On the other hand, warnings that judges have considered to fail to provide the essential information required by the *Miranda* rights or that judges have concluded are misleading have been held to be inadequate.

In 2010, in *Florida v. Powell*, the Supreme Court revisited the question whether a *Miranda* warning “clearly informed” a suspect of his or her rights. Powell was arrested in connection with a robbery. The Tampa, Florida,



police, before asking Powell any questions, informed him that “[i]f you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.” Powell waived his rights and admitted that as a felon, he was in unlawful possession of a firearm when arrested. He contended that the *Miranda* warnings were deficient because he was not explicitly informed of the right to the presence of a lawyer throughout his interrogation. The warning instead indicated that Powell could consult with a lawyer only before the interrogation (*Florida v. Powell*, 130 S. Ct. 1195, 559 U.S. \_\_\_ [2010]).

The Court held that “although the warnings were not the clearest possible formulation of . . . [the] right to counsel advisement, they were sufficiently comprehensive and comprehensible when given a common sense reading.” Powell was informed that he could consult with a lawyer before the interrogation started and that he could exercise the right to consult with a lawyer at “any time . . . during the interview.”

The Supreme Court noted that while “no precise formulation” of the *Miranda* warnings was required, the standard FBI warnings were “admirably informative.” The FBI warnings inform suspects that they have the right to talk to a lawyer before questioning and also inform suspects of the right to have a lawyer present during questioning.

Justices Stevens and Breyer in their dissent argued that the warnings in *Powell* “entirely failed” to inform Powell of the right to have a lawyer present during questioning. According to the dissenters, the case marked “the first time the Court has approved a warning which, if given its natural reading, entirely omitted an essential element of a suspect’s rights.”

The Supreme Court also has been reluctant to require the police to expand the *Miranda* warnings beyond the three-part warning required in the *Miranda* judgment. In *Colorado v. Spring*, Spring waived his rights, presumably thinking that he would be interrogated by federal agents on an illegal gun charge and then was surprised with a question regarding a homicide. The Supreme Court held that Spring’s admission that he had “shot [a] guy once” was admissible. The Court explained that Spring had been read his *Miranda* rights and that it was neither trickery nor deception for the police to fail to inform him of the topic of interrogation (*Colorado v. Spring*, 479 U.S. 546 [1987]).

The next case in the text, *Moran v. Burbine*, asks whether the police are required to go beyond the warnings required in the *Miranda* judgment and inform a suspect of the availability of an attorney.

### Legal Equation

Three-part *Miranda* warnings = Reasonably convey rights

+ *Miranda* is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect. The *Miranda* warnings are not a talismanic incantation.

### Was Burbine adequately informed of his right to access to a lawyer?

***Moran v. Burbine*, 475 U.S. 412 (1986), O’Connor, J.**

#### Facts

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later, she died from her wounds.

Several months after her death, the Cranston, Rhode Island, police arrested respondent and two

others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey’s death lived at a certain address and went by the name of “Butch.” Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other



suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 P.M., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 P.M., respondent's sister telephoned the public defender's office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian, who had been scheduled to meet with respondent earlier that afternoon to discuss another charge unrelated to either the break-in or the murder. As soon as the conversation ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another assistant public defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 P.M., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder. At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions, he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use.

Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel." The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction.

### Issue

We granted certiorari to decide whether a prearrest confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him.

### Reasoning

The record amply supports the state-court findings that the police administered the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer. He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda*, we should extend that decision to condemn the conduct of the Providence police. . . .

The purpose of the *Miranda* warnings . . . is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda's* mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation, overriding practical



considerations counsel against its adoption. As we have stressed on numerous occasions, “[one] of the principal advantages” of *Miranda* is the ease and clarity of its application. . . . We have little doubt that the approach urged by respondent . . . would have the inevitable consequence of muddying *Miranda*’s otherwise relatively clear waters. The legal questions it would spawn are legion: To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel’s efforts to contact the suspect? Do counsel’s efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter? . . .

### Holding

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney’s efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society’s legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the court of appeals was not that awareness of Ms. Munson’s phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. Because neither the letter nor

purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation. . . .

### Dissenting, *Stevens, J., joined by Brennan, J., and Marshall, J.*

What is the cost of requiring the police to inform a suspect of his attorney’s call? It would decrease the likelihood that custodial interrogation will enable the police to obtain a confession. This is certainly a real cost, but it is the same cost that this Court has repeatedly found necessary to preserve the character of our free society. . . . Just as the “cost” does not justify taking a suspect into custody or interrogating him without giving him warnings simply because police desire to question him, so too the “cost” does not justify permitting police to withhold from a suspect knowledge of an attorney’s communication, even though that communication would have an unquestionable effect on the suspect’s exercise of his rights. The “cost” that concerns the Court amounts to nothing more than an acknowledgment that the law enforcement interest in obtaining convictions suffers whenever a suspect exercises the rights that are afforded by our system of criminal justice. . . .

In my view, as a matter of law, the police deception of Munson was tantamount to deception of Burbine himself. It constituted a violation of Burbine’s right to have an attorney present during the questioning that began shortly thereafter. . . . If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers, . . . then the Court’s decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights, . . . then today’s decision makes no sense at all. . . .

### Questions for Discussion

1. Why does the Supreme Court hold that the police are not required to inform Burbine of the availability of a lawyer? What problems would requiring this warning create in terms of judicial supervision of the *Miranda* rule?
2. What is your reaction to the Court’s holding that the inadvertent or intentional misleading of a lawyer is not relevant in determining whether Burbine’s waiver was knowing, voluntary, and intelligent?
3. What if Burbine signed a contract with a lawyer providing that “if I am ever arrested, you are obligated to advise me during any police interrogation”? Would the police be obligated under this contract to inform Burbine that his lawyer was at the police station and ready to assist him under such circumstances?
4. Do you believe that Burbine’s waiver was knowing, voluntary, and intelligent in light of the fact that he was not informed of the availability of a public defender?
5. *Problems in policing.* Write a policy guideline for the police discussing the reading of the *Miranda* warnings and detailing how the police should treat a lawyer who appears at a police station while a suspect is being subjected to custodial interrogation.



## Cases and Comments

**Criminal Procedure in the States.** Several state supreme courts have rejected the Supreme Court's reasoning in *Burbine* and have held that their state constitutions require the police to inform a defendant of an attorney's immediate availability.

The Illinois Supreme Court observed that a state is free to interpret its constitution to provide greater protections than are available under the U.S. Constitution. A suspect's right against self-incrimination is guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and by Article I, Section 10 of the Illinois Constitution. The Illinois Supreme Court held that the state constitutional guarantees "simply do not permit police to delude custodial suspects . . . into falsely believing they are without immediately available legal counsel and to also prevent that counsel from accessing and assisting their clients during the interro-

gation." This constitutes an interference with the client-attorney relationship and provides an incentive for the police to extract a confession before the suspect requests or learns of the presence of a lawyer.

The Illinois Supreme Court stressed that "if a defendant is entitled to the benefit of an attorney's assistance and presence during custodial interrogation, . . . certainly fundamental fairness requires that immediately available assistance and presence not be denied by police authorities." The Supreme Court concluded that the defendant, McCauley, had been denied the information required to make a voluntary, knowing, and intelligent waiver and that it was contrary to the American constitutional system to fear the consequences of individuals' exercise of their rights and liberties. Do you support the approach of the Illinois Supreme Court? See *People v. McCauley*, 163 Ill. 2d 414 (1994).

## INVOKING THE *MIRANDA* RIGHTS

Following the reading of the *Miranda* rights, a defendant may assert his or her right to a lawyer or right to silence—or may waive both of these rights. Is it sufficient that a defendant indicates that he or she "might" want a lawyer or "probably" should remain silent? Are the police required to ask the defendant to clarify his or her intent?

In *Davis v. United States*, Davis, a member of the Navy, was suspected of murdering another sailor and, when interviewed by the Naval Criminal Investigative Service, initially waived his *Miranda* rights. An hour and a half into the interview, Davis blurted out that "maybe I should talk to a lawyer." One of the agents later testified at trial that we made it clear that we "weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer." Davis replied, "No, I'm not asking for a lawyer," and then added, "No, I don't want a lawyer." Following a break in the interrogation, the investigators again read Davis his *Miranda* rights, and the interview continued for an additional hour. At this point, Davis asserted, "I think I want a lawyer before I say anything," and the investigators stopped their interrogation (*Davis v. United States*, 512 U.S. 452 [1994]).

Did Davis invoke his right to an attorney when he remarked that "maybe" he should talk to a lawyer? Was he then impermissibly persuaded to continue the interrogation as a result of the investigators' request for clarification? The U.S. Supreme Court held that an individual intending to assert his or her right to have counsel present must articulate this "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." A rule that required the police to cease questioning following an ambiguous statement by the accused would transform *Miranda* into a "wholly irrational obstacle to interrogations."

In other words, the investigators were free to continue interrogating Davis following his ambiguous statement as to whether he "should talk to a lawyer." They were not required to clarify his intent. In fact, in an effort to clarify a suspect's statement, the police might be accused of influencing the suspect to waive his or her right to an attorney. For example, in *Hart v. A.G.*, a police officer was asked by the suspect about the pros and cons of hiring a lawyer. The Eleventh Circuit Court of Appeals ruled that an officer had discouraged the suspect from invoking his right to an attorney when the officer stated that "I'm going to want to ask you questions and he's [the lawyer] going to tell you can't answer me," but I am telling you that "honesty wouldn't hurt" (*Hart v. A.G.*, 323 F.3d 884 [11th Cir. 2003]).

Justice Souter, writing on behalf of four concurring judges in *Davis*, observed that the Court's ruling in *Davis* would impose a special hardship on the poor and uneducated and on women and minorities. These individuals were particularly likely to feel overwhelmed by the interrogation process and would find it difficult to assert themselves. Justice Souter accordingly favored requiring the police to clarify ambiguous statements that might "reasonably be understood" as expressing a desire for the protection of a lawyer.



In another important ruling, the Supreme Court held in *Fare v. Michael C.* that the right to a lawyer did not encompass a juvenile's request to talk to his probation officer and that the juvenile's confession was properly admitted at his murder trial. The Supreme Court explained that lawyers, rather than probation officers, clergy, or friends, are trained and equipped to protect a suspect's right against self-incrimination (*Fare v. Michael C.*, 442 U.S. 707 [1979]).

In 2010, in *Berghuis v. Thompkins*, the U.S. Supreme Court clarified the standard for invoking the right to silence. The Court held that an accused who wants to invoke his or her right to silence is required "to do so unambiguously." The justices reasoned that the police should not be required to "read a suspect's mind" and guess as to whether a suspect is invoking his or her right to silence. Thompkins was largely silent for two hours and forty-five minutes before making incriminating statements. The Court held that his statement was admissible because he "did not say that he wanted to remain silent or that he did not want to talk with the police." Had he made either of these . . . statements, he would have invoked his "right to cut off questioning." Should the Court have required the police to try to clarify a suspect's intent? See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 560 U.S. \_\_\_ (2010).



You can find *Davis v. United States* and *Berghuis v. Thompkins* on the Student Study Site, [edge.sagepub.com/lippmancp3e](http://edge.sagepub.com/lippmancp3e).

### Legal Equation

Invocation of *Miranda* rights = Sufficiently clear that a reasonable police officer would understand that the suspect is asserting a right to a lawyer or to silence.

## WAIVER

A suspect, of course, may choose to waive his or her *Miranda* right to silence or right to an attorney. The Supreme Court stressed in *Miranda* that the government is required to meet a "heavy burden" in demonstrating that a suspect voluntarily, knowingly, and intelligently waived his or her rights. The *Miranda* judgment stated that a waiver requires an express statement and may not be presumed from the fact that an accused remains silent following the warnings.

What do we mean by a **voluntary, knowing, and intelligent waiver**? In *Moran v. Burbine*, the Supreme Court explained that a waiver inquiry involves a three-step process (*Moran v. Burbine*, 475 U.S. 412, 421 [1985]).

**Voluntary.** The right must be voluntarily relinquished, it must be the product of a free and deliberate choice, and it may not be caused by intimidation, coercion, or deception. I am doing this because I want to; the police did not make me waive my rights.

**Knowing and intelligent.** The waiver must be made with a full awareness both of the nature of the right being abandoned and of the consequences of the decision to abandon the right. A suspect must possess sufficient mental competence to understand the rights and the significance of a waiver. I know what the *Miranda* rights mean and what may happen to me if I talk.

**Totality of the circumstances.** The determination whether the waiver is voluntary, knowing, and intelligent is based on the totality of the circumstances surrounding the interrogation. We cannot read your mind, but we can see from the entire situation that the police did not pressure you into waiving your rights, and you seemed to know what you were doing.

The prosecution is required to establish a *knowing, voluntary, and intelligent waiver* by a *predominance of the evidence* (51 percent). The Supreme Court explained in *Colorado v. Connelly* that holding the prosecution to this relatively modest burden of proof is sufficient to deter illegal behavior on the part of the police (*Colorado v. Connelly*, 479 U.S. 157, 169 [1986]).

### Voluntary

The *Miranda* decision noted that evidence that an accused was threatened, tricked, or cajoled (pressured) into a waiver is sufficient to establish that a suspect did not voluntarily waive his or her rights. A waiver also will not be



recognized if obtained under coercive circumstances, such as a lengthy interrogation or a lengthy incarceration prior to the confession.

The Supreme Court has equated the test for voluntariness under *Miranda* with the due process voluntariness (“but for”) test that we discussed earlier in this chapter. In *Oregon v. Elstad*, the Supreme Court dismissed the defendant’s claim that his confession was involuntary and explained that the defendant had not alleged “coercion of a confession by physical violence or other deliberate means calculated to break the suspect’s will” (*Oregon v. Elstad*, 470 U.S. 298, 312 [1985]).

As you recall, in *Colorado v. Connelly*, the Supreme Court ruled that a defendant’s confession that was the product of a mental disability was not involuntary for the purposes of *Miranda*. An involuntary confession requires an “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant on the other.” In determining whether a confession is involuntary, a court will evaluate the impact of the police interrogation techniques in light of the totality of the circumstances. The factors to be considered include the following:

- **Offender.** The age, education, background, and other characteristics of the accused.
- **Conditions of interrogation.** The length of the interrogation or the length of the suspect’s detention prior to the reading of the *Miranda* rights.
- **Interrogation techniques.** Whether there was the threat or use of coercion, duress, or violence.
- **Motivation.** Whether the suspect had a reason to confess such as a desire for a reduced sentence that was not related to the actions of the police.

The question always is whether the totality of circumstances caused the defendant to involuntarily confess. Was his or her will overborne by the totality of the circumstances? See *Colorado v. Connelly*, 479 U.S. 157, 166 (1986).

Judges have generally been reluctant to find involuntary waivers in cases in which the police misrepresented or exaggerated the evidence against a suspect. In *United States v. Velasquez*, the police misrepresented the strength of the case against Velasquez by falsely informing her that a co-conspirator had implicated her in a drug scheme. The Third Circuit Court of Appeals ruled that the educated and experienced suspect had weighed and balanced various factors in deciding whether to waive her rights and that her co-conspirator’s alleged confession was only one consideration in her decision. In other words, Velasquez’s will and capacity for independent judgment were not overcome by the police officers’ misrepresentation; this was only one of many factors in her decision to talk to the police (*United States v. Velasquez*, 885 F.2d 1076, 1086 [3d Cir. 1989]). The Second Circuit, in another case, ruled that a defendant’s confession was based on his desire to be isolated from society in order to prevent himself from continuing his pattern of uncontrollable violence and that his confession had not been caused by the false representation that his fingerprints had been identified at the crime scene (*Green v. Scully*, 850 F.2d 894 [2d Cir. 1988]).

## Knowing and Intelligent

We have seen that a suspect is required to understand the meaning of the *Miranda* rights as well as the consequences of a waiver. Once having read the *Miranda* warnings, may an officer assume that a suspect fully comprehends his or her rights? What if an individual clearly does not understand the rights?

In *Tague v. Louisiana*, the arresting officer testified that he read Tague the *Miranda* warnings, but the officer “could not presently remember what those rights were . . . could not recall whether he asked [Tague] whether he understood the rights as read to him, and ‘couldn’t say yes or no’ whether he rendered any tests to determine whether [Tague] was literate or otherwise capable of understanding his rights.” The U.S. Supreme Court concluded that Louisiana had failed to satisfy the heavy burden of establishing that Tague knowingly and intelligently waived his rights before confessing. In other words, a police officer may not automatically assume that an individual knowingly and intelligently waived his or her rights (*Tague v. Louisiana*, 444 U.S. 469 [1980]).

What factors are relevant in determining whether a suspect’s waiver of *Miranda* is knowing and intelligent? In *Fare v. Michael C.*, the Supreme Court indicated that this is based on the *totality of the circumstances*. Michael was sixteen and a half years of age, and the Supreme Court indicated that the proper approach is to inquire into a “juvenile’s age, experience, education, background, and intelligence and into whether he [or she] has the capacity to understand the warnings given him [or her], the nature of his [or her] Fifth Amendment rights, and the consequences of waiving those rights.” The Court stressed that the police were careful to ensure that Michael C. understood his rights and that he clearly indicated a desire to waive them. In addition, there was nothing in Michael’s background to indicate that he lacked the capacity to understand his rights. He was a sixteen-and-a-half-year-old juvenile who had significant experience in the criminal justice system, including a history of



multiple arrests, internment in a youth camp, and having been on probation for several years. There also was no indication that he lacked the intelligence to understand the *Miranda* rights (*Fare v. Michael C.*, 442 U.S. 707, 725–727 [1979]). Judges also examine a defendant's behavior during interrogation. In *United States v. Gaddy*, the Eleventh Circuit Court of Appeals noted that despite the defendant's addiction to drugs and his mental illness, he was of above-average intelligence, had been involved with the criminal justice system on several occasions in the past, and did not exhibit “scattered” thinking, “panicky” behavior, severe depression, or anxiety during his interrogation and that his waiver was knowing and voluntary (*United States v. Gaddy*, 894 F.2d 1307, 1312 [11th Cir. 1990]).

We have already seen in *Colorado v. Spring* and in *Moran v. Burbine* that the Supreme Court has resisted requiring the police to incorporate additional information into the *Miranda* warnings, such as informing defendants of the topic of interrogation or of the availability of an attorney. The Court has stressed that the U.S. Constitution does not require that an individual be informed of all information that might prove useful in arriving at his or her decision, such as the strength of the prosecution's case. The Supreme Court also has recognized that absent this information, a decision to talk might be voluntary but not necessarily the best course to follow (*Colorado v. Spring*, 479 U.S. 564, 577 [1987]). In other words, a voluntary, knowing, and intelligent waiver is not necessarily a wise waiver.

## Express and Implied Waiver

A waiver, as we have seen, must be voluntary, knowing, and intelligent. *Miranda* indicated that an “express statement” that the individual is willing to make a statement and does not want an attorney followed closely by a statement constitutes a waiver and that a waiver will not be presumed from silence or “from the fact that a confession was in fact eventually obtained.” Have courts continued to require a clear and affirmative statement? Must a defendant sign a waiver form?

A mentally competent defendant who affirmatively waives his or her rights clearly meets the **express waiver** standard. However, the issue of waiver is not always this clear. Consider *North Carolina v. Butler*. Butler was convicted of kidnapping, armed robbery, and felonious assault stemming from the robbery of a service station and the shooting of the attendant. He was arrested and fully advised of his rights. Butler thereafter was taken to the FBI office, and after determining that he had an eleventh-grade education and was able to read, he was given a written *Miranda* warning form to review. Butler stated that he understood his rights and refused to sign the waiver of his right to silence and right to a lawyer at the bottom of the page. The FBI agents assured him that he was not required to speak or to sign the form and asked whether Butler was willing to talk to them. He replied that he would talk to the agents but would not sign the rights waiver form and then proceeded to make incriminating statements. An FBI agent testified at trial that Butler had said “nothing” when advised of his rights and attempted neither to request an attorney nor to halt the interrogation (*North Carolina v. Butler*, 441 U.S. 369 [1979]).

The U.S. Supreme Court ruled that the prosecution's burden is “great, but that . . . in some cases, a waiver can be clearly inferred from the actions and words of the person interrogated.” In these instances, the prosecution is required to establish that although there was no affirmative waiver, the suspect nevertheless understood his or her rights and engaged in a “course of conduct indicating waiver” (373). This is an **implied waiver**. Do you believe that Butler fully understood that he was waiving his *Miranda* rights? A similar issue arose in *Connecticut v. Barrett*, which you will find on the Student Study Site. Barrett was arrested for sexual assault, and he indicated that he would not provide a written statement without his lawyer but that he was happy to talk to the police. Was Barrett's confession admissible?

*Berghuis v. Thompkins* (discussed above) is the latest case discussing an implicit waiver of the *Miranda* rights. Berghuis was suspected of involvement in a shooting. At the beginning of the interrogation, Detective Helgert presented Thompkins with a form containing the *Miranda* rights. Helgert asked Thompkins to read the fifth warning out loud to determine whether he could read. The right read as follows: “You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.”

Thompkins read the *Miranda* warnings on the form aloud and refused to sign the form. Helgert and another officer then began the interrogation. At no point during the questioning did Thompkins express that he wanted to “remain silent, that he did not want to talk with the police, or that he wanted an attorney.” He was “[l]argely” silent during the interrogation, which lasted three hours. Thompkins gave a few limited verbal responses, such as “yeah,” “no,” or “I don't know,” and in some instances nodded his head. He declined an offer of a peppermint and complained that the small chair was “hard.”

Roughly two hours and forty-five minutes into the interrogation, Helgert asked, “Do you believe in God?” Thompkins looked at Helgert and responded, “Yes,” and his eyes “well[ed] up with tears.” Helgert then asked,



“Do you pray to God to forgive you for shooting that boy down?” Thompkins stated, “Yes,” and turned his head away. Thompkins refused to make a written confession, and the interrogation ended roughly fifteen minutes later.

Thompkins claimed that he did not knowingly and voluntarily waive his *Miranda* rights. The Supreme Court affirmed that a waiver either may be explicit or implicit. An implicit waiver is established where the prosecution “shows that a *Miranda* warning was given and that it was understood by the accused and [in such circumstances] an accused’s uncoerced statement establishes an implicit waiver of the right to remain silent.”

The Court concluded that Thompkins knowingly and voluntarily waived his right to silence.

**Received and read his rights.** Thompkins read his rights, and there is no evidence indicating that he did not understand his rights.

**Course of conduct.** Thompkins’s answer to the question about praying to God for forgiveness was “sufficient to show a course of conduct indicating waiver.”

**Uncoerced.** There is no evidence indicating that Thompkins’s statement was coerced by threats or by sleep or food deprivation or that an interrogation of this length is “inherently coercive.”

The *Berghuis* decision seemingly lessens the “heavy burden” on the prosecution to establish a defendant’s waiver of his or her *Miranda* rights by explicitly holding that a waiver may be “presumed” when an “individual . . . with full understanding of his or her rights, acts in a manner inconsistent with their exercise” and makes a “decision to relinquish the protection those rights afford.” The majority decision stressed that *Miranda* does not require a “formalistic waiver procedure.” The judgment in *Berghuis* was based on a recognition of the “constraints and necessities” of interrogation and on the fact that the “main protection” of *Miranda* was in advising defendants of their rights.

Justice Sotomayor, writing for the dissent, noted that Thompkins did not express a willingness to talk to the police. She questioned whether it was reasonable to conclude that the prosecution met the “heavy burden” of proof required to establish a waiver on a record “consisting of three one-word answers, following 2 hours and 34 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions.”

Justice Sotomayor criticized the majority decision for abandoning the “longstanding” precedent that a “valid waiver will not be presumed” from the “fact that a confession was eventually obtained” and that the question whether a defendant waived his or her rights should be decided based on a case-by-case basis with a heavy burden on the government to establish a waiver.

In 2013 in *Salinas v. Texas*, the Supreme Court applied the principle established in *Berghuis* to a defendant who without being placed in custody or receiving the *Miranda* warnings voluntarily answered the questions of a police officer who was investigating a murder. Salinas freely answered a police officer’s questions during an interview that lasted roughly an hour. But, when asked whether his shotgun “would match the shells recovered at the scene of the murder,” Salinas declined to answer. Instead, he “[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 Salinas answered (*Salinas v. Texas*, 133 S. Ct. 2174, 568 U.S. \_\_\_ [2013]).

Salinas subsequently was charged with murder, and his failure to answer the officer’s question about the shotgun was used against him as evidence of guilt at trial. Salinas claimed that the prosecutor’s use of his silence at trial violated his Fifth Amendment right against self-incrimination. The Court held that to invoke the right against self-incrimination a defendant must explicitly invoke his or her Fifth Amendment rights. The Court noted that in *Berghuis* “we held . . . that a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes. If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.”



You can find *North Carolina v. Butler*, and *Connecticut v. Barrett*, *Berghuis v. Thompkins*, and *Salinas v. Texas* on the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).

### Legal Equation

Waiver	=	Voluntary, knowing, and intelligent
	+	An affirmative statement (express waiver) or totality of the circumstances (implied waiver).



## WAIVER: QUESTION FIRST AND WARN LATER

In *Elstad v. Oregon*, the police visited the home of eighteen-year-old Michael James Elstad, briefly and casually interrogated him regarding a burglary, and obtained a voluntary incriminating statement. The officers then arrested Elstad and, at police headquarters, read Elstad his *Miranda* rights and obtained a detailed confession. The U.S. Supreme Court had no difficulty in ruling that the first confession was inadmissible because the officers had failed to read Elstad his *Miranda* rights. What of the second confession? Elstad clearly must have believed that there was little reason not to continue talking to the police after having already “let the cat out of the bag” concerning his guilt. It would seem only fair to require the police to inform Elstad that in considering whether to invoke his *Miranda* rights, he should be aware that his first confession was inadmissible.

The U.S. Supreme Court held that the unlawful character of Elstad’s first voluntary confession did not automatically taint his second voluntary confession and ruled that a “suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.” The Supreme Court found that the *Miranda* warnings cured the taint of the initial confession and that warning a suspect that his or her first confession was inadmissible was neither “practicable nor constitutionally necessary.” The police, according to the majority, were sufficiently deterred from failing to give the *Miranda* warning by excluding the first confession. Justices Brennan and Marshall in dissent criticized what they viewed as the Supreme Court’s growing impatience with constitutional rights and condemned their fellow justices for increasingly viewing civil liberties as impediments to combating crimes (*Oregon v. Elstad*, 470 U.S. 298, 312 [1985]).

Following *Elstad*, a number of police departments adopted a policy of interrogating suspects in “successive, unwarned and warned phases.” The Supreme Court reacted to this tactic in *Missouri v. Seibert* by reconsidering the judgment in *Elstad*. Patrice Seibert’s twelve-year-old son, Jonathan, had cerebral palsy and died in his sleep. Fearing charges of neglect because of the bedsores on Jonathan’s body, Seibert entered into a plan with her sons and some of their friends to incinerate Jonathan’s body in the family’s mobile home. They intentionally left Donald Rector, a mentally challenged teenager who lived with the Seiberts, in the home to give the impression that he was looking after Jonathan at the time of the fire.

Five days later, Seibert was arrested at the hospital where Donald was being treated for burns. She was taken to the police station and left alone in the interrogation room for fifteen to twenty minutes. Officer Hanrahan then followed orders and neglected to give Seibert the *Miranda* warnings prior to the thirty- to forty-minute interrogation. Seibert ultimately confessed to her crime and was given a twenty-minute break. Officer Hanrahan then turned on the tape recorder, indicated that they should continue their conversation, and gave Seibert the *Miranda* warnings, and Seibert waived her rights. Hanrahan initiated the questioning by confronting Seibert with her prewarning statements, and she immediately admitted that the plan was for Donald “to die in his sleep” (*Missouri v. Seibert*, 542 U.S. 600 [2004]).

The Supreme Court stated that the issue when the police **question first and warn later** is whether “it would be reasonable to find that in these circumstances the warnings could function ‘effectively’” to advise the suspect that he or she “had a real choice about giving an admissible statement.” In other words, when a suspect is warned that “anything you say may be used against you,” will he or she understand that the first confession is inadmissible and cannot be introduced into evidence to establish his or her guilt and that the defendant may find that it is in his or her self-interest to invoke the right to silence or the right to an attorney (613–614)?

The Supreme Court pointed out that in *Elstad*, one of the arresting officers likely was confused as to whether the suspect was in custodial interrogation and committed the “oversight” of casually remarking that he believed that Elstad was involved in the burglary. Elstad then confirmed that he was at the crime scene. The living-room conversation in *Elstad* was corrected at the police station when another officer read Elstad the *Miranda* warnings before undertaking a systematic interrogation. The Supreme Court noted that a reasonable person would view the station-house interrogation by a separate police officer as “a markedly different experience from the short conversation at home” (614).

In *Seibert*, the plurality of the Supreme Court concluded that the facts challenge the “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.” In contrast to the casual, inadvertent, and brief questioning in *Elstad*, the facts in *Seibert* reveal a police strategy intended to undermine the *Miranda* warnings. Both the unwarned interrogation and the warned interrogation took place in the station house and were conducted by the same officer. The first interrogation was systematic, exhaustive, and conducted with psychological skill, and the officer did nothing to inform Seibert that the first confession could not be used against her. Officer Hanrahan gave the impression that the second interrogation was a continuation of the earlier questioning when he noted that he had been talking to Seibert about “what happened” (616–617). As you read *Missouri v. Seibert* on the Student Study Site, consider whether you agree with the Supreme Court decision.



## Legal Equation

Confession resulting from a question-first-warn-later interrogation



Reasonable to find that in these circumstances, the warnings could function effectively to advise the suspect that he or she had a real choice about giving an admissible statement



Relevant facts and circumstances of the interrogation.

### You Decide



**8.5** Alexander Texidor was arrested by federal authorities for the unlawful purchase of firearms and agreed to provide the FBI with information concerning other individuals involved in the illicit trade in firearms. This led to the arrest of Luis Gonzalez-Lauzan Sr. on January 8, 2002. On January 28, 2002, Texidor was murdered and Senior and his son, Gonzalez-Lauzan Jr., and two other individuals were indicted for the murder in September 2002. Gonzalez-Lauzan Jr. was in prison on unrelated charges prior to the indictment when he was questioned by state and federal authorities in the interview room of the courthouse regarding Texidor's murder. The three officers made a decision not to administer the *Miranda* warnings and spent between two and a half and three hours talking to Gonzalez-Lauzan Jr. The officers explained that they were working on a murder investigation and believed that Gonzalez-Lauzan Jr. was involved.

The officers instructed Gonzalez-Lauzan Jr. that "we are not asking you any questions. We don't want you to say anything. We just have something to say to you and we ask that you listen to it so that you can understand where we are coming from." The officers described the evidence linking Gonzalez-Lauzan Jr. to the killing in detail and instructed him several times merely to listen when he occasionally interjected and denied involvement. After roughly two and a half hours, Gonzalez-Lauzan Jr. interrupted and exclaimed, "[O]kay, you got me." Gonzalez-Lauzan Jr. was then immediately read his *Miranda* rights, and he signed a form agreeing to waive his rights. He admitted that he had instructed the co-conspirators to teach Texidor a lesson, that he had provided the murder weapon, and that he had been present at the killing. Is Gonzalez-Lauzan Jr.'s confession admissible? See *United States v. Gonzalez-Lauzan Jr.*, 437 F.3d 1128 (11th Cir. 2006). See also *Hairston v. United States*, 905 A.2d 765 (D.C. 2006).

*You can find the answer by referring to the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).*

## WAIVER FOLLOWING INVOCATION OF THE *MIRANDA* RIGHTS

Once an individual invokes his or her *Miranda* rights, are the police prohibited from questioning him or her again? On one hand, the police clearly are obligated to respect a suspect's desire to invoke his or her *Miranda* rights. On the other hand, the police may desire to confront a suspect with new evidence or to question a suspect concerning an unrelated offense. How does the Supreme Court balance these competing interests?

The Supreme Court has established one legal test in those instances in which a defendant invokes his or her right to silence and another legal test in those instances in which a defendant invokes his or her right to an attorney. In this section, we will describe the two legal tests and explain the reason for the Court's reliance on separate tests. We first turn to the approach employed when a suspect invokes his or her right to silence.

In *Michigan v. Mosley*, Mosley was arrested in connection with two robberies. He was read his *Miranda* rights and invoked his right to silence, and the robbery detective ceased questioning. The detective then took Mosley to the cell block. Two hours later, Mosley was moved to the homicide bureau for questioning about "an unrelated holdup murder." He once again was advised of his rights and this time waived them and made an incriminating statement. Mosley later appealed that his second interrogation for murder was unlawful and pointed out that *Miranda* clearly stated that if an individual indicates at any time that he wishes to remain silent, the interrogation must cease. Did this mean that the police interrogation of Mosley for the homicide was a violation of his right against self-incrimination (*Michigan v. Mosley*, 423 U.S. 96 [1975])?



The U.S. Supreme Court ruled that the Detroit police acted in lawful fashion. The legal test for whether a statement obtained after a person in custody decides to remain silent depends on whether his or her right to silence was **scrupulously honored**. What does this mean?

- The police immediately ceased questioning.
- The police suspended interrogation for a significant period.
- The police provided a fresh set of Miranda warnings.
- The second interrogation focused on a crime different in time, nature, and place.

The Supreme Court stressed that the critical consideration is whether the police respected Mosley's "right to cut off questioning." This was not a situation in which the police failed to honor a decision to terminate questioning by refusing to discontinue the interrogation or by engaging in repeated efforts to wear down Mosley's resistance and pressure him to change his mind.

The dissent pointed out that Mosley initially did not want to talk about the robberies and argued that the police had taken advantage of the coercive environment of Mosley's incommunicado detention to extract a confession to an unrelated criminal offense.

The scrupulously honored test is subject to several criticisms. Clearly, the police were aware when they arrested Mosley that he possibly was involved in a killing, and the Court's holding invites the police to subject a defendant to a series of interrogations when they have evidence of the defendant's involvement in multiple crimes. What did the Supreme Court mean when it required that the second interrogation address a crime different in time, nature, and place? What about a bank robber who flees in a car and hits a pedestrian? Are the bank robbery and auto accident different in time, nature, and place?

An example of the application of *Mosley* is *United States v. Tyler*. Tyler was arrested for the murder of a government informant and, after being read his *Miranda* rights, invoked his right to silence. He was taken to a small room in the police barracks in which a timeline of the murder investigation and crime scene photographs were pasted to the wall. After several hours, Detective Ronald Egolf entered the room and engaged Tyler in a general discussion on his family, education, and hunting and, after roughly an hour, directed Tyler to "tell the truth." Tyler allegedly started to cry, Egolf again warned him of his *Miranda* rights, and Tyler confessed to involvement in the murder. The Third Circuit Court of Appeals held that Tyler's interrogation was inconsistent with "scrupulously honoring Tyler's assertion of silence." Can you explain the court's decision? See *United States v. Tyler*, 164 F.3d 150, 155 (3d Cir. 1998).

The Supreme Court, in *Edwards v. Arizona*, established a separate **initiation** test for determining whether a defendant who invokes his or her right to an attorney may be once again interrogated. Under what circumstances would a waiver and subsequent confession be considered voluntary, knowing, and intelligent? The facts in *Edwards* are remarkably similar to the facts in *Mosley*. Edwards was arrested for burglary, robbery, and murder and then waived his rights, agreed to talk, and later asserted his right to counsel. The next morning, two detectives approached Edwards and again read him his *Miranda* rights. Edwards agreed to talk to the police and confessed.

The confession obtained by the detectives to a crime to which Edwards earlier had invoked his right to counsel clearly would be inadmissible under the *Mosley* test. The U.S. Supreme Court, however, explained that a new test was required because an individual who invokes his or her right to counsel clearly lacks confidence in his or her ability to withstand the pressures of interrogation and desires the help of a lawyer. The Court held that Edwards "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself *initiates* further communication, exchanges or conversations with the police." A confession obtained in the absence of counsel is presumed to be involuntary (*Edwards v. Arizona*, 451 U.S. 477, 484–485 [1981]).

In *Arizona v. Roberson*, the Supreme Court extended *Edwards*, which prohibits reinterrogation about the same crime, to prohibit the police from reinterrogating a suspect about a *different crime*. Justice Stevens explained that a suspect who requests a lawyer clearly believes that he or she is in need of legal assistance regardless of whether interrogated about the same offense or a different offense. Stevens reasoned that such a suspect who is again approached by the police will find it difficult to overcome the pressures of custodial interrogation and again assert his or her right to a lawyer. Justice Kennedy, in dissent, pointed out that the *Edwards–Roberson* rule will prevent the police from interrogating suspects based on newly discovered evidence or offenses (*Arizona v. Roberson*, 486 U.S. 675 [1988]).

Some of the difficulties with the initiation test are illustrated by *United States v. Green*. In *Green*, a defendant was arrested on a drug charge, was read his *Miranda* rights, invoked his right to an attorney, and pled guilty. Three months later, the police obtained an arrest warrant charging the defendant with an unrelated homicide that had taken place six months before he had been arrested on the drug charge. The defendant subsequently was



interrogated on the homicide and, after being advised of his *Miranda* rights, confessed. Despite the fact that five months had passed between the time that the defendant invoked his right to counsel and the time that he confessed to the murder, the District of Columbia Court of Appeals ruled that a strict interpretation of the *Edwards* rule dictated that the confession should be suppressed (*United States v. Green*, 592 A.2d 985 [D.C. 1991]). The U.S. Supreme Court was in the process of considering this case when the defendant died, and as a result, no ruling was issued. How would you resolve the dilemma confronting the judge in *Green*?

In 2010, in *Maryland v. Shatzer*, the Supreme Court addressed the prohibition against interrogation of a suspect who has invoked his or her right to counsel. Shatzer was incarcerated in Maryland for child sexual abuse. A detective interviewed Shatzer on August 7, 2003, about another allegation of child abuse against his son, and Shatzer invoked his right to a lawyer; the investigation was dropped (*Maryland v. Shatzer*, 559 U.S. \_\_\_ [2010]).

Thirty months later, additional information developed that supported the allegation of child abuse against Shatzer's son, and a second detective, Paul Hoover, interviewed the alleged victim, then eight years of age. In March 2006, Hoover interviewed Shatzer in a second correctional institution to which he had been transferred. Hoover explained that he wanted to question Shatzer about the alleged abuse of his son. He read Shatzer the *Miranda* rights and obtained a written waiver. Shatzer admitted to masturbating in front of his son from a distance of less than three feet. He agreed to take a polygraph examination, and after being read the *Miranda* rights, Shatzer failed the test. He was visibly upset, started to cry, and incriminated himself by saying, "I didn't force him. I didn't force him." Shatzer requested an attorney, and Hoover ended the interrogation.

*Edwards* protects a suspect who has invoked the right to a lawyer from being coerced or badgered into waiving his or her right to a lawyer, and Shatzer's confession would have been thrown out under the *Edwards* rule. The Supreme Court, however, avoided his harsh result by establishing a **break in the custody rule** that regulates police interrogation of suspects who have invoked their right to counsel under *Edwards*. The Court noted that when a suspect is released from pretrial custody and "has returned to his normal life for some time, . . . there is little reason to think that his change of heart regarding interrogation without counsel has been coerced." The suspect is no longer isolated and has been able to seek advice from a lawyer, family, and friends. His or her change of heart likely is a result of a calculation of his or her self-interest rather than a result of police coercion.

The Supreme Court held that when a suspect has been released from custody for fourteen days, the police may once again approach a suspect. This provides time for the suspect to consult with friends and lawyers. The fourteen-day waiting period insulates a suspect against police continually attempting to interrogate and to wear a suspect down. Shatzer, although incarcerated, was not under pressure to talk to the police. He was in medium-security institutions and had access to a law library, exercise, and adult education; and he was able to send and receive letters and to receive visitors.

The next issue confronting the U.S. Supreme Court was clarifying what the Court meant in *Edwards* when it wrote that a suspect is not subject to interrogation until a lawyer has been "made available to him." In *Minnick v. Mississippi*, Mississippi argued that once a defendant requests and meets with an attorney, "counsel has been made available to him." Following this meeting, Mississippi argued that the police are free to interrogate a suspect without a lawyer being present. The Supreme Court, however, held that a "fair reading of *Edwards* . . . demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. . . . When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney" (*Minnick v. Mississippi*, 498 U.S. 146, 150 [1990]).

In summary, keep three points in mind when it comes to a suspect's invocation of the *Miranda* rights and waiver of the *Miranda* rights.

- **Invocation of counsel.** We saw in *Davis* and in *Berghuis* that the invocation of a right to counsel and the right to silence requires a clear and unambiguous statement.
- **Scrupulously honored.** *Mosley* taught us that the waiver of the right to silence following the assertion of this right is considered voluntary in those instances in which the police scrupulously honored the suspect's rights.
- **Initiation.** A waiver of the invocation of the right to an attorney following the assertion of this right is considered voluntary in those instances in which the defendant initiates contact with the police.

What do we mean by *initiation*? Must there be a clear and affirmative statement of waiver? The U.S. Supreme Court provided an answer to this question in *Oregon v. Bradshaw*, the next case on the Student Study Site. In reading *Bradshaw*, pay attention to the legal test for waiver of the right to a lawyer. The Supreme Court ruled that Bradshaw's question to a police officer, "Well, what is going to happen to me now?" constituted initiation



and a waiver of Bradshaw's previous request for a lawyer. The Court reasoned that "[a]lthough ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship." Did Bradshaw intend to waive his right to an attorney? Ask yourself whether the law has made it difficult or easy for the police to obtain a waiver from an individual who has previously invoked his or her right to an attorney.

### Legal Equation

Waiver following invocation of right to silence	=	(Scrupulously honor rights) Immediately cease interrogation	+	Suspend questioning for a significant period of time
	+	Fresh set of <i>Miranda</i> warnings	+	Interrogation on crime different in time, nature, and place.
Waiver following invocation of right to an attorney	=	Initiate contact with the police.		

## CRIMINAL PROCEDURE IN THE NEWS

In 2006, the United Nations Committee Against Torture called for an impartial national investigation of alleged "police brutality and torture in Chicago, about which nothing has been done for a long time." The report was issued by ten independent international experts charged with monitoring compliance with the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

This echoed a 1990 report by the international human rights organization Amnesty International that called for an investigation into ongoing allegations of torture of individuals subjected to police interrogation in Chicago.

It is alleged that between 1973 and 1991, at least sixty-six individuals were tortured by Chicago Police Commander Jon Burge and by the officers under his supervision in the Area 2 police headquarters in Chicago. Burge and his fellow officers are accused of beating suspects, shocking them with electric wires and cattle prods, suffocating them using plastic bags, and jamming guns against their heads or in their mouths in order to extract confessions. The credibility of this charge is bolstered by a report by the Chicago Police Department's Office of Professional Standards (OPS), which, in 1990, listed the names of fifty alleged victims of police torture. The report determined that physical abuse "did occur and . . . it was systematic. . . . [T]he

type of abuse . . . was not limited to the usual beatings, but went into such areas as psychological techniques and planned torture." The OPS investigation also concluded that members of the police command were aware of the "systematic abuse" and either participated in the activity or failed to intervene to bring it to an end.

The case that first brought these charges to public attention involved Andrew Wilson, convicted of killing two police officers. Wilson ultimately won a civil judgment against the City of Chicago, which admitted that Wilson had been tortured and that Burge and others had acted in an "outrageous manner and utilized methods far beyond those . . . permitted and expected by the Police Department." Lawyers for the city also conceded that Burge and others had tortured another suspect nine days earlier. This led to Burge's termination in 1993 and to the suspension of two detectives. It later was revealed that Chicago had spent more than \$30 million in legal fees defending Burge and the police under his command against charges of torture.

There is no question that some of the individuals who were apparently tortured by Burge and his men, in fact, were guilty. Some innocent individuals, however, were convicted. In January 2003, Illinois Governor George Ryan granted four death row inmates pardons after concluding that their confessions had been obtained by Burge and his unit through torture.



The claims of torture have received support from a number of state and federal courts. In 1999, Federal District Court Judge Milton Shadur wrote that it is “now common knowledge that . . . Jon Burge and . . . officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. . . . [B]eatings and other means of torture occurred as an established practice, not just on an isolated basis” (*United States ex rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078 [N.D. Ill. 1999] [Memorandum and order]).

Federal Court of Appeals Judge Diane Wood, in *Hinton v. Uchtman* (2005), wrote that the defendant’s torture allegations were “reminiscent of the news reports of 2004 concerning the notorious Abu Ghraib facility in Iraq.” She observed that this type of conduct “imposes a huge cost on society: it creates distrust of the police generally, despite the fact that most police officers would abhor such tactics, and it creates a cloud over even the valid convictions in which the problem officers played a role” (*Hinton v. Uchtman*, 395 F.3d 810, 833 [7th Cir. 2005]).

There is no doubt that the systematic use of torture has called into question the credibility of criminal convictions in Chicago. In 2006, two special prosecutors issued a three-hundred-page report discussing 148 cases of alleged torture in Chicago. The report concluded that Burge and a dozen police officers abused suspects and that at least three former prosecutors failed to inquire into the condition of suspects. The same pattern of indifference was displayed by high-level police and prosecutorial officials in Chicago. The prosecution of individuals accused of torture, according to the report, likely is barred by the statute of limitations.

United States Attorney Patrick Fitzgerald charged Burge with perjury and with obstruction of justice for having allegedly committed perjury by denying torture in a civil case in federal court. He was convicted in June 2011 and sentenced to four and one-half years in prison. The key witness was former Chicago Police Detective Michael McDermott, who corroborated the

testimony of five individuals who claimed to have been tortured by Burge and his “Midnight Gang.” Following the verdict, Fitzgerald stated that it was “important to send a message that this sort of thing” will not be tolerated in the criminal justice system.

In 2014, as John Burge was being released from a halfway house, allegations emerged that former Chicago police officer Richard Zuley had directed enhanced interrogation techniques at Guantánamo and was under investigation for using some of the same methods to interrogate detainees in Chicago. These methods included shackling them to the wall for long periods and threats to family members and to detainees. Zuley, it was also alleged, was involved in planting evidence in the conviction of Lathierial Boyd, whose wrongful conviction for murder was overturned in 2013 after Boyd had spent twenty-three years in prison.

In April 2015, the Chicago City Council appropriated \$5.5 million to be shared by torture victims who had not as of yet reached a financial settlement with the city. Payments are limited to \$100,000, and individuals who have settled for less than this figure are eligible to participate in the program. In return for the payments, individuals are required to waive their legal remedies. Mayor Rahm Emanuel and the City Council issued a formal apology to the victims and provided that public school curriculum include a history of police torture in Chicago. The victims of torture also received free tuition at Chicago community colleges and psychological counseling. Educational benefits also were extended to the victims’ children and grandchildren. A monument was to be constructed honoring the victims of police torture.

Chicago, prior to passage of the compensation legislation, had spent more than \$20 million in private legal fees defending Burge and others involved in torture and had paid out roughly \$64 million in settlements. Defense attorneys report that sixteen torture victims have been exonerated and roughly twenty-five more wrongfully convicted individuals remain behind bars.

## INTERROGATION

You should have it firmly fixed in your mind that a defendant may not be interrogated by the police prior to the reading of the *Miranda* warnings. Following the reading of the *Miranda* rights, there also are firm limits on police **interrogation**. As we have seen, once a suspect invokes either the right to silence or the right to an attorney, he or she is not subject to interrogation. The police must *scrupulously honor* the right to silence and may interrogate a suspect only about a crime different in time, nature, and place after suspending interrogation for a period of time and issuing a fresh set of *Miranda* warnings. A suspect who invokes his or her right to an attorney may be interrogated only in the event that the suspect *initiates* contact with the police.

What is the definition of *police interrogation*? Does this mean that the police are prohibited from conversing with the suspect? Can the police let a suspect know that they found several hundred pounds of cocaine in his or her house or inform the suspect of the progress of the investigation or of the fact that a co-conspirator confessed?



In *Rhode Island v. Innis*, the next case in the text, the U.S. Supreme Court defined *interrogation*. The Court explained that interrogation involves either **express questioning** or the **functional equivalent of express questioning**.

- **Express questioning.** Questions directed to a suspect by the police.
- **Functional equivalent.** 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.

Express questioning entails a direct question. The test for the functional equivalent of questioning is whether the police should know that a practice is likely to elicit an incriminating statement from a suspect. The police are required to put themselves in the shoes of the suspect and ask themselves whether a statement or practice is likely to lead the suspect to incriminate himself or herself. For example, the police should anticipate that an appeal to religion may lead a suspect who is a member of the clergy to incriminate himself or herself.

In reading *Rhode Island v. Innis*, ask yourself whether the legal test for interrogation is clearly stated by the Court. Do you believe that the police unconstitutionally interrogated Innis?

### Did the police interrogate Innis?

#### *Rhode Island v. Innis*, 446 U.S. 291 (1980), Stewart, J.

##### Facts

On the night of January 12, 1975, John Mulvaney, a Providence, R.I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R.I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 A.M. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a patrol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda*

rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter's request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the *Miranda* warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his *Miranda* rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a "caged wagon," a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified:

At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school



for handicapped children is located nearby] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

Patrolman McKenna apparently shared his fellow officer's concern:

I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to Captain Leyden that they were returning to the scene of the arrest, and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights but that he “wanted to get the gun out of the way because of the kids in the area in the school.” The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

The trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

## Issue

In *Miranda v. Arizona*, the Court held that once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue, therefore, is whether the respondent was “interrogated” by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term *interrogation* under *Miranda* before turning to a consideration of the facts of this case.

## Reasoning

The starting point for defining *interrogation* in this context is, of course, the Court's *Miranda* opinion. There, the Court observed that “[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.” This passage and other references throughout the opinion to “questioning” might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody. We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the “interrogation environment” created by the interplay of interrogation and custody would “subjugate the individual to the will of his examiner” and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of lineups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. A variation on this theme discussed in *Miranda* was the so-called “reverse lineup” in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to “[posit] the guilt of the subject,” to “minimize the moral seriousness of the offense,” and “to cast blame on the victim or on society.” It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

We conclude that the *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. By “incriminating response,” we refer to any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial. As the Court observed in *Miranda*:

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

Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

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.

Moreover, it cannot be fairly concluded that the respondent was subjected to the “functional equivalent” of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

### Holding

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted

of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent’s contention that under the circumstances, the officers’ comments were particularly “evocative.” It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

By way of example, if the police had done no more than to drive past the site of the concealed weapon while taking the most direct route to the police station, and if the respondent, upon noticing for the first time the proximity of the school for handicapped children, had blurted out that he would show the officers where the gun was located, it could not seriously be argued that this “subtle compulsion” would have constituted “interrogation” within the meaning of the *Miranda* opinion.

### Dissenting, *Marshall, J.*, joined by *Brennan, J.*

One can scarcely imagine a stronger appeal to the conscience of a suspect—any suspect—than the assertion that if the weapon is not found, an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to “display some evidence of decency and honor,” is a classic interrogation technique.

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

### Dissenting, *White, J.*

As this example illustrates, the Court’s test creates an incentive for police to ignore a suspect’s invocation of his rights in order to make continued attempts to



extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an incriminating statement, that statement can be used against him at trial. The Court thus turns *Miranda's* unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.

The Court's assumption that criminal suspects are not susceptible to appeals to conscience is directly contrary to the teachings of police interrogation manuals, which recommend appealing to a suspect's sense of morality as a standard and often successful interrogation technique. Surely, the practical experience embodied in such manuals should not be ignored in a case such as this in which the record is devoid of any evidence—one way or the other—as to the susceptibility of suspects in general or of *Innis* in particular.

### Questions for Discussion

1. Why did *Innis* confess? Out of guilt or self-interest? Should the police have been aware that the discussion concerning handicapped children might elicit an incriminating response?
2. Was the shotgun important to the prosecution's case against *Innis*? Would the police likely have been successful in obtaining a confession once *Innis* met with a lawyer?
3. Can you give an example of actions that are likely to lead a suspect to self-incriminate? What about showing a suspect photos of a bloody crime scene?
4. The definition of *interrogation* in *Innis* must be applied to the facts in each case. As a police officer, would you be clear after reading *Innis* about what you can and cannot say to a suspect?
5. How would you rule in this case?
6. *Problems in policing*. Explain how the police can rely on the rule in *Innis* to elicit a confession from a suspect who has invoked his or her *Miranda* rights.

### Cases and Comments

**Taped Interrogations.** Questions about what transpired during police interrogation often come down to a “swearing contest” at trial between the police and the defendant. The officer testifies that he or she respected the defendant's rights, and the defendant alleges that the confession was coerced or was the product of police manipulation and trickery.

Many legal scholars advocate the taping of interrogations to provide a record of what transpired in the interrogation room and to guard against psychologically and physically coercive interrogations. Various states, by statute or court decision, require taping of at least some serious felony cases. This has been required by the supreme courts of Alaska, Minnesota, and New Jersey and for certain offenses by the state legislatures of Illinois, Maine, New Mexico, Texas, and Wisconsin and by the District of Columbia. In 2004, the American Bar Association also endorsed the audio or video recording of interrogations. Australia, Canada, and England provide for the taping of confessions. At last count, 450 local police departments also require the videotaping of interrogations.

In 2004, in *Commonwealth v. DiGiambattista*, the Massachusetts Supreme Judicial Court ruled that “when there is not at least an audiotape recording of

the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care.”

The Massachusetts Supreme Judicial Court's opinion also included a number of observations concerning the desirability of recording interrogations. The court noted that the failure of the police to record *DiGiambattista's* interrogation meant that the court was forced to spend a significant amount of time reconstructing what had occurred several years ago. The court also observed that prosecutors should favor taping because it makes it easier for the government to demonstrate beyond a reasonable doubt that a suspect's confession was voluntary. A court, for example, might conclude after viewing *DiGiambattista's* interrogation that despite the tactics employed by the police, his confession was voluntary. Videotaping also deters coercive police practices and inspires confidence in the police. The Massachusetts Supreme Judicial Court therefore held that based on these policy reasons, the jury in criminal prosecutions



should be instructed that they are to weigh confessions that are not recorded with “great caution and care.” The court explained that it was only fair to inform the jury that the prosecution that has the burden of proof has decided not to preserve “evidence of that interrogation in a more reliable form, and to tell them that they may consider that fact as part of their assessment.”

The main objection to recording is that it will discourage suspects from making statements to the police because they may be reluctant to provide a permanent record of their admissions of guilt that may be used in a court of law. Other critics point to the financial

cost of taping. Another criticism is that the police can conceal abuse by coercing suspects and then turning on the videotape and interrogating suspects in a calm and controlled fashion.

Nineteen states and the District of Columbia record interrogations involving all or certain specified felonies. In 2014, the FBI announced that it would record all interrogations. Should there be a requirement that interrogations be videotaped? What is your view? See *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004). See also *Stephan v. State*, 711 P.2d 1156 (Alaska 1985).

### You Decide



**8.6** Blake and Tolbert robbed and killed Straughan Lee Griffin and carjacked his automobile. Tolbert was arrested, and he implicated Blake. Blake was

arrested and was read his *Miranda* rights; he invoked his right to an attorney and was jailed.

Thirty-five minutes later, Detective William Johns returned to Blake’s cell to give Blake a statement of the charges. Maryland law requires that defendants receive a statement of the charges against them. Johns was accompanied by Officer Curtis Reese. Johns told Blake, “[I]t’s very serious, this is your copy, you need to read it over.” The statement contained a description of each charge as well as the maximum penalty for each offense. The maximum penalty listed for the first-degree murder charge was “DEATH.” The death penalty is indeed the maximum penalty that can be imposed in Maryland for first-degree murder, although Blake himself could not have received the death penalty because he was seventeen years old on the night of the murder. The factual summary on which the charges were based included an accusation by Tolbert that Blake was the one who shot Griffin and drove Griffin’s vehicle from the scene.

As Johns began to leave, Reese said in a loud and confrontational voice, “I bet you want to talk now,

huh?” Detective Johns loudly stated to Reese, “[N]o he doesn’t want to talk to us, you can’t say anything to him, he asked for a lawyer.”

Roughly one half-hour after Johns had spoken to Blake, Johns returned to the cell block to deliver some clothing to Blake that had been delivered for him. Blake asked, “I can still talk to you?” Johns replied, “Are you saying you want to talk to me now?” Blake said, “[Y]es.” Johns told him he would have to reread Blake his *Miranda* rights before they could talk. Blake walked back to the interview room, where he was re-*Mirandized*. Blake provided a full account of the robbery, murder, and carjacking.

At the end of the interview, Detective Johns asked if Blake would agree to a polygraph exam, and Blake said he would. The polygraph administrator told Blake that he appeared to have been deceptive, and Blake then admitted that on the day of the murder, he knew Tolbert had a gun. He also admitted that they were looking for someone to carjack, and that Blake initially noticed Griffin and pointed him out to Tolbert. Was Blake improperly interrogated by the Annapolis, Maryland, police officers under *Rhode Island v. Innis*? In the alternative, did Blake initiate the contact with the police under *Bradshaw*? See *United States v. Blake*, 571 F.3d 331 (4th Cir. 2009).

*You can find the answer by referring to the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).*

## SIXTH AMENDMENT RIGHT TO COUNSEL: POLICE INTERROGATIONS

The Sixth Amendment provides for the right to a speedy and public trial before an impartial jury with the right to obtain witnesses and to confront your accusers. The amendment further guarantees that an individual shall “have the assistance of counsel for his defense.” The right to an attorney is crucial; without the skill and expertise



of a lawyer, an individual may find himself or herself unable to meaningfully contest his or her guilt at trial. The U.S. Supreme Court, in a series of cases, extended the Sixth Amendment right to counsel beyond the criminal trial to provide protections to individuals subjected to interrogation in the postindictment phases of the criminal justice process. Keep two points in mind as we explore the Sixth Amendment right to counsel.

The Sixth Amendment right supplements the due process voluntariness and Fifth Amendment *Miranda* protections. The Sixth Amendment automatically attaches following the initiation of criminal proceedings. At this point, guilt or innocence is to be determined in a court of law.

The Sixth Amendment protection ensures that the criminal justice process functions in a fair fashion. In contrast, the due process voluntariness test protects individuals against involuntary confessions, and *Miranda* is intended to safeguard the right against self-incrimination.

In 1964, in *Massiah v. United States*, as we have seen, the U.S. Supreme Court proclaimed that following indictment, individuals enjoy a *Sixth Amendment right to counsel* that provides protection against the police deliberately eliciting incriminating statements (*Massiah v. United States*, 377 U.S. 201, 206 [1964]). As you recall, the Sixth Amendment right to counsel also provided the basis for the Court's decision two years later in *Escobedo v. Illinois*. These two decisions were thereafter overshadowed by the Supreme Court's decision in *Miranda v. Arizona*, recognizing that the Fifth Amendment provides protections for individuals subjected to custodial interrogation. The Sixth Amendment was not again employed to protect individuals from interrogation until 1977 when the Supreme Court applied the Sixth Amendment in *Brewer v. Williams* (430 U.S. 387 [1977]). *Brewer* was followed by a number of decisions that further defined the Sixth Amendment right to counsel.

As noted above, the Sixth Amendment provides protections to individuals confronting formal criminal proceedings.

In 2008, in *Rothgery v. Gillespie County*, the U.S. Supreme Court clarified that the Sixth Amendment right attaches at a criminal defendant's "initial appearance before a judicial officer," where he or she learns the charge against him or her, a probable cause determination is made, and bail is set restricting the defendant's liberty (*Rothgery v. Gillespie County*, 554 U.S. 191 [2008]). At this point, an individual's status has shifted from that of a criminal suspect to that of a criminally accused. As the Supreme Court observed in *Moran v. Burbine*, the Sixth Amendment's "intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake. . . . [By] its very terms, [the Sixth Amendment] becomes applicable only when the government's role shifts from investigation to accusation. . . . [I]t is only then that the assistance of one versed in the intricacies of law is needed to assure the prosecution's case encounters the 'crucible of meaningful adversarial testing'" (*Moran v. Burbine*, 475 U.S. 412, 430 [1986]).

The philosophy underlying the Sixth Amendment protection from involuntary interrogation is that individuals against whom criminal proceedings have been initiated are entitled to have their guilt or innocence determined in a court of law before a judge and jury and that this process should not be short-circuited by permitting the police to elicit incriminating information from an individual in the absence of his or her lawyer.

*Massiah* provided the foundation for the development of the Sixth Amendment right to counsel. As you may recall, *Massiah* was indicted for federal narcotics violations, retained a lawyer, pled guilty, and was released on bail. *Massiah's* co-defendant, *Colson*, agreed to cooperate with the government and engaged *Massiah* in a conversation in *Colson's* car, which was equipped with a radio transmitter. A government agent overheard *Massiah* make several incriminating remarks. The Supreme Court ruled that although *Massiah* had made a voluntary admission, his statement was obtained in violation of *Massiah's* Sixth Amendment right to counsel. Justice Stewart explained that at a time when *Massiah* was entitled to have his guilt adjudicated in a courtroom presided over by a judge, *Massiah* had been subjected to police-orchestrated extrajudicial interrogation in the absence of counsel. This denied *Massiah* a range of rights, including the opportunity to cross-examine the witnesses against him. In summary, *Massiah* had been denied his right to counsel "where there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel" (*Massiah v. United States*, 377 U.S. 201, 204 [1964]).

The Supreme Court did not return to the Sixth Amendment protection against the deliberate eliciting of a confession until *Brewer v. Williams* in 1977. *Williams* had been arraigned for the murder of a ten-year-old child and was being transported to Des Moines, Iowa. The deeply religious, former mental patient confessed after one of the officers gave an emotional speech on the importance of providing the young woman with a "Christian burial." The Supreme Court concluded that Detective Leaming "deliberately and designedly set out to elicit information from *Williams* just as surely as and perhaps more effectively than if he had formally interrogated him." Detective Leaming was fully aware that *Williams* was represented by an attorney, and the Supreme Court stressed that in such circumstances, a heavy burden rests on the government to establish that *Williams* intentionally relinquished or abandoned his Sixth Amendment right to counsel. The Supreme Court concluded that *Williams's* Sixth Amendment rights had been violated and held that his confession had been improperly admitted into



evidence. *Brewer* is important for extending the Sixth Amendment and Fourteenth Amendment right to a lawyer by holding that a person is “entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—whether by way of formal charge, preliminary hearing, indictment, information or arraignment” (*Brewer v. Williams*, 430 U.S. at 398 [1977]).

Would *Brewer* have been decided differently if Detective Leaming had asked Williams whether he wanted to waive his right to an attorney and to discuss the charges against him? In 2009, in *Montejo v. Louisiana*, the Supreme Court reversed a decision in *Michigan v. Jackson* (475 U.S. 625 [1986]) and held that the police are free to initiate contact with a defendant following a preliminary hearing in which the Sixth Amendment right to counsel has attached and that the defendant should be given the opportunity by the police to waive legal representation. It previously was assumed that any statements made by a defendant in response to police-initiated questioning following the attachment of a suspect’s Sixth Amendment right to counsel were involuntary. Justice Scalia explained that in roughly twenty-four states, including Louisiana, lawyers are appointed for defendants without requiring the defendants to request legal representation at a hearing and that defendants like *Montejo* may welcome the opportunity to cooperate with the police. *Montejo* clearly was aware of the consequences of talking to the police without his lawyer being present because he had been read his *Miranda* rights after having been approached by the police following the hearing, had agreed to talk to law enforcement officials, and subsequently wrote a letter of apology to the victim’s widow (*Montejo v. Louisiana*, 556 U.S. 778 [2009]).

The main importance of the Sixth Amendment is in providing defendants protection against interrogation by government informants. In 1980, in *United States v. Henry*, the Supreme Court held that the Sixth Amendment provided protections to prison inmates facing trial against unknowing interrogations by undercover government agents. The Court held that the government had contravened Henry’s Sixth Amendment right when the FBI instructed Nichols, a paid government informant, to gather information on Henry’s involvement in a bank robbery. Nichols was directed to engage Henry in discussions but not to directly question Henry about the crime. The Supreme Court nevertheless concluded that the informant was not a passive listener. He had engaged Henry in conversation and succeeded in eliciting a confession. Justice Burger noted that even if the government officials did not intend for the informant to take active steps to obtain a confession, the government must have anticipated that it had created a situation that was likely to “induce Henry to make incriminating statements without the assistance of counsel.” Consider how the decision in *Henry* differs from the U.S. Supreme Court decision in the *Miranda* case of *Illinois v. Perkins*, 496 U.S. 292 (1990) (*United States v. Henry*, 447 U.S. 264, 272–273 [1980]).

Six years later, in *Kuhlmann v. Wilson*, the Supreme Court seemingly reversed course and ruled that the government did not violate Wilson’s Sixth Amendment rights. An informant was instructed not to ask questions concerning Wilson’s pending murder and robbery prosecution and was advised to “keep his ears open” and to pay attention to any unsolicited admissions of guilt. The informant reportedly listened to Wilson’s spontaneous statements of guilt and testified against Wilson at trial. The Supreme Court stressed that the Sixth Amendment is not violated when the government through “luck or happenstance” obtains incriminating statements from the accused after the right to counsel has attached. The defendant must demonstrate that the police and the informant did not merely listen but took some action that was “designed deliberately to elicit incriminating remarks” (*Kuhlmann v. Wilson*, 477 U.S. 436, 459 [1986]).

In summary, the Sixth Amendment right to counsel applies under certain conditions:

- **Judicial proceedings.** The Sixth Amendment applies to both federal and state government agents at or after the time that judicial proceedings have been initiated against an accused—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.
- **Deliberately elicited.** The government may not intentionally elicit information. This prohibits the use of informants to directly interrogate suspects as well as the creation of a situation likely to induce a defendant to make incriminating statements concerning a pending charge without the assistance of counsel.
- **Waiver.** The police may initiate contact with an individual whose Sixth Amendment right to counsel has attached following a preliminary hearing, and the individual is free to talk to the police. The suspect must voluntarily, knowingly, and intelligently relinquish his or her right to counsel prior to his or her interrogation.

Keep in mind that the Supreme Court held in *McNeil v. Wisconsin* that the Sixth Amendment is “offense-specific.” In *McNeil*, *McNeil* was considered to have automatically asserted his Sixth Amendment right to counsel when he appeared with a lawyer at a bail hearing for armed robbery. The U.S. Supreme Court ruled that this did not prohibit the deputy sheriff from later reading *McNeil* the *Miranda* rights and obtaining a confession about a factually *unrelated* murder, attempted murder, and armed burglary. Justice Scalia explained that the Sixth Amendment applies only to the specific offense that is the subject of criminal proceedings and that *McNeil* was required to affirmatively assert his desire to consult with an attorney under *Miranda* when questioned about



You can find *Kuhlmann v. Wilson* on the Student Study Site, [edge.sagepub.com/lippman3e](http://edge.sagepub.com/lippman3e).

the homicides (*McNeil v. Wisconsin*, 501 U.S. 171 [1991]). Note that at the time that *McNeil* was decided, the police would have been prohibited by the Sixth Amendment from questioning McNeil on the same offense that was the subject of the bail hearing (as you may recall, this rule was changed in 2009 in *Montejo v. Louisiana*). Another point to keep in mind is that the Sixth Amendment applies only to the specific offense for which a subject has been prosecuted. An indictment for murder does not protect a person against being interrogated for a robbery that occurred during the murder (*Texas v. Cobb*, 532 U.S. 162 [2000]).

You likely are fairly confused at this point. The important point is that once proceedings have been initiated against a suspect and the suspect has requested or retained a lawyer, the police are prohibited from interrogating the suspect outside the presence of a lawyer. This is intended to ensure that innocence or guilt is established at trial rather than through police questioning. Now that you understand the Sixth Amendment right to counsel, you might ask yourself why we need this protection. Why is *Miranda* not sufficient?

### Legal Equation

Sixth Amendment right to counsel and interrogation	=	The Sixth Amendment applies at the time that judicial proceedings have been initiated against an accused—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment
	+	The accused must have requested or arranged for legal representation
	+	The government may not deliberately elicit information absent a waiver
	+	The suspect must voluntarily, knowingly, and intelligently relinquish his or her right to an attorney.

## CHAPTER SUMMARY

Confessions are essential in the investigation and detection of crime. The procedural standards governing confessions are based on the following:

- **Due Process Clause** of the Fourteenth Amendment.
- **Fifth Amendment** right against self-incrimination.
- **Sixth Amendment** right to counsel.

Together, these constitutional amendments have been interpreted to ensure that confessions are the product of fair procedures:

- **Voluntary.** Are the product of voluntary choice and are not the result of psychologically or physically coercive interrogation tactics.

- **Procedures.** Result from fair and uniform procedures.
- **Reliable.** May be relied on as a truthful account of the facts.
- **Trials.** Do not result in a defendant's guilt or innocence being determined by extrajudicial, police-orchestrated questioning rather than in an adversarial trial.

The three constitutional approaches to confessions are summarized below:

**Due Process.** The due process voluntariness test was first articulated in *Brown v. Mississippi* in 1936. This requires that a confession be the result of a free and voluntary choice and not be the product of compulsion. Courts decide whether a confession is voluntary



by analyzing the totality of the circumstances. This test is criticized for failing to provide law enforcement officials with clear standards to guide their decisions and is difficult for courts to apply. The Supreme Court attempted to provide greater clarity in *McNabb v. United States* (1943) and in *Mallory v. United States* (1957), which require the police to immediately bring suspects before a judicial officer for arraignment. Any confession obtained by unnecessarily delaying the presentation of a suspect before a judge is inadmissible. These rulings were limited by congressional legislation and proved to have limited impact on state criminal procedure.

In 1964, in *Escobedo v. Illinois*, the Supreme Court took an additional step to clarify the protections to be extended to suspects when the Court held that Escobedo was entitled to be informed of his rights to silence and counsel under the Sixth Amendment and that Escobedo's statement had been unconstitutionally obtained and improperly introduced into evidence.

**Miranda.** The Fifth Amendment right against self-incrimination was extended to the states in *Malloy v. Hogan* (1964). The Fifth Amendment provided the basis for *Miranda v. Arizona* (1966). *Miranda* established that individuals subjected to custodial interrogation are to be informed that anything they say may be used against them and that they have the right to silence and the right to an attorney, appointed or retained. The *Miranda* warning is intended to provide individuals with the necessary information to resist the inherent pressures of custodial interrogation. There are a number of central components of the *Miranda* rule.

**Custodial interrogation.** *Miranda* is triggered by custodial interrogation. This is the *threshold determination* and occurs when there is a custodial arrest or the functional equivalent of a custodial arrest. In determining whether there is the functional equivalent of custodial interrogation, judges ask whether a reasonable person, based on the totality of the circumstances, would believe that the individual is in police custody to a degree associated with a formal arrest. Courts typically ask whether a reasonable person would feel free to leave. In *J.D.B. v. North Carolina*, the Supreme Court held that a juvenile's age should be considered in determining whether he or she was subjected to custodial interrogation.

**Public safety.** In *New York v. Quarles*, the U.S. Supreme Court recognized a *public safety exception* to *Miranda*. This exception permits the police to ask questions reasonably prompted by a reasonable concern with public safety without first advising a suspect of his or her *Miranda* rights. The Supreme Court concluded that a reasonable concern with the safety of the police or the

public outweighs the interest in protecting the suspect's right against self-incrimination.

**Miranda warning.** The *three-part* *Miranda* warning is essential for informing suspects of their rights and of the consequences of waiving their rights. The *Miranda* judgment states that the warnings are to be recited in "clear and unequivocal terms" and that a suspect is to be "clearly informed" of his or her rights. The Supreme Court has provided broad guidance to the police on how to recite the *Miranda* rights. *Miranda* is a flexible formula. The test is whether the warnings viewed in their totality convey the essential information to the suspect.

**Invocation of rights.** Following the reading of the *Miranda* rights, a defendant has the opportunity to *assert his or her right to a lawyer or right to silence or to waive these rights*. In *Davis v. United States* (1994), the Supreme Court held that an individual is required to "articulate his desire to have counsel present . . . sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." The Court reasoned that a rule that required the police to cease questioning following an ambiguous statement by the accused would transform *Miranda* into a "wholly irrational obstacle to interrogations." In *Berghuis v. Thompkins*, the Supreme Court held that a defendant is required to invoke the right to silence in an unambiguous fashion.

**Voluntary waiver.** The Supreme Court stressed in *Miranda* that the government is required to meet a "heavy burden" in demonstrating that a suspect voluntarily, knowingly, and intelligently waived his or her rights. The *Miranda* decision noted that any evidence that an accused was threatened, tricked, or cajoled into a waiver is sufficient to demonstrate that a suspect did not *voluntarily* waive his or her rights. A waiver also will not be upheld if obtained under coercive circumstances such as a lengthy interrogation or a lengthy incarceration prior to a confession.

**Knowing and intelligent waiver.** We have seen that an individual must understand the *Miranda* rights as well as the consequences of waiving them. *Tague v. Louisiana* held that a police officer may not automatically conclude that an individual *knowingly and intelligently* waived his or her rights. What factors are relevant in determining whether a waiver of *Miranda* is knowing and intelligent? In *Fare v. Michael C.*, the Supreme Court indicated that the question whether a waiver is knowing and intelligent is determined on a case-by-case basis by the totality of the circumstances. In *Fare*, this analysis considered the "juvenile's age, experience, education, background, and intelligence and whether he [or she] has the capacity to understand the warnings given him [or her] . . . and the consequences of waiving those rights." Courts also will examine



whether the defendant acted in a calm and rational fashion or in an emotional and incoherent manner. The Supreme Court stressed that the Constitution does not require that an individual should be informed of all the information that might prove useful in arriving at a decision whether to waive his or her rights, such as the strength of the prosecution's case.

**Express and implied waiver.** A waiver, as we have seen, must be voluntary, knowing, and intelligent. *Miranda* indicated that an "express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." A waiver will not be presumed from an accused's silence. The Supreme Court has recognized implied as well as explicit waivers and ruled that "in some cases, a waiver can be clearly inferred from the actions and words of the person interrogated." In these instances, the prosecution is required to establish that although there was no affirmative waiver, the suspect engaged in a "course of conduct indicating waiver."

**Question first and warn later.** The U.S. Supreme Court was next asked to address whether a waiver is valid that is obtained through a *question first and warn later* tactic. In *Missouri v. Seibert*, the Supreme Court stated that the issue when the police question first and warn later is whether "it would be reasonable to find that in these circumstances the warnings could function 'effectively' to advise the suspect that he or she had a real choice about giving an admissible statement." In other words, when a suspect is warned that "anything you say may be used against you," will he or she understand that despite the initial confession, he or she need not speak to the police? The Supreme Court suggested in a footnote that this might require that the police inform a suspect that the first confession is inadmissible in evidence.

**Interrogation following invocation of the Miranda rights.** Once individuals invoke their *Miranda* rights, the Supreme Court has recognized that they still may be subjected to interrogations. The Court ruled that the admissibility of statements obtained after a person in custody had decided to remain silent depends on whether his or her right to silence had been *scrupulously honored*. The Court, in *Edwards v. Arizona*, established a separate *initiation test* for determining whether a defendant who invokes his or her right to an attorney may be once again interrogated. Initiation does not require a direct waiver of an individual's right to a lawyer. *Maryland v. Shatzer* limited *Edwards* by permitting the interrogation of a suspect who had previously invoked his or her right to counsel and then was released from custody for fourteen days. In *Oregon v. Bradshaw*, the Supreme Court held that the initiation standard is satisfied by a generalized discussion regarding the criminal investigation.

**Interrogation.** In *Rhode Island v. Innis*, the Supreme Court defined *interrogation*. The Court explained that interrogation entails *express questioning* or the *functional equivalent of direct questioning*. The test for the functional equivalent of direct questioning is whether the police should know that their words or actions are likely to elicit an incriminating statement from a suspect.

**Sixth Amendment.** In 1966, in *Massiah v. United States*, the U.S. Supreme Court proclaimed that following the initiation of criminal proceedings, individuals enjoy a *Sixth Amendment right to counsel* that protects them from the government's deliberately eliciting incriminating statements. The Sixth Amendment was not again applied to protect individuals from interrogation in the pretrial phase of the criminal justice process until 1977 when the Supreme Court applied the Sixth Amendment in *Brewer v. Williams*. *Brewer* was followed by a number of decisions that further defined the Sixth Amendment right to counsel.

As noted above, the Sixth Amendment provides protections to individuals *confronting formal criminal proceedings*. At this point, an individual's status has shifted from that of a criminal suspect to a criminally accused. The philosophy underlying the Sixth Amendment protection is that an individual against whom criminal proceedings have been initiated is entitled to have his or her guilt or innocence determined in a court of law before a judge and jury and that this process should not be short-circuited by permitting the police to elicit incriminating information from a defendant in the absence of his or her attorney or a waiver of the defendant's Sixth Amendment right.

In reviewing this chapter, be certain that you understand the three constitutional approaches to interrogations and the points in the criminal justice process in which each applies:

- **Fourteenth Amendment due process voluntariness test** prohibits involuntary confessions and applies at all stages of the criminal justice process. You always have this protection.
- **Fifth Amendment *Miranda* rights** provide protections during custodial interrogation. You only have this protection during custodial interrogation.
- **Sixth Amendment right to counsel** applies after the initiation of formal proceedings against an accused following a request or hiring of a lawyer. You have this protection once your status shifts from criminal suspect to criminal defendant.

In thinking about Chapter 8, consider how the U.S. Supreme Court has attempted to balance the rights of the defendant against the interests of society



in interrogations. For example, the invocation of the right to an attorney insulates a suspect from police interrogation unless the suspect initiates contact with the police. However, invocation of the right to counsel under *United States v. Davis* requires an affirmative and clear statement by the accused. The invocation of the right to a lawyer provides a defendant with significant protection against police interrogation but is easily waived under *Oregon v. Bradshaw* by a statement that relates generally to the criminal justice process. An individual who invokes his or her right to

silence may still be interrogated by the police about a crime different in time, nature, and place where the police scrupulously honor the suspect's rights (*Mosley v. Michigan*). Of course, the definition of *interrogation* is limited to express questioning or its functional equivalent, opening the door to the type of "subtle compulsion" that the police employed in *Rhode Island v. Innis*.

In Chapter 9, we turn our attention to other investigative mechanisms available to the police: lineups and identifications.

## CHAPTER REVIEW QUESTIONS

1. Why are confessions important tools in criminal investigation?
2. What are some of the dangers of relying on confessions to obtain criminal convictions?
3. Can you identify some of the reasons that suspects make false confessions?
4. Write a one-page response to the following quote. Supreme Court Justice Felix Frankfurter famously remarked, in regard to the due process test, that it is "impossible . . . to . . . precisely . . . delimit the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test . . . has . . . evolved" (*Culombe v. Connecticut*, 367 U.S. 568, 601–602 [1961]).
5. What is the significance of the *McNabb–Mallory* rule?
6. Summarize the holding in *Escobedo v. Illinois*. How did this set the stage for the Supreme Court's decision in *Miranda v. Arizona*?
7. Why was the right against self-incrimination included in the U.S. Constitution? Distinguish between testimonial and nontestimonial evidence.
8. What is the holding of the U.S. Supreme Court in *Miranda v. Arizona*? Explain how this decision is intended to counter the pressures inherent in incommunicado interrogation.
9. What is the test for custodial interrogation? Discuss the public safety exception.
10. How should the *Miranda* rights be read to a suspect?
11. Give an example of a statement that satisfies the legal test for invoking the right to a lawyer under *Miranda*. Provide an example of a statement that would not satisfy the standard for invoking the right to a lawyer under *Miranda*.
12. Distinguish between a voluntary and an involuntary waiver. What factors does a court consider in determining whether a waiver is knowing and intelligent? What is the difference between an express and an implied waiver?
13. Why is it important whether an individual is considered to be subject to custodial interrogation? List the factors that a court evaluates in determining whether a suspect is subjected to custodial interrogation.
14. What is the legal test for determining whether the police can interrogate a suspect who has invoked his or her right to silence? What is the legal test for determining whether the police can interrogate a suspect who has invoked his or her right to a lawyer?
15. What is the legal test for determining whether an individual has initiated contact with the police?
16. Define *interrogation* as articulated by the U.S. Supreme Court. Distinguish between direct questioning and the functional equivalent of direct questioning. Why would it be helpful for the police to understand the concept of interrogation under *Miranda*?
17. How does the Sixth Amendment right to counsel protect individuals from interrogation by the police?
18. Does *Miranda* handcuff the ability of the police to rely on confessions, or does it favor the police?
19. Write a brief essay illustrating how the U.S. Supreme Court's decisions on police interrogation have balanced the interests of the suspect and the interests of society.



## LEGAL TERMINOLOGY

admissions	fundamental fairness	public safety exception
break in the custody rule	implied waiver	question first and warn later
confessions	incommunicado	scrupulously honor
custodial interrogation	interrogation	Star Chamber
express questioning	initiation	statements
express waiver	interrogation	testimonial evidence
false confession	involuntary confessions	third degree
Fourteenth Amendment due process voluntariness test	<i>Miranda</i> warnings	voluntary, knowing, and intelligent waiver
functional equivalent of express questioning	nontestimonial evidence	
	police methods test	



## CRIMINAL PROCEDURE ON THE WEB

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1. Explore the debate over whether *Miranda* impedes the police.
2. Watch a video of a false confession.
3. Look at a video about the psychology of confessions.
4. Consider whether “terrorists” should receive the *Miranda* warnings before they are interrogated.
5. Watch a Public Broadcasting Service (PBS) video on the Central Park jogger case.