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Moran v. Burbine: The Decline of Defense Counsel's "Vital" Role in the Criminal Justice System

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NOTES

MORAN v. BURBINE: THE DECLINE OF DEFENSE COUNSEL’S “VITAL” ROLE IN THE CRIMINAL JUSTICE SYSTEM

The fifth,¹ sixth,² and fourteenth³ amendments to the United States Constitution form a core of individual liberties that is fundamental to the fair administration of our accusatorial system of justice.⁴ When an individual becomes the focus of a criminal investigation, these individual rights are sometimes threatened by our law enforcement system.⁵ While zealously attempting to apprehend and convict those individuals who violate the law, the government may ignore restraints imposed by the Constitution upon state criminal procedures.⁶ Historically, this has most often occurred when the police have attempted to secure a confession from a suspect through

¹. The fifth amendment privilege guarantees that an individual will not be compelled to incriminate himself. Miranda v. Arizona, 384 U.S. 436, 457-60 (1966). The fifth amendment states in relevant part: “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .” U.S. CONST. amend. V. The fifth amendment was made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964).

². The sixth amendment ensures that an accused will not be deprived of life or liberty during a criminal prosecution unless he is given an opportunity to have the assistance of counsel for his defense. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). The sixth amendment states in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. The sixth amendment was made applicable to the states through the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963).


⁵. See Miranda, 384 U.S. at 481; see also Constantino, Cannavo & Goldstein, A New Wave of Sixth Amendment Waivers: The Use of Judicial Officers as Advisors, 49 FORDHAM L. REV. 329, 329 (1980).

⁶. See Constantino, Cannavo & Goldstein, supra note 5, at 329.
questionable interrogation tactics. Thus, the judiciary has frequently been called upon to strike a balance between society's competing interests in the protection of individual liberties and the maintenance of effective law enforcement through custodial interrogation.

In striking this balance in the past, the Supreme Court of the United States has stated that an accusatorial system of justice is not swayed by "fear" that a suspect will exercise the rights guaranteed to him under the federal Constitution. Hence, although the entrance of an attorney into the early stages of a criminal investigation will usually promote a suspect's invocation of rights, the Court has emphasized that defense counsel should not be considered "a menace to law enforcement." Instead, the attorney has been recognized by the Court as playing "a vital role" and occupying "a critical position" in our criminal justice system. In 1986, however, the Court retreated from this philosophy in *Moran v. Burbine*, a decision that has seriously threatened defense counsel's ability to provide clients with meaningful legal assistance prior to and during custodial interrogation.

In *Burbine*, assistant public defender Allegra Munson telephoned the Cranston, Rhode Island police station at 8:15 p.m. on the evening of Brian Burbine's arrest in connection with a burglary investigation. An unidenti-

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8. See Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *Yale L.J.* 1000, 1048-51 (1964) [hereinafter *Historical Argument*].
10. See *Miranda*, 384 U.S. at 480 ("An attorney may advise his client not to talk to police . . . or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught.").
11. See id.
12. Id. at 481.
15. One commentator reported on the prospective implications of *Burbine* as viewed by pro-defense groups such as the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association and the American Civil Liberties Union. See Browning, *Moran v. Burbine: The Magic of Miranda*, 72 A.B.A. J., Jan. 1, 1986, at 58-59 (Burbine's lawyers and their amici "fear that . . . the police will be encouraged to treat defense attorneys as interlopers."); see also Brief for American Bar Association as Amicus Curiae at 4, *Moran v. Burbine*, 106 S. Ct. 1135 (1986) (No. 84-1485) ("The ABA is deeply concerned that, if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost."). See generally Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1, 93-94 (1978).
16. *Burbine*, 106 S. Ct. at 1138-39 (1986). Burbine's sister had contacted the public defenders office to obtain legal representation for her brother in the breaking and entering charge. *Id.* at 1139. When assistant public defender Richard Casparian, who was representing Burbine in an unrelated charge, could not be reached, Munson was assigned to the case. *Id.*
fled male in the station's detective division answered the call. After receiving an affirmative response, Munson stated that she would represent Burbine if the police planned to question him or place him in a lineup. Munson was informed that the police were “through” with Burbine for the night and would not be questioning him. Munson was not told that in addition to being implicated in the pending breaking and entering charge, Burbine was also the principal suspect in the investigation of a murder that had occurred several months earlier in Providence, Rhode Island. The police also failed to tell Munson that members of the Providence police force had been summoned to Cranston for the purpose of interrogating Burbine about the murder. Less than an hour after Munson's telephone call to the Cranston police station, Burbine was interrogated without being informed of Munson's inquiry in his behalf.
the murder.\textsuperscript{25}

Prior to trial, Burbine asserted that his waiver was not valid and moved to have his statements suppressed from evidence.\textsuperscript{26} Finding "no . . . collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney,'"\textsuperscript{27} the Superior Court of Rhode Island denied the motion.\textsuperscript{28} After being convicted of first-degree murder,\textsuperscript{29} Burbine appealed to the Supreme Court of Rhode Island.\textsuperscript{30} The court upheld the trial judge's finding that Burbine had knowingly, intelligently, and voluntarily waived his right to counsel and affirmed the conviction.\textsuperscript{31} Burbine's petition for a writ of habeas corpus was denied by the United States District Court for the District of Rhode Island.\textsuperscript{32} He then appealed to the United States Court of Appeals for the First Circuit.\textsuperscript{33} The First Circuit reversed, holding that the combined circumstances of the police "reckless[ly]" misleading Munson and then failing to communicate the exchange to Burbine vitiated any possibility of a valid waiver.\textsuperscript{34}

The Supreme Court granted certiorari and, in a six to three decision, reversed the court of appeals.\textsuperscript{35} Writing for the majority, Justice O'Connor rejected Burbine's constitutional arguments and held that his confession was properly admitted into evidence,\textsuperscript{36} even though the police misinformed Munson about their plans to interrogate her client\textsuperscript{37} and failed to inform Burbine of his lawyer's efforts to reach him.\textsuperscript{38} Justice Stevens, joined by Justices Brennan and Marshall in a dissenting opinion, counteracted that the

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\textsuperscript{25}Burbine, 106 S. Ct. at 1139. Burbine was questioned during a series of interrogations. \textit{Id.} Prior to each session, he was informed of his \textit{Miranda} rights. \textit{Id.} He executed three written waivers, acknowledging that he comprehend his right to the presence of counsel during the interrogation, and explicitly declined to exercise the right to counsel. \textit{Id.} Burbine also had access to a telephone at least twice during the evening of the interrogation. \textit{Id.}

\textsuperscript{26}State v. Burbine, 451 A.2d at 22.

\textsuperscript{27}\textit{Id.} at 24.

\textsuperscript{28}\textit{Id.} at 22.

\textsuperscript{29}\textit{Id.} Burbine was sentenced to life imprisonment. \textit{Id.}

\textsuperscript{30}\textit{Id.} at 22.

\textsuperscript{31}\textit{Id.} at 31.

\textsuperscript{32}Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984). The district court held that under the totality of circumstances, Burbine's waiver was made "sentiently, intelligently, and in the free exercise of volitional judgment." \textit{Id.} at 1253.

\textsuperscript{33}Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985).

\textsuperscript{34}\textit{Id.} at 187.

\textsuperscript{35}\textit{Burbine.} 106 S. Ct. at 1148.

\textsuperscript{36}\textit{Id.} at 1145, 1147-48.

\textsuperscript{37}See \textit{id.} at 1140, 1143.

\textsuperscript{38}See \textit{id.} at 1140, 1142-43. Although the Court phrased the issue as if Munson at-
majority opinion was as equally offensive to "well-established legal principles" as the conduct of the Cranston police.\textsuperscript{39} Citing the overwhelming body of state law in conflict with the Court's decision,\textsuperscript{40} the dissent proffered that because Burbine was not informed of his attorney's telephone call, his waiver was not constitutionally sound.\textsuperscript{41}

This Note will provide an overview of the origins of the right to counsel, its subsequent applicability to the custodial interrogation environment, and judicial interpretation of the standard for waiver that has been delineated by the Court. An analysis of Burbine will demonstrate that although the Court's sixth amendment argument is amply supported by precedent, the Court has jeopardized the "vital" role of counsel in the criminal justice system by concluding that the fifth amendment does not prohibit the police from interfering with attorney-client communications. Furthermore, this

\textsuperscript{39} Burbine, 106 S. Ct. at 1166 (Stevens, J., dissenting).

\textsuperscript{40} A number of state courts have held that a suspect's statements cannot be used as evidence when the police fail to inform the suspect of his attorney's defense efforts. \textit{See} Weber v. State, 457 A.2d 674 (Del. 1983) (attorney told he would not be permitted to consult with his client unless the suspect asked for a lawyer); Haliburton v. State, 476 So. 2d 192 (Fla. 1985) (lawyer, while present at police station, not permitted to speak with suspect), \textit{vacated and remanded}, 106 S. Ct. 1432 (1986); People v. Smith, 93 Ill. 2d 179, 442 N.E.2d 1325 (1982) (police misinformed attorney that her client was undergoing drug withdrawal and was therefore unavailable for consultation), \textit{cert. denied}, 461 U.S. 937 (1983); State v. Matthews, 408 So. 2d 1274 (La. 1982) (lawyer told over the telephone that the interrogation of his client would not be interrupted despite his request); State v. Jackson, 303 So. 2d 734 (La. 1974) (suspect not informed defense counsel had been retained by his family and was available for assistance); Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985) (attorneys, retained by suspect's mother, denied access to client upon their arrival at police station), \textit{vacated and remanded}, 106 S. Ct. 1452 (1986); Elifadi v. State, 61 Md. App. 32, 485 A.2d 275, \textit{cert. denied}, 303 Md. 42, 491 A.2d 1197 (1985), \textit{cert. denied}. 106 S. Ct. 1457 (1986) (after a telephone request to speak with the suspect was denied, lawyer arrived at police station but was again denied opportunity to consult with suspect); Commonwealth v. Sherman, 389 Mass. 287, 450 N.E.2d 566 (1983) (despite counsel's request to be present during questioning of her client, police failed to inform her of the location and time of the interrogation); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969) (police directed attorney to the wrong city when he requested to consult with his client); Lewis v. State, 695 P.2d 528 (Okla. Crim. App. 1984) (lawyer retained by suspect's parents misdirected to several locations while in search of his client); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979) (police transported suspect to another location to frustrate counsel's attempts to see his client), \textit{cert. denied}, 446 U.S. 945 (1980); Dunn v. State, 696 S.W.2d 561 (Tex. Crim. App. 1985) (en banc) (police refused to permit counsel to consult with client and refused to give suspect counsel's business card), \textit{cert. denied}. 106 S. Ct. 1478 (1986); State v. Jones, 19 Wash. App. 850, 578 P.2d 71 (1978) (lawyer contacted police by telephone and requested that they refrain from interrogating the suspect in his absence). \textit{See also} Burbine, 106 S. Ct. at 1151 & n.10 (Stevens, J., dissenting) (citing Brief for the American Bar Association as \textit{Amicus Curiae} at 4 n.2, Moran v. Burbine, 106 S. Ct. 1135 (1986) (No. 84-1485)).

\textsuperscript{41} \textit{See} Burbine, 106 S. Ct. at 1157 (Stevens, J., dissenting).
Note will assert that, although Burbine suggests that in some instances deliberate police deception may rise to a denial of fundamental fairness, the Court's dictum under the fourteenth amendment is ambiguous, and therefore provides insufficient guidance to the lower courts. Since state courts are frequently confronted by situations in which the police have either directly or deceptively refused to grant an attorney's request to consult with a client, this Note will conclude by exploring the most sound alternative available to states seeking to protect attorney-client communications in the wake of Burbine.

I. ORIGINS OF THE RIGHT TO COUNSEL AND ITS APPLICABILITY TO THE CUSTODIAL INTERROGATION SETTING

A. The Explicit Sixth Amendment Right to Counsel

The right to counsel is explicitly granted by the sixth amendment.\textsuperscript{42} At trial, the guarantee is necessary to assist the accused when he is confronted by an intricate judicial proceeding that poses a threat to his life or liberty.\textsuperscript{43} The right would be of little consequence, however, if it did not also afford the accused protection during critical pretrial events that carry sufficient adversarial weight to shape the outcome of the final judgment.\textsuperscript{44} Mindful of this need, the sixth amendment right to counsel has been extended "backwards"\textsuperscript{45} by the Court since its early declaration in Powell v. Alabama\textsuperscript{46} that "the guiding hand of counsel" is necessary to protect the accused "at every step in the proceedings against him."\textsuperscript{47}

Today, the sixth amendment is interpreted to guarantee the assistance of counsel at or after the initiation of adversary judicial proceedings against the accused.\textsuperscript{48} Thus, the right extends not only to trial\textsuperscript{49} and to the adversary

\textsuperscript{42} For a summarization of the history of the right to counsel, see Historical Argument, supra note 8, at 1018-34.
\textsuperscript{43} See Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) (stating that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty").
\textsuperscript{44} See Hamilton v. Alabama, 368 U.S. 52, 54 (1961) ("What happens [at arraignment] may affect the whole trial. Available defenses may be . . . irretrievably lost, if not then and there asserted . . . .").
\textsuperscript{45} See Kamisar, supra note 15, at 83 ("The Court has extended the sixth amendment right to counsel . . . backwards from the trial through the indictment to the initiation of judicial proceedings . . . .").
\textsuperscript{46} 287 U.S. 45 (1932).
\textsuperscript{47} Id. at 69.
\textsuperscript{48} United States v. Gouveia, 467 U.S. 180, 188 (1984); see Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972). In Kirby, the Court noted that the initiation of adversary judicial proceedings signifies that "the government has committed itself to prosecute." Id. at 689. The Court explained that "[i]t is then that a defendant finds himself
judicial proceedings themselves, but also to any critical "extrajudicial" proceedings conducted after the government has committed itself to prosecute. Massiah v. United States marked the Court's initial application of the sixth amendment right to counsel to the extrajudicial interrogation process. The Court, in Massiah, held that the government's surreptitious and deliberate elicitation of incriminating statements from the accused, who was free on bail after indictment, amounted to a sixth amendment violation.

faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Id. The Court has recognized adversarial judicial proceedings as "formal charge, preliminary hearing, indictment, information, or arraignment." Id.


50. See, e.g., Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (Alabama preliminary hearing is a critical stage at which the accused is entitled to the assistance of counsel); White v. Maryland, 373 U.S. 59, 60 (1963) (Maryland preliminary hearing is a critical stage); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (Alabama arraignment is a critical stage).


54. See id. at 205-06.

55. See id. In Massiah, a co-defendant cooperated with the government and allowed its agents to install a transmitter in his automobile. Id. at 202-03. When Massiah met with the informant in the automobile, the government used the transmitter to listen to the conversation. Id. at 203. Massiah made several incriminating remarks which were later used by the government to secure his conviction. Id.

56. Id. at 201.

57. Id. at 205-06. Massiah's "deliberate elicitation" test was reaffirmed in United States v. Henry, 447 U.S. 264, 270-71 (1980), and Maine v. Moulton, 106 S. Ct. 477, 489 (1985). In Henry, the Court held that the government's intentional use of a jail plant created a situation likely to induce incriminating statements from the already indicted accused in the absence of counsel. Henry, 447 U.S. at 266, 274. Although the informant did not question Henry directly, he served as a catalyst for the elicitation of incriminating statements by engaging in conversation with the accused. Id. at 271. See generally Note, Sixth Amendment—Massiah Revitalized, 71 J. CRIM. L. & CRIMINOLOGY 601 (1980); Note, United States v. Henry: The Further Expansion of the Criminal Defendant's Right to Counsel During Interrogations, 8 PEPPERDINE L. REV. 451 (1981). In Moulton, the police obtained incriminating statements from the accused, who had previously been indicted and released on bail, by equipping an accomplice with a body wire transmitter. Moulton, 106 S. Ct. at 480-82. Relying on Massiah, the Court held that by "knowingly circumventing" Moulton's right to the assistance of counsel during an adversarial confrontation between the accused and the state, the police violated his sixth amendment right. See id. at 489-90. Whether the use of an informant who acts only as a
This principle was extended to prohibit indirect interrogation tactics in Brewer v. Williams. In Williams, the police employed an emotional "Christian burial speech" to persuade the accused to lead them to the body of the victim. Finding Williams "constitutionally indistinguishable" from Massiah, the Court held that the sixth amendment right to counsel was violated when the police elicited incriminating statements from the accused in the absence of counsel. The Court emphasized that although Williams had expressly and implicitly asserted his right to counsel, the police made no effort prior to the delivery of the burial speech to determine whether the accused wished to execute a waiver. Relying on the waiver standard for constitutional rights set in Johnson v. Zerbst, the Court held that the state failed to prove that Williams intentionally relinquished a known right to counsel before responding to the police.

"listening post" violates the sixth amendment right to counsel was left unresolved in Moulton and Henry. See Moulton, 106 S. Ct. at 488 n.13; Henry, 447 U.S. at 271 n.9. The Court provided a negative response to this question in 1986 in Kuhlmann v. Wilson, 106 S. Ct. 2616, 2628 (1986). Emphasizing that Massiah's primary concern was eradicating surreptitious conduct that is the functional equivalent of direct police interrogation, the Court held that the use of an informant who does not take affirmative action to elicit incriminating statements from the accused is not violative of the sixth amendment right to counsel. See id. at 2630.

59. Id. at 392-93. Williams, who had escaped from a mental institution, was arrested and arraigned for the murder of a ten-year-old girl. Id. at 390-91. He was advised of his Miranda rights by the police and the arraigning judge. Id. The Miranda warnings were repeated shortly before two detectives escorted Williams by police car to another city. Id. at 391. Additionally, Williams' counsel made an agreement with the police that the accused would not be interrogated during the trip. Id. at 392. At some point during the ride, however, one of the detectives who knew Williams was religious delivered the "Christian burial speech." Id. at 392-93. In essence, the detective requested Williams to direct the police to the body of the victim so that she could be given a Christian burial before a snowstorm made discovery of the body impossible. Id. Although the detective stated that he did not want an answer from Williams, but only wanted him to "think about it," Williams eventually directed the police to the body. Id. at 393.
60. Id. at 400.
61. Id. at 401, 405. See generally Kamisar, supra note 15 (discussing why Williams was analyzed under the sixth amendment rather than under the fifth amendment).
62. The Court held that Williams made an express invocation of the right to counsel when he stated he would speak to the police after he had the opportunity to consult with his lawyer. See Williams, 430 U.S. at 405. The Court also held that Williams had impliedly asserted his right to counsel by having secured counsel who, "acting as his agents," instructed the police not to interrogate their client while he was being transported. See id.
63. Id.
64. 304 U.S. 458 (1938). The Court noted that "[a] waiver [of a fundamental right] is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id. at 464.
65. Williams, 430 U.S. at 405. The Court carefully limited its ruling by stating in dictum that Williams could have waived his sixth amendment right to counsel without notice to his attorneys. See id. at 404-05. However, the Court failed to state whether a waiver of Miranda
Surprisingly, it was not until 1986, in Michigan v. Jackson, that the Court finally had the opportunity to apply a sixth amendment analysis to a situation involving direct police interrogation rather than the surreptitious or indirect types of conduct present in Massiah and Williams. In Jackson, the two defendants were questioned by the police after their separate arraignments. The Court determined that since adversary judicial proceedings had been initiated against both of the accused, the right to counsel was applicable to their custodial interrogations by way of the sixth amendment as well as the fifth amendment. Jackson established that the sixth amendment right to counsel affords at least as much protection as the fifth amendment right. It remains undetermined, however, whether a higher standard of review accrues once the sixth amendment has attached.  

warnings alone would have been sufficient to establish a valid waiver of the sixth amendment right to counsel. The Second Circuit has consistently held that a waiver of Miranda warnings is not sufficient to establish a valid waiver of the sixth amendment right to counsel. See, e.g., United States v. Smith, 778 F.2d 925 (2d Cir. 1985); United States v. Brown, 699 F.2d 585 (2d Cir. 1983); United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980); Carvey v. LeFevre, 611 F.2d 19 (2d Cir. 1979), cert. denied, 446 U.S. 921 (1980); United States v. Massimo, 432 F.2d 324, 327 (2d Cir.) (Friendly, J., dissenting), cert. denied, 400 U.S. 1022 (1970). See generally Costantino, Cannavo & Goldstein, supra note 5; Note, Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers, 60 B.U.L. REV. 738 (1980) [hereinafter Standards for Pretrial Waivers]; Note, Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel, 82 COLUM. L. REV. 363 (1982). Other circuits have held that the sixth amendment right to counsel can be relinquished through a waiver of Miranda warnings alone. See, e.g., United States v. Karr, 742 F.2d 493 (9th Cir. 1984); Tinsley v. Purvis, 731 F.2d 791 (11th Cir. 1984); United States v. Woods, 613 F.2d 629 (6th Cir.), cert. denied, 446 U.S. 920 (1980); Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979).

67. Id. at 1407-08.
68. The Court also applied a sixth amendment analysis to a case involving direct police interrogation in Escobedo v. Illinois, 378 U.S. 478 (1964). However, in that case, adversary judicial proceedings had not yet been initiated against the suspect and the Court has since expressly disavowed its reliance on the sixth amendment. See infra notes 82-83 and accompanying text.
70. Id. at 1407.
71. In Edwards v. Arizona, 451 U.S. 477, 484 (1981), the Court held that once a suspect invokes the fifth amendment right to counsel, a valid waiver cannot be established if the police reinstate questioning before an attorney is provided. See infra note 150. In Jackson, the Court concluded that "the assertion [for counsel] is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment." Jackson, 106 S. Ct. at 1411.
72. See supra note 65 (discussing circuit courts' waiver standards under the fifth and sixth amendments). In Burbine, the majority suggested in dictum that the sixth amendment right to counsel does provide an accused with greater protection than the fifth amendment Miranda right to counsel, at least as far as attorney-client communications are concerned. See Moran v. Burbine, 106 S. Ct. 1135, 1145 (1986) ("[W]e readily agree that once the [sixth amendment] right has attached, it follows that the police may not interfere with the efforts of a defendant's
B. Escobedo v. Illinois: Transcending the Right to Counsel into the Investigatory Context

In Escobedo v. Illinois, an anomaly in the right to counsel case law, the Court applied a sixth amendment analysis to find a constitutional violation where adversary judicial proceedings had not been initiated against the suspect. Prior to his formal indictment, Escobedo was interrogated and, after repeated requests to consult with his attorney, he was told by the police "that his lawyer 'didn't want to see him.'" In actuality, while Escobedo was being questioned, his attorney was at the station persistently attempting to consult with his client, but being prevented from doing so by the police. The Court, finding that "it would exalt form over substance" to distinguish between custodial interrogation conducted before or after formal indictment, held that when an "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," that suspect has a right to counsel under the sixth amendment.

The Court subsequently has limited Escobedo to its facts and has expressly disavowed its reliance on the sixth amendment. The decision is significant, however, because it emphasized that the importance of a suspect's need for assistance of counsel during custodial interrogation should not be dependent on the formal stage of the judicial proceedings against

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76. Escobedo, 378 U.S. at 485.
77. Id. at 481.
78. Id. at 480-81.
79. Id. at 486. The Court also noted: The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.
80. Id. at 488. In Miranda, the Court explained that what it had meant in Escobedo by "an investigation which had focused on an accused" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 & n.4 (1966); see also infra note 94.
him. Furthermore, the Court noted that our system of justice should not "fear" communication between a suspect and his attorney because it might encourage the suspect to invoke a constitutional right. These assertions created a bridge for the Court to cross in *Miranda v. Arizona* when it examined the right to counsel within the fifth amendment context.

C. *Miranda's Implicit Fifth Amendment Right to Counsel*

While the *Miranda* Court claimed to adhere to the principle of *Escobedo*, the case was founded on a wholly different constitutional principle. Unlike *Escobedo*’s sixth amendment analysis, *Miranda* found the right to counsel implicit in the context of the fifth amendment privilege against compelled self-incrimination. Although not a constitutional right in itself, *Miranda*’s right to counsel is a safeguard to insure that a suspect’s fifth amendment right “to choose between silence and speech remains unfettered throughout the interrogation process.” The right is, in effect, an equalizer designed to combat the inherent coerciveness of police-dominated questioning.

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84. The Court noted that “[i]t would exalt form over substance to make the right to counsel... depend on whether at the time of the interrogation, the authorities had secured a formal indictment.” *Escobedo*, 378 U.S. at 486.

85. The Court stated:

No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Id. at 490 (emphasis in original) (footnotes omitted).


87. Id. at 444.

88. See Note, *Standards for Pretrial Waivers, supra* note 65, at 743.

89. See supra notes 79-81 and accompanying text.

90. See *Miranda*, 384 U.S. at 469.


93. See id. at 467.

94. See id. at 457. The right applies not only when an individual is interrogated by law enforcement officials when in custody at the police station, but also when he is questioned while "deprived of his freedom of action in any significant way." *Id.* at 477. Compare Orozco v. Texas, 394 U.S. 324, 327 (1969) (questioning of a suspect in his bedroom held equivalent to interrogation because the individual was not free to leave) and Mathis v. United States, 391 U.S. 1, 4-5 (1968) (holding *Miranda* applicable where suspect was questioned by Internal Revenue Service agents while imprisoned for a separate offense) with Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (finding "noncoercive aspect of ordinary traffic stops" negates necessity for *Miranda* warnings) and Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (finding no
To insure that the principles of *Miranda* were carried out of the courtroom and into the interrogation room, the Court required the authorities to adhere to specific measures. Most familiar is the required delivery of *Miranda* warnings which includes informing a suspect of his right to have counsel present during police questioning. The Court noted that an attorney "plays a vital role in the administration of criminal justice" and should not be considered a "menace" to the police because he or she might advise the suspect not to make a statement or might request to be present during the interrogation. Hence, should the right to counsel be invoked, the request must be fully honored by the authorities regardless of whether it will affect the ability of the police to obtain a confession. However, the *Miranda* Court held that failure to request affirmatively the assistance of an attorney does not in itself constitute a waiver and, therefore, does not leave a suspect unprotected.

II. The *Miranda* Waiver: Constitutional Requirements and Judicial Interpretation

Once it has been ascertained that an individual subjected to custodial interrogation was properly advised of his *Miranda* rights, a prerequisite to the establishment of an effective waiver of counsel, the inquiry becomes two-custodial interrogation where the suspect went voluntarily to the police station and was immediately informed that he was not under arrest) and *Beckwith v. United States*, 425 U.S. 341, 342-47 (1976) (holding *Miranda* inapplicable where Internal Revenue Service agents questioned an individual at his private residence while he was not in custody).


96. Although the Court delineated a specific procedure for the authorities to follow, it also invited the states to design alternative, equally effective measures. See *Miranda*, 384 U.S. at 444.

97. See supra note 24.


99. *Id.* at 481; see also *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.").

100. *Miranda*, 384 U.S. at 480.

101. *Id.* at 480-81 ("[The attorney] is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client."); see also *Escobedo*, 378 U.S. at 490.

102. See *Miranda*, 384 U.S. at 467; see also *Michael C.*, 442 U.S. at 719.

103. See *Miranda*, 384 U.S. at 470 ("An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver.").

104. *Miranda*, 384 U.S. at 468; see also *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984). However, there have been exceptions to *Miranda*'s call for mandatory warnings. See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985) (failure to provide *Miranda* warnings prior to initial inter-
First, a waiver must meet the traditional notion of voluntariness. Although Miranda's primary concern was directed at eradicating the inherently compelling pressures of custodial questioning, the Court also voiced continued concern over more flagrant and violative incommunicado interrogation tactics used to secure confessions. Evidence that a suspect was subjected to lengthy or isolated interrogation or that the police used threats or deception to obtain a statement indicates that the waiver was not voluntarily made.

In addition to reiterating the indispensability of voluntariness, the Miranda Court held that a waiver must be knowingly and intelligently executed. This second-level inquiry originates from Johnson's sixth amendment waiver standard and encompasses an evaluation of whether the individual was sufficiently able to understand the right being relinquished and the consequences of waiver. Because the state is responsible for creating the insulated atmosphere of custodial interrogation, the Court concluded that the government must shoulder the heavy burden of proving a valid waiver.


See Miranda, 384 U.S. at 444.

Id. at 445-48 & nn.6-7.

See id. at 476.

In addressing the requirements for waiver, the Court held:

Opportunity to exercise [the rights to silence and counsel] must be afforded to [a suspect] throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of the interrogation can be used against him.

Id. at 479 (footnote omitted); see also Edwards, 451 U.S. at 482 (“[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege . . . .”).

See supra note 64 and accompanying text.

See North Carolina v. Butler, 441 U.S. 369, 373 (1979) (“The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.”).

See Miranda, 384 U.S. at 475.
A. The Voluntariness Doctrine

The notion of voluntariness pre-dates *Miranda* and, although incorporated into that decision's fifth amendment analysis, remains an independent constitutional source for scrutinizing the admissibility of a confession under the fourteenth amendment. Under our accusatorial system of justice, due process requirements of fundamental fairness forbid the use of a confession against a suspect when the statement was obtained through inquisitorial measures. Additionally, fundamental fairness dictates that the ultimate truth of a confession is irrelevant to a determination regarding its admissibility into evidence. The Supreme Court has deemed this necessary to preserve the ideals of decency and fairness "implicit in the con-

113. See Miller v. Fenton, 106 S. Ct. 445, 449 (1985) ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

114. See *Miranda*, 384 U.S. at 444.

115. See *Miller*, 106 S. Ct. at 449 ("[E]ven after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations . . . the Court has continued to measure confessions against the requirements of Due Process." (citations omitted)).

116. See Rogers v. Richmond, 365 U.S. 534, 541 (1961). The Court stated that "the methods used to extract [voluntary confessions] offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system." *Id.*

117. See *Miller*, 106 S. Ct. at 453. In *Miller*, the Court stated that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. *Id.* (emphasis in original).

118. The due process guarantee of fundamental fairness has been applied by the Court in other contexts. See, e.g., Wainwright v. Greenfield, 106 S. Ct. 634, 641 (1986) (use of postarrest, post-*Miranda* warnings silence as evidence of sanity deemed fundamentally unfair); Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (revocation of defendant's probation, who through no fault of his own could not pay a fine, held contrary to the principle of fundamental fairness); Taylor v. Kentucky, 436 U.S. 478, 487 n.14 (1978) (refusal to give petitioner's requested instruction on presumption of innocence violative of due process guarantee of fundamental fairness); Doyle v. Ohio, 426 U.S. 610, 618 (1976) (use of postarrest, post-*Miranda* warnings silence to impeach testimony at trial is fundamentally unfair); Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecution's suppression of evidence favorable to an accused, despite accused's request, violates due process where the evidence may affect guilt or punishment). *But see* South Dakota v. Neville, 459 U.S. 553, 565 (1983) (use of refusal to take a blood-alcohol test as evidence of guilt is not fundamentally unfair); Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980) (use of prearrest silence for impeachment purposes is not an abridgement of fundamental fairness).


120. See *Rochin* v. California, 342 U.S. 165, 169 (1952) ("Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon
cept of ordered liberty."

The principle that interrogation tactics must not result in a denial of due process was advanced as early as 1936 in Brown v. Mississippi. In Brown, the police hanged and beat the defendants until confessions were compelled. Finding such tactics "revolting to the sense of justice," the Court held the resulting inculpatory statements inadmissible under the fourteenth amendment. Brown was followed by a long line of cases in which the Court held state interrogation practices to be violative of due process.

the whole course of proceedings... in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples..."

(quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

121. See id. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
122. 297 U.S. 278 (1936).
123. Id. at 281-83.
124. Id. at 286.
125. See Mincey v. Arizona, 437 U.S. 385 (1978) (suspect interrogated while barely conscious in hospital intensive care unit despite his repeated requests for counsel); Darwin v. Connecticut, 391 U.S. 346 (1968) (per curiam) (police attempted to employ a hypnotic device during incommunicado interrogation); Beecher v. Alabama, 389 U.S. 35 (1967) (per curiam) (suspect ordered to confess while the chief of police held a loaded gun to his head); Haynes v. Washington, 373 U.S. 503 (1963) (suspect held in lengthy incommunicado detention and told he would only be allowed to call his wife if he confessed); Townsend v. Sain, 372 U.S. 293 (1963) (police inadvertently administered truth serum-like drug to suspect who was ill); Culombe v. Connecticut, 367 U.S. 568 (1961) (suspect's wife asked by the police to confront her husband and urge him to confess); Blackburn v. Alabama, 361 U.S. 199 (1960) (suspect was insane at the time he confessed); Spano v. New York, 360 U.S. 315 (1959) (false emotional ploy used to elicit confession); Payne v. Arkansas, 356 U.S. 560 (1958) (suspect told that 30-40 people outside of the jail "wanted to get" him and if he confessed the police would protect him); Fikes v. Alabama, 352 U.S. 191 (1957) (petitioner of extremely low intelligence kept in isolation for five days while his lawyer and father were prevented from seeing him); Leyra v. Denno, 347 U.S. 556 (1954) (the "doctor" that police obtained to treat suspect's sinus condition was actually a psychiatrist trained in hypnosis); Harris v. South Carolina, 338 U.S. 68 (1949) (police threatened to arrest petitioner's mother to obtain a confession); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held incommunicado for five days of persistent questioning); Watts v. Indiana, 338 U.S. 49 (1949) (petitioner held in solitary confinement for five days of persistent questioning); Haley v. Ohio, 332 U.S. 596 (1948) (fifteen-year-old suspect questioned for five hours in the middle of the night by numerous police officers in the absence of counsel or friends); Malinski v. New York, 324 U.S. 401 (1945) (prosecutor stated at trial that suspect, who was held incommunicado and questioned while naked, "was not too hard to break"); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (suspect held incommunicado without sleep or rest for 36 hours); Ward v. Texas, 316 U.S. 547 (1942) (suspect continuously moved to strange towns, told of threats of mob violence, and persistently questioned); White v. Texas, 310 U.S. 350 (1940) (suspect taken from jail and interrogated in the woods at night); Chambers v. Florida, 309 U.S. 227 (1940) (questioning of suspects over the course of five days culminated in an all-night interrogation session). In other cases, however, the Court has held confessions to be voluntary. See Ashdown v. Utah, 357 U.S. 426 (1958) (suspect's father and uncle denied permission to consult with her); Brown v. Allen, 344 U.S. 443 (1953) (illiterate suspect was held for 18 days before preliminary hearing and appointment of counsel); Stroble v. California, 343 U.S. 181 (1952) (interrogation occurred in the presence of 19 state authorities and attorney
What emerged from these decisions was a totality of circumstances approach under which, "by way of convenient shorthand," the Court assessed the voluntariness of each confession. However, due to the Court's case-by-case examination, vague guidelines rather than bright line rules circumscribe the voluntariness doctrine's application to new fact patterns.

One certainty that does exist under the voluntariness doctrine is that the range of inquiry under the totality of circumstance approach must be broad enough to encompass mental as well as physical coercion. Darwin v. Connecticut provides an example of the Court's application of due process standards to a situation void of physically abusive interrogation tactics, yet still questionable under traditional notions of justice. The suspect in Darwin was arrested on a murder charge. He was then subjected to intensive questioning by the police which included the attempted use of a hypnotic device. Darwin's requests to communicate with the outside world were denied on three occasions. The following day, after continued interroga-

126. See Betts v. Brady, 316 U.S. 455, 462 (1942). In holding that due process is tested under the totality of circumstances surrounding a particular case, the Court in Betts noted that facts "which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." Id. (citation omitted); see also Culombe, 367 U.S. at 601 ("No single litmus-paper test for constitutionally impermissible interrogation has been evolved.").

127. See Blackburn, 361 U.S. at 206-07.

128. See Graham, supra note 4, at 161. Several commentators have criticized the use of the voluntariness doctrine and principles of fundamental fairness to adjudge interrogation methods due to the vagueness of the totality of circumstances approach. See Historical Argument, supra note 8, at 1013-14 ("A case decided by the standard of fundamental fairness has limited value as precedent since it provides only vague principles to guide those who must enforce the standard."). See generally Schulhofer, Book Review, 79 Mich. L. Rev. 865 (1981) (reviewing Y. Kamisar, Police Interrogations and Confessions: Essays in Law and Policy (1980)) (summarizing criticism of the voluntariness test expressed by Kamisar and other commentators); Kamisar, A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test, 65 Mich. L. Rev. 59 (1966) (criticizing the Miranda dissenters' "extravagant faith" in the voluntariness test). But see Grano, supra note 74, at 944 ("While some of the criticism [regarding the voluntariness doctrine] correctly pointed to the need for more analytic certainty, most of it went too far in calling for the abandonment of this doctrine altogether.").

129. See Blackburn, 361 U.S. at 206 (citing Fikes, 352 U.S. at 197); see also Leyra, 347 U.S. at 558.

130. 391 U.S. 346 (1968) (per curiam).

131. See id. at 349.

132. Id. at 347. Darwin requested to make a telephone call upon his arrest, but was denied an opportunity to do so. Id. at 347 n.1.

133. Id. at 347.

134. Id. at 349.
tion, Darwin confessed to the crime.135 Throughout the course of the incommunicado questioning, Darwin's lawyers made numerous attempts to communicate with their client by telephone and in person.136 These efforts proved unsuccessful due to police interference, which included repeated disclaimers of knowledge of where Darwin was located.137 The Court concluded that under the totality of these circumstances, Darwin's confession was not voluntary.138

The Court recently had occasion to review the voluntariness doctrine in Miller v. Fenton.139 During custodial interrogation, the police suggested to Miller, who was arrested for murder,140 that he would not be punished if he confessed because it was apparent that whoever committed the crime 'had a 'mental problem' and needed medical help.'141 The Court indicated that a finding of voluntariness, in addition to turning on whether the suspect's will was overborne,142 is also based on preserving a system of justice "that presumes innocence and assures that a conviction will not be secured by inquisitorial means."143 Although acknowledging that the usefulness of the

135. Id. at 347. Shortly before confessing, Darwin appeared to faint. After being revived, he issued his statement to the police. Id.
136. Id.
137. See id. at 347-48. Even after counsel obtained a writ of habeas corpus, the police still failed to produce the suspect until he was brought to court the following day. Id. at 348.
138. Id. at 349. One of the factors the Court considered in assessing the totality of circumstances surrounding Darwin's confession was the denial of access to counsel made by the police. Id. But see Stroble v. California, 343 U.S. 181, 197-98 (1952) (prosecutor's refusal to interrupt interrogation to admit counsel, who had previously consulted with the suspect, held not to be a violation of due process). The Court in Stroble noted that "[w]hile district attorneys should always honor a request of counsel for an interview with a client," there was no showing of prejudice from the denial under the facts of the case. Id. at 198. The inconsistent results in Darwin and Stroble, particularly the degree of emphasis the Court placed on counsel being denied access to a suspect in each case, demonstrates the unpredictability of the voluntariness doctrine. See supra note 128 and accompanying text.
139. 106 S. Ct. 445 (1985). The ultimate issue in Miller was whether the voluntariness of a confession is a finding of fact entitled to a presumption of correctness. Id. at 447. The Court concluded that the voluntariness of a confession is a legal inquiry requiring independent federal review. Id. at 451-52. The case was reversed and remanded for further proceedings consistent with the Court's holding. Id. at 454. On remand, the court of appeals held Miller's confession to be voluntary. Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986).
140. Miller. 106 S. Ct. at 447. The victim was a seventeen-year-old woman who was found mutilated in a stream near her home. Id.
141. Id. at 448. In addition, the police falsely informed Miller that he had been identified at the scene of the murder and that his blood stains had been found there. Id. The police also told Miller that the victim was still alive and able to identify the person who attacked her even though they knew this was a false statement. Id. Later, they informed Miller that the victim "had just died." Id. The interrogation session lasted less than one hour. After confessing, Miller lapsed into a "state of shock." Id.
142. Id. at 453.
143. Id.
B. State Interpretation of Miranda's Knowing and Intelligent Requirement

A valid waiver of the fifth amendment right to counsel must not only be voluntary, but must also be "a knowing and intelligent relinquishment or abandonment of a known right or privilege." As found under the voluntariness doctrine, a totality of the circumstances approach is used to examine the validity of a waiver under the knowing and intelligent standard. Factors that have been held to influence the ability of an individual to make a valid waiver under this standard include "the background, experience, and conduct of the accused." The Court, however, has offered little indication of how these, as well as other, circumstances should or should not bear on this evaluation. Thus, prior to Burbine, when state courts were required

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144. Id. at 453 n.4 ("The voluntariness rubric has been variously condemned as 'useless,' . . . 'perplexing,' . . . and 'legal double-talk' . . . ." (citations omitted)).
145. See id. at 449.
147. See supra notes 126-27 and accompanying text.
148. See, e.g., Edwards, 451 U.S. at 482.
150. See Note, Totality of the Circumstances: A Guideline for Waiver of Miranda Rights? North Carolina v. Butler, 51 U. Colo. L. Rev. 247, 250 & n.26 (1980). The clearest rule pertaining to waiver was established in Edwards. Edwards held that once the right to counsel has been invoked, a waiver is per se invalid unless the suspect is given the opportunity to consult with counsel or he initiates further communication with the police. Id. at 484-85. Thus, even if an individual is readvised of his Miranda rights after invoking his right to counsel and executes an express waiver, statements resulting from police-initiated interrogation are still inadmissible as evidence. Id. In addition, even if the suspect is responsible for initiating communication with the police after invoking the right to counsel, thereby negating the applicability of the Edwards bright line rule, an inquiry still has to be made as to whether the waiver was knowing and intelligent under the totality of circumstances. Id. at 485-86. For example, in Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983) (plurality opinion) the Court found that the suspect initiated communication with the police after invoking his right to counsel. Thus, the Edwards per se rule was inapplicable and the remaining inquiry was whether Bradshaw's waiver was knowingly and intelligently made. Id. at 1046. Factors that influenced the Court's determination that Bradshaw had executed a valid waiver were the absence of coercion from the interrogation environment, proper administration and comprehension of Miranda warnings, and Bradshaw's unprovoked decision to change his mind about his previous request to consult with counsel. Id. at 1045-46.

Few of the Court's decisions have examined the validity of a Miranda waiver where the right to counsel was never invoked by the suspect. Even those cases that have addressed the issue
to resolve a situation where the police interfered with communications between an attorney and client prior to or during interrogation, they were left to their own interpretational devices. Three divergent views have emerged.

1. The Liberal New York Rule

Although urged to do so by amici, the Miranda Court did not go as far as requiring the actual presence of counsel during custodial interrogation as a prerequisite to the establishment of a valid fifth amendment waiver.\(^1\)\(^5\) Nothing in the Miranda decision, however, was meant to prevent the states from formulating more protective safeguards than those delineated.\(^1\)\(^5\)\(^2\) Therefore, relying on its own state constitution and statutory provisions,\(^1\)\(^5\)\(^3\) New York has extended its protections beyond those guaranteed by the federal Constitution in what has become known as the Donovan-Arthur-Hobson rule.\(^1\)\(^5\)\(^4\)

In *People v. Donovan*,\(^1\)\(^5\)\(^5\) decided several years prior to *Miranda*, a murder confession was obtained during a period of interrogation throughout which

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1. See *Solem v. Stumes*, 465 U.S. 638, 650-51 (1984), the Court held that *Edwards* should not be applied retroactively, but declined to rule on whether the suspect's waiver met the knowing and intelligent standard. *Id.* at 651. The case was remanded for that determination. *Id.*

2. See *Miranda*, 384 U.S. at 467. The Court stated: "Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform. . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual . . . ." *Id.*


counsel was denied access to the suspect.\textsuperscript{156} Finding the responsibility to protect individual rights weightier than the need for effective police interrogation tactics,\textsuperscript{157} the Court of Appeals of New York held that if either a suspect or his retained attorney is denied a request to consult with the other, a violation of fundamental fairness and the effective assistance of counsel results.\textsuperscript{158} In \textit{People v. Arthur},\textsuperscript{159} the court refined its standard by holding that once an attorney enters a proceeding, a valid waiver of the right to counsel can only be executed by the suspect while the attorney is present.\textsuperscript{160} \textit{People v. Hobson}\textsuperscript{161} reaffirmed this rule, holding that it "breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary."\textsuperscript{162}

2. The Prevalent State View

The majority of other state courts that have ruled on the issue have also held that the failure of the police to inform a suspect of his attorney's efforts to contact him vitiates any possibility of a valid waiver.\textsuperscript{163} Declining to adopt the more extreme position of the New York rule, however, these

\begin{footnotesize}
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\item \textsuperscript{156} \textit{Id.} at 150-51, 193 N.E.2d at 629, 243 N.Y.S.2d at 842.
\item \textsuperscript{157} \textit{See id.} at 152, 193 N.E.2d at 630, 243 N.Y.S.2d at 844.
\item \textsuperscript{158} \textit{Id.} at 153, 193 N.E.2d at 630, 243 N.Y.S.2d at 844-45. The Donovan violation was based on provisions in the New York State Constitution pertaining to the right to counsel, the privilege against self-incrimination, and the guarantee of due process. \textit{See id.} at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.
\item \textsuperscript{159} 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968).
\item \textsuperscript{160} \textit{Id.} at 329, 239 N.E.2d at 539, 292 N.Y.S.2d at 666 ("There is no requirement that the attorney or defendant request the police to respect this right . . . ."). In People v. Pinzon, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 725, 406 N.Y.S.2d 268, 271 (1978), the court afforded further protection to attorney-client communications by placing the burden on the police to keep track of a suspect in custody. Thus, in Pinzon, an attorney's telephone call to the main switchboard at the police station and his request that no further questioning take place was enough to place the police on notice that counsel had appeared on behalf of the suspect. \textit{Id.} In People v. Gunner, 15 N.Y.2d 226, 229-31, 205 N.E.2d 852, 854, 257 N.Y.S.2d 924, 926-28 (1965), the court went as far as barring all inculpatory statements made by the defendant while he was under arrest in California after his retained attorney, who was located in New York, telephoned the New York police and told them that he did not want any statements taken from the suspect. The court concluded that "where a person is represented by counsel, whether or not the police may question him in the absence of his attorney should not turn on whether the latter presents himself at the place where his client is in physical custody and expressly requests the opportunity to consult with him." \textit{Id.} at 231-32, 205 N.E.2d at 855, 257 N.Y.S.2d at 928.
\item \textsuperscript{161} 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).
\item \textsuperscript{162} \textit{Id.} at 484, 348 N.E.2d at 898, 384 N.Y.S.2d at 422. The New York rule has been adopted in Pennsylvania. \textit{See Commonwealth v. Hilliard}, 471 Pa. 318, 322, 370 A.2d 322, 324 (1977) ("If counsel has expressed a desire to be present during interrogation, a waiver of counsel obtained in counsel's absence should be held invalid as a matter of law.").
\item \textsuperscript{163} \textit{See supra} note 40.
\end{itemize}
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Decline of Defense Counsel's "Vital" Role

Courts have reached a consensus that while police interference with attorney-client communication\(^\text{164}\) may result in a constitutional violation, the absence of counsel from the interrogation room does not fatally taint a waiver.\(^\text{165}\) These states require the police, at a minimum, to inform a suspect of his lawyer's availability.\(^\text{166}\) Once the suspect is properly armed with this information, he may then choose to accept or reject his attorney's assistance.\(^\text{167}\) If he declines to consult with counsel, statements obtained during subsequent questioning may be used against him.\(^\text{168}\)

There are variations, however, even among this consensus. For example, in *State v. Jones*\(^\text{169}\) the Court of Appeals of Washington held that a suspect must be informed of counsel's telephonic request that the police refrain from

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\(^\text{164}\) In some instances, the police not only failed to inform the suspect of counsel's availability, but also deliberately prevented the attorney from consulting with the suspect through deceptive ploys. *See* People *v.* Smith, 93 Ill. 2d 179, 183, 442 N.E.2d 1325, 1326-27 (1982) (attorney incorrectly told "she could not see her client because he was undergoing heroin withdrawal"), *cert. denied*, 461 U.S. 937 (1983); Commonwealth *v.* McKenna, 355 Mass. 313, 319-20, 244 N.E.2d 560, 563-64 (1969) (while the suspect was under interrogation in Revere, Massachusetts, the police directed his attorney to Boston); Lewis *v.* State, 695 P.2d 528, 531 (Okla. Crim. App. 1984) ("compelling circumstantial evidence" suggested that attorney was purposefully kept from his client by being sent to various locations in the jail and courthouse); *State v. Haynes*, 288 Or. 59, 63, 602 P.2d 272, 274 (1979) (when counsel arrived at the jail to consult with his client, the police moved the suspect to another location), *cert. denied*, 446 U.S. 945 (1980).

\(^\text{165}\) *See*, e.g., Weber *v.* State, 457 A.2d 674, 686 (Del. 1983) ("[T]he rule we adopt and the New York rule are distinct, and we specifically decline to adopt the latter."); Lodowski *v.* State, 302 Md. 691, 721, 490 A.2d 1228, 1243 (1985) ("Other cases . . . have adopted an even more stringent rule—once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney . . . we do not subscribe to that rule." (citations omitted) (emphasis in original)), *cert. denied*, 106 S. Ct. 1469 (1986).

\(^\text{166}\) *See*, e.g., Haliburton *v.* State, 476 So. 2d 192, 194 (Fla. 1985) ("In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him."); *vacated and remanded*, 106 S. Ct. 1452 (1986); Smith, 93 Ill. 2d at 189, 442 N.E.2d at 1329 ("[W]hen police . . . refuse an attorney . . . access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him."); *Haynes*, 288 Or. at 73-74, 602 P.2d at 278-79 ("[W]hen law enforcement officers have failed to inform counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they cannot thereafter rely on defendant's 'waiver' for the use of his subsequent uncounseled statements or resulting evidence against him.").

\(^\text{167}\) *See*, e.g., Weber, 457 A.2d at 686 ("After being fully informed of the presence of counsel, a suspect may knowingly and intelligently waive his rights without consulting his attorney."); Haliburton, 476 So. 2d at 194 ("If the defendant wishes to reject the opportunity for such advice, he may do so. The determination of the need for counsel is defendant's prerogative."); *State v. Jones*, 19 Wash. App. 850, 853, 578 P.2d 71, 73 (1978) ("A defendant may . . . choose to disavow his counsel's demand that counsel be present during interrogation.").

\(^\text{168}\) *See*, e.g., *Haynes*, 288 Or. at 70, 602 P.2d at 277.

interrogating the suspect in his absence. Similarly, in Commonwealth v. Sherman the Supreme Judicial Court of Massachusetts held that a suspect must be informed of his attorney's request to be present during questioning.

In State v. Haynes the Supreme Court of Oregon limited its holding by requiring the police to inform a suspect of counsel's availability only when the lawyer is available and attempting to consult with his or her client. Whether a telephone call to the police renders an attorney "available" under Haynes is uncertain. A number of other state courts have resolved this ambiguity by ruling that an attorney must actually be present at the site of the interrogation before the police will be required to inform a suspect of counsel's availability.

Despite these distinctions, the general premise behind the prevalent state view is that the abstract offer of counsel provided in the Miranda warnings differs substantially from an opportunity to consult with "an identified attorney actually available to provide at least initial assistance and advice." A suspect who declines the former offer might react differently to the latter. Thus, the majority of state courts have concluded that information regarding counsel's availability is essential to a knowing and intelligent Miranda waiver. In addition to relying on this interpretation of Miranda to prohibit interference with attorney-client communications, a few states have

170. Id. at 851, 853, 578 P.2d at 72-73.
172. Id. at 294, 450 N.E.2d at 570; see also Commonwealth v. McKenna, 355 Mass. 313, 324, 244 N.E.2d 560, 566 (1969).
174. Id. at 70, 602 P.2d at 277.
175. See State v. Weber, 457 A.2d 674, 686 (Del. 1983) ("To effectively invoke this rule, the attorney must present himself at the police station or other site of interrogation...."); Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985) ("The police do not have to obey a telephone order of an attorney to cease questioning a defendant.... Our holding turns on the fact that the attorney.... was in the station house requesting to speak with appellant."); vacated and remanded. 106 S. Ct. 1452 (1986); Lodowski v. State, 302 Md. 691, 721, 490 A.2d 1228, 1243 (1985) ([A] suspect must be fully informed of the actual presence and availability of counsel who seeks to confer with him."); vacated and remanded. 106 S. Ct. 1452 (1986).
176. Haynes, 288 Or. at 72, 602 P.2d at 277.
177. Id., 602 P.2d at 277.
178. See, e.g., Weber, 457 A.2d at 685-86 ("To allow the police to use tactics which prevent or forestall a suspect from exercising his rights is inconsistent with the clear purpose of Miranda.... Furthermore, the use of such tactics is logically incongruous with the concept of a knowing and intelligent waiver....") (citations omitted)); People v. Smith, 93 Ill. 2d 169, 185-86, 442 N.E.2d 1325, 1328 (1982) ("Here we consider that there was not a knowing and intelligent waiver of the right to counsel during the interrogation in view of the interference with [the attorney's] effort to consult with the defendant."); cert. denied. 461 U.S. 937 (1983). In Lewis v. State, 695 P.2d 528 (Okla. Crim. App. 1984), the court concluded:

It is one thing to say a lawyer has no right to see a client; it is quite another to say that an accused person knowingly and intelligently waived his right to counsel and
also utilized their own constitutions and laws to require the police to inform a suspect of his attorney's defense efforts.¹⁷⁹

3. The Strict Miranda Construction

A minority of states have declined to adopt the view expressed by the majority of jurisdictions and have narrowly interpreted the Miranda decision. The Supreme Court of Georgia in Blanks v. State¹⁸⁰ criticized the liberal New York rule, as well as the prevalent state position for providing an unwarranted advantage to the suspect who, through financial and other resources, is swiftly able to retain counsel.¹⁸¹ Finding a rule based on how quickly counsel appears at the interrogation site or how quickly he “springs to the telephone” to be irrational, the court concluded that the fifth amendment privilege against compelled self-incrimination is a personal right that cannot be invoked by counsel or other third parties.¹⁸² A similar position was expressed by the Supreme Court of Iowa in State v. Blanford.¹⁸³ In Blanford, the court reasoned that “a suspect’s request for counsel must be honored; a lawyer's request for a client need not be.”¹⁸⁴

his right against selfincrimination [sic] when it was not made known to him that his lawyer was, in effect, knocking at the jail house door.

Id. at 530.

179. See, e.g., Lewis, 695 P.2d at 531; Haynes, 288 Or. at 71-74, 602 P.2d at 278-79; Dunn v. State, 696 S.W.2d 561, 569-70 (Tex. Crim. App. 1985) (en banc), cert. denied, 106 S. Ct. 1478 (1986). In State v. Matthews, 408 So. 2d 1274, 1277 (La. 1982), the Supreme Court of Louisiana relied entirely upon its state constitution and statutory policy to prohibit the authorities from interfering with attorney-client communications. The court held that, in accordance with state policy, Louisiana “welcome[s] and encourage[s] an attorney to confer with his client in order that he may intelligently exercise his rights during interrogation.” Id. at 1278 (footnote and citation omitted).


181. Id. at 423, 330 S.E.2d at 579 (citing Kamisar, supra note 15, at 95).

182. Id. (citing State v. Burbine, 451 A.2d 22, 28 (R.I. 1982); see also State v. Beck, 687 S.W.2d 155, 158 & n.7 (Mo. 1985) (en banc) (“Appellant’s constitutional privilege against self-incrimination is a personal one and is a right that cannot be exercised by third parties.” (citations omitted)).

183. 306 N.W.2d 93 (Iowa 1981).

184. Id. at 96. The court reasoned: “We may differ as to whether the police should have told defendant of [counsel’s] call. The question, however, is whether they were obliged to do so. We find no basis for saying they were.” Id. (emphasis in original). The court’s holding ignores the standards for post-custodial procedure proposed by the American Law Institute and the American Bar Association. See CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.7(1) (Official Draft 1975) (“An attorney undertaking to act as counsel for an arrested person shall have prompt access to such person, by telephone, and in person on counsel’s arrival at any place where such person is detained”); STANDARDS FOR CRIMINAL JUSTICE 5-5.1 & commentary (2d ed. 1980 & Supp. 1986) (proposing that counsel should be provided to a suspect “as soon as feasible after custody begins”); STANDARDS FOR CRIMINAL JUSTICE 5-7.1 & commentary (2d ed. 1980 & Supp. 1986) (proposing that the authorities should affirmatively assume the responsibility of placing a suspect in communication with a lawyer).
These cases represent the strictest state construction of Miranda. According to this view, a suspect's ability to make a knowing and intelligent fifth amendment waiver cannot be influenced by the failure of the police to disclose information about his attorney's availability. Although a minority position, the interpretation received constitutional approval in Burbine.

III. Moran v. Burbine: The Decline of Defense Counsel's "Vital" Role in the Criminal Justice System

It is undisputed under Miranda that when a suspect asks to consult with an attorney prior to or during custodial interrogation, the police must scrupulously honor the request. Moran v. Burbine presented the Court with a variation of this scenario by necessitating a determination of the obligations of the police when an attorney attempts to reach a client who is being held in custody. Burbine contended that under the federal Constitution the police must inform a suspect of counsel's defense efforts in his behalf and must be forthright in their dealings with the suspect's attorney. Furthermore, he asserted that by deliberately misleading attorney Munson and failing to inform him of her telephone call the Cranston police violated his rights under the fifth, sixth and fourteenth amendments.

A. The Majority Opinion: Defense Counsel as a "Handicap" to Effective Law Enforcement

Burbine contended that the police violated his sixth amendment right to counsel by interfering with the attorney-client relationship that had been established between him and Munson. The Court was unpersuaded. After

185. See Blanks, 254 Ga. at 423, 330 S.E.2d at 579; Beck, 687 S.W.2d at 159.
186. See Burbine, 106 S. Ct. at 1141 ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.").
187. See Edwards v. Arizona, 451 U.S. 477, 484 (1981). In Edwards, the Court held that when a suspect exercises the fifth amendment right to counsel, the police must honor the request by ceasing all questioning until an attorney is made available or the suspect reinitiates communication about the investigation. Id.
188. 106 S. Ct. 1135 (1986).
189. Although Munson did not request to speak with or to see her client, the Court phrased the issue as if she had attempted to "reach" Burbine. See supra note 38.
190. See Burbine, 106 S. Ct. at 1143.
191. The police told Munson that they would not be questioning her client, but then proceeded to interrogate Burbine less than an hour after the phone call terminated. See supra notes 20, 23, and accompanying text.
192. See Burbine, 106 S. Ct. at 1141, 1145, 1147.
193. See id. at 1145. While Burbine conceded that the formal sixth amendment right to counsel attaches only after the filing of a formal charge, he contended that the sixth amendment "protects the integrity of the attorney-client relationship regardless of whether the prose-
Decline of Defense Counsel's "Vital" Role

...discrediting Burbine's reliance on Escobedo and Miranda as support for his sixth amendment argument, the Court rejected the assertion that the sixth amendment right to counsel can be "triggered" by the formation of the attorney-client relationship. Writing for the majority, Justice O'Connor emphasized that the attachment of a constitutional right is not a matter of happenstance, as it would be if it were dependent on whether a suspect had fortuitously retained counsel prior to questioning by the police. Justice O'Connor reiterated that the Court's unyielding precedent has established that the sixth amendment right to counsel attaches only after adversary judicial proceedings have been initiated against the accused. The Court concluded that since the government's focus in Burbine was investigatory rather than accusatory, the sixth amendment challenge was "practically and theoretically unsound."

The majority also rejected Burbine's assertion that information regarding attorney Munson's telephone call was essential to his ability to execute a...
valid fifth amendment waiver.\textsuperscript{201} Although Justice O'Connor acknowledged that such information might have been "useful" to Burbine,\textsuperscript{202} she reasoned that it would be "incongruous" to hinge a suspect's ability to knowingly and intelligently waive his rights on events that are completely unknown to him.\textsuperscript{203} Under the majority's analysis, once it was ascertained that the police did not coerce Burbine's confession,\textsuperscript{204} and that Burbine was fully apprised of his Miranda rights and understood the consequences of issuing a statement,\textsuperscript{205} his waiver was valid "as a matter of law."\textsuperscript{206}

The Court refused to extend Miranda to require the police to inform a suspect of his lawyer's communications.\textsuperscript{207} Justice O'Connor stated that while the adoption of such a rule "might add marginally"\textsuperscript{208} to diminishing the inherent coercion of the custodial interrogation environment,\textsuperscript{209} it would also serve to "handicap" the investigative duties of the police by discouraging the suspect from issuing a statement.\textsuperscript{210} Concluding that this would come at a substantial cost to society's long-recognized need for interrogation as an effective law enforcement tool,\textsuperscript{211} the Court struck the balance against

\begin{itemize}
\item \textsuperscript{201} See Burbine, 106 S. Ct. at 1141.
\item \textsuperscript{202} Id. at 1142. The Court noted that such information might have affected Burbine's decision to confess. Id.
\item \textsuperscript{203} See id. at 1141-42. According to the Court, "the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his Miranda rights had a lawyer not telephoned the police." Id. at 1142.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} Id. at 1143.
\item \textsuperscript{208} Id. The Court stated that "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." Id. at 1144.
\item \textsuperscript{209} See id. at 1143-44.
\item \textsuperscript{210} See id. at 1144. Justice O'Connor noted that "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." Id. The majority also expressed concern that the adoption of a rule requiring the police to inform a suspect of counsel's availability "would have the inevitable consequence of muddying Miranda's otherwise relatively clear waters." Id. at 1143. The Court provided a list of questions the rule would "spawn" regarding the obligations of the police. See id.; see also Browning, supra note 15, at 61. Browning summarized the possible confusion a "telephone rule" would create:
\begin{quote}
The minute a voice on the telephone claims to be that of a lawyer . . . the police will have to stop what they're doing to answer these questions: Is this person really a lawyer? Does this lawyer have a legitimate, "professionally" ethical interest in the suspect? Has the lawyer expressed that interest properly or has the offer of assistance been so half-hearted that the courts will consider it no offer at all?
\end{quote}
\textit{Id.}
\item \textsuperscript{211} See Burbine, 106 S. Ct. at 1144. According to Justice O'Connor, "[a]dmissions of guilt are more than merely 'desirable,' . . . they are essential to society's compelling interest in
society's competing concern for the protection of individual liberties.\textsuperscript{212} Justice O'Connor recognized that the Court's holding conflicts with the prevalent state interpretation of \textit{Miranda}.\textsuperscript{213} She emphasized, however, that the Court's duty to interpret the Constitution cannot defer to "the numerical preponderance" of state decisions.\textsuperscript{214}

The Court perfunctorily rejected Burbine's fourteenth amendment argument that the deception of his attorney deprived him of the due process guarantee of fundamental fairness.\textsuperscript{215} Justice O'Connor stated that the conduct of the Cranston police did not "shock[] the sensibilities of civilized society"\textsuperscript{216} as to justify federal encroachment of the state's criminal procedure.\textsuperscript{217} The Court did note in dictum, however, that under "more egregious" circumstances than those surrounding Munson's telephone call to the Cranston police, police deception might result in a denial of fundamental fairness.\textsuperscript{218}

\textbf{B. The Dissenting Opinion: The "Cost" of "Lawyer-Free" Interrogation}

In a dissenting opinion Justice Stevens, joined by Justices Brennan and Marshall, criticized the majority's conclusion that police interference with attorney-client communications does not violate the Constitution.\textsuperscript{219} According to the dissent, this holding ignores the accusatorial nature of our finding, convicting and punishing those who violate the law." \textit{Id.} (citation omitted). \textit{But see Historical Argument, supra} note 8, at 1048-51 (arguing that the presence of counsel during interrogation is not a complete impediment to the prosecution).

\textsuperscript{212} See \textit{Burbine}, 106 S. Ct. at 1144.
\textsuperscript{213} See \textit{id.} The view expressed by a majority of state courts is that a suspect must be informed of his attorney's defense efforts in order to execute a knowing and intelligent fifth amendment waiver. \textit{See supra} notes 163-79 and accompanying text.
\textsuperscript{214} \textit{Burbine}, 106 S. Ct. at 1144. The Court also refused to adopt the legal profession's suggested standards for proper treatment of a suspect held in custody. \textit{Id.} ("[O]ur interpretive duties go well beyond deferring . . . to the subconstitutional recommendations of even so esteemed a body as the American Bar Association."). The American Bar Association Standards for Criminal Justice recommend that the police affirmatively assume the responsibility of placing a suspect in communication with a lawyer "as soon as feasible after custody begins." \textit{See STANDARDS FOR CRIMINAL JUSTICE 5-5.1} & commentary (2d ed. 1980 & Supp. 1986); \textit{STANDARDS FOR CRIMINAL JUSTICE 5-7.1} & commentary (2d ed. 1980 & Supp. 1986); \textit{see also supra} note 184. Thus, despite its acknowledgment of a "distaste" for the deliberate deception of an attorney and the "reckless" withholding of information from a suspect, the Court found no basis under the fifth amendment for regulating this type of conduct. \textit{See Burbine}, 106 S. Ct. at 1142-43.
\textsuperscript{215} \textit{See Burbine}, 106 S. Ct. at 1147-48.
\textsuperscript{216} \textit{See id.} at 1148.
\textsuperscript{217} \textit{See id.}
\textsuperscript{218} \textit{See id.} at 1147.
\textsuperscript{219} \textit{See id.} at 1150 (Stevens, J., dissenting).
criminal justice system\textsuperscript{220} as well as the Court's deep-rooted abhorrence of incommunicado questioning.\textsuperscript{221} Dismayed by the Court's approval of "lawyer-free, incommunicado custodial interrogation,"\textsuperscript{222} Justice Stevens viewed the Court's opinion as sanctioning "police deception of the shabbiest kind."\textsuperscript{223}

Justice Stevens failed to make a direct response to the majority's sixth amendment analysis. Finding the existence of Burbine's right to counsel unquestionable under the fifth amendment,\textsuperscript{224} the dissent found no significance in whether the sixth amendment right to counsel was also applicable.\textsuperscript{225} According to Justice Stevens, the pertinent issue was whether the deception of attorney Munson was "utterly irrelevant" to Burbine's right to counsel, regardless of whether the source of that right was the fifth or sixth amendment.\textsuperscript{226} The dissent then utilized agency law principles\textsuperscript{227} to hold that the deception of Burbine's attorney was equivalent to the deception of Burbine,\textsuperscript{228} and therefore violated his "undisputed" right to counsel under the fifth amendment.\textsuperscript{229}

In addressing Burbine's waiver challenge, Justice Stevens reminded the Court that under \textit{Miranda} the government, not the suspect, bears the burden of proving a knowing and intelligent relinquishment of the fifth amendment privilege.\textsuperscript{230} Justice Stevens suggested that this strict presumption\textsuperscript{231} was especially relevant in \textit{Burbine} where, through no fault of the suspect, it was difficult to ascertain what actually transpired during the interrogation due to a lack of "disinterested witnesses."\textsuperscript{232} The dissent proffered that a suspect's knowledge of the availability of an identified attorney differs substantially

\begin{itemize}
\item \textsuperscript{220} See \textit{id.} at 1148 (citing Miller v. Fenton, 106 S. Ct. 445, 449 (1985)).
\item \textsuperscript{221} See \textit{id.} at 1150.
\item \textsuperscript{222} See \textit{id.}
\item \textsuperscript{223} \textit{Id.} at 1151.
\item \textsuperscript{224} See \textit{id.} at 1163 \& n.51.
\item \textsuperscript{225} See \textit{id.} at 1163.
\item \textsuperscript{226} See \textit{id}.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} Justice Stevens relied on Brewer v. Williams, 430 U.S. 387 (1977), in his application of agency principles. See \textit{Burbine}, 106 S. Ct. at 1163 n.49 (Stevens, J., dissenting). In \textit{Williams}, the Court held that counsel had asserted Williams' rights by acting as his agents. See \textit{Williams}, 430 U.S. at 405; see also supra note 62. However, in \textit{Williams} the accused's sixth amendment right to counsel had attached by way of arraignment. \textit{Williams}, 430 U.S. at 391. Hence, Justice Stevens' reliance on \textit{Williams} is questionable since adversary judicial proceedings had not been initiated against Burbine at the time of his interrogation.
\item \textsuperscript{229} See \textit{Burbine}, 106 S. Ct. at 1163 n.49 (Stevens, J., dissenting).
\item \textsuperscript{230} \textit{Id.} at 1157.
\item \textsuperscript{231} See \textit{id.}
\item \textsuperscript{232} \textit{Id.}
\end{itemize}
from the abstract offer of counsel provided in the *Miranda* warnings. In accordance with the prevalent state view, Justice Stevens concluded that information regarding the actual availability of counsel has a direct influence on the right the suspect is being asked to relinquish.

The dissent also criticized the Court's refusal to extend *Miranda* to require the police to inform a suspect of his attorney's availability. Dismissing the majority's balancing approach as "profoundly misguided," Justice Stevens stressed that the only "cost" of informing a suspect of his lawyer's defense efforts is an increased probability that the suspect will exercise his rights and a decreased probability that the police will obtain a confession. The dissent noted that in *Miranda* the cost of less effective interrogation practices did not justify allowing the police to question a suspect without first informing him of his rights. Applying this principle to *Burbine*, Justice Stevens reasoned that the same cost should not justify the deliberate withholding of information crucial to a suspect's waiver decision. The dissent was clearly disturbed that the Court allowed "fear" of the invocation of rights to "tip[] the scales of justice." He proposed that the due process guarantee of fundamental fairness encompasses a broad evaluation of whether the requirements of "fairness, integrity, and honor" have been afforded to an individual in the administration of criminal justice. Noting that the voluntariness doctrine is often used as a "convenient shorthand" for reviewing a full range of questionable interrogation tactics under requirements of fundamental fairness, the dissent reasoned that police interference with attorney-client relations should also fall under the due process "rubric."

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233. *Id.* at 1159-60 (quoting State v. Haynes, 288 Ore. 59, 72, 602 P.2d 272, 278 (1979) (footnote omitted)).
234. *See supra* notes 163-79 and accompanying text.
235. *Burbine*, 106 S. Ct. at 1159-60 & n.42 (Stevens, J., dissenting).
236. *Id.* at 1160.
237. *See id.*
238. *See id.* at 1161.
239. *See id.*
240. *See id.*
241. *See id.*
242. *See id.* at 1165 ("Finding its conscience troubled, but not shocked, the majority rejects the due process challenge.").
243. *See id.*
244. *See supra* note 127 and accompanying text.
246. *See id.* at 1165. The dissent saw no relevance to whether Burbine's sixth amendment right to counsel had attached since Burbine's right to counsel had clearly become applicable under the fifth amendment. *See supra* notes 227-29 and accompanying text. The dissent's
The dissent held that by driving "a wedge" between Munson and Burbine through the use of false information and the omission of critical information, the conduct of the Cranston police had clearly violated Burbine's rights under the fourteenth amendment.247

C. The Forgotten Role of Counsel

The Court's denial of Burbine's sixth amendment claim is clearly supported by precedent. The sixth amendment right to counsel has consistently been held to attach only after the state's focus becomes adversarial.248 The State of Rhode Island was acting in an investigative capacity at the time of Burbine's interrogation.249 Burbine attempted to sidestep this fact by directing the Court's attention to the integrity of the attorney-client relationship rather than the stage of the proceedings against him.250 By refusing to create an exception that would provide sixth amendment protection at the formation of the attorney-client relationship, the Court has indicated that it is not readily diverted from the "state focus" test.251

While the Court was clearly warranted in relying on precedent to reject Burbine's sixth amendment argument, it chose to ignore its own fifth amendment teachings. In addressing the waiver issue, the majority refused to adopt a rule that would require the police to inform a suspect of counsel's availability.252 The Court held that such a rule would "handicap" effective law enforcement by discouraging confessions and encouraging a suspect to approach ignores the distinction the Court has drawn between the explicit sixth amendment right to counsel and the implicit fifth amendment right to counsel. But see Kamisar, supra note 15, at 80-83 (discussing the arbitrariness of the attachment of the sixth amendment right to counsel at the initiation of adversary judicial proceedings). Justice Stevens' failure to make a direct response to the majority's sixth amendment analysis suggests that the dissent had no basis for circumventing the Court's strong sixth amendment precedent.

247. See Burbine, 106 S. Ct. at 1166 (Stevens, J., dissenting).
249. Formal charges had not been filed against Burbine at the time of his interrogation. See Burbine, 106 S. Ct. at 1145.
250. The only exception to this precedent is Escobedo v. Illinois, 378 U.S. 478 (1964) (discussed supra notes 73-85 and accompanying text). In Escobedo, the Court held that the suspect's sixth amendment right to counsel was violated during his custodial interrogation even though adversary judicial proceedings had not been initiated. See id. at 485. The Court has subsequently limited Escobedo to its facts and criticized its reliance on sixth amendment principles. See Gouveia, 467 U.S. at 188 n.5; Michigan v. Tucker, 417 U.S. 433, 438 (1974); Kirby, 406 U.S. at 682; see also supra notes 82-83 and accompanying text.
251. See Kamisar, supra note 15, at 83 (hypothesizing that although the sixth amendment right to counsel has been extended "backwards" from trial to the initiation of adversary judicial proceedings, "the Court is unlikely to extend the right any further").
252. See supra notes 207-12 and accompanying text.
invoke his rights to silence and counsel. As the dissent noted, this balancing approach is at odds with the Court's philosophy that an accusatorial system of justice cannot be swayed by fear that an individual will exercise a constitutional right. Furthermore, while the majority refused to defer to the "numerical preponderance" of state decisions, the Court failed to indicate why an overwhelming number of state courts incorrectly concluded that information regarding counsel's availability is essential to a suspect's ability to make a knowing and intelligent fifth amendment waiver. The Court's failure to account for the rejection of the prevalent state interpretation of Miranda is questionable in a decision that has a direct bearing on state criminal procedure.

The majority's fifth amendment analysis is also disturbing because it ignores what the Court has described as defense counsel's "vital role in the administration of criminal justice." In its result-oriented attempt to place the need for confessions before the need for legal representation, the Court did not hesitate to protect the ability of law enforcement authorities to execute their investigative duties. It found no basis, however, under the federal Constitution for giving equal effect to the lawyer's "critical position in our legal system" as a protector of individual rights. In effect, the Court has sanctioned in Burbine what it had condemned the police from doing in Miranda; it has labeled defense counsel a "menace" to interrogation out of fear that the presence of a lawyer will encourage a suspect to remain silent.

253. See id.
254. See Burbine, 106 S. Ct. at 1160-61 (Stevens, J., dissenting); see also Miranda, 384 U.S. at 480-81; Escobedo, 378 U.S. at 490.
255. See supra notes 163-79 and accompanying text (discussing the prevalent state interpretation of Miranda).
256. See Burbine, 106 S. Ct. at 1159 (Stevens, J., dissenting).
257. See id.
258. Miranda, 384 U.S. at 481.
259. See Burbine, 106 S. Ct. at 1144.
261. See Miranda, 384 U.S. at 480-81 ("[The attorney] is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client.").
262. See Miranda, 384 U.S. at 480; see also Brief of the American Bar Association as Amicus Curiae at 4, Moran v. Burbine, 106 S. Ct. 1135 (1986) (No. 84-1485) ("[T]he police . . . armed with a routine Miranda waiver of the abstract right to a lawyer, will be free to treat the real lawyer as an uninvited intruder in the post-arrest interrogation process."); see also supra note 15.
IV. BEYOND THE FEDERAL CONSTITUTION: ATTORNEY-CLIENT COMMUNICATIONS IN THE WAKE OF BURBINE

As Justice Stevens noted in his dissenting opinion, the scope of Burbine is ominous.263 The decision suggests that the police may deny an attorney access to a suspect with little risk of constitutional repercussions.264 While the Court noted that under "more egregious" facts than those presented in Burbine, police deception may result in a violation of the fourteenth amendment due process guarantee of fundamental fairness,265 no indication was given as to the type of conduct that might cause such an abridgement. Furthermore, due to the ambiguous nature of the Court’s dictum, it is unclear whether the statement was made in reference to deception of a suspect or deception of an attorney. If the Court’s dictum was meant to prevent the police from deceiving a suspect, it has merely restated prior voluntariness principles in a confusing form, for the Court has frequently emphasized that the police may not employ deception to trick a suspect into waiver.266 However, if the Court’s dictum was also made in reference to the deception of an attorney, then a new dimension to fundamental fairness principles has been announced.267

State courts may choose, when confronted by “egregious” cases in which the police have deceived an attorney, to rely on the Court's fourteenth amendment dictum, thereby protecting attorney-client communications under notions of fundamental fairness. A consequence of this approach, however, is that it requires an assessment of the totality of circumstances surrounding each case to determine whether the particular type of deception employed is or is not violative of the Constitution.268 Because state case law indicates that the police frequently utilize a variety of deceptive ploys to prevent an attorney from consulting with a suspect who is being held in custody,269 this approach would undoubtedly result in inconsistent state ju-

263. See Burbine, 106 S. Ct. at 1164 (Stevens, J., dissenting).
264. See id. Justice Stevens noted that, prior to Burbine, even the law enforcement profession believed that it could not deny an attorney’s access to his or her client. Justice Stevens stated that if there was no constitutional bar to refusing counsel access to a client, there would be no need for the police to employ deceptive measures to avoid access, as exemplified in a number of state decisions. See id. at 1164 & nn.55-56; see also supra note 164 (discussing state decisions in which the police employed deception to prevent a consultation between counsel and client).
265. Burbine, 106 S. Ct. at 1147.
266. See Miller v. Fenton, 106 S. Ct. 445 (1985); see also Miranda, 384 U.S. at 476 (“[A]ny evidence that the accused was...tricked...into a waiver...will, of course, show that the defendant did not voluntarily waive his privilege.”).
267. See supra notes 111-21 and accompanying text (discussing the voluntariness doctrine).
268. See supra notes 126-28 and accompanying text.
269. See supra note 164.
Decline of Defense Counsel’s “Vital” Role

A final consideration is that application of the Court’s dictum is likely to be subject to further constitutional scrutiny due to the ambiguous nature of the Court’s statement in *Burbine*.271

A more sound alternative is available to states seeking to protect attorney-client communications in the wake of *Burbine*. As the Court noted, its decision does not prevent the states from adopting more exacting requirements pertaining to the conduct of state authorities.272 The states of New York273 and Louisiana274 have effectively utilized their own constitutions and statutory policies to prevent police from interfering with an attorney’s right to consult with a client.275 If counsel is to remain an integral element in the early stages of the criminal justice system, other states should follow the examples set by these states and utilize their own constitutions and laws as the basis for prohibiting the police from directly or deceptively denying an attorney access to a suspect being held in custody.276

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270. Commentators have criticized the usefulness of the fourteenth amendment voluntariness doctrine and principles of fundamental fairness due to the vagueness of the totality of circumstances approach. *See supra* note 128 and accompanying text. The inconsistency that results from the totality of the circumstances approach is illustrated by comparing the Court’s conclusions in *Darwin v. Connecticut*, 391 U.S. 346 (1968) (*per curiam*) and *Stroble v. California*, 343 U.S. 181 (1952). *See supra* note 138 and accompanying text; *see also supra* note 125.

271. *See supra* notes 265-67 and accompanying text.

272. *See Burbine*, 106 S. Ct. at 1145; *see also Miranda*, 384 U.S. at 467. For a comparison of how several states have broadened the right to counsel beyond the limitations imposed by the sixth amendment of the federal Constitution, see Miller, *Right to Counsel: State Courts on the Front Line*, 1984 ANN. SURV. AM. L. 179, 190-200.


275. Other states have relied in part on their own constitutions in reaching the conclusion that a suspect cannot make a knowing intelligent waiver unless he is informed of his attorney’s defense efforts. *See supra* note 179 and accompanying text.

276. The American Bar Association Standards for Criminal Justice and the American Law Institute’s Model Code of Pre-Arraignment Procedure provide useful guidelines for states seeking to adopt statutory provisions to protect attorney-client communications. *See supra* note 184. The adoption of such a statute would allow the state to create a clear set of rules governing the conduct of police authorities as well as defense counsel. Thus, states that are hesitant to make the police accountable for every telephone call that comes through the station’s main switchboard can institute laws that would only require accountability when defense counsel is actually present at the interrogation site. *See supra* note 210 (discussing the potential confusion a “telephone rule” might create); *see also supra* notes 169-75 and accompanying text (discussing various guidelines state courts have utilized in making the police accountable for an attorney’s request to consult with a client). Furthermore, a statutory provision does not necessarily have to require the police to honor an attorney’s request to consult with a suspect being held in custody in order to protect attorney-client communications. The law need only require the police to inform the suspect of counsel’s availability; the suspect may then choose to accept or reject the lawyer’s assistance. *Compare supra* notes 155-62 and accompanying text (discussing the New York rule) *with* notes 163-68 and accompanying text (discussing a potential alternative to the New York rule).
V. CONCLUSION

In Moran v. Burbine, the Supreme Court held that the sixth amendment does not protect the integrity of the attorney-client relationship prior to the initiation of adversary judicial proceedings against the accused. The Court also held that the fifth amendment does not require the police to inform a suspect of counsel's availability as a prerequisite to a knowing and intelligent Miranda waiver. While the Court's dictum under the fourteenth amendment is ambiguous, it is clear that at least some types of deception of an attorney are not violative of the due process guarantee of fundamental fairness. The Court's conclusion in Burbine was based on the premise that society's interest in utilizing interrogation to secure confessions outweighs its interest in the protection of individual liberties.

In rejecting the fifth amendment as a basis for safeguarding counsel's ability to consult with a suspect held in custody, the Court has been swayed by fear of the invocation of constitutional rights. Furthermore, the Court's failure to recognize the critical position of defense counsel as a protector of individual rights demonstrates a retreat from the values inherent in an accusatorial system. Unless the states assume the responsibility of protecting attorney-client communications by relying on their own constitutions and statutory provisions, Burbine may signify the decline of defense counsel's vital role in the criminal justice system.

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