The Erosion of Miranda: Stare Decisis Consequences

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Assume, for the moment, that the Warren Court’s 1966 decision in *Miranda v. Arizona* was wrong. Assume that its combination of required warnings and associated rules limiting custodial police interrogation of criminal suspects improperly rewrote the Fifth Amendment’s privilege against self-incrimination, improperly balanced the interests of suspects and society, and improperly interfered with the law enforcement prerogatives of the States and the Court’s coequal branches of government. Assume that all of this is true, or at least, with the appointment of four new Justices to the Court between 1969 and 1971, that a majority of the Court came to believe that it was.

Even with those assumptions, there is a strong argument that the new Court should nevertheless abide by the earlier decision. So long as the Court is to remain a judicial body and not a political one, stare decisis cautions against simply disregarding existing law in favor of the new Court’s correct (or, at least, temporarily final) interpretation. Facing such a situation, any action the Court takes, whether it abides by the earlier decision or overrules it, involves costs. If it overrules the earlier decision, the new Court can address the perceived doctrinal error of the earlier Court but only at the cost of further politicizing the Court. If it abides by the prior decision, the new Court can restore some of the judicial luster to, and remove some of the political tarnish from the Court as an institution, but only at the expense of tolerating a mistake in constitutional doctrine and consequential social costs.

In dealing with *Miranda*, the Burger and, more recently, Rehnquist Courts have plotted a third course that attempts to avoid the perceived costs of either abiding by or overruling *Miranda*. This course consists of

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pretending to abide by *Miranda* while eviscerating its substance. Through this course, the Burger and Rehnquist Courts hope for the benefits associated with both of the first two approaches, without the costs of either. By keeping *Miranda* alive as a symbol while substantially limiting the decision’s reach, they hope to address *Miranda*’s supposedly mistaken interpretation of the Constitution and its potential for undue costs on law enforcement, while at the same time keeping their actions too subtle to spark the average person’s awareness. The Court hopes thereby to avoid the perception of political or otherwise improper activism.

Rather than achieve cost-free the benefits of either abiding by or overruling *Miranda*, however, there is a grave risk that the Burger and Rehnquist Courts’ approach to *Miranda* will achieve just the opposite. Attempting to rewrite *Miranda* by dissecting and narrowing its doctrinal details implicitly acknowledges the validity of *Miranda*’s supposedly mistaken core constitutional interpretation, further compounding any constitutional error *Miranda* made. Similarly, such an approach leaves law enforcement personnel, defense attorneys, and others directly affected by the rules, generally bound by *Miranda*, but with certain, often unclear, exceptions and areas of erosion. As a result, these individuals face not only the costs of *Miranda* itself but the tremendous uncertainty of trying to decipher the maze with which the Court has now surrounded *Miranda*. Finally, even to the extent that such an approach avoids the attention of the average individual, the politically experienced will seldom be fooled by the Court’s misdirection and will recognize the Court’s political activism, however packaged, for what it is.

In addition, the course that the Burger and Rehnquist Courts have chosen entails one further cost. Almost by definition, the third approach involves a degree of deception and pretense, of saying one thing while doing another, not present when the Court honestly abides by or honestly overrules an earlier decision. Given its influence, the Court’s use of duplicity will undoubtedly be imitated by others—other courts, certainly, and perhaps other actors as well. Over the long term, the increased deceptiveness likely to result will, on its own, outweigh any advantages that the Court’s chosen path might otherwise generate.

To explore these issues, this Article will consider, in turn, the following: (1) the pre-*Miranda* limitations on police interrogation and the pre-*Miranda* Court’s increasing frustration with the failure of these limitations to curb improper psychologically coercive police practices; (2) *Miranda* itself; (3) the Burger and Rehnquist Courts’ treatment of *Miranda*; before finally turning to (4) an analysis of the pragmatic conse-
quences of the Burger and Rehnquist Courts' chosen approach to *Miranda*.

I. SETTING THE STAGE FOR *MIRANDA*

*Miranda* has generated spirited debate on such issues as whether the warning requirements arise from the Constitution, or are instead merely an exercise of the Court’s supervisory powers in the areas of procedure and evidence, as well as the decision’s impact on the criminal justice system and clearance rates. Some have argued that *Miranda* represents the precise sort of raw judicial fiat that should most alarm those who are

concerned about stare decisis, and that *Miranda* represents a departure from 180 years of previous constitutional doctrine. The question of whether the *Miranda* Court was unreasonably activist is largely beyond the scope of this Article, however. Instead, this Article explores the later Courts' general failure to interpret *Miranda* honestly, and the potential damage to the Court's prestige and authority that repeated vacillations in interpreting constitutional doctrine may produce. Voluntariness as an admissibility standard is considered in order to introduce certain problems that had arisen in applying the voluntariness test, including the persistent failure of police to apprise suspects of their federal constitutional rights, and the refusal of the lower courts to consider meaningfully the police's omission of such warnings in determining voluntariness.

A. Development of the Voluntariness Standard

Although the privilege against self-incrimination occupies a prominent place in the Bill of Rights, the Supreme Court did not address limitations on the admissibility of confessions until near the end of the nineteenth century. Initially, the Court, in cases such as *Hopt v. Utah* and *Pierce v. United States*, dealt with the admissibility of confessions in federal criminal trials as a matter for common law evidentiary rules, and did not refer to the Fifth Amendment's privilege against self-incrimination. Within a few years, however—in fact, the first time the Court excluded a confession as involuntary—the Court relied on the Fifth Amendment's privilege against self-incrimination as the basis for excluding an involuntary


4. See, e.g., United States v. Dickerson, 166 F.3d 667, 684 (4th Cir. 1999) (observing that "prior to *Miranda*, the rule governing the admissibility of confessions in federal court—if not the rule's justification—remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily").

5. See *infra* note 31.

6. See *infra* notes 31-32 and accompanying text.

7. 110 U.S. 574 (1884).


9. See id. at 357; *Hopt*, 110 U.S. at 585; see also *Sparf v. United States*, 156 U.S. 51, 54-55 (1895) (finding the confession admissible without reference to Fifth Amendment, and explaining that "confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises"); Welsh S. White, False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997) (observing that "[a]t common law, confessions were excluded only when there was a concern as to their reliability" (emphasis removed)).
or "coerced" confession in a federal criminal trial. Whether tied to the common law or the Fifth Amendment, the Court phrased the test for admissibility in terms of whether the confession was "made freely, voluntarily and without compulsion or inducement of any sort."

In 1936, the Court crafted a similar rule to govern the admissibility of confessions in state criminal proceedings under the Due Process Clause of the Fourteenth Amendment. Although tied to a different constitu-

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10. See Bram v. United States, 168 U.S. 532, 542 (1897) (holding that in federal criminal trials, "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself').

11. Wilson v. United States, 162 U.S. 613, 623 (1896); accord Pierce, 160 U.S. at 357; Hopt, 110 U.S. at 585. In Wan v. United States, 266 U.S. 1, 14 (1924), the Court emphasized that "[i]n the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made." The Court later supplemented this standard with the McNabb-Mallory rule, which rendered inadmissible in federal criminal trials "incriminating statements elicited from defendants during a period of unlawful detention." Mallory v. United States, 354 U.S. 449, 453, 455-56 (1957) (reversing a conviction based, in part, upon confession obtained from defendant where police had probable cause to arrest the defendant, arrested him, detained him for four and one-half hours, questioning him for two of those hours, without bringing defendant before a committing magistrate, in violation of Federal Rule of Criminal Procedure 5(a)). Earlier in McNabb v. United States, 318 U.S. 332, 343-44 (1943), the Court held that:

[L]egislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

accord Upshaw v. United States, 335 U.S. 410, 413 (1948) (reaffirming the McNabb rule that "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological'" (quoting United States v. Mitchell, 322 U.S. 65, 68 (1944)); cf. also James E. Hogan & Joseph M. Snee, S.J., The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 GEO. L.J. 1, 2-21 (1958) (discussing the content of the McNabb-Mallory rule in the context of prompt arraignment).

12. See Brown v. Mississippi, 297 U.S. 278, 286-87 (1936) (reversing conviction because authorities coerced confessions). In dealing with the admissibility of confessions in state court trials, the Court initially left enforcement of the privilege against self-incrimination to the States, holding that the Fifth Amendment privilege did not apply directly to state court proceedings, and refusing to enforce the privilege through either the Privileges and Immunities Clause or the Due Process Clause of the Fourteenth Amendment. See Twining v. New Jersey, 211 U.S. 78, 99, 113-14 (1908), overruled in part by Malloy v. Hogan, 378 U.S. 1 (1964); Adamson v. California, 332 U.S. 46, 50-54 (1947); Palko v. Connecticut, 302 U.S. 319, 323-24 (1937).
tional provision, the admissibility standard for state proceedings also focused on whether the confession was "voluntary," and in practice, the Court treated the state and federal inquiries as interchangeable, citing decisions under the rule for federal proceedings in cases involving state proceedings, and vice versa. Taken together, the Fifth Amendment's privilege against self-incrimination and the Due Process Clause prohibited the use of a coerced confession against a defendant in any federal or state criminal trial, respectively.

B. The Shift Towards Bright-Line Rules

While the totality of the circumstances test went a long way toward

13. See Gallegos v. Nebraska, 342 U.S. 55, 65 (1951) ("So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness."); Lisenba v. California, 314 U.S. 219, 238 (1941); Chambers v. Florida, 309 U.S. 227, 238 (1940); Brown, 297 U.S. at 285-86.

14. See, e.g., United States v. Carignan, 342 U.S. 36, 39 & n.2 (1951) (citing Lisenba, 314 U.S. at 239, a case involving admissibility of a confession in a state court proceeding, in a case involving the admissibility of a confession in a federal court proceeding); see also Gallegos, 342 U.S. at 65 (citing McNabb, 318 U.S. at 346, as authority in interpreting the admissibility rule for confessions in state court proceedings); see also McHenry v. United States, 308 F.2d 700, 703 (10th Cir. 1962) (applying Court cases dealing with admissibility of confessions in state proceedings to determine admissibility of confession in federal proceeding); Note, Developments in the Law - Confessions, 79 HARV. L. REV. 935, 961 (1966) (discussing the merger of the state and federal inquiries).

15. See Ashcraft v. Tennessee, 322 U.S. 143, 154 n.9 (1944) ("Taken together, the Bram and Lisenba cases hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court.").

16. Although the Court had long considered all of the circumstances surrounding a confession to determine whether it was voluntary, the "totality of the circumstances" language first appeared in Fikes v. Alabama, 352 U.S. 191, 197 (1957) ("The totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits."). In conducting this inquiry, the Court considered such factors as whether the suspect was interrogated for an extended period of time, interrogated in relays, denied food, rest, or other physical needs, see, e.g., Ashcraft, 322 U.S. at 154, as well as the suspect's age, intelligence, race, education, and whether the suspect had been advised of his federal constitutional rights. See, e.g., Haynes v. Washington, 373 U.S. 503, 516-17 (1963) (finding that failure to warn a suspect of his federal constitutional rights was one factor in determining whether confession was voluntary); Culombe v. Connecticut, 367 U.S. 568, 631-35 (1961)(same); Payne v. Arkansas, 356 U.S. 560, 567-68 (1958) (same); Harris v. South Carolina, 338 U.S. 68, 70-71 (1949) (same); Watts v. Indiana, 338 U.S. 49, 54-55 (1949) (same); Powers v. United States, 223 U.S. 303, 313-14 (1912) (same); Wilson v. United States, 162 U.S. 613, 623-24 (1896) (same); see also Bernard Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 28-29 (1961) (discussing Court's differing rationales and reliance on differing factors in determining "voluntariness"). Use of brutality, torture, beating, starvation, or physical pain during interrogation rendered the suspect's confession or statement prima facie involuntary. See Ashcraft, 332 U.S. at 160 (Jackson, J., dissenting); see also Brown, 297 U.S. at 286-87 (holding that admission of confessions obtained through torture was "a wrong so
discouraging physically abusive police practices, the test encountered more difficulty in preventing police use of psychological coercion to elicit incriminating responses. Although the Court made clear, on several oc-

fundamental that it made the whole proceeding a mere pretense of a trial”). More subtle pressures were judged by a “weighing of the circumstances of pressure against the power of resistance of the person confessing.” Stein v. New York, 346 U.S. 156, 185 (1953); see also Thomas v. Arizona, 356 U.S. 390, 393 (1958) (quoting Stein, 346 U.S. at 185, for the same proposition); Fikes, 352 U.S. at 197 (same).

17. Certainly, there is good reason to believe that the test did not eliminate such practices altogether. See Stephen J. Schulhofer, Confessions and the Court, 79 MICH. L. REV. 865, 872 (1981) (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFessions: Essays in Law and Policy (1980)) (noting that the voluntariness standard, by expressly allowing “some” pressure to be placed on suspect, left the door open for “sincere, dedicated investigators, intent on solving brutal crimes, occasionally [to] los[e] their tempers”).

18. See Honorable Charles E. Glennon & Tayebe Shah-Mirani, Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda, 21 LOY. U. CHI. L.J. 811, 813 (1990) (noting that “in pre-Miranda decisions, the Court focused primarily upon the use of physical force by the police in order to obtain a confession”; during the years from Brown to Miranda, however, police used a variety of tactics aside from beatings, and threats of beatings, to elicit incriminating responses). Central to all of these “psychological” approaches is the isolation of the individual from friends, family, and his attorney, and the placement of the individual within the control of the police. See id.; see also Haynes, 373 U.S. at 514 (“We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects.”). If isolation and incommunicado detention alone were insufficient, the suspect, once isolated and in police control, could be exposed to a variety of techniques designed to elicit incriminating statements, including relentless, accusatory questioning undertaken at odd hours employing, if necessary, trickery, deception, and false accusation, and using teams of officers intended to play alternatively on the individual’s fears and sympathies. See Culombe, 367 U.S. at 631-34 (describing tactics used to break Culombe’s will and force his confession once he was in police custody, including, inter alia, extended, repeated questioning and use of wife and daughter to extract confession); Spano v. New York, 360 U.S. 315, 322-24 (1959) (describing tactics used to extract confession, including repeated, extended questioning conducted during the night, and use of childhood friend to play on the suspect’s sympathies and lie to suspect); Watts, 338 U.S. at 53 (describing the tactics used to extract confession as including incommunicado detention, solitary confinement in a cell “aptly enough called ‘the hole,’” five night-time sessions of questioning, and trips around town designed to elicit information concerning the individual’s suspected crimes); Haley v. Ohio, 332 U.S. 596, 598 (1948) (stating that tactics used to extract confession included incommunicado detention and isolation of individual from family and attorney, with extended questioning from midnight to five a.m.); Ashcraft, 322 U.S. at 153-54 (describing relentless questioning of individual held incommunicado as “inherently coercive”); see also Miranda v. Arizona, 384 U.S. 436, 448-58 (1966) (describing various psychological techniques used to extract incriminating information); Charles S. Potts, The Preliminary Examination and The Third Degree, 2 BAYLOR L. REV. 131, 134-42 (1950); David L. Sterling, Police Interrogation and the Psychology of Confession, 14 J. PUB. L. 25, 37-46 (1965); Welsh S. White, Police Trickery in Inducing Confessions, 127 U. PA. L. REV. 581, 602-28 (1979). Through such tactics, the process of interrogation “implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right.” Watts, 338 U.S. at 54; see also Haynes, 373 U.S. at 514
casions, that psychological pressures alone could render a confession involuntary, application of the voluntariness standard in such cases proved difficult and controversial. In part, these difficulties stemmed from the admissibility standard's purported focus on "voluntariness." If "voluntariness" is taken literally, it might be thought to prohibit any degree of coercion, and allow only those confessions that were truly volunteered. But even Justice Frankfurter refused to give such a reading to the standard: "[a] statement to be voluntary of course need not be volunteered." At the other extreme, an action might be thought voluntary so

19. See Watts, 338 U.S. at 52 (noting that "[t]here is torture of mind as well as body; the will is as much affected by fear as by force"); see also Payne, 356 U.S. at 566 (stating that the fact "[t]hat petitioner was not physically tortured affords no answer to the question whether the confession was coerced").

20. See Spano, 360 U.S. at 321 (discussing difficulty in assessing voluntariness because of increased sophistication in law enforcement techniques). For examples of the split decisions that resulted from the Court's attempts to apply the voluntariness standard to confessions found coerced by psychological pressures alone, see Culombe, 367 U.S. at 568, 635-42 (six Justices in four separate opinions finding confession involuntary, with three Justices dissenting); Harris, 338 U.S. at 68, 71-73 (three Justice plurality, two Justices concurring separately, and four Justices dissenting to Court's ruling that confession was involuntary); Turner v. Pennsylvania, 338 U.S. 62, 63, 66 (1949) (three Justice plurality, two Justices concurring separately, and four Justices dissenting to Court's ruling that confession was involuntary); Watts, 338 U.S. at 49, 53-61 (three Justice plurality, three Justices concurring separately, and three Justices dissenting to Court's ruling that confession was involuntary); Haley, 332 U.S. at 597, 599, 601, 606-07 (four Justice plurality, one Justice concurring, and four Justices dissenting to Court's ruling that confession was involuntary); Malinski v. New York, 324 U.S. 401, 402, 420, 430, 434 (1945) (four Justice plurality, two Justices concurring in part and dissenting in part, and three Justices dissenting to Court's ruling that confession was involuntary); see also Caplan, supra note 3, at 1431-33 (describing the test for voluntariness as a "hybrid").

21. See Paul M. Bator & James Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 COLUM. L. REV. 62, 72-73 (1966) ("Judicial decisions speak in terms of the 'voluntariness' of a confession, but the term itself provides little guidance."); Lawrence Herman, The Supreme Court and Restrictions on Police Interrogation, 25 OHIO ST. L.J. 449, 457 (1964) ("Moreover, the sweep of the confessions rule is mitigated in practice by the Court's own adherence to the terminology of voluntariness which hides the values now underlying the confessions rule."); Arthur E. Sutherland, Jr., Crime and Confession, 79 HARV. L. REV. 21, 37 (1965) ("The underlying vice in the confession cases is the involuntary 'voluntariness' which until recently we have somehow come to think adequate to justify depriving a man of a deep-rooted constitutional privilege."); Weisberg, supra note 16, at 29 ("The ambiguous concepts of coercion and free choice have invited dispute.").

22. Watts, 338 U.S. at 53 (Frankfurter, J., plurality opinion); see also Ashcraft, 322 U.S. at 161 (Jackson, J., dissenting). Writing for the dissent, Justice Jackson made a similar argument:

To speak of any confessions of crime made after arrest as being "voluntary" or "uncoerced" is somewhat inaccurate, although traditional.
long as it was a "product of a sentient choice." But the decision to yield to pressure, even extreme pressure, represents such a choice, and so voluntariness might be read to exclude only those few confessions where the individual has been literally forced to speak. The Court rejected this extreme as well, however, and refused to read "voluntariness" to encompass choices "constrained" or "coerced" by undue physical or psychological pressures.

In part, the difficulties with applying the voluntariness standard to control psychological coercion were the result of the Court’s internal disagreements concerning the proper balancing of the interests of suspect and society, and of federal and state governments, at stake in the confession cases. The voluntariness test also called for a fact-intensive analy-

A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indignities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions, to answer them truthfully, and to confess if guilty.

Id.

23. Haley, 332 U.S. at 606 (Frankfurter, J., concurring).

24. See id. ("It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is 'voluntary' simply because the confession is the product of sentient choice. 'Conduct under duress involves a choice...'") (quoting Union Pac. R. Co. v. Public Serv. Comm’n, 248 U.S. 67, 70 (1918)); see also Bator & Vorenberg, supra note 21, at 72-73 ("Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives."); Joseph D. Grano, Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. Chi. L. Rev. 174, 182 & n.47 (1988) [hereinafter Grano, Schulhofer Reply] ("Even a person being tortured makes a conscious choice between yielding to the pressure and resisting further.").

25. See, e.g., Haley, 332 U.S. at 606 (Frankfurter, J., concurring).

26. See, e.g., Caplan, supra note 3, at 1434 ("The Court was, it is true, often divided in its judgments, but the fragmentation was less a by-product of the voluntariness standard than a reflection of deep cleavages in society that were at last becoming apparent."); cf. Edward L. Barrett, Jr., Police Practices and the Law—From Arrest to Release or Charge, 50 CAL. L. REV. 11, 14-15 (1962) (noting clash between proponents of constitutional values on one side and proponents of effective police practices on other); Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CAL. L. REV. 929, 938-40 (1965) (arguing that the Court should hesitate to impose its views on States, and suggesting that Court's recent moves to control state criminal procedure were "reminiscent of Lochner v. New York"); Sutherland, Jr., supra note 21, at 24-27 (noting the arguments that police interrogation is essential to effective policing); Roger J. Traynor, The Devils of Due Process in Criminal Detection, Detention and Trial, 33 U. CHI. L. REV. 657, 674-77 (1966) (noting the conflict between effective enforcement of privilege against self-incrimination and effective detection and prosecution of crime). Thus, decisions limiting, or dissents arguing for limits to, the scope of constitutional protections for criminal defendants typically re-
sis that: (1) inevitably led to a “swearing contest” between the defendant and the police as to the circumstances of the interrogation,\(^2\) (2) entailed substantial use of judicial resources, and (3) prevented effective appellate guidance and control of trial court application of the test.\(^2\)

\(^{27}\) See Charles J. Ogletree, Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda, 100 HARV. L. REV. 1826, 1834 (1987); see also Crocker v. California, 357 U.S. 433, 443-44 (1958) (Douglas, J., dissenting) (“The trial of the issue of coercion is seldom helpful. Law officers usually testify one way, the accused another.”); Schulhofer, supra note 17, at 870-71; David Sonenshein, Miranda and the Burger Court: Trends and Counter trends, 13 LOY. U. CHI. L.J. 405, 414 (1982). In an attempt to avoid undue involvement in the fact-finding process, the Court would rely only on “undisputed” facts in resolving the voluntariness issue. See, e.g., Catherine Hancock, Due Process Before Miranda, 70 TUL. L. REV. 2195, 2210-12 (1996) (noting “the Court’s refusal to consider claims of coercion that rested upon ‘disputed’ facts”). But this approach severely limited the Court’s ability to ensure that state and lower federal courts were abiding by the Court’s rulings.

\(^{28}\) See, e.g., Culombe v. Connecticut, 367 U.S. 568, 635-36 (1961) (Warren, C. J., concurring) (warning that general principles are of little help in resolving voluntariness issue, and suggesting that nature of issue effectively compels “a case-by-case approach”); see also New York v. Quarles, 467 U.S. 649, 683 (1984) (recounting some history of pre-Miranda analysis: “Difficulties of proof and subtleties of interrogation technique made it impossible . . . for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled. Courts . . . [nationwide] were spending countless hours reviewing the facts of individual custodial interrogations.”); YALE KAMISAR, A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test, in POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 41, 69-76 (1980); Yale Kamisar, Foreword: Brewer v. Williams A Hard Look at a Discomfiting Record, 66 GEO. L.J. 209, 234-35 (1977) (noting that the traditional litigation process typically produces a record inadequate to the task of making sensible judgments concerning the extent or nature of police pressure applied to a suspect); Ogletree, supra note 27, at 1834 (“The case-by-case analysis proved inadequate in a second way, because it provided the Court with scant opportunity to shape and direct the behavior of law enforcement officers.”); Schulhofer, supra note 17, at 869 (noting that the voluntariness test left police with little guidance); Weisberg, supra note 16, at 29 (noting that “the records in these cases usually contain very little information about the circumstances of the interrogation and even less information about the defendant’s state of mind”); White, Defending Miranda, supra note 2, at 7-8 (“But long before Miranda, it was widely recognized that, in most cases, the adversary process was not equipped to give anything close to an accurate picture of what happened at the police station.”); White, supra note 18, at 595-96, 598 (“[T]he un-
With the appointment of Chief Justice Warren in 1954, and Justice Brennan in 1958, the Court began to focus more closely on the psychological tactics associated with modern police interrogation practices. Initially, the Court attempted to address such tactics through a stricter application of the voluntariness standard. Despite the Court's repeated warnings concerning the importance of failing to apprise a suspect of his federal constitutional rights, however, state courts essentially ignored this factor in determining voluntariness. Faced with state courts that refused to penalize police officers for failing to apprise a suspect of his federal constitutional rights, the Court began to explore ways to impose predictability of the voluntariness test greatly limits its usefulness as a legal standard for the control of police trickery in interrogation. ... Beyond that, however, the 'totality of circumstances' test's fatal flaw is its failure to generate precedents that can serve as guidelines for the police and the lower courts.


30. See Haynes, 373 U.S. at 516-17 (ruling that finder of fact must expressly consider whether suspect was warned of constitutional rights prior to interrogation in making voluntariness determination); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (citing youth of defendant, coupled with extended isolation, as factors that likely would be psychologically coercive in obtaining a confession from a minor). In Spano, the Court stated:

The facts of no case recently in this Court have quite approached the brutal beatings in Brown v. Mississippi, 297 U.S. 278 (1936), or the 36 consecutive hours of questioning present in Ashcraft v. Tennessee, 322 U.S. 143 (1944). But as law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.

360 U.S. at 321; see also Payne, 356 U.S. at 566-67 (highlighting psychologically coercive tactics used to secure confession from a "19-year-old youth").

31. See Davis v. North Carolina, 384 U.S. 737, 739-40 (1966) (noting that "[t]here is no indication in the record that police advised [defendant] ... of his rights until after he had confessed orally on the 16th day" of custody and describing failure to warn as "a significant factor in considering the voluntariness of statements later made"); Miranda v. Arizona, 384 U.S. 436, 493-94 (1966) (discussing refusal of the trial court in Vignera to charge jury to consider whether warnings were given in determining voluntariness of confession); Haynes, 373 U.S. at 510-11 ("Nor is there any indication in the record that prior to signing the written confession, or even thereafter, Haynes was advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney."); Wilson v. United States, 162 U.S. 613, 623-24 (1896) (noting that failure to warn Wilson of his right to remain silent and to the assistance of counsel created a "conflict of evidence as to whether a confession is or is not voluntary," but not sufficient in this case to remove the question of voluntariness from the jury); HONORABLE NATHAN R. SOBEL, THE NEW CONFESSION STANDARDS: MIRANDA V. ARIZONA 20 (1966) (noting that "[s]tate courts gave that circumstance [e.g. failure to warn] very little weight" in determining whether a confession was coerced).

32. See White, supra note 18, at 598 (observing that "[b]y the early sixties, however, experience had demonstrated that the 'totality of circumstances' test was an ineffective means of preventing unacceptable police pressures").
rigid, inescapable warning requirements on police officials.

With the addition of Justice Stewart in 1959, five members of the Court appeared ready to look elsewhere for a means to address such coercion, and had expressed their opinion that the right to assistance of counsel placed limitations on police interrogation, at least where the questioning occurred after the defendant had been indicted.33 This position became the law in 1964, through the Court's decisions in Gideon v. Wainwright,34 Massiah v. United States,35 and Escobedo v. Illinois.36 These decisions worked together, first extending the application of the Sixth Amendment right to assistance of counsel to the States in Gideon v. Wainwright,37 and then, extending the Sixth Amendment right to counsel to police questioning that occurred prior to the initiation of judicial or adversarial proceedings in Escobedo.38 Although there was some reason for optimism that this approach, by effectively requiring the presence of counsel during police questioning, would constrain improper psychological coercion, it did not prove entirely satisfactory. First, the holding in Escobedo as to when the Sixth Amendment right to counsel attached was
The Erosion of Miranda

quite fact-intensive, and it became difficult to predict whether the Sixth Amendment had been violated when the facts differed in any significant respect from those in Escobedo. 39 Second, the application of the Sixth Amendment’s assistance of counsel requirement to police-suspect interrogations conducted at the pre-indictment stage represented a clear expansion of the Sixth Amendment right, 40 and therefore faced considerable resistance in both state and lower federal courts. 41

Although these difficulties with the Sixth Amendment approach could perhaps have been overcome, the Court turned instead to the Fifth Amendment’s proscription against compelled self-incrimination as the proper means of insuring that suspects are adequately protected against psychologically coercive interrogation tactics. The Fifth Amendment approach became a viable alternative in 1964, when the Court, in Malloy

39. See, e.g., State v. McLeod, 203 N.E.2d 349, 350-52 (Ohio 1964) (affirming conviction obtained with statements made in absence of counsel on remand from the Court’s suggestion that the decision be reconsidered in light of Massiah, because the Court said Massiah was limited to its facts), rev’d without op. 381 U.S. 356 (1965); see also Traynor, supra note 26, at 671-73 (noting the confusion that arose from the rule set forth in Escobedo).

40. See Escobedo, 378 U.S. at 493-94 (Stewart, J., dissenting) (observing that the Sixth Amendment’s guarantee of assistance of counsel had previously attached only after the criminal investigation had ended and adversarial proceedings had commenced); Traynor, supra note 26, at 668-69:

In extending the right to counsel to the prearraignment stage, the Court promulgated a rule not only of dim contours but also of hazy constitutional derivation from the [S]ixth [A]mendment. Though there had been a drift in this direction, there was scant warning that the Court would so swiftly take command . . .

Id. (footnote omitted); see also Donald C. Dowling, Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 143, 146-51 (1965) (tracing the evolution of the Sixth Amendment right to counsel from Betts v. Brady, 316 U.S. 455 (1942), to Gideon, Massiah, and Escobedo); Arnold N. Enker & Sheldon H. Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 49-53 (1964) (discussing the right to counsel before the Court decided Escobedo and Massiah); Friendly, supra note 26, at 942-48 (same); Herman, supra note 21, at 481-95 (same).

41. See, e.g., People v. Hartgraves, 202 N.E.2d 33, 35 (Ill. 1964) (finding that a denial of the right to counsel required both failure to warn defendant of his right to silence and a refusal of his request to consult an attorney); Campbell v. State, 384 S.W.2d 4, 7 (Tenn. 1964) (noting the statement of the trial judge in a colloquy with defense counsel concerning the admissibility of an oral confession, “‘and this court is not going to be bound by what the Federal courts have said about it’”); see also SOBEL, supra note 31, at 20-21, 27, 37, 46-47; Dowling, supra note 40, at 143, 145, 155 & n.82 (noting critiques of, and state court refusal to give a fair reading to, Escobedo); Traynor, supra note 26, at 669-73 (warning that an expansive reading of the Sixth Amendment’s right to assistance of counsel represents a serious threat to judicial authority and to effective police work).
v. Hogan,\(^4^2\) reconsidered its initial position\(^4^3\) and made the Fifth Amendment's privilege against self-incrimination applicable to the States by incorporation into the Due Process Clause of the Fourteenth Amendment.\(^4^4\) In this way, the stage was set for the Court to turn to the Fifth Amendment as the basis for its *Miranda* decision.

**II. MIRANDA**

In 1966, the Court heard argument in a quartet of cases that would become the now-famous decision, *Miranda v. Arizona*.\(^4^5\) In each of the four cases, the police had taken an individual into custody and questioned him, eliciting incriminating statements that were introduced into evi-

\(^4^2\) 378 U.S. 1 (1964).

\(^4^3\) See *supra* note 12 and accompanying text (discussing the Court's initial position that the Fifth Amendment's privilege against self-incrimination did not apply to the States, either directly, by virtue of the Privileges and Immunities Clause of the Fourteenth Amendment, or by virtue of the Due Process Clause of the Fourteenth Amendment); see also *Twining v. New Jersey*, 211 U.S. 78, 93, 99, 113-14 (1908), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964). In reversing this position, the *Malloy* Court observed that "[t]he Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy*, 378 U.S. at 5.

\(^4^4\) See *Malloy*, 378 U.S. at 3. In addition to concluding that the Fifth Amendment's privilege against self-incrimination was applicable to the States by virtue of the Fourteenth Amendment, the *Malloy* Court also ruled that the admissibility of confessions in either federal or state prosecutions would be examined under the federal standard set out in *Bram v. United States*, 168 U.S. 532, 542 (1897). See *Malloy*, 378 U.S. at 6-7 (quoting the *Bram* standard as "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment"); see also *supra* text accompanying notes 12-15. The *Malloy* Court noted that the shift to the federal standard, which the Court stated had already begun in several earlier cases, reflected the recognition that the Fifth Amendment's privilege was an "essential mainstay" of America's accusatorial criminal justice system. See *Malloy*, 378 U.S. at 7 (citing, in the following order, *Lisenba v. California*, 314 U.S. 219 (1941); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Malinski v. New York*, 324 U.S. 401 (1945); *Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Haynes v. Washington*, 373 U.S. 503 (1963)); see also *Traynor, supra* note 26, at 667. Some commentators viewed this shift to the Self-Incrimination Clause as a basis for excluding confessions in state criminal proceedings as being of questionable pedigree, because the Court had relied almost exclusively on the Due Process Clause to evaluate the admissibility of confessions in state proceedings in the years preceding the *Malloy* decision. See *Herman, supra* note 21, at 465-66 (describing *Malloy* as "a shotgun wedding of the privilege to the confessions rule"). But see *Sutherland, Jr., supra* note 21, at 35 ("When the Supreme Court on June 15, 1964, decided in *Malloy v. Hogan* that the privilege against self-incrimination, formulated in the [Fifth] [A]mendment, operates as a restriction on the states under the due process clause of the [F]ourteenth, the ruling should not have surprised anyone ... ").

dence at the individual's subsequent criminal trial; from their convictions, the individuals appealed, arguing that the statements given in response to police questioning were improperly admitted.46

In approaching these cases, there were several directions the Court could have taken in analyzing the admissibility of the incriminating statements. As three of the defendants had plausible arguments for overturning their convictions based upon the voluntariness standard, the Court could have used these cases to develop further the more rigorous voluntariness analysis it had begun to articulate in Haynes v. Washington.47 Alternatively, because each of the defendants had plausible claims under Escobedo that the questioning violated their Sixth Amendment right to assistance of counsel, the Court could have used these cases to define more specifically when the right to assistance of counsel at-

46. See id. at 445, 491-99 (describing the proceedings in each case).
47. See Haynes, 373 U.S. at 513-15. Of the four cases addressed in Miranda, the defendant in Stewart had the strongest argument that his confession was coerced under the voluntariness standard. See Miranda, 384 U.S. at 457. On the basis of a tip, police went to Stewart's home to arrest him. See id. at 497. While there, the officers obtained Stewart's consent to search the house and discovered several items taken from robbery victims. See id. At the time of his arrest, the police also arrested Stewart's wife and three people visiting his house. See id. Although there was no evidence to connect Stewart's wife or the other three visitors to the crimes, all five were held for nearly a week until Stewart finally confessed. See id. Further, Stewart steadfastly maintained his innocence through the first eight questioning sessions, and only confessed during the ninth session. See id.

While the circumstances surrounding Vignera's confession did not reveal excessive or otherwise improper police pressure under the traditional due process analysis, the trial court had refused to charge the jury that one factor for consideration in determining whether the statements were voluntary was the failure of the police to warn Vignera of his right to remain silent prior to questioning. See id. at 493-94. In Haynes, the Court had ruled that the failure to include the absence of warnings as a factor in determining voluntariness required reversal of a conviction based in part upon a confession. See Haynes, 373 U.S. at 517 ("Whatever independent consequence . . . [the failure to warn a suspect of his constitutional rights] may otherwise have, they are unquestionably attendant circumstances which the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession.").

Westover had, at least, a plausible argument that his confession was coerced under traditional voluntariness standards. See Miranda, 384 U.S. at 495. He had been in custody for over fourteen hours, and had been interrogated at length, by state and federal officers, before confessing. See id. at 495-96. On the other hand, Miranda had confessed readily after his arrest, making it difficult to find that his confessions had been coerced under the traditional voluntariness analysis. See id. at 491-92 (noting that Miranda confessed within two hours of his arrest and onset of questioning).
The Court chose neither of these paths, however. Instead, the Court relied upon the Fifth Amendment’s privilege against compelled self-incrimination, made applicable to the States in *Malloy*, as the basis for limiting the admissibility of confessions obtained by the questioning of individuals in police custody. Specifically, the Court held that when an individual is subjected to “custodial police interrogation,” police must follow certain procedural safeguards before evidence or statements obtained as a result of such interrogation can be used against the individual in a criminal trial. As the Court explained, unless other “fully effective means” were devised to apprise the individual of his rights, the following now-familiar warnings must be given prior to any questioning of an individual in custody: (1) that “he has a right to remain silent”; (2) “that any statement he does make may be used as evidence against him”; (3) “that he has a right to the presence of an attorney” prior to questioning and to have counsel present during any questioning; and (4) “that if he is indigent a lawyer will be appointed to represent him.”

In justifying its ruling, the Court explained that custodial interrogation exerts a practical compulsion to speak, that is, if not dispelled, a threat to the Fifth Amendment’s privilege against self-incrimination. With such custodial interrogation, an individual is “thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.” He is “questioned by police officers, detectives, or a prosecuting attorney in a room in which he [is] cut off from the outside world.” The Court de-

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48. See *Miranda*, 384 U.S. at 498 (noting that the California Supreme Court had reversed the conviction of Stewart because the questioning violated Stewart’s right to assistance of counsel under *Escobedo*); see also JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 296 (1997 ed.) (noting a statement made by the late John J. Flynn, Miranda’s lawyer before the Supreme Court, that he and others “had ‘agreed that the briefs should be written with the entire focus on the Sixth Amendment [right to counsel] because that is where the Court was headed after Escobedo,’ but ‘in the very first paragraph . . . Chief Justice Warren said [in effect], ‘It is the Fifth Amendment . . . that is at issue today.’” (alterations in original)).


50. See *Miranda*, 384 U.S. at 478-79.

51. Id. at 444, 471, 473, 479.

52. See id. at 478 (noting that “when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the [Fifth Amendment] privilege against self-incrimination is jeopardized”); see also Glennon & Shah-Mirani, supra note 18, at 813-14 (arguing that “incommunicado interrogation . . . casts doubt upon the voluntariness of a subsequently obtained confession”).


54. Id. at 445.
scribed this sort of questioning as “incommunicado interrogation of individuals in a police-dominated atmosphere.” For the Miranda Court, the isolation, the setting, the psychological ploys often used, and the trickery sometimes employed during custodial interrogation were “created for no purpose other than to subjugate the individual to the will of his examiner.” In such a setting, “no statement obtained from the defen-

55. Id.
56. See id. at 449 (quoting police manuals that observed that the “‘principle psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation’”). This tactic is effective because “[t]he subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.” Id. at 449-50 (quoting police manual).
57. See id. at 448. In the course of its decision, the Court relied heavily on FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962), as evidence of the techniques and tactics available to police to place psychological pressure on an individual to confess. See Miranda, 384 U.S. at 448-455. In applying these tactics, known collectively as the “third degree,” the Court identified “privacy”—the isolation of the individual with the police—as the central consideration. See id. at 449, 455. Once isolated, the officer can employ accusatory questioning techniques that assume the individual’s guilt, while minimizing the moral seriousness of the offense or offering legal excuses or pretended sympathy for the individual’s supposed actions. See id. at 450-51. If necessary, overt psychological ploys, such as the “Mutt and Jeff” approach, with a team of officers playing alternately sympathetic and hostile roles, or false accusation or other trickery can be employed. See id. at 452-53; see also Bator & Vorenberg, supra note 21, at 73 (listing deceptive practices police employ to obtain a confession). Once isolated, requests for an attorney or to speak with family can be ignored or used as a means for reemphasizing the individual’s need to speak, because the police are advised to use the following tactic: “[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation.”

Miranda, 384 U.S. at 453, 454 (quoting INBAU & REID, supra, at 57). If all else fails, simple persistence, with patient, relentless questioning, can eventually wear down an individual’s resistance. See id. at 451, 455 (citing CHARLES E. O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).
58. Miranda, 384 U.S. at 457. As the Miranda Court explained:

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

Requiring warnings at the outset of such questioning would, the Miranda Court believed, tend to dispel the inherently coercive atmosphere that would otherwise arise during custodial interrogation. To complement the required warnings and ensure that they could not be easily circumvented, the Court also crafted a number of parallel enforcement rules. Initially, once the warnings had been given, the police were not to question the individual unless he had made a voluntary, knowing, and intelligent waiver of his constitutional rights. If the "individual indicate[d] in any manner" that he wished to remain silent, either before or during questioning, then the interrogation had to cease. In addition,
to ensure that an individual was not penalized for exercising his Fifth Amendment privilege while undergoing police custodial interrogation, the *Miranda* Court barred the prosecution from using at trial the fact that the individual "stood mute or claimed his privilege in the face of accusation."65

Taken together, the warnings and these enforcement rules were intended to redress the "potentiality for compulsion" otherwise present in custodial interrogation, and thereby "protect precious Fifth Amendment rights."66 Although the Court recognized that this protection would come at some expense to "society's need for interrogation," the Court believed that the limits it placed on the interrogation process would "not constitute an undue interference with a proper system of law enforcement."67

III. INROADS ON *MIRANDA*

From the outset, *Miranda* met with something less than universal acclaim. In *Miranda* itself, four Justices dissented from the Court's decision, and at least one of the dissenters remained so adamant in his opposition to *Miranda* that he refused to accord the decision any weight under stare decisis years after it was rendered.68 Commentators and politicians

65. *Id.* at 468 n.37. This parallel enforcement rule reiterated the Court's holding in *Griffin v. California*, 380 U.S. 609 (1965), that a prosecutor in state court proceedings may not comment on a defendant's decision to remain silent. See *Griffin*, 380 U.S. at 614-15.

66. *Miranda*, 384 U.S. at 457. As the Court explained:

We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

*Id.* at 461.

67. *Id.* at 479, 481. The Court explained its conclusion:

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties.

*Id.* at 481.

68. *See id.* at 499 (Clark, J., dissenting in part); *id.* at 504 (Harlan, J., Stewart, J., and White, J., dissenting); see also *Orozco v. Texas*, 394 U.S. 324, 331 (1969) (Stewart, J., dissenting) (rejecting Justice Harlan's reluctant recognition of *Miranda*’s principles in later cases on the basis of stare decisis). Another dissenter, Justice White, was also intensely opposed to the *Miranda* decision, but in *Withrow v. Williams*, 507 U.S. 680 (1993), he pro-
proclaimed the decision a disaster for law enforcement, and attacked *Miranda* as an illegitimate and misguided instance of judicial fiat. With the appointment of Chief Justice Burger to replace Chief Justice Warren in 1969, and the addition of Justice Blackmun (initially, a conservative) in 1970, and Justices Powell and Rehnquist in 1971, the political balance on the Court shifted sharply. Chief Justice Burger, Justice Powell, and Justice Blackmun each replaced one of the Justices who had joined *Miranda*'s five Justice majority. These Justices, and Justice Rehnquist as well, largely shared the views of the *Miranda* dissenters. Yet, given that one of the central criticisms of *Miranda* was its activism and failure to abide by existing law, the new majority was unwilling simply to overturn *Miranda* as that would, in a sense, represent the very sort of activism it found so troubling about *Miranda* itself. A quick reversal of *Miranda* would not only hint at hypocrisy, but given the extent to which *Miranda* had, for good or ill, captured the public's attention, reversal would tend to reveal, to an uncomfortable extent, the Court as a political, rather than judicial, actor.  

Rather than overturn *Miranda*, the Burger and later Rehnquist Courts set about to limit its reach by interpreting *Miranda*'s requirements narrowly and crafting exceptions to its commands. To open the door for these approaches, and to provide the Court with the flexibility to treat *Miranda* as it saw fit, the Burger Court's most fundamental assault on *Miranda* involved questioning its constitutional pedigree.

### A. Miranda Deconstitutionalized

Even a superficial reading of the *Miranda* opinion reveals that the *Miranda* Court viewed its decision as an application of the Fifth Amendment's privilege against self-incrimination. In justifying the

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'A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.'

*Id.; see also* Sonenshein, *supra* note 27, at 461 (surmising that "[i]n *Tucker*, the Court even appeared to deny *Miranda*'s jurisprudential legitimacy, inexplicably failing to overrule the Warren Court holding, perhaps because protestations of awed respect for precedent bound the majority’s hands").

70. *See* Miranda, 384 U.S. at 442 (alluding to the Fifth Amendment in observing that "our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings"); *id.* at 445 ("The constitutional issue we
warnings and parallel enforcement rules, the *Miranda* Court began with the voluntariness standard, and the proposition that a confession is not admissible unless "truly the product of free choice." 71 The Court then examined the circumstances of in-custody interrogation, and found compulsion inherent in the process. 72 Unless this compulsion was somehow dispelled, "no statement obtained . . . [from in-custody interrogation] can truly be the product of [an individual's] free choice." 73 Through this reasoning, the Court equated the results of in-custody interrogation with statements unconstitutionally compelled, unless steps were taken to dispel the compulsion otherwise inherent in the custodial environment. 74 Toward this end, the *Miranda* Court devised the warning and parallel enforcement rules to dispel this compulsion and thereby "assure that the individual's right to choose between silence and speech remains unfettered." 75 Given this reasoning, the *Miranda* warnings and associated enforcement rules were not arbitrary constitutional embellishments in any sense, but were constitutionally required in order for statements obtained through in-custody interrogation to satisfy the dictates of the Self-
Incrimination Clause. As the *Miranda* Court explained, the requirement of warning a suspect about his federal constitutional rights and obtaining an informed waiver of those rights prior to custodial interrogation was “fundamental with respect to the Fifth Amendment privilege.” The Court continued to express this view in the early years after *Miranda*.

By the early 1970s, however, the membership and the politics of the Court had changed, and the Court itself began to express doubt as to *Miranda’s* constitutional basis. The view of *Miranda’s* requirements as something less than constitutional first appeared in 1974 in *Michigan v. Tucker*. Joined by one of the dissenters from *Miranda*, and the three Justices appointed since *Miranda* was decided, then-Justice Rehnquist, writing for the Court, suggested that *Miranda* had merely “recommended” a series of procedural safeguards, which were not themselves

76. See id. at 467. Although the *Miranda* Court was careful to acknowledge that the Constitution did not require “adherence to any particular solution” for providing a suspect with the necessary information and obtaining his informed waiver, “unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [described in *Miranda*] must be observed.” Id. The Court also explained that it was not attempting to create “a constitutional straightjacket,” and invited Congress and the States to devise equally effective procedures to protect individual’s rights. See id.

77. Id. at 476. Moreover, the *Miranda* decision itself clearly distinguished between its holding, and other constitutionally-required protections, and the protections afforded defendants in federal criminal trials established under the Court’s supervisory power. See id. at 463-65 (distinguishing between protections established under supervisory power over federal courts and constitutional protections required in state court proceedings); Oregon v. Elstad, 470 U.S. 298, 348 (1985) (Brennan, J., dissenting) (“*Miranda’s* requirement of warnings and an effective waiver was not merely an exercise of supervisory authority over interrogation practices.”); see also *Michigan v. Tucker*, 417 U.S. 433, 465-66 (1974) (Douglas, J., dissenting) (“*Miranda*’s purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated ‘constitutional standards for protection of the privilege’ against self-incrimination.” (emphasis in original) (quoting *Miranda*, 384 U.S. at 491)).

78. See, e.g., *Orozco v. Texas*, 394 U.S. 324, 326 (1969) (holding that “the use of these admissions obtained in the absence of the required [*Miranda*] warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment”); *Mathis v. United States*, 391 U.S. 1, 3 (1968) (observing that the *Miranda* opinion stated “at some length the constitutional reasons” for requiring the prescribed warnings prior to custodial interrogation).


80. See supra note 68 (noting the dissenting Justices in *Miranda*). Justice Stewart, one of the *Miranda* dissenters, joined Justice Rehnquist’s majority opinion in *Tucker*. See *Tucker*, 417 U.S. at 434. Justice White, another dissenter from *Miranda*, concurred separately, but also expressed doubt concerning *Miranda’s* constitutional stature. See id. at 460 (“For the reasons stated in my dissent in that case, I continue to think that *Miranda v. Arizona*, 384 U.S. 436 (1966), was ill-conceived and without warrant in the Constitution.”).

rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." In support of its view that Miranda warnings were not constitutional in origin, the Tucker Court, quoting Miranda, stated, "the Constitution [does not] necessarily require[] adherence to any particular solution for the inherent compulsions" associated with custodial interrogation. But the Tucker Court omitted the remainder of Miranda's discussion of this issue in which the Miranda Court unequivocally stated that unless equally effective procedures were used to protect individual rights, the Miranda safeguards "must be observed."

The theme that Miranda warnings were mere prophylactic safeguards that were not themselves required by the Constitution reemerged in later Court decisions. However, neither the Burger nor the Rehnquist Court has shown a willingness, as yet, to follow through on these comments. The Court has, for example, avoided the constitutional issue of how the Court could require the States to enforce Miranda if Miranda were not constitutional in origin. The Court has also avoided a similar issue

82. Id. at 443-44.
83. Id. at 444 (quoting Miranda, 384 U.S. at 467).
84. See Miranda, 384 U.S. at 467; see also supra text accompanying notes 50-59 & 66-67.
86. Cf. Tucker, 417 U.S. at 462 (Douglas, J., dissenting) (observing that "[t]he Court is not free to prescribe preferred modes of interrogation absent a constitutional basis"); see also OLP REPORT, supra note 2, at 526-27. The Office of Legal Policy of the United States Justice Department said the following concerning this issue:
There is, however, a more fundamental sense in which the doctrinal changes reflected in these decisions make it mysterious how Miranda can continue to be applied at all in a case in which Miranda is violated in an interrogation, but no actual compulsion takes place. Under the Supreme Court's current case law, no violation of the Fifth Amendment occurs at the interrogation in such a case...
Nevertheless, Miranda requires that [the suspect's statements] be excluded...

... [Under these circumstances, the Court] could preserve Miranda only by
raised by Title II of the Omnibus Crime Control and Safe Street Act of 1968, codified as section 3501 of title 18 of the United States Code. Enacted specifically in response to the Miranda decision, section 3501 appears to make voluntariness the exclusive prerequisite for a confession's admissibility in federal criminal trials. If so enforced, section 3501 would seem to conflict directly with Miranda, and thereby present a clear constitutional challenge: if Miranda was constitutional in origin, Congress would lack the authority legislatively to reverse it. On the other hand, if Miranda was not a constitutional mandate, then Congress could legislatively overrule it, thereby exposing the underlying constitutional issue of how the Miranda Court could impose the decision's requirements on the States in the first place. The Department of Justice avowing a supervisory power over the state courts . . . .


87. 18 U.S.C. § 3501(a)-(b) (1994) ("Admissibility of confessions").
88. See S. REP. No. 1097, at 41, 50-51 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2127, 2137 (criticizing Miranda and describing it as inflicting a "most disastrous blow to the cause of law enforcement in this country"). The Report also stated the following:

The committee is convinced from the mass of evidence heard by the subcommittee, much of which is printed in the transcript of hearings, that the rigid and inflexible requirements of the majority opinion in the Miranda case are unreasonable, unrealistic, and extremely harmful to law enforcement. Instance after instance are documented in the transcript where the most vicious criminals have gone unpunished, even though they had voluntarily confessed their guilt.

. . . The Committee aligns itself whole-heartedly with the view expressed by the dissenting Justices and with what it feels are the views of the vast majority of judges, lawyers and plain citizens of our country who are so obviously aroused at the unrealistic opinions such as the Miranda decision which are having the effect of daily releasing upon the public vicious criminals who have voluntarily confessed their guilt.

89. See 18 U.S.C. § 3501(a) (providing that "a confession . . . shall be admissible in evidence if it is voluntarily given").
90. See 18 U.S.C. § 3501(b). While section 3501 directed the court to consider as part of the voluntariness analysis whether the defendant had known or been advised of his right to remain silent and his right to assistance of counsel, the failure to apprise the defendant of his rights did not necessarily render any resulting confession inadmissible—an approach that directly contradicted Miranda. See id. ("The presence or absence of any of the above-mentioned factors [including notice of the right to remain silent and the right to counsel] . . . need not be conclusive on the issue of voluntariness of the confession.").
91. See City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress does not possess the legislative authority to supersede a Supreme Court decision construing the Constitution).
92. See Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (observing that with respect to cases tried in state courts, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"); see also OLP REPORT, supra note 2, at 543. The Office of Legal Policy argued that

[the current Court has repudiated the premises on which Miranda was based, but has drawn back from recognizing the full implications of its decisions. We
has been reluctant to press for resolution of this conflict, however, and when it has pressed the issue, courts have, until recently, found ways to avoid it, generally by finding that *Miranda* was satisfied in any event.¹³

are left with admittedly non-constitutional rules that continue to be applied in both federal and state proceedings, despite a contrary Act of Congress at the federal level and an admitted lack of supervisory authority to enforce such rules against the state courts.


93. Although President Johnson reluctantly signed section 3501 into law, he stated in his signing statement that he believed the section was unconstitutional, and his Attorney General, Ramsey Clark, instructed the U.S. Attorneys to offer into evidence only those confessions that satisfied *Miranda*’s dictates. See Daniel Gandara; *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts*, 63 Geo. L.J. 305, 311-12 (1974). With the arrival of the Nixon administration in 1969, the new Attorney General, John Mitchell, attempted to press for resolution of the issue of whether section 3501 had displaced *Miranda*’s requirements. See id. at 312. In the early 1970s, U.S. Attorneys raised the issue and pressed for its resolution in a number of cases, but the courts avoided the issue, generally by finding that *Miranda*’s requirements had been satisfied. See, e.g., United States v. Poole, 495 F.2d 115, 124 (D.C. Cir. 1974) (Leventhal, J., concurring) (“In view of the *Miranda* warnings and waiver, there is no need . . . [here] even remotely to consider whether . . . § 3501, which purport[s] to make a confession ‘admissible in evidence if it is voluntary’ are operative to rescue a confession that violates the constitutional rights safeguarded by *Miranda*.” (quoting 18 U.S.C. § 3501 (1994))); United States v. Vigo, 487 F.2d 295, 299 (2d Cir. 1973) (“Inasmuch as we hold defendant Vigo’s statements voluntary and admissible under the requirements of *Miranda* v. Arizona, they are similarly voluntary and admissible under the requirements of 18 U.S.C. § 3501. It is therefore unnecessary to reach the question of the application and constitutionality of § 3501.” (citation omitted)); United States v. Marrero, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, C.J., concurring) (assuming that the majority opinion did not intend to overrule *Miranda* or address its constitutionality); Ailsworth v. United States, 448 F.2d 439, 441 (9th Cir. 1971) (“We decline in this case to reach the issues presented by § 3501.”); United States v. Lamia, 429 F.2d 373, 377 (2d Cir. 1970) (same); Gandara, *supra*, at 313-16 (discussing the application of *Miranda* in federal and state courts). In terms of displacing *Miranda*, until recently, the most that has been accomplished was the Tenth Circuit’s ruling in United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975), where the court appeared to embrace section 3501. See id. at 1136-38. The panel’s endorsement of the section 3501 guidelines represented an alternative holding by the court, because the panel also found *Miranda*’s requirements to have been satisfied. See id. at 1138. Challenges to *Miranda*’s constitutional basis have recently begun to succeed, however. A Utah trial judge recently relied on Crocker’s alternative holding in upholding section 3501’s constitutionality, and applying its guidelines to determine the admissibility of the defendant’s
As a result, the apparent constitutional collision between section 3501 and *Miranda* remains unresolved.\textsuperscript{94} Further, when the proper characterization of *Miranda*'s constitutional stature could have made a substantive difference, Justice White and Justice Blackmun, both of whom had joined earlier Court decisions impugning *Miranda*'s constitutional stature,\textsuperscript{95} refused to use the "prophylactic" characterization to restrict habeas statements. See United States v. Rivas-Lopez, 988 F. Supp. 1424, 1436 (D. Utah 1997) (applying section 3501 to determine voluntariness despite apparent *Miranda* violation due to continued questioning after defendant had invoked *Miranda* rights). Consistent with many of the earlier cases, the Government had taken the "curious position" of agreeing with the defendant that section 3501 was unconstitutional, while the Safe Streets Coalition was given permission by the court to file an *amicus curiae* brief arguing in favor of section 3501's constitutionality. See id. at 1430.

94. The Fourth Circuit has recently held that section 3501's guidelines, rather than the *Miranda* requirements, represent the proper admissibility analysis in the federal courts, and refused to suppress an incriminating, but voluntary, statement given in violation of *Miranda*. See United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999). In *Dickerson*, the Government raised the section 3501 issue in its motion for reconsideration at the trial court level, but did not brief this issue in its interlocutory appeal to the Fourth Circuit. See id. at 680-81 (observing that the Department of Justice had taken the "unusual step" of prohibiting the U.S. Attorney's office from briefing the section 3501 issue). Notwithstanding the Government's failure to rely on section 3501, the Fourth Circuit upheld the statute as a legitimate exercise of "Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts." Id. at 692. The Fourth Circuit did not address the question of how *Miranda*'s requirements could have been imposed on the States if the decision lacked a constitutional basis.

Recent Supreme Court decisions suggest that at least some of the Justices may be ready to tackle this constitutional issue. See, e.g., United States v. Alvarez-Sanchez, 511 U.S. 350, 351 (1994) (describing section 3501 as "the statute governing the admissibility of confessions in federal prosecutions"). This comment from Justice Thomas, writing for the Court, appears to support the argument that section 3501, rather than *Miranda*, governs the admissibility of confessions in federal criminal prosecutions. Such a conclusion was unnecessary for the Court to reach in the context of the *Alvarez-Sanchez* facts, however, and, in fact, the Court thereafter continued to apply the *Miranda* analysis in prosecutions by the United States, perhaps, in part, because the Government continued to refuse to rely on section 3501. See Davis v. United States, 512 U.S. 452, 457 n.* (1994) (observing that the Government had not relied on section 3501 in arguing the case and that the Court would be "reluctant" to consider the applicability of this statute when "the Department of Justice expressly declines to take a position"). In his concurrence, Justice Scalia expressed his willingness to consider whether the confession in *Davis* was voluntary under section 3501. See id. at 464 (Scalia, J., concurring) (arguing that notwithstanding prudential concerns that would generally lead the Court to avoid consideration of arguments not raised by the Government, it would be appropriate to consider the applicability of section 3501 "when a case that comes within the terms of this statute is next presented to us"). Therefore, *Miranda*'s continued validity as constitutional doctrine may soon come before the Court.

review of alleged *Miranda* violations.96

Taken together, these indications of unwillingness to follow through on the language questioning *Miranda*’s constitutional status suggests that, at least for some members of the Court, such discussions are largely an exercise in judicial disparagement.97 These statements may set the stage for overruling *Miranda* at some point in the future, but for the present, they serve to undermine *Miranda* directly, by signaling courts that the present Court will not be overly concerned by unduly-narrow readings of *Miranda*, and indirectly, by providing both rationale and excuse for narrowing *Miranda*’s scope and implementation. Both the Burger Court, in the past and, more recently, the Rehnquist Courts have taken full advantage of the opportunity thereby created, as the following sections explore.

**B. Erosion of the Miranda Triggers: Custody and Interrogation**

In *Miranda*, the Court identified two triggers for determining when the *Miranda* warnings would be required: custody and interrogation.98 Because authorities are required to give *Miranda* warnings to any person who is subjected to custodial interrogation, the question of when a person is “in custody” and what constitutes “interrogation” are essential inquiries in the *Miranda* analysis. Further, as the gatekeepers for determining when *Miranda* warnings are required, the “custody” and “interrogation” requirements were especially vulnerable to narrow interpretations by those Justices who wished to limit *Miranda*’s reach.

**1. Custody**

Given the facts presented, the *Miranda* Court faced very little difficulty in finding that the four defendants in the cases before it were in cus-
tody. At the time of their confessions, three of the defendants had been arrested, while the fourth had been "picked up" by police; all four had been taken to a police station for questioning. The Court was not, therefore, faced with having to define the precise boundaries of the custody trigger. Nevertheless, the Court provided several guides that left little room to doubt that the custody trigger would encompass situations other than an arrested person at the police station.

First, in its general definition of custody, the Miranda Court explained that a suspect was "in custody" when he was "taken into custody or otherwise deprived of his freedom [by the authorities] in any significant way." On its face, this definition makes reference to neither arrest nor the police station, and in applying the definition, the Court ruled that the formality of arrest was not required for the custody trigger to be satisfied.

Second, in explaining the scope of its ruling, the Miranda Court referred to the warning practices of the Federal Bureau of Investigation, and to the warning practices prevalent in certain other countries and required in the United States under the Uniform Code of Military Justice. The Court noted that under these other systems of criminal justice, warnings were typically given or required for "both suspects and persons under arrest." The Miranda Court intended its warning requirement to be at least as protective as these.

99. See id. at 491-97 (noting that Miranda, Westover, and Stewart had been arrested, and that Vignera had been "picked up" by police and was arrested after his questioning).

100. Id. at 444, 478; see also id. at 477 ("The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.").

101. See id. at 493-94 (ruling that Vignera was in custody at the time of his initial questioning, even though he was not formally arrested until after his questioning).

102. See id. at 483-90 (referring to FBI practices, and warning requirements in England, Scotland, India, and Ceylon, and under the Uniform Code of Military Justice).

103. Id. at 484 (quoting letter from the Solicitor General that warnings are given by the FBI to suspects and persons under arrest at the outset of the interrogation); id. at 486-87 (stating that warnings are required under English law as soon as the police officer "has evidence that affords reasonable grounds for suspicion"); id. at 488 & n.59 (stating that in Scotland police interrogation is not permitted beyond "when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime"); id. at 489 (stating that "in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first [receiving proper warnings]").

104. See id. at 489 (reasoning that "it is consistent with our legal system that we give at least as much protection to these rights as [these other jurisdictions]"); see also id. at 486 ("The [warning] practice of the FBI can readily be emulated by state and local enforcement agencies.")
Third, in addition to defining the circumstances where warnings were required, the Court also gave examples of situations where the warning requirement was not implicated. In the course of this discussion, the Court distinguished between "an individual [who] is in custody on probable cause" and "persons not under restraint," and stated that under the ruling, the police were free to question the latter. Warnings also were not required for "[g]eneral on-the-scene questioning as to facts surrounding a crime," or when "a person . . . enters a police station and states that he wishes to confess to a crime." But if the individual had been "deprived of his freedom by the authorities in any significant way," the custody trigger was satisfied.

Despite these guidelines and the Court's attempt to provide a reasonably comprehensive definition of the custody trigger, the custody trigger suffered ambiguity in two areas: (1) whether police-initiated questioning of a suspect at a police station necessarily satisfied the custody trigger; and (2) whether the custody analysis extended beyond the police station.

In its early post-Miranda decisions, the Court seemed to assume that the answer to the first question was yes, and focused on answering the second question. In these decisions, the Court, while recognizing that Miranda focused on the types of psychological pressures that may be exerted on an individual isolated in unfamiliar surroundings, broadly interpreted the "in custody" requirement, and found an interrogee to be "in custody" even in a familiar setting. In Mathis v. United States, for example, Mathis was interrogated, without receiving Miranda warnings, by an Internal Revenue Service agent concerning possible criminal tax fraud, while he was serving a prison sentence on an unrelated state charge; he ultimately was convicted of criminal tax fraud based, in part, on statements he made to the agent. After losing at the appellate level, Mathis argued to the Supreme Court that his statements were not admissible under Miranda because he was in custody at the time the statements were made. The Court agreed, rejecting the Government's argument that the "in custody" requirement was offense specific. The Court

105. See id. at 477-78.
106. Id. at 477.
107. Id.
108. Id. at 478.
109. See id.
111. 391 U.S. 1 (1968).
112. See id. at 2-3.
113. See id. at 4. The Government argued that because Mathis had not been put into
stated that the Government's view of custody would "go[] against the whole purpose of the Miranda decision which was designed to give meaningful protection to Fifth Amendment rights." Even though Mathis was familiar with his jailhouse surroundings, he was nevertheless "in custody" for purposes of Miranda.

The following term, the Court again interpreted broadly the "in custody" requirement in Orozco v. Texas. In this case, Orozco was questioned at four a.m. in his bedroom about a murder that had occurred earlier in the evening. The key issue in the case was whether Orozco could be said to be "in custody" while he was questioned in the familiar surroundings of his bedroom. The Court answered this question affirmatively, noting that Orozco was under arrest and not free to leave when he was questioned.

jail by the officials who interrogated him, he was not entitled to receive Miranda warnings prior to questioning. See id. In so arguing, the Government favored a narrow view of custody that would focus on why the person was confined. See id. The Court, however, concluded that "[t]hese differences are too minor and shadowy to justify a departure from the well-considered conclusions of Miranda with reference to warnings to be given to a person held in custody." Id.

114. Id.

115. See id. at 4-5. The dissent argued that Mathis was not in custody because of his familiarity with his surroundings, in contrast with the concerns that motivated the adoption of Miranda: the "pressure to answer questions . . . [that] flows from . . . police station interrogation of someone charged with or suspected of a crime." Id. at 7 (White, J., dissenting).


117. See id. at 325. Orozco was questioned by four officers who gained admission to his boardinghouse by an "unidentified woman" who told them that Orozco was asleep in the bedroom. See id. The four officers entered Orozco's bedroom and, without apprising Orozco of the Miranda warnings, asked him questions regarding the following facts: his name, whether he had been to the cafe where the murder had occurred earlier that evening, whether he owned a pistol, and where the pistol was located. See id. Orozco gave incriminating responses to the officers' questions, which he later sought to have suppressed on the grounds that he was subjected to custodial interrogation in his bedroom without the benefit of Miranda warnings. See id. at 325-26.

118. See id. at 327. Central to the Court's holding was the fact that one of the officers testified that from the moment Orozco identified himself, Orozco "was under arrest and not free to leave." Id. It is unclear whether the officer related this fact to Orozco during questioning, however. These facts highlight the uncertainty that existed in the early years after Miranda concerning the standard to be used in determining custody: the subjective intentions of the officer to take the individual into custody; the subjective belief of the interrogee that he is in custody; or an objective analysis—whether a reasonable person in the interrogee's position would conclude that he is in custody. The Court addressed this confusion in Berkemer v. McCarty, 468 U.S. 420 (1984), and concluded that custody is an objective inquiry in which a court should consider "how a reasonable man in the suspect's position would have understood his situation." Id. at 442. The Court recently reiterated this view in Stansbury v. California, 511 U.S. 318, 323 (1994) (noting that the custody determination "depends on the objective circumstances of the interrogation, not on the sub-
Although they interpreted broadly the circumstances under which *Miranda* warnings were required, *Mathis* and *Orozco* also illustrate the principal internal disagreement on the Court in the early years after *Miranda*. The majority focused on whether the circumstances of the questioning exerted upon the individual a practical compulsion to speak, regardless of where the interrogation took place. The dissent, on the other hand, concentrated on the location of the interrogation, focusing specifically on the fact that the interrogation did not take place at the station house, in concluding that the interrogee was not in custody. Even assuming that *Miranda* had been correctly decided, the dissent saw *Miranda*, at most, as a remedy to dispel the supposedly intimidating atmosphere of the police station, and argued that the majority's opinion expanded the circumstances under which *Miranda* warnings would be required beyond any plausible justification. Both the majority and dissent seemed to take for granted that the custody trigger would be implicated by any police-initiated station house interrogation, leaving how far beyond the station house the custody analysis would extend as the principal dispute.

With the appointments of Chief Justice Burger in 1969, Justice Blackmun in 1970, and Justices Powell and Rehnquist in 1971, the politics of the Court shifted considerably, and shortly thereafter, the Court began to reorient the “in custody” analysis. In doing so, the Court moved away

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119. See supra notes 110-18 and accompanying text (discussing the Court's opinions in its early post-*Miranda* decisions).

120. See *Orozco*, 394 U.S. at 329-30 (White, J., dissenting); see also *Mathis*, 391 U.S. at 7 (White, J., dissenting). Three Justices dissented in *Mathis* on the grounds that the *Miranda* decision was not supported by the history or language of the Fifth Amendment, and because they perceived *Miranda*’s cost to society as unreasonably high. See *Mathis*, 391 U.S. at 5 (White, J., dissenting). These Justices went on to observe that even if *Miranda* had been correctly decided, the *Mathis* majority erred in applying *Miranda* to interrogation outside the station house. See id. at 7-8 (noting that “[t]he rationale of *Miranda* has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation”). In *Orozco*, two dissenting Justices again criticized *Miranda*, and went on to protest its application outside the police station. See *Orozco*, 394 U.S. at 329 (White, J., dissenting) (“If there is any warrant to *Miranda* at all, it rests on the likelihood that in a sufficient number of cases exposure to station house practices will result in compelled confessions and that additional safeguards should be imposed in all cases to prevent possible erosion of Fifth Amendment values.”).

121. See, e.g., *Orozco*, 394 U.S. at 329-30 (White, J., dissenting). The *Orozco* dissent, for example, viewed the majority's position as a significant departure from *Miranda* because none of the concerns that moved the *Miranda* majority were present during Orozco's interrogation: Orozco was interrogated for a short period of time (only four questions were asked), Orozco's surroundings were familiar, and the police avoided the psychologically coercive tactics discussed in *Miranda*. See id. at 330 (arguing that the majority's holding represents "dilution of the custody requirements of *Miranda*").
from both the majority and dissenting views of the early post-\textit{Miranda} decisions, and began to emphasize the formality of arrest as the determinative “in custody” issue.\footnote{122} As arrest or arrest-like circumstances became the central consideration, the question was no longer how far beyond the station house the custody analysis would apply, but whether it would apply even at the station house.\footnote{123}

The Burger Court began this reorientation by substantially restricting application of the custody trigger beyond the station house in its first case dealing with the “in custody” issue, \textit{Beckwith v. United States}.\footnote{124} Prior to \textit{Beckwith}, a number of courts had extended the custody analysis beyond the station house in those instances where the police were interrogating an individual that they had reasonable grounds to believe may have committed the crime or on whom the investigation had come to focus.\footnote{125} Courts derived this focus factor from language in \textit{Escobedo} that identified whether an “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect,” as a consideration relevant to determining the time at which the Sixth Amendment’s right to assistance of counsel attached.\footnote{126} \textit{Miranda} had seemingly

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\item \textit{Escobedo v. Illinois}, 378 U.S. 478, 490-91 (1964). The \textit{Escobedo} Court explained as follows:

\begin{quote}
We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied “the Assistance of Counsel” in violation of the Sixth Amendment to the Constitution as “made obligatory upon the States by the Fourteenth Amendment. . . .”
\end{quote}
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122. \textit{See infra} notes 124-52 (discussing the change in determination of what constitutes “in custody”).
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123. \textit{Cf. Illinois v. Perkins}, 496 U.S. 292, 299 (1990) (“The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.”).
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125. \textit{See, e.g.}, Windsor v. United States, 389 F.2d 530, 534 (5th Cir. 1968) (finding custodial interrogation where “[t]he focus of the investigation was clearly and unmistakably upon [the defendant],” even though police informed defendant that “he was not under arrest before” the interrogation); People v. Glover, 276 N.Y.S.2d 461, 466-67 (N.Y. Sup. Ct. 1966) (“Moreover, whatever else Miranda may have intended ‘custody’ to mean, this much is apparent—police questioning of a person wherever detained, upon whom suspicion has already focused, appears ruled to be ‘custodial interrogation[].’”); Commonwealth v. Sites, 235 A.2d 387, 390-91 (Pa. 1967) (finding custodial interrogation where defendant was questioned by police in his own home at time when “he was strongly suspected of participation in the crime”). Such a suspect was said to be the “focus” of the investigation. \textit{See Windsor}, 389 F.2d at 534.
\footnotesize
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incorporated this aspect of Escobedo into its definition of “custodial interrogation” through its footnote four.\footnote{127} Immediately after Miranda, courts recognized this connection and generally required Miranda warnings when the individual being questioned was the focus of an investigation,\footnote{128} but not where the police were merely seeking information from the individual or conducting on-the-scene questioning.\footnote{129}

In Beckwith, the Court rejected the focus argument. Beckwith was a suspect in a criminal tax fraud investigation, and was interviewed by agents of the Intelligence Division of the Internal Revenue Service at a private home where Beckwith sometimes stayed.\footnote{130} Beckwith argued that

\ldots We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate \ldots.

\textit{Id.} at 490-91, 492 (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)).

\footnote{127} See Miranda v. Arizona, 384 U.S. 436, 444 & n.4 (1966) (“This [custodial interrogation] is what we meant in Escobedo when we spoke of an investigation which had focused on an accused.”).

\footnote{128} See, e.g., Windsor, 389 F.2d at 534; Sites, 235 A.2d at 389-91; Glover, 276 N.Y.S.2d at 467-68. One commentator has stated:

The prime inquiry is into the existence of probable cause. If indeed the police officer had probable cause to arrest, his protestations that the person detained was “free to go” must be ignored. It must be presumed that a police officer will do his duty; if he has probable cause, he will arrest. The existence of probable cause establishes “custody.” Any other rule would permit the frustration of Miranda’s commands.

\textit{Sobel, supra} note 31, at 61.

\footnote{129} See, e.g., Menendez v. United States, 393 F.2d 312, 318 (5th Cir. 1968) (finding defendant’s statements admissible when made at a time that “the investigation was exploratory and not at the ‘accusatory state’”); People v. Merchant, 67 Cal. Rptr. 459, 461-63 (Cal. Ct. App. 1968) (ruling that police questioning did not require Miranda warnings where “[t]he commission of any crime was as yet unknown” and “[t]he interest of the police in the suspect was purely exploratory”); State v. Phinis, 430 P.2d 251, 256 (Kan. 1967) (finding statements made in response to police questioning admissible because the questioning was a “general inquiry . . . for the purpose of determining if a crime had been committed” and “the inquiry into such had not focused on any particular suspect”), disapproved on other grounds, 433 P.2d 538 (Kan. 1967); State v. Tarrance, 211 So. 2d 304, 308-09 (La. 1968) (“[I]t was required that appellant be advised of his constitutional rights at the time the investigation of Mrs. Millien’s death ceased to be exploratory in nature, i.e., when the officers focused their attention on appellant as the guilty party . . . and sought to secure inculpatory statements from him.”); see also \textit{Sobel, supra} note 31, at 62 (noting that “interrogation may be found ‘non-custodial’ only when it is perfectly evident that the police were clearly investigating to determine whether a crime had been committed or who had committed it,” and stating that “[t]he basic inquiry is ‘Were the police merely seeking information from the person detained or had suspicion sufficiently focused to establish an intent to detain?’”).

\footnote{130} See Beckwith v. United States, 425 U.S. 341, 342 (1976). The agents identified themselves to the person who answered the door, and were invited into the house. \textit{See id.} While the agents were inside the house, Beckwith was permitted to move about unhin-
his statements during the interview and any evidence derived from those statements should be suppressed because he was the "focus" of a criminal investigation at the time he was questioned, and had not received the warnings required by Miranda. The Court refused to suppress Beckwith's statements, finding that while Beckwith may have been the "focus" of a criminal investigation, he was not in custody for purposes of Miranda; therefore, the agents were not required to provide him with Miranda warnings prior to questioning.

In several respects, Beckwith was an easy case for the Court to decide because Beckwith received partial Miranda warnings, and was interviewed in a "relaxed" and "friendly" atmosphere at his friend's home. The coercion that exists when a person is questioned alone in an unfamiliar environment, some of the concerns that motivated the Miranda Court, simply were not present in Beckwith. This aspect of Beckwith is perfectly consistent with the cases interpreting Miranda up to that time. By rejecting the "focus" argument, however, Beckwith departs significantly from the earlier decisions. After Beckwith, police were no longer required to give Miranda warnings to an individual that they suspected of committing the crime, thereby permitting police to engage in accusatory questioning of the suspect, at least where the interrogation took place.

131. See id. at 343. The agents gave Beckwith incomplete Miranda warnings, which Beckwith waived, and then interviewed Beckwith for about three hours in a "relaxed" and "friendly" atmosphere. See id. The agents asked to examine certain of Beckwith's records, which Beckwith indicated were at his place of employment. See id. at 343-44. The agents warned Beckwith that he was not required to furnish the records to the agents, but Beckwith nevertheless agreed to provide the records. See id. at 344. At the conclusion of the interview, the agents permitted Beckwith to drive his own vehicle to his place of employment, where the agents met him in order to retrieve the records. See id.

132. See id. at 344, 346-47. The Court recently reiterated its rejection of the focus argument in Stansbury v. California, 511 U.S. 318 (1994), holding that an officer's subjective and undisclosed view that the interrogee is a suspect is irrelevant to the custody analysis. See id. at 323-24. The Court went on to note that the officer's beliefs or knowledge, when conveyed to the suspect by word or deed, were relevant to the custody issue "only to the extent they would affect how a reasonable person in the [interrogee's] position" would view his "freedom of action." Id. at 325 (internal quotation marks omitted).

133. See supra note 130 and accompanying text (describing the facts in Beckwith).

134. In many of the pre-Beckwith cases, courts had found that interrogation in familiar surroundings, such as the person's home or the home of a familiar third person, was an important factor in concluding that the person was not in custody at the time of questioning. See, e.g., Truex v. State, 210 So. 2d 424, 425 (Ala. 1968) (finding that defendant was not in custody when, among other factors, he was questioned in his home); Phinis, 430 P.2d at 253, 256 (finding that defendant was not in custody when, among other factors, she was questioned in a cabin that she occupied); Tarrance, 211 So. 2d at 306, 309 (finding that defendant was not in custody when, among other factors, he was questioned at home of an "intimate friend" who he planned to marry).
outside the station house. In so ruling, Beckwith significantly narrowed the circumstances under which Miranda warnings would be required outside the station house.

Having limited the application of Miranda outside the station house, the Court began in succeeding years to limit the application of Miranda in cases involving interrogations within the station house. This trend began in the year following Beckwith, in Oregon v. Mathiason, where the Court considered whether station house interrogation of an individual who had become the "focus" of an investigation must be preceded by Miranda warnings. The Oregon Supreme Court had determined that Mathiason was in custody at the time the interrogation occurred, and had ruled that Miranda warnings were, therefore, required. The Court summarily reversed; it was not persuaded that Mathiason was "in custody" simply because his interrogation had taken place at the police station, nor was it persuaded that Mathiason was "in custody" because he had become the focus of the investigation. Instead, the Court analyzed

135. While accusatory questioning would likely not represent a due process violation, the Miranda Court observed that it is a police interrogation tactic that contributes to the police-dominated atmosphere that Miranda warnings were meant to dispel. See Miranda v. Arizona, 384 U.S. 436, 450 (1966) ("The guilt of the suspect is to be posited as a fact."). Notwithstanding the Miranda Court's observation, the Court has recently held that accusatory questioning at the station house may not render an individual in custody for purposes of Miranda. See Stansbury, 511 U.S. at 325 ("Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").


137. See id. at 493-94. In this case, Mathiason, a parolee, was a suspect in a residential burglary. See id. at 493. After several attempts to reach Mathiason at his apartment, the police officer left his card at the apartment with a note asking Mathiason to call in order to "discuss something." Id. When Mathiason called, the officer asked where it would be convenient to meet; when Mathiason expressed no preferences, the officer arranged to meet Mathiason at the police station. See id.

When Mathiason arrived at the police station, the officer shook hands with him and told Mathiason he was not under arrest. See id. The officer led Mathiason to a room for questioning, and closed the door. See id. The officer told Mathiason that he was a suspect in a burglary, and stated falsely that Mathiason's fingerprints had been recovered from the burglary scene. See id. The officer also stated that Mathiason's "truthfulness would possibly be considered by the district attorney or judge." Id. Within five minutes of Mathiason's arrival at the station house, he gave a confession. See id. The officer then apprised Mathiason of his Miranda rights, and took a taped-recorded confession. See id. at 494. At the end of the interview, Mathiason was told he was free to leave and that he was not being arrested at that time. See id.

138. See id. at 492, 494.

139. See id. at 495. As the Court explained: "Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." Id.
the custody issue exclusively in terms of whether Mathiason had been under arrest or suffered a restraint on his freedom of movement at the time the interrogation occurred.\textsuperscript{140} Under this interpretation of the custody trigger, the critical facts were that Mathiason (1) "came voluntarily to the police station;" (2) "was immediately informed that he was not under arrest;" and (3) was allowed to leave the station house at the end of the interview.\textsuperscript{141} Therefore, it was simply irrelevant that Mathiason had come to the police station in response to a police request, was interviewed by a police officer in isolation, was falsely informed that the police had evidence incriminating him in the crime, and was a parolee under supervision.\textsuperscript{142} These factors may establish that Mathiason’s interrogation took place in a "coercive environment," but according to the Court, they had "nothing to do with whether respondent was in custody for purposes of the Miranda rule."\textsuperscript{143}

The Court continued on this path and further narrowed the "in custody" analysis in \textit{California v. Beheler}.\textsuperscript{144} In this case, Beheler and several others attempted to steal illegal drugs from a drug dealer. When the drug dealer resisted, Beheler’s companion shot and killed her. Shortly thereafter, Beheler called the police to report the crime and to advise them that the murder weapon had been hidden in Beheler’s backyard.\textsuperscript{145} Beheler consented to a search of his backyard, and the police recovered the weapon. Beheler later agreed to accompany the police to the station, although he was specifically told that he was not under arrest.\textsuperscript{146}

At the station, Beheler agreed to discuss the murder, although he was not apprised of his \textit{Miranda} rights.\textsuperscript{147} The interview lasted less than thirty minutes, and after the interview, Beheler was permitted to leave the station. Five days later, Beheler was arrested in connection with the murder. After the arrest, Beheler was advised of his \textit{Miranda} rights, which he waived, and gave a second tape-recorded confession in which he

\textsuperscript{140} See \textit{id.} at 495. The Mathiason Court explained its refusal to consider the possible coercive effects of the police station environment through the following observation: "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} See \textit{id.} at 493, 495.

\textsuperscript{143} See \textit{id.} at 495-96.

\textsuperscript{144} 463 U.S. 1121 (1983).

\textsuperscript{145} See \textit{id.} at 1122.

\textsuperscript{146} See \textit{id.}

\textsuperscript{147} See \textit{id.}
stated that his earlier statement to the police had been voluntary.\textsuperscript{148}

Although these facts bear some similarity to those in Mathiason, there are several key differences. First, in Mathiason, the defendant had come to the police station under his own power in response to a note left on his door.\textsuperscript{149} In contrast, the police in Beheler were physically present when they asked Beheler to accompany them to the police station, and Beheler was apparently taken to the station house by the police. Second, at the time of the "request" that Beheler "accompany" them to the station, the police in Beheler had probable cause to arrest Beheler for his participation in the crime under investigation. If Beheler had refused to "come along," the police could simply have forced him, and Beheler was almost certainly aware of that reality when he "agreed" to accompany them.

For these and other reasons, the California Court of Appeal had distinguished Mathiason, ruling that, because Beheler was in custody at the time his first statement was made, he was entitled to Miranda warnings; his failure to receive them necessitated reversal of his conviction.\textsuperscript{150} On certiorari, the Court was not persuaded that the case was materially different than Mathiason and summarily reversed.\textsuperscript{151} In doing so, the Court

\textsuperscript{148} See id.

\textsuperscript{149} See supra note 137 (discussing the facts in Mathiason).

\textsuperscript{150} See Beheler, 463 U.S. at 1122-23. Among other factors, the California appellate court focused on the fact that Beheler was questioned at the police station. See id. at 1123. It distinguished Mathiason on the grounds that "Beheler was interviewed shortly after the crime was committed, had been drinking . . . and was emotionally distraught" at the time of the interrogation. Id. at 1124-25. The court also noted that the police had substantially more information about Beheler at the time of questioning than did the police in Mathiason, and that because Mathiason was a parolee, he was obligated to cooperate with the police. See id. at 1125.

The fact that Mathiason was a parolee actually cuts both ways on the custody issue. See Oregon v. Mathiason, 429 U.S. 492, 500 (1977) (Stevens, J., dissenting). As Justice Stevens observed, the State on the one hand has greater authority to question a parolee about his activities than to question the average citizen. See id. On the other hand, however, a parolee is technically in custody until his sentence has been served, so under a formalistic analysis of the custody issue, the parolee should always receive Miranda warnings prior to questioning. See id. Justice Stevens observed that:

*Miranda* teaches that even if a suspect is not in custody, warnings are necessary if he is "otherwise deprived of his freedom of action in any significant way." If a parolee being questioned in a police station is not described by that language, today's decision qualifies that part of *Miranda* to some extent.

\textsuperscript{151} See Beheler, 463 U.S. at 1121-22.
introduced a custody standard that rigidly construed the custody question. The Beheler Court concluded that although it was proper for a court to consider the circumstances of each case, “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”

The effect of the Court’s decisions in Beckwith, Mathiason, and Beheler is to narrow significantly the Miranda concept of custody. After Beheler, a person will be said to be “in custody” only if the person has been formally arrested, or the situation has come to resemble a formal arrest. This definition amounts to a redundancy: Miranda’s reference to “custody” now means “formal arrest,” while Miranda’s discussion of “otherwise deprived of his freedom of action in any significant way” now means circumstances that look like a formal arrest. After Beckwith, police may question without Miranda warnings, even in an accusatory manner, the prime suspect in an investigation, and based upon Mathiason, may trick the suspect by presenting him with false evidence of his guilt in hopes of eliciting incriminating statements. Moreover, the interrogation may take place at the station house, so long as the suspect is told he is not under arrest and may leave at anytime.

152. Id. at 1125 (quoting Mathiason, 429 U.S. at 495). The Court cited Mathiason for the proposition that custody means “‘formal arrest or restraint on freedom of movement’” to a degree associated with formal arrest. See id. However, when this language is examined in the context of the Mathiason decision, the Mathiason Court is merely explaining that a “coercive environment” is not enough to satisfy Miranda’s custody requirement. See Mathiason, 429 U.S. at 495 (“Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a ‘coercive environment.’”). In extending this explanation, the Mathiason Court was not attempting to limit the definition of “in custody” to formal arrest or situations that resemble formal arrest.

153. Miranda defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda v. Arizona, 384 U.S. 436, 444 (1966).

154. Id.

155. See Beheler, 463 U.S. at 1125. Whether Beheler’s reference to “freedom of movement” in contrast with Miranda’s discussion of “freedom of action” will place an additional restrictive limitation on the “in custody” question remains to be seen.

156. See supra text accompanying notes 135 and 142.

157. While it was significant to the Mathiason and Beheler Courts that the suspects in both cases had been told they were free to leave the station and were not arrested at the conclusion of questioning, this does not appear to be an absolute prerequisite to a finding that the suspect was not in custody. In Stansbury v. California, 511 U.S. 318, 320, 326-27 (1994), the Court reversed a state court’s holding that Stansbury was “in custody” when he was questioned at a police station in connection with a homicide to which he was a possible witness. Stansbury agreed to the interview and rode to the police station in the front seat of the police car. See id. at 320. It does not appear that Stansbury was ever told that
By limiting custody to arrest and arrest-like situations, the Court has narrowed substantially the circumstances under which *Miranda* warnings will be required. If an individual is not in custody simply because police informed him that he may terminate the interrogation and leave the station house, we can be assured that police will be trained to make this recital. However, the fact that such a recital has been murmured has no true bearing on how an individual undergoing station house interrogation perceives his status. Few individuals, even the hypothetical "reasonable person," would likely believe that they were free to end an interrogation and leave if they were confronted with false "evidence" or accused of committing a crime. The compulsion to speak under such he was free to leave, however, and he was arrested after giving incriminating statements during the interview. See id. at 320-21. Further, the fact that during the course of the interview the officer became suspicious that Stansbury was the perpetrator of the crime did not, by itself, render Stansbury in custody. See id. at 324. So long as the officer’s views that the suspect is no longer free to leave remain undisclosed to the suspect, the suspect is not "in custody" for *Miranda* purposes. See id. at 324-25 (permitting police actually to accuse the interrogee of the crime: "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest.").

In addition to whether the police officer advises the suspect that he is free to leave, several courts have incorporated into the totality of the circumstances analysis the consideration of whether a reasonable person would have felt free to terminate the interrogation and leave. See, e.g., *United States v. Salvo*, 133 F.3d 943, 949 (6th Cir. 1998) (considering that courts, in determining whether suspect is "in custody," may inquire into whether a reasonable person in that suspect’s particular circumstances would have felt free to leave). This "free to leave" component of the custody question finds support in the Court’s recent *Thompson v. Keohane* decision, in which the Court noted that the "in custody" analysis turned on whether "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." 516 U.S. 99, 112-13 (1995) (footnote omitted) (making the above observation in a case which held that the "in custody" issue is a mixed question of law and fact that is subject to independent review by a federal habeas court). While the "free to leave" inquiry should, at most, represent only one factor in the "in custody" analysis, it seems likely that this will become the dispositive consideration in non-*Terry* cases, as it is a question that can be easily addressed by courts with a minimum expenditure of judicial resources. The danger, however, is that it is also a question that is susceptible to results-oriented decisionmaking by the courts.

158. Police are also well aware of the importance of fostering a congenial atmosphere by providing bathroom breaks, soft drinks, and permitting smoking. These police efforts would be intended to address the question of whether a reasonable person would feel free to terminate the interrogation and leave. See *Keohane*, 516 U.S. at 112 (noting that the existence of custody turns on whether a reasonable person would feel free to leave).

159. Courts have not always accepted the self-serving statements of police officers as being indicative of what a person might reasonably believe. See *Windsor v. United States*, 389 F.2d 530, 532, 534 (5th Cir. 1968) (concluding that Windsor had been in custody when interrogated in his motel room despite FBI agent’s statement to Windsor that "he was not under arrest and was not being detained in any way and was not to construe this [the interrogation] as being detained," because the agents had probable cause to arrest Windsor at the time of the interrogation; "[t]he Government agents' testimony that Windsor was not a
circumstances in an attempt to clear oneself would presumably be overwhelming. These are the precise concerns that motivated the *Miranda* Court: reducing the practical compulsion to speak that arises in a police-dominated atmosphere where the suspect has not been fully apprised of his federal constitutional rights.

Through the tactics used to avoid an "in custody" finding and, thereby, avoid *Miranda* requirements, the police may actually be creating an environment that is at least as psychologically compelling as what typically existed at the time *Miranda* was decided. Police may isolate the individual and question him at the police station. Police may use sympathy, display antagonism toward the victim, and appear to be on the suspect's side as if looking for a way to exclude him from suspicion, all without apprising the suspect that, in fact, the officer is his adversary or potential adversary. Since the average member of the public has largely come to believe that he is not in any irredeemable trouble with the law until given the *Miranda* warnings, the Court's interpretation of the "in custody" trigger enables police to capitalize on this misconception and encourage the suspect to "explain himself" into a conviction.

In addition to the doctrinal narrowing of the custody trigger, lower courts cannot help but to have noticed the shifting direction in the Court's approach to *Miranda* custody issues. Where, in the first years after *Miranda*, the Court consistently reversed appellate decisions for defining custody too narrowly, the Court since the mid-1970s has almost

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suspect and not under arrest when questioned in his motel room is belied by the facts of the case. We cannot permit the *Miranda* principles to be so easily frustrated.

160. See INBAU & REID, supra note 57, at ix (listing various interrogation techniques, with titles such as "Sympathize with the Subject by Telling Him That Anyone Else [U]nder Similar Conditions or Circumstances Might Have Done the Same Thing," "Reduce the Subject's Guilt Feeling by Minimizing the Moral Seriousness of his Offense," "Suggest a Less Revolting and More Morally Acceptable Motivation or Reason for the Offense Than That Which Is Known or Presumed," "Sympathize with the Subject by (1) Condemning His Victim, (2) Condemning His Accomplice, or (3) Condemning Anyone Else [u]pon Whom Some Degree of Moral Responsibility Might Conceivably Be Placed for the Commission of the Crime in Question," and "Utilize Displays of Understanding and Sympathy in Urging the Subject to Tell the Truth").

161. Cf., e.g., Adedeji v. United States, 782 F. Supp. 688, 700 (D. Mass. 1992) (describing, in a border search context, that the customs inspectors read the suspect her *Miranda* warnings, "giving her the impression that she was about to be arrested").

162. Even an innocent person may lie to avoid disclosing personal information or an embarrassing fact in what otherwise seems to be a cordial discussion, not realizing that the lie may be used at a later criminal prosecution to help prove his guilt. See, e.g., Crooker v. California, 357 U.S. 433, 447 (1958) (Douglas, J., dissenting) ("The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of the crime. He may be implicated by ambiguous circumstances difficult to explain away."), overruled in part on other grounds by Escobedo v. Illinois, 378 U.S. 478 (1964).
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universally taken the opposite stance, consistently reversing appellate decisions for defining custody too broadly. Supreme Court decisions invariably provide not only specific doctrinal rules, but also a sense of the direction in which the Court desires to move. Attuned to these subtextual signals, lower courts have embraced the Court's new direction, and have narrowed the custody analysis even further than required by the specific holdings in Beckwith, Beheler, and Mathiason.


164. For example, despite holding in Mathis that a person serving a prison sentence for one crime was “in custody” when he was interrogated by government officials about another, unrelated crime, the Rehnquist Court in Illinois v. Perkins, 496 U.S. 292 (1990), purported to leave open the question of whether “[t]he bare fact of custody [would] in every instance require a warning even when the suspect is aware that he is speaking to an official.” Id. at 299-300 (ruling that Perkins was not entitled to Miranda warnings because he was not “interrogated” during his incarceration when Perkins was questioned about an unrelated murder by an undercover agent and was, therefore, unaware that he was speaking to a government official); see also Laurie Magid, Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects, 58 OHIO ST. L.J. 883, 932-51 (1997) (arguing that incarcerated suspects should not be considered “in custody” for Miranda purposes absent some additional restraint).

165. For example, United States v. Leshuk, 65 F.3d 1105, 1109-10 (4th Cir. 1995) (noting that even “drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful [traffic] stop into a custodial arrest for Miranda purposes”); United States v. Howard, 991 F.2d 195, 200 (5th Cir. 1993) (ruling that defendant was not in custody even though police officers had told him to “stay put” during a search of his residence). For example, in State v. Bradley, 538 N.E.2d 373 (Ohio 1989), the Supreme Court of Ohio affirmed without discussion the lower court's holding that the defendant was not in custody when he was a prisoner interrogated about a murder that had occurred in the prison. See id. at 375-76, 385. The Ohio courts concluded that Bradley was not entitled to receive Miranda warnings prior to this interrogation because he was not “in custody” for purposes of Miranda. See Bradley v. Ohio, 497 U.S. 1101, 1103 (1990) (Marshall, J., dissenting from denial of cert.). In so holding, the Ohio courts followed a trend that had developed in several other courts in which a prison inmate would be considered “in custody” for Miranda purposes only if some additional restriction on his freedom of movement above and beyond the normal limitations of incarceration had been imposed. See, e.g., United States v. Cooper, 800 F.2d 412, 414 (4th Cir. 1986); Flittie v. Solem, 751 F.2d 967, 974 (8th Cir. 1985); United States v. Scalf, 725 F.2d 1272, 1276 (10th Cir. 1984); Cervantes v. Walker, 589 F.2d 424, 427-29 (9th Cir. 1978); see also Magid, supra note 164, at 935-39 (summarizing decisions imposing additional restraint requirement). Despite the fact that this “additional restraint” test appeared to be directly contrary to the Court's holding in Mathis, see 391 U.S. at 4-5 (holding that a person serving a prison sentence for one crime was “in custody” when he was inter-
While this article focuses on whether the Court’s unduly-narrow interpretation of *Miranda* is an appropriate way to revise constitutional doctrine, rather than on the legitimacy of the policies and assumptions that motivate the Court’s interpretations, it seems clear that certain of the Court’s membership view the costs of *Miranda*, as *Miranda* was intended to function, as simply being too high.\(^{166}\) Regardless, as the Court chips away at *Miranda*, perhaps in an effort to redress these perceived problems, the Court may, in fact, be chipping away at its own institutional legitimacy.

2. *Interrogation*

Although the *Miranda* Court did not provide a great deal of guidance on what specific police actions “interrogation” would cover, it referred to interrogation as “questioning initiated by law enforcement officers.”\(^{3167}\) The *Miranda* Court was not asked to provide additional context because in each of the four cases presented the defendants had been directly questioned by law enforcement officers,\(^{168}\) leaving open the issue of whether police practices that did not amount to express questioning might constitute “interrogation.” The Court was called upon to address this issue in *Rhode Island v. Innis*.\(^{169}\)

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\(^{166}\) See Withrow v. Williams, 507 U.S. 680, 704 (1993) (O’Connor, J., concurring in part and dissenting in part) (“Any rule that so demonstrably renders truth and society the loser, bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.”) (internal quotation marks omitted) (alteration in original) (citation omitted) (quoting United States v. Leon, 468 U.S. 897, 908 n.6 (1984) (quoting Illinois v. Gates, 462 U.S. 213, 257-58 (1983) (White, J., concurring in judgment)); New York v. Quarles, 467 U.S. 649, 662-63 (1984) (O’Connor, J., concurring in part and dissenting in part) (“To be sure, the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way.”).


\(^{168}\) See id., 384 U.S. at 491 (noting that Miranda was taken by police to “Interrogation Room No. 2” where “he was questioned by two police officers”); id. at 493 (noting that Vignera was taken to a police station and was there “questioned” by a detective); id. at 494-95 (noting that Westover was interrogated by local police and then by the FBI); id. at 497 (noting that after taking Stewart into custody, “police interrogated [him] on nine different occasions” over a five day period).

\(^{169}\) 446 U.S. 291 (1980). In this case, Innis was arrested in connection with the shotgun murder of a taxicab driver and the armed robbery of a second taxicab driver. See id. at 293-94. At the time of his arrest, he was advised of his *Miranda* rights. See id. at 294. Innis stated that he understood his rights and invoked his right to counsel, whereupon the police loaded Innis into a squad car for transport to the central police station. See id. Three officers accompanied Innis and were cautioned by the Captain not to “question...
In *Innis*, the parties were in agreement that Innis was “in custody,” and that Innis had validly invoked his right to counsel. The issue, therefore, was whether the police officers had “interrogated” Innis in violation of *Miranda* when they discussed among themselves their concerns about a handicapped child perhaps finding the missing shotgun and hurting herself.

In considering the meaning of “interrogation,” the *Innis* Court observed that *Miranda*’s discussion of this term might suggest that the interrogation trigger was satisfied only by express questioning of an individual who is in police custody. The Court concluded that *Miranda* should not be read so narrowly, however. The *Innis* Court based its interpretation of “interrogation” on the fact that several of the police practices the *Miranda* Court identified did not involve “express questioning,” and concluded that “these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to intimdate or coerce Innis in any way.”

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Id. During the trip to the central station, one of the officers initiated a conversation with one of the other officers concerning the missing shotgun. See id. This officer later testified regarding the conversation:

“A. At this point, I was talking back and forth with [one of the other officers in the vehicle] stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there’s a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.”

Id. at 294-95 (alteration in original).

Innis interrupted, telling the officers they should turn the vehicle around so that he could show them where the shotgun was hidden. See id. at 295. The officers did so, and upon return to the crime scene, Innis pointed out the gun’s location. See id. Innis stated that he “wanted to get the gun out of the way because of the kids in the area in the school.” Id. Innis later sought to suppress the shotgun and the statements he made to the police about its location. See id. at 295-96. The Rhode Island Supreme Court concluded that once Innis had invoked his right to counsel, *Miranda* required that all interrogation cease, and that the officers in the vehicle had “interrogated” Innis without a valid waiver of his *Miranda* rights. Id. at 296. Additionally, the Rhode Island Supreme Court concluded that the evidence was insufficient to support a finding that Innis had validly waived his *Miranda* rights. See id. The Court granted certiorari to consider “for the first time the meaning of ‘interrogation’ under *Miranda v. Arizona*.” Id. at 297.

170. See id. at 298.

171. See id. at 299.

172. See id. The practices noted by the *Innis* Court included “the use of lineups in which a coached witness would pick the defendant as the perpetrator”; the use of a “‘reverse line-up’” in which a coached witness would identify the defendant as the perpetrator of a fictitious crime, in hopes that the defendant would confess to the actual crime for which he was a suspect in order to avoid prosecution for the false crime; and various “psychological ploys,” including assuming the guilt of the suspect, minimizing the seriousness of the crime, and blaming the victim and society for causing the suspect to commit the crime. Id.
interrogation.”

The Court emphasized that *Miranda* warnings were not required simply because an individual had been taken into police custody; *Miranda* applied where a person in custody was subjected to interrogation, and was accordingly exposed to “a measure of compulsion above and beyond that inherent in custody itself.” The Court defined “interrogation” to mean not only express questioning, but also its “functional equivalent,” and went on to explain that this meant “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”

By incorporating the “functional equivalent” of interrogation in its definition, the *Innis* Court focused on the suspect’s perceptions, rather than on the intentions of the law enforcement officer. Therefore, a practice that an officer should know is reasonably likely to elicit an incriminating response amounts to interrogation, even without objective proof of the officer’s intent to obtain an incriminating response. The *Innis* Court’s determination that “interrogation” may occur in situations other than direct police questioning represents an appropriate reading of *Miranda*, and the standard that it introduced for determining whether police conduct amounts to interrogation is equally consistent with the concerns that prompted the *Miranda* Court. Although *Innis’s* definition of interrogation is perfectly rational in light of *Miranda*, the Court’s ap-

173. *Id.* The *Innis* Court observed that “[i]n order to limit the ambit of *Miranda* to express questioning would ‘place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda.*’” *Id.* at 299 n.3 (quoting Commonwealth v. Hamilton, 285 A.2d 172, 175 (Pa. 1971)).

174. *Id.* at 300.

175. *Id.* at 300-01 (footnotes omitted).

176. See *id.* at 301. In a footnote, the Court explained that the officer’s intent remained relevant, however, in that use of a police practice that is designed or intended to elicit an incriminating response is likely a practice that the police should have known was reasonably likely to evoke such a response. See *id.* at 301 n.7. Nevertheless, the Court insisted that police officers cannot be held responsible for the “unforeseeable results of their words or actions.” *Id.* at 301-02. In judging whether a response was “unforeseeable,” the Court observed that any knowledge that the officer might have concerning a suspect’s susceptibility to a certain type of persuasive practice would be important in determining whether the officer should have known that his words or conduct was reasonably likely to elicit an incriminating response from that suspect. See *id.* at 302 n.8.

177. The *Innis* Court, like the *Miranda* Court, was concerned that creation of an “interrogation environment” during custodial interrogation would “‘subjugate the individual to the will of his examiner’ and thereby undermine the privilege against compulsory self-incrimination.” *Innis*, 446 U.S. at 299 (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 457-58 (1966)).
plication of this test to the Innis facts reflects an analysis that is unreasonable in view of Miranda’s goals.

The Innis Court first concluded that Innis was not subjected to interrogation because the officers’ conversation in the police car did not include “express questioning” of Innis. The Court next determined that Innis was not subjected to the “functional equivalent” of express questioning because there was nothing in the record to suggest that the officers should have known that their conversation was reasonably likely to cause Innis to incriminate himself. Because the officers’ entire discussion amounted to no more than “a few offhand remarks,” as contrasted with a “lengthy harangue in the presence of the suspect,” the officers would not reasonably have known that Innis would be moved to incriminate himself. In reaching this conclusion, the Court established an unrealistically high threshold for determining when an officer should have known that his conduct was reasonably likely to elicit an incriminating response. Although there was no direct evidence that the officers’ conversation was intended as, or designed to be, an interrogation tactic, appeals to the conscience of a suspect are a well-known interrogation strategy. But the Court was unwilling to presume that the officers were using this strategy, absent some showing that Innis was “peculiarly susceptible” to statements concerning the safety of handicapped children.

The Court’s analytic approach is problematic for two reasons. First, application of the Innis standard leads to a swearing contest between suspect and officers that is even more troubling than the one that arises on the issue of whether the Miranda warnings have been properly given. The suspect swears that the conduct or statements were intended to pressure him to respond, the officers deny any such purpose,

178. See id. at 302.
179. See id. at 302-03. The Court observed that nothing in the record suggested that the officers were aware that Innis would be especially susceptible to concerns about the safety of handicapped children or that the officers were aware that Innis “was unusually disoriented or upset at the time of his arrest.” Id. at 302-03. There was also no indication that the officers’ remarks were “designed” to evoke an incriminating response, because it was “entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other.” Id. at 303 n.9 (quoting state trial judge who heard the officers’ testimony) (emphasis removed) (alteration in original).
180. See id. at 303.
181. Police interrogation manuals suggest that the interrogator appeal to the suspect to confess for the sake of his own conscience, for the sake of all concerned, and to “display some evidence of decency and honor” by confessing the crime. See, e.g., INBAU & REID, supra note 57, at 56-58.
182. See, e.g., Schulhofer, supra note 17, at 870-71, 882 (noting that “Miranda does nothing whatsoever to mitigate the pitfalls of the swearing contest” between police and defendant that was a central failing of the voluntariness standard).
and the court or jury is left with largely unfettered discretion to resolve the issue.\footnote{183} Second, the Court's approach permits the police effectively to initiate custodial interrogation without providing \textit{Miranda} warnings or to interrogate a \textit{Mirandized} suspect who has invoked his right to counsel, so long as the police have no reason to believe that the interrogation strategy might be successful.\footnote{184} It is certainly contrary to \textit{Miranda} that in order for a classic interrogation technique to be considered "interrogation," the police must be aware that the suspect might be vulnerable to such a strategy.\footnote{185} \textit{Miranda} contemplates that once the suspect invokes his right to counsel, he will no longer be subjected to interrogation, not

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that the police may continue with interrogation tactics so long as they appear unlikely to be fruitful.\footnote{186} Moreover, even applying the standard in the manner the Court suggests, it is difficult to imagine that the officers’ conversation would not be viewed as calling for a response from a reasonable person—Innis was faced with the knowledge that if he failed to disclose the location of the shotgun, an innocent, handicapped little girl might be killed.\footnote{187} The Court’s refusal to credit the power that such an appeal would likely have turns a reasonable-sounding standard for identifying the presence of interrogation on its head.\footnote{188}

While Justice Marshall viewed the result in Innis as an “aberration” and expressed hope that the interrogation standard would be applied more reasonably in future cases,\footnote{189} he was to be disappointed when the Court next considered the issue in Arizona v. Mauro.\footnote{190} As in Innis, the

\footnote{186} As Justice Stevens observed in dissent in Innis:

From the suspect’s point of view, the effectiveness of the warnings depends on whether it appears that the police are scrupulously honoring his rights. Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right and tend to reinstate the imbalance between police and suspect that the Miranda warnings are designed to correct.

\footnote{187} See id. at 295. The officer’s decision to describe the child as a little girl, rather than a boy or simply a child, suggests that he intended his statement to have the most significant emotional appeal possible on Innis. Cf. id. (stating that the third officer testified that he overheard the conversation between the other two officers as follows: “A. He... said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.”).

\footnote{188} See id. at 306 (Marshall, J., dissenting). As Justice Marshall observed, “[t]he notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous.” Id.

\footnote{189} See id. at 307 (Marshall, J., dissenting) (observing “I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.”).

\footnote{190} 481 U.S. 520 (1987). In this case, Mr. Mauro entered a local store and stated that he had killed his son. See id. at 521. When the police arrived, Mauro again claimed to have killed his son, and directed the police to the child’s body. See id. He was then arrested and advised of his Miranda rights. See id. at 521-22. At the police station, Mauro invoked his right to have counsel present, and all questioning ceased. See id. at 522. Because there was no secure detention area available, Mauro was held in the police captain’s office. See id. During this same period of time, Mrs. Mauro was being questioned in another room. See id. She asked the officer, Detective Manson, if she could speak with her husband. See id. After discussing Mrs. Mauro’s request with his supervisor, it was determined that Mrs. Mauro would be permitted to speak with her husband but that the Mauros would not be left alone and that their conversation would be tape-recorded. See id. Manson informed the Mauros that they could speak to each other only if an officer remained present “to observe and hear what was going on;” then placed a tape-recorder in plain view on the table and recorded the Mauros’s conversation. See id. During the con-
suspect, Mauro, had been arrested, and after receiving Miranda warnings, had invoked his right to counsel.\textsuperscript{191} Because the crime at issue was the murder of Mauro’s son, the police had also brought Mrs. Mauro to the police station for questioning. After questioning Mrs. Mauro, the police allowed her to speak with her husband while an officer was present to record Mr. Mauro’s reaction to her statements. Mr. Mauro’s responses were later used at trial to rebut his contention that he was insane at the time of the killing.\textsuperscript{192} Mauro argued that the confrontation with his wife was a psychological ploy, and therefore, the “functional equivalent” of interrogation under Innis, and that the statements he made during this discussion should have been suppressed. The Arizona Supreme Court agreed, and reversed Mauro’s conviction.\textsuperscript{193} The United States Supreme Court disagreed with this application of Innis, however, and ruled that allowing Mrs. Mauro to speak with her husband while an officer remained present to record the conversation did not amount to interrogation.\textsuperscript{194}

The police clearly foresaw the likelihood that the Mauros’ discussion would lead to incriminating statements—the officer brought a tape recorder along and used it to record the conversation.\textsuperscript{195} The police also refused to give Mauro any advance warning that Mrs. Mauro would be permitted to speak with him, or to wait until after Mauro had an opportunity to consult with counsel and have counsel present before allowing the confrontation to occur.\textsuperscript{196} Nevertheless, the Court noted that Mauro

\textsuperscript{191} See id. at 521-22.

\textsuperscript{192} See id. at 523.

\textsuperscript{193} See id. at 524-25.

\textsuperscript{194} See id. at 529-30.

\textsuperscript{195} See id. at 534-36 (Stevens, J., dissenting).

\textsuperscript{196} See id. at 531 (Stevens, J., dissenting). Justice Powell, writing for the Court, was careful to emphasize that the police were simply acceding to Mrs. Mauro’s “demands” to see her husband. See id. at 528 (quoting trial court’s finding that police had finally “yielded to [Mrs. Mauro’s] insistent demands” to see her husband). Such a view is difficult to accept, however, as Mrs. Mauro had no legal right to see her husband, and the decision whether to allow Mrs. Mauro to see her husband was entirely within police discretion. In earlier cases, the police had expressly refused to allow a suspect to see his spouse or family member when the police believed that such a discussion might interfere with “breaking” the suspect. See Haynes v. Washington, 373 U.S. 503, 507-08 (1963) (holding confession involuntary in part because police refused to allow suspect to contact wife until he had confessed); Fikes v. Alabama, 352 U.S. 191, 196-97 (1957) (holding confession involuntary in part because police refused to allow father to speak with defendant until after
chose to respond to his wife’s entreaties, when he could simply have ignored her.\textsuperscript{197} Given Mauro’s “decision” to speak, “his volunteered statements cannot properly be considered the result of police interrogation.”\textsuperscript{198} In reaching this conclusion, the Court appeared to limit “interrogation” to actions or statements by the police that would “coerce[ ] [a suspect] to incriminate himself.”\textsuperscript{199} Ironically, where \textit{Miranda} required warnings to dispel the presumptively coercive atmosphere that arises when police officers implement strategies designed to evoke incriminating responses from suspects in custody, \textit{Mauro} turns this on its head, refusing to require warnings until the atmosphere has, in fact, become coercive.\textsuperscript{200} The presumption of coercion that prompted the Court to adopt \textit{Miranda} warnings is thus overlooked.

As in \textit{Innis}, the \textit{Mauro} Court was again willing to accept law enforcement justifications as proof that an officer had not designed his words or actions to elicit an incriminating response.\textsuperscript{201} Based upon \textit{Innis} and

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\textsuperscript{197} See \textit{Mauro}, 481 U.S. at 527-28 n.5.
\textsuperscript{198} \textit{Id.} at 529.
\textsuperscript{199} \textit{Id.} at 528 (“We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way.”).
\textsuperscript{200} See \textit{White}, supra note 18, at 588 (noting that “the Court appears to have restricted its definition of ‘custodial interrogation’ to situations that involve ‘coercive environments’ similar to those considered by the Court in \textit{Miranda} itself. Thus, unless a suspect is actually subjected to the coercive pressures generated by involuntary restraints and interrogation in a police station-like atmosphere, \textit{Miranda} seems to be inapplicable.” (footnotes omitted)).
\textsuperscript{201} See \textit{Mauro}, 481 U.S. at 523-24. The Court quoted the Arizona trial court’s explanations for the officer’s presence:

The police justifiably appeared [concerned] for Mrs. Mauro’s . . . safety, and they were also concerned about security, both in terms of whether Mr. and Mrs. Mauro might cook up a lie or swap statements with each other that shouldn’t have been allowed, and whether some escape attempt might have been made, or whether there might have been an attempt to smuggle in a weapon.
Mauro, the Court appears willing to permit the police to apply even well-documented interrogation techniques, so long as they are applied to a suspect in an oblique manner and the officer has a reasonable explanation for the conduct. Such an approach virtually strips all meaning from the “functional equivalent” standard because a resourceful police officer can almost always find a legitimate non-interrogation-related rationale for his conduct, even without coaching from the district attorney’s office. By giving such an artificially narrow ambit to the “functional equivalent” standard, the Court frustrates the very purpose of the standard, thereby “placing] a premium on the ingenuity of the police to devise methods of indirect interrogation.” Under this standard, very little police conduct will amount to the “functional equivalent” of express questioning, and police will have ample room to pressure a suspect to talk. Once the suspect has said something—no matter how seemingly

Id.

202. See Rhode Island v. Innis, 446 U.S. 291, 303 n.9 (1980) (finding that appeal to conscience was not expressly directed at Innis, and accepting trial judge's observation that it was “entirely understandable” that officers would express concern about safety of handicapped children). Confrontations between suspects, or between a parent and a juvenile suspect, are also a well-known interrogation strategy, since police can reasonably anticipate that incriminating statements are likely in the heat of the confrontation. See, e.g., Escobedo v. Illinois, 378 U.S. 478, 482-83 (1964) (during police-arranged confrontation with another suspect, defendant stated, “I didn't shoot Manuel, you did it”). In Mauro, however, the Court accepted testimony that the police had not created the confrontation, but merely “yielded” to Mrs. Mauro's request to see her spouse. See Mauro, 481 U.S. at 528.

203. See, e.g., Mauro, 481 U.S. at 523-24, 528 (noting both legitimate law enforcement reasons for officer’s presence and the “possibility” that allowing Mr. Mauro to speak with his wife would lead to incriminating statements).

204. Innis, 446 U.S. at 299 n.3 (quoting Commonwealth v. Hamilton, 285 A.2d 172, 175 (Pa. 1971)).

205. One of the most common approaches is to confront the defendant with witnesses or other evidence linking him to the crime, and then see if the defendant responds. In some cases, the officers go further and expressly ask whether the defendant wishes to reconsider his silence or request for counsel after viewing the evidence. The use of this strategy is ironic given that more than one hundred years ago, in Bram v. United States, 168 U.S. 532 (1897), the Court clearly recognized the compulsion inherent in such confrontations:

[I]t cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime, would not be impelled to say something, when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself, commit the offense . . . .

Id. at 563. Despite this long-standing recognition, some courts, in applying the Innis/Mauro standard, have ruled that such confrontations are not likely to elicit a response and, therefore, are not interrogation. Compare United States v. Payne, 954 F.2d 199, 201-03 (4th Cir. 1992) (refusing to find interrogation where police officer told suspect “[t]hey found a gun at your house,” and suspect made incriminating statements in response), and
innocent—that remark may turn out to be inculpatory in an unexpected way, and those first words often become a torrent of further explanation.

C. Erosion of Miranda's Enforcement Rules

In setting out to address the compulsion inherent in custodial interrogation, the *Miranda* Court insisted that "[t]he requirement of warnings and waiver of rights is . . . not simply a preliminary ritual to existing methods of interrogation." To ensure that its decision effected real change in police-suspect interactions, the *Miranda* Court set forth enforcement rules in mandatory and seemingly unambiguous language intended to parallel the language of the warnings. "[W]ithout the full warnings and effective waiver," a defendant's statement made in response to custodial interrogation may not be used either to establish guilt directly, or "to impeach his testimony at trial . . . and thus prove guilt by

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206. For example, in *United States v. Jackson*, 863 F.2d 1168 (4th Cir. 1989), a DEA agent, in response to the defendant's protestations that he was not involved with drugs, responded "'Just think about Harry Payne,'" referring to the person to whom the defendant allegedly delivered cocaine. See id. at 1171. The defendant's false exculpatory response that he did not know Harry Payne was introduced at his trial. See id.; see also *United States v. Taylor*, 799 F.2d 126, 127-28 (4th Cir. 1986) (allowing defendant's identification of himself as "Snake" into evidence, after defendant had invoked right to counsel, where co-defendant had stated that he had robbed the bank with a man named "Snake").

207. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 328-32, 356-57 (1985) (Brennan, J., dissenting) (citing numerous sources for the ease with which further statements can be obtained once the first admission, described as the 'breakthrough' and the 'beachhead,' has been obtained); see also *Escobedo v. Illinois*, 378 U.S. 478, 483-92 (1964) (holding unconstitutional the method by which police obtained a confession from a suspect, that is, confronting him with a co-suspect so that he would implicate himself, then obtaining additional statements).


209. See id. at 467-77.
implication."\footnote{210} "If the individual indicates in any manner . . . that he wishes to remain silent," or "wants an attorney, the interrogation must cease."\footnote{211} Moreover, "[o]portunity to exercise these rights must be afforded to him throughout the interrogation."\footnote{212}

Despite this seemingly clear language, the Court has subsequently eroded key aspects of these enforcement rules.\footnote{213} The first inroad came in \textit{Harris v. New York}.\footnote{214} Despite the fact that language in \textit{Miranda} could be viewed as barring any use of a statement obtained in violation of \textit{Miranda}, the Burger Court held that statements preceded by defective \textit{Miranda} warnings, while inadmissible in the prosecution’s case-in-chief, could nevertheless be used for impeachment purposes if the defendant took the stand in his own defense.\footnote{215} In a series of later decisions, the Court further expanded this impeachment exception, substantially undermining a suspect’s right to remain silent.\footnote{216}

Similarly, although language in \textit{Miranda} would seem to indicate that once a suspect invokes his right to silence the police are barred from further questioning, the Court has permitted police reinitiation of ques-

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\item \footnote{210} \textit{Id.} at 477.
\item \footnote{211} \textit{Id.} at 473-74.
\item \footnote{212} \textit{Id.} at 479; see also \textit{id.} at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."); see \textit{id.} at 475-76 ("Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.").
\item \footnote{213} See, e.g., Ogletree, \textit{supra} note 27, at 1839-41 (noting various efforts to limit \textit{Miranda}’s reach and scope).
\item \footnote{214} 401 U.S. 222 (1971).
\item \footnote{215} See 401 U.S. at 222, 224-26 ("The shield provided by \textit{Miranda} cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."). The \textit{Harris} Court reached this holding notwithstanding its acknowledgement that "[s]ome comments" from \textit{Miranda} could be read as barring any use of a statement obtained in violation of its requirements. See \textit{id.} at 224.
\item \footnote{216} See, e.g., Fletcher v. Weir, 455 U.S. 603, 605-07 (1982) (allowing impeachment use of defendant’s silence in response to custodial interrogation where police failed to provide \textit{Miranda} warnings); Jenkins v. Anderson, 447 U.S. 231, 239-40 (1980) (allowing impeachment use of defendant’s silence in response to pre-custodial interrogation). \textit{But see Doyle} v. Ohio, 426 U.S. 610, 618 (1976) (holding impermissible the impeachment use of defendant’s silence in response to custodial interrogation where \textit{Miranda} warnings had been given). For a survey of these decisions, see OLP REPORT, \textit{supra} note 2, at 527-30 (discussing Court’s decision to allow impeachment use of defendant’s silence). The Court has similarly allowed impeachment use of a statement obtained through custodial interrogation after a suspect invokes his right to counsel. See \textit{Oregon} v. \textit{Hass}, 420 U.S. 714, 722-23 (1975); see also \textit{infra} text and accompanying notes 227-28 (discussing \textit{Minnick} v. \textit{Mississippi} and \textit{Oregon} v. \textit{Hass}).
tioning under certain circumstances. In *Michigan v. Mosley*, the suspect was arrested on robbery charges, was given *Miranda* warnings, and invoked his right to silence, after which interrogation was immediately terminated. More than two hours later, while Mosley was still in jail, a different detective gave Mosley fresh *Miranda* warnings, obtained a written waiver of Mosley's *Miranda* rights, and interrogated Mosley solely about an unrelated murder. Mosley made incriminating statements about this murder, which he later sought to have suppressed on the grounds that he should not have been interrogated about any crime in view of his earlier invocation of his right to remain silent. The Court disagreed, finding that police reinitiation of interrogation was permissible under these circumstances. Important to the Court's decision was the fact that the police "scrupulously honored" Mosley's right to silence by immediately terminating the first interrogation, and that interrogation was resumed "only after the passage of a significant period of time and . . . provision of a fresh set of [*Miranda*] warnings," and police "restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." Although limiting interrogation to a different crime than the subject of the earlier interrogation appeared to be a crucial consideration to the *Mosley* Court, some later courts have permitted police reinitiation of interrogation concerning the same crime.

Similar erosion is apparent in the enforcement rules pertaining to the right to have counsel present. At the outset, the Court held that in order for a suspect to invoke his right to counsel, he "must unambiguously request counsel." Moreover, if a suspect makes some reference to having

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218. See id. at 97.
219. See id. at 97-98.
220. See id. at 98, 104.
221. Id. at 104-06.
222. See United States v. Bautista, 145 F.3d 1140, 1150 (10th Cir. 1998) (permitting reinitiation of interrogation concerning same crime after suspect had invoked right to counsel and where six days had passed during which time suspect was not in custody), cert. denied, 119 S. Ct. 255 (1998); Jackson v. Dugger, 837 F.2d 1469, 1471 (11th Cir. 1988) (characterizing defendant's *Miranda* rights as "scrupulously honored" where defendant continuously invoked right to silence, and in response, police stopped questioning but then attempted to resume an hour later; when defendant again invoked right to silence, police again stopped questioning only to resume three to four hours later; on third attempt, defendant finally made an inculpatory statement); United States v. Bosby, 675 F.2d 1174, 1181-82 (11th Cir. 1982) (permitting reinitiation of interrogation concerning same crime after suspect had invoked right to silence where several weeks had passed between interrogations).
an attorney present, but does not request counsel "unambiguously," the
police may continue to question the suspect, and are not required to ask
clarifying questions to determine whether or not the individual is at-
tempting to invoke his right to counsel. Even where an unambiguous
request for counsel is made, the scope of the request may be confined to
the request's precise language. Rendering a suspect's right to counsel
dependent on the precise language the suspect uses assumes a degree of
sophistication and articulateness rarely found in the average criminal
suspect, and runs directly counter to Miranda's warning that an unduly
strict request requirement "would discriminate against . . . the very
defendant who most needs counsel.

However, once a suspect who is undergoing custodial interrogation
manages to make an unambiguous request for counsel, the Court has
protected the right to counsel more scrupulously than it has the right to
silence, and has taken to heart Miranda's admonition that once a suspect
invokes his right to counsel, interrogation may not resume until counsel

224. See Davis, 512 U.S. at 461-62. As the Davis Court explained:
Of course, when a suspect makes an ambiguous or equivocal statement it will of-
ten be good police practice for the interviewing officers to clarify whether or not
he actually wants an attorney. . . . But we decline to adopt a rule requiring offi-
cers to ask clarifying questions. If the suspect's statement is not an unambiguous
or unequivocal request for counsel, the officers have no obligation to stop ques-
tioning him.

statement that he would not give a written statement without an attorney present but had
"no problem" talking about crime in question was only a limited request for counsel; be-
cause request did not specifically extend to oral questioning, police could proceed with
such questioning).

361, 369-70 (Cal. 1965)); see also Ogletree, supra note 27, at 1841 (noting that "it is un-
likely that the suspects would have waived their Miranda rights if they had clearly under-
stood the consequences, or if they first had an opportunity to consult with counsel"); cf.
Fare v. Michael C., 442 U.S. 707, 724 (1979) (refusing to equate minor's request for his
probation officer with a request for counsel). In his dissent in Fare, Justice Marshall
opined that "[a] juvenile in these circumstances will likely turn to his parents, or another
adult responsible for his welfare, as the only means of securing legal counsel." Id. at 730
(Marshall, J., dissenting).
is present. \textsuperscript{227} Nevertheless, the Court has placed limitations on enforcement of \textit{Miranda}'s right to counsel as well. The Court has allowed, for example, impeachment use of statements obtained through custodial interrogation that continues even after a suspect has unambiguously invoked his right to counsel. \textsuperscript{228} In addition, although the Court has prohibited the police from reinitiating interrogation once a suspect has invoked his right to counsel, the police may resume questioning if the suspect re-initiates further communication with the police. \textsuperscript{229} Although there is nothing inherently wrong with such an approach, the Court, in \textit{Oregon v. Bradshaw,\textsuperscript{230}} established an absurdly low threshold for suspect "reinitiation" sufficient to open the door for further police questioning. \textsuperscript{231} In the

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\item See Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (holding that after suspect invokes right to counsel in response to \textit{Miranda} warnings, police may not reinitiate questioning without counsel present even if suspect has had opportunity to meet and confer with his counsel); Arizona v. Roberson, 486 U.S. 675, 677-78 (1988) (holding that after suspect invokes right to counsel in response to \textit{Miranda} warnings, police may not reinitiate questioning even if questioning concerns offense unrelated to subject of initial interrogation); Edwards v. Arizona, 451 U.S. 477, 487 (1981) (holding that after suspect invokes right to counsel in response to \textit{Miranda} warnings, police may not reinitiate questioning).
\item The Court in \textit{Miranda} was specific: If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. \ldots If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time. 384 U.S. at 474.
\item See Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (allowing impeachment use of a statement made after a suspect had invoked his right to counsel, but where the police had refused to honor the suspect's right by continuing to interrogate him without counsel present).
\item 462 U.S. 1039 (1983).
\item In \textit{Bradshaw}, the defendant was questioned while in custody concerning a single-car automobile accident in which the owner of the vehicle (who was a passenger at the time of the accident) was killed. \textit{See id.} at 1041. In response to police questioning, Bradshaw admitted that he had furnished alcohol to the victim, a minor, but denied involvement in the automobile accident that caused the victim's death. \textit{See id.} At this point, Bradshaw invoked his right to counsel, and questioning immediately ceased. \textit{See id.} at 1041-42. Sometime later, while Bradshaw was being transferred from the police station to the county jail, Bradshaw asked of a police officer, "[w]ell, what is going to happen to me now?" \textit{Id.} at 1042. The police officer reminded Bradshaw that he did not need to talk to the police because Bradshaw had invoked his right to counsel. \textit{See id.} Bradshaw stated that he understood, and thereafter a discussion of the crime for which Bradshaw would be charged occurred. \textit{See id.} The police officer recommended that Bradshaw undergo a polygraph test to which Bradshaw agreed. \textit{See id.} The following day, after Bradshaw received fresh \textit{Miranda} warnings and waived his \textit{Miranda} rights, Bradshaw underwent the polygraph. \textit{See id.} When the polygraph showed evidence of deception, Bradshaw eventually recanted his original story and admitted that he had been driving the victim's car at
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Bradshaw case, the suspect, after invoking his right to counsel, and while being transferred to county jail, merely asked: "Well, what is going to happen to me now?" A plurality of the Court held that this inquiry opened the door for further police interrogation because it "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship," such as a request for a drink of water or a request to use the telephone. Although the Court required a showing of fresh Miranda warnings after Bradshaw's reinitiation of questioning and a valid waiver of those rights, allowing reinitiation on such a slight pretense makes plain to a suspect that the warnings are a mere legal formality. Facing such a resumption of interrogation, practical reality for the suspect quickly becomes "interrogation will continue [or recur] until a confession is obtained."234

the time of the accident. See id.

232. Id. at 1042.

233. Id. at 1045-46. Justice Marshall dissented and, joined by three other Justices, expressed difficulty with the plurality's permissive interpretation of suspect reinitiation. See id. at 1051 (Marshall, J., dissenting). The dissenters believed that the standard would permit authorities "to capitalize on the custodial setting. Yet Miranda's procedural protections were adopted precisely in order 'to dispel the compulsion inherent in custodial surroundings.'" Id. at 1056 (Marshall, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 456 (1966)) (arguing that the plurality's conclusion of valid suspect reinitiation "flies in the face of the basic purpose of the Miranda safeguards").

234. See Ogletree, supra note 27, at 1840 ("Thus, suspects view the subsequent recitation of Miranda rights as a mere formality rather than a substantive cure for a defective confession."). The Court in Arizona v. Roberson, 486 U.S. 675 (1988), voiced a similar concern:

Thus, we also disagree with petitioner's contention that fresh sets of Miranda warnings will 'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled. Especially in a case such as this, in which a period of three days elapsed between the unsatisfied request for counsel and the interrogation about a second offense, there is a serious risk that the mere repetition of the Miranda warnings would not overcome the presumption of coercion that is created by prolonged police custody.

Id. at 686 (citation omitted).

235. Miranda v. Arizona, 384 U.S. at 468 ("It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury."); Professor Schulhofer suggests that well-educated defendants also are susceptible to this pressure:

Even the sophisticated law professor or professional investigator, if he found himself suspected of crime, would be under considerable pressure to cooperate with the police, to try to get them on his side by telling what he knew or what he thought he could safely disclose, rather than standing confidently on his right to remain silent.

Schulhofer, Reconsidering Miranda, supra note 2, at 448.
Additional erosion of the *Miranda* protections has occurred in the area of subsequent confessions, where police secure a voluntary, but unwarned, first confession from a suspect, and then later, after reading the suspect his *Miranda* warnings, obtain a second voluntary confession. In *Oregon v. Elstad*, the Court concluded that while the first, unwarned confession must be suppressed as a violation of *Miranda*, the second confession was admissible so long as it was voluntarily made. In so holding, the Court rejected as "speculative and attenuated" the notion that once a suspect confesses, he will likely repeat that confession even after being apprised of his *Miranda* rights, unless the suspect is specifically advised that his first, unwarned confession is likely inadmissible. The Court rejected the so-called "cat-out-of-the-bag" presumption despite the existence of police interrogation manuals that emphasize the importance of securing the initial admission in obtaining a full confession.

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236. See *Oregon v. Elstad*, 470 U.S. 298, 300-01 (1985). In this case, Elstad, an eighteen-year old still living at his parents' home, was taken into custody for a neighborhood burglary. See *id.* at 300-01. While still at the Elstad residence, the officer told Elstad that he thought Elstad was involved in the burglary, to which Elstad responded, "'[y]es I was there.'" *Id.* at 301. Elstad was first advised of his *Miranda* rights about an hour later at police headquarters. See *id.* Elstad waived his *Miranda* rights and gave a full confession concerning the burglary. See *id.*


238. See *id.* at 318.

239. See *id.* at 313-14. The Court refused to apply the ""fruit of the poisonous tree"" analysis to the second confession because there was only a "procedural *Miranda* violation" involving the first confession, but no actual Fifth Amendment violation. See *id.* at 305-06; see also Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 922-27 (1995) (arguing that "fruits" obtained in violation of Fifth Amendment should be admissible).

240. See, e.g., *Arthur S. Aubry, Jr. & Rudolph R. Caputo, Criminal Interrogation* 26 (3d ed. 1980); *William Dienstein, Technics for the Crime Investigator* 117 (2d ed. 1974); *Robert F. Royal & Steven R. Schutt, The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide* 143 (1976); see also supra note 207 (noting the existence of sources that explain the ease with which further statements can be obtained after the first admission has been secured). The *Elstad* dissent rejected, as "marble-palace psychoanalysis," the majority's assumption that the initial unwarned admission does not precondition the suspect to confess again after receiving *Miranda* warnings. See *Elstad*, 470 U.S. at 324 (Brennan, J., dissenting). As Justice Brennan, in dissent, explained:

The Court's marble-palace psychoanalysis is tidy, but it flies in the face of our own precedents, demonstrates a startling unawareness of the realities of police interrogation, and is completely out of tune with the experience of state and federal courts over the last 20 years. Perhaps the Court has grasped some psychological truth that has eluded persons far more experienced in these matters; if so, the Court owes an explanation of how so many could have been so wrong for so many years.

*Id.*
Further, despite language in *Elstad* intended to deter police officers from using deliberately manipulative practices that pre-condition the unwarned suspect to confess again, in practice, *Elstad* has served as a license for police to gain incriminating responses through unwarned custodial interrogation and then "cleanse" any later confessions by administering *Miranda* warnings and obtaining a valid waiver.

The Burger Court has also made the task of establishing a suspect's waiver of *Miranda* rights much easier. Despite language in *Miranda* that appeared to require an express waiver that would satisfy the "high standards of proof" necessary to establish waiver of a constitutional right, the Burger Court in *North Carolina v. Butler*, ruled that *Miranda* did not require an express waiver. Further, despite the *Miranda* Court's "heavy burden" language concerning proof of waiver, a waiver of
Miranda rights must be proven by only a preponderance of the evidence.  

D. Exceptions to Miranda

Not only have the Burger and Rehnquist Courts narrowed the circumstances under which Miranda warnings are required and the associated enforcement rules become applicable, but the post-Warren Court also has created exceptions to Miranda. For each exception, an individual has been subjected to custodial interrogation, yet the Court has held that Miranda's warning requirements are nevertheless inapplicable. First, in New York v. Quarles, the Court created a "public safety" exception to the requirement that Miranda warnings be given prior to custodial interrogation. Under this exception, an officer need not provide Miranda warnings to an individual in custody when the officer asks questions that are reasonably motivated by a concern for public safety. Second, in Rhode Island v. Innis, the Court excluded from the definition of "interrogation" police questioning or conduct "normally attendant to arrest and custody." This exception came to be known as the "routine booking" exception. Although a plurality of the Court attempted in Pennsylvania v. Muniz to confine this exception to "questions [that] secure the 'biographical data necessary to complete booking or pretrial services,'" lower courts have seemingly ignored the plurality's admonition that even routine booking questions may constitute "interrogation" where the questions are "designed to elicit incriminatory admissions." Third, in
Illinois v. Perkins, the Court held that "Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer." Under this exception, police may interrogate an individual in custody, so long as they use an informant or undercover officer and thereby ensure that the individual remains unaware that he is being questioned by the police.

IV. EVALUATING THE EROSION OF MIRANDA

As the preceding sections reflect, the Burger and Rehnquist Courts have chipped away at Miranda over the past twenty-seven years. Without expressly overruling Miranda, they have undermined its constitutional stature, narrowed unreasonably the circumstances under which Miranda will apply, eviscerated Miranda's parallel enforcement rules, and created exceptions to Miranda's seemingly direct commands. In evaluating this erosion, two questions arise. First, is the erosion a desirable change in the law? Second, and perhaps more importantly, is this an appropriate way for the Court to revise constitutional doctrine?

The Court, Congress, and numerous commentators and public officials have taken up the first issue, with largely inconclusive results. Despite valiant efforts to blame Miranda for a variety of social ills, the evidence concerning Miranda's consequences on crime and society's ability to solve crimes and obtain convictions is largely inconclusive. Too many

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reasonably likely to demonstrate that Muniz was intoxicated, and therefore, tended to prove the crime of driving while under the influence. See Muniz, 496 U.S. at 610-11 (Marshall, J., concurring in part and dissenting in part); see also United States v. Sotelo, 2 F.3d 1058, 1068 (10th Cir. 1993) (asking defendant his name for "the direct and admitted purpose of linking [defendant] to his incriminating immigration file" constituted interrogation and did not fall under "routine booking" exception). Further, in Muniz, the fact that the Pennsylvania police typically videotaped the booking procedure of persons arrested for driving while intoxicated demonstrated that the questioning was for purposes other than "record-keeping." See 496 U.S. at 611 (Marshall, J., concurring in part and dissenting in part).
256. Id. at 294.
257. See id.; see also id. at 309 (Marshall, J., dissenting) (observing that majority's decision incorporates an "undercover agent" exception to the Miranda rule [that] is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights).
259. See Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("Miranda warnings may inhibit persons from giving information"); New York v. Quarles, 467 U.S. 649, 657 (1984) ("[i]f the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding."); see also supra note 2.
other factors contribute to crime and clearance rates to permit assigning a significant or specific causal role to *Miranda* with any confidence, except perhaps for purposes of political posturing.\(^{260}\)

Moreover, few seemed to have considered carefully the fact that eroding *Miranda* reestablishes voluntariness as the central gatekeeper in determining the admissibility of confessions in an increasing number of circumstances.\(^{261}\) The central difficulties that drove the Warren Court to seek some alternative to the voluntariness standard remain,\(^{262}\) but perhaps the Burger and Rehnquist Courts now see these difficulties as advantages.\(^{263}\) Returning to this standard will undoubtedly increase the chance of an individual's conviction based upon an improperly obtained confession,\(^{264}\) but the fact-intensive nature of the analysis at least insu-

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260. For an example of such posturing, see the Senate Report accompanying enactment of the Omnibus Crime Control and Safe Streets Act of 1968. S. REP. NO. 1097, at 41-46 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2127-32 (quoting various studies, which appear to be unscientific, to support view that *Miranda* was a “most disastrous blow to the cause of law enforcement”); see also Sonenshein, *supra* note 27, at 405-06 n.6 (noting reported statements of Police Commissioner Howard R. Leary that *Miranda* “will certainly restrict us in our effectiveness” and “[t]here should be some diminishing of law and order as a result”).

261. In the early years after *Miranda*, some believed that *Miranda*'s admissibility requirements had entirely displaced the voluntariness approach. See, e.g., Sobel, *supra* note 31, at 30 (“We need not spend any time with definitions of voluntariness. *Miranda* makes such definitions obsolete. . . . Hereafter the sole tests to be used in determining 'admissibility' will be 'custody,' 'warnings' and 'waiver.'”). With *Miranda*'s erosion, the voluntariness standard becomes correspondingly more important. See, e.g., Elstad, 470 U.S. at 307-08 (“Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, ‘the primary criterion of admissibility [becomes] the “old” due process voluntariness test.’”) (quoting Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865, 877 (1981)).

262. See *supra* text accompanying notes 20-28.


*Miranda*, for all its alleged brightness, is not without its difficulties; and voluntariness is not without its strengths. . . . *Miranda* creates as many close questions as it resolves. . . .

The totality-of-the-circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous.

*Id.*; see also Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 168 (arguing that the Court's narrow interpretations are based upon a “fundamental rejection of the premises of *Miranda* and an apparent desire to return, ultimately, to the 'voluntariness' standard”).

264. See Joseph D. Grano, *Confessions, Truth, and the Law* 59-83 (1993). Professor Grano, one of *Miranda*'s consistent critics, recognizes that abandoning *Miranda* would lead to a return to the voluntariness standard, and acknowledges the weakness of
lated the Court from responsibility for the results in any given case. A return to the voluntariness standard thereby allows the Court to maintain the appearance of concern over the acquisition and use of coerced confessions, while washing its hands of the improprieties that will inevitably result.

In any event, while debates concerning the substantive merits (or demerits) of *Miranda* will undoubtedly continue, evaluation of the manner in which the Court has addressed *Miranda* and identification of the Court’s proper role within our governmental structure may prove more vital over the long run. Yet, this question has gone largely unaddressed. Commentators and the Court have discussed whether *Miranda* itself was a legitimate exercise of judicial authority, but the issue of how the Court may legitimately treat *Miranda* once it has been decided has received far less attention.

that doctrine as presently formulated. *See id.* In conjunction with his plea for reversal of *Miranda*, Professor Grano also proposes a revised voluntariness standard that he argues would serve better to separate admissible and inadmissible confessions than either the traditional voluntariness approach or *Miranda*. *See id.* at 87-118. While a critique of his voluntariness approach is beyond the scope of this article, others have noted that his approach is not unproblematic. *See, e.g.*, Daniel P. Collins, *Farewell Miranda?*, 1995 PUB. INTEREST L. REV. 185, 196-99 (reviewing JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993)) (critiquing Grano’s proposed voluntariness analysis and standard).

*Miranda*’s erosion increases the likelihood that state court judges, many of whom are elected, may view apprising suspects of their federal constitutional rights as an unreasonable impediment to effective law enforcement efforts, and therefore would minimize the significance of this factor, as many pre-*Miranda* courts did, in determining voluntariness. *See supra* note 31 and accompanying text. One substantial danger that arises from a return to the voluntariness analysis is that it will enable judges to make results-oriented admissibility decisions that are largely insulated from effective appellate review due to the number of considerations involved in the totality of the circumstances test. *See supra* notes 27-28 and accompanying text.

The Court has heightened the risks that coerced confessions will be obtained and used to convict an individual by reversing the Court’s historic practice and applying the harmless error rule in cases where a coerced confession was improperly admitted. *See* Arizona v. Fulminante, 499 U.S. 279, 290 (1991) (White, J., dissenting) (noting that the Court endorsed use of *Chapman*’s harmless error analysis in a case involving coerced confession, despite the fact that *Chapman* itself identified use of a coerced confession as an example of a constitutional error that could not be categorized as harmless); *see also* Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 746 (1992) (observing that lower courts take a “cavalier” attitude toward Due Process claims because so few have been upheld by the Court in recent years).

*Compare* Miranda v. Arizona, 384 U.S. 436, 490 (1966) (refusing to withhold decision to give the legislatures a chance to address the issue because “the issues presented are of constitutional dimensions and must be determined by the courts”), Schulhofer, *Reconsidering Miranda*, *supra* note 2, at 436, 440, 448-53 (justifying *Miranda*’s ruling as a proper exercise of judicial authority), and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191-95, 209 (1988) (same), *with Miranda,* 384 U.S. at 510 (Harlan, J., dissenting) (criticizing Court’s ruling as a “trompe l’oeil”), OLP REPORT, *supra* note 2,
It is undisputed that the Court has the authority to change direction, particularly with constitutional decisions, where the amendment process is too unwieldy to function as a viable alternative for legal change. Nevertheless, if a majority of the Court comes to believe that a prior constitutional decision has been wrongly decided, the question remains whether the Court should (1) simply overrule the decision, or (2) pretend to honor the decision while eviscerating its substance. In its history, the Court has used both approaches. In the 1930s, the Court in *Nebbia v. New York* and *West Coast Hotel Co. v. Parrish* rejected the principle that the Constitution prohibited government imposition of price and wage controls, specifically overruling *Adkins v. Children's Hospital*, and signaling the demise of the *Lochner* approach to Due Process. Similarly, in the 1950s, *Brown v. Board of Education* rejected the separate-but-equal approach to the Fourteenth Amendment's Equal Protec
tion Clause, overruling Plessy v. Ferguson.

In dealing with Miranda, the Burger and Rehnquist Courts have preferred the second approach. Whether they have done so in an attempt to distinguish themselves from the perceived activism of the Warren Court or for some other reason is, for purposes of this article, largely immaterial. Rather, the concern here is solely a pragmatic one: to suggest the relative costs and benefits of these two approaches towards revising constitutional doctrine.

The ultimate penalty available for undue Court activism on constitutional issues is well-known: the other branches may refuse to support the Court's decision. Roosevelt's court-packing plan and Eisenhower's reluctance to supply the federal troops necessary to enforce the Court's desegregation decisions are perhaps the best examples of cases where the Court's constitutional interpretations raised the possibility of this ultimate price. Yet, although they clearly delineate one limit on the Court's otherwise final say on constitutional issues, cases where the Court revises constitutional doctrine rarely threaten such a crisis. In the vast majority of cases that may be said to involve constitutional revision, regardless of how the Court decides, Congress and the Executive will proceed with more or less enthusiasm to acknowledge the validity, though not necessarily the desirability, of the Court's action.


277. For discussions of the court-packing plan, see LEO PFEFFER, THIS HONORABLE COURT 295-320 (1965); ARTHUR E. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 481-501 (1965).


279. For purposes of this article, "constitutional revision" is an umbrella term that includes change of any sort in constitutional doctrine, including what some may call "development" or "interpretation" of existing constitutional doctrine. Even where the Court attempts to honor the spirit and the letter of existing constitutional doctrine, interstitial development of doctrine nevertheless involves change, and will be considered a form of revision.

280. Thus, even though the Senate sharply disagreed with the Court's Lochner-era approach, it also disagreed with Roosevelt's court-packing plan as an appropriate solution. See S. REP. NO. 711, at 23 (1937) (condemning the court-packing plan "as a needless, futile, and utterly dangerous abandonment of constitutional principle").
In evaluating constitutional revision, rather than focus on the extremely remote possibility that the Executive may refuse to enforce the Court's order or that Congress may cutoff funding as a result of the decision, a pragmatic analysis should instead examine the more commonplace consequences of the Court's approach to revision. These include the approach's effects on (1) the predictability of the law; (2) the certainty of the law; (3) the reliance on the law; (4) the desirability of the law; and (5) the integrity of the judicial process. In the abstract, a gradual evolution of constitutional doctrine would seem to be generally preferable to the Court's frank reversal of a prior constitutional decision. Gradual change makes it easier for the courts, and perhaps even private citizens, to anticipate the likely direction in

281. Cf. Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion of Justice O'Connor) ("As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy.").


283. As Professor Maltz has noted, "[a]ll of these benefits [from stare decisis], however, rest on a single, generally unstated premise: the doctrine of stare decisis will control the actions not only of a single justice, but of all (or at least of most) justices." Earl M. Maltz, No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis, 25 RUTGERS L.J. 669, 672-73 (1994).

284. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."). (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)); Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986); see also Powell, supra note 282, at 16 (stating that elimination of stare decisis would make the Constitution nothing more than what a majority of the Justices think).
which the law will move and adjust their behavior accordingly.\textsuperscript{285} Theoretically, predictions concerning probable legal rules can be made with more confidence when the law evolves gradually because evolution involves, by definition, less variation than sharp changes. Gradual evolution has less risk of disrupting settled expectations and therefore better protects reliance that may have developed in response to earlier decisions.\textsuperscript{286} Gradual changes provide the Court with a better opportunity to measure the influence of legal change on behavior, and to calibrate the law more precisely towards achieving desired social norms. Finally, gradual evolution suggests a more measured and deliberative, and in that sense, less political, process, and therefore better preserves the integrity of the judicial process by tending to insulate courts from charges of usurping political functions.\textsuperscript{287}

Despite these considerations, there are undoubtedly instances where a direct reversal of a prior decision is more appropriate.\textsuperscript{288} In some cases, a single, sharp change to a given rule may better promote predictability and certainty than a series of decisions tacking back and forth while steadily approaching the same result. In hindsight, the eventual goal of either approach may be readily apparent, but the sharp change reveals the eventual rule immediately, while the tacking suggests any number of possible outcomes, without revealing the eventual rule until the final tack. (And one can never be quite sure which tack is final.)\textsuperscript{289} For similar reasons, a single, sharp change in the law may disrupt settled expecta-

A striking feature of the common law is its elasticity and its capacity to mould and adjust itself to new needs and new conditions, and thus, by constant growth, without haste but without rest, to keep pace with the enlightened public opinion of the people by whom and for whom it has been fashioned.

\textit{Id.}

\textsuperscript{286} The “now common device of prospective overruling” can also substantially accommodate reliance interests that may have developed. Monaghan, \textit{supra} note 282, at 748 n.145.

\textsuperscript{287} See Planned Parenthood v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion of Justice O’Connor) (noting that “the country can accept some correction of error without necessarily questioning the legitimacy of the Court’’); \textit{Vasquez}, 474 U.S. at 266 (suggesting that stare decisis ensures precedent will be overruled only when the “proponent” of the change overcomes a “heavy burden . . . . that changes in society or the law” are necessary to serve a “greater objective”).

\textsuperscript{288} See \textit{Casey}, 505 U.S. at 864 (plurality opinion of Justice O’Connor) (identifying “the repudiation of \textit{Adkins} by \textit{West Coast Hotel} and \textit{Plessy} by \textit{Brown}” as examples where a single, sharp change was justified).

\textsuperscript{289} \textit{Cf. id.} at 944-50 (1992) (Rehnquist, C.J., concurring in judgment and dissenting in part) (reexamining the Court’s abortion cases and observing the “confused state” of the jurisprudence).
tions and reliance more substantially than any one, lesser change in the law. But as between a single, sharp change to reach a given rule, and a series of lesser changes that reach the same rule by steps, the expectations disrupted by the series of steps, taken as a whole, may well exceed those of the single, sharp change, particularly if the series of decisions involves any missteps along the way.\footnote{290} As to the final two considerations, desirability and integrity, a slow evolution will almost always better promote these objectives than outright reversal of the earlier decision. Only in rare cases can the Court so readily determine the likely consequences of a sharp change in constitutional doctrine that the desirability of such a change is apparent and undertake that change without reminding the public that the Court is, at times, a law-making and thus political entity.\footnote{291}

This discussion suggests that gradual evolution should be the norm for Court-driven changes in constitutional doctrine, and outright reversal, the exception.\footnote{292} In theory, this would seem to suggest that the Burger and Rehnquist Courts' approach to \textit{Miranda} may be appropriate. Rather than reverse the decision outright, a slow erosion of \textit{Miranda}, even if it establishes the same end result as overruling, may enable police, attorneys who work in the criminal justice process, and perhaps even ordinary citizens, to predict somewhat more accurately and with somewhat more certainty the legal rules that will govern their activities encompassed by \textit{Miranda}. It may also serve to distinguish the inappropriate "activism" of the Warren Court, from the more measured and

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\item \footnote{290} Cf. Shaffer v. Heitner, 433 U.S. 186 (1977) (overruling \textit{Pennoyer v. Neff}, 95 U.S. 714 (1877)). \textit{Pennoyer}'s holding that due process limited assertions of jurisdiction over non-resident defendants to cases that satisfied either \textit{in rem} or \textit{in personam} requirements, eventually created substantial uncertainty in the commercial area as the Court expanded the concepts of "consent" and "presence" to address new situations arising from an industrialized and increasingly mobile society. See, e.g., Robert Mitchell Furniture Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921) (refusing to permit assertion of personal jurisdiction over corporate defendant in a lawsuit arising out of defendant's activities in the forum, where the defendant had ceased to do business in the forum prior to commencement of the action); Harris v. Balk, 198 U.S. 215 (1905) (permitting forum state court to assert \textit{in rem} jurisdiction over a defendant by personal service on the defendant's debtor who had entered the forum).
\item \footnote{291} Outright reversal of an earlier constitutional decision may enhance the public's view of the Court, and thereby encourage acquiescence to the Court's decisions where time and societal change has rendered the earlier decision an anachronism. See \textit{Casey}, 505 U.S. at 864 (O'Connor, J., plurality opinion) (offering "the repudiation of \textit{Adkins} by \textit{West Coast Hotel} and \textit{Plessy} by \textit{Brown}" as instances where circumstances had changed so substantially as to justify overruling the earlier decisions); \textit{id.} at 959 (Rehnquist, C.J., dissenting) (agreeing with Justice O'Connor that \textit{West Coast Hotel} and \textit{Brown} represent decisions where the Court "enhanced its stature by acknowledging and correcting its error").
\item \footnote{292} See Powell, \textit{supra} note 282, at 15 ("But I repeat that the general rule of adherence to prior decisions is a proper one.").
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judicious approaches of the later Courts.\textsuperscript{293}

Yet, before embracing this conclusion, consider that several factors cut sharply against this evaluation. First, in crafting the warnings and parallel enforcement rules, \textit{Miranda} attempted to define bright-line rules that could be readily understood by police and suspects alike.\textsuperscript{294} Much of the erosion in those rules has served to blur the relatively clear demarcations that \textit{Miranda} set forth.\textsuperscript{295} As a result, there is today a broader range of conduct that will fall into a grey area where predictions concerning \textit{Miranda}'s application will prove difficult. Second, the Court's path has not always been steady. While the general direction since the early 1970s has been toward erosion of \textit{Miranda}, occasional decisions such as

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\textsuperscript{293} Not all scholars have found the Burger Court's attempt at appearing less activist than its predecessor convincing. \textit{See} Earl M. Maltz, \textit{Some Thoughts on the Death of Stare Decisis in Constitutional Law}, 1980 Wis. L. REV. 467, 467 (1981) ("It seems fair to say that if a majority of the Warren or Burger Court has considered a case wrongly decided, no constitutional precedent—new or old—has been safe.").

\textsuperscript{294} \textit{See}, e.g., \textit{Fare} v. Michael C., 442 U.S. 707, 718 (1979). In \textit{Fare}, the Court stated: Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, \textit{Miranda}'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in \textit{Miranda} imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

\textit{Id.}; \textit{see also} Illinois v. Perkins, 496 U.S. 292, 308 (1990) (Marshall, J., dissenting) ("The Court's adoption of an exception to the \textit{Miranda} doctrine is incompatible with the principle, consistently applied by this Court, that the doctrine should remain simple and clear."); Berkemer v. McCarty, 468 U.S. 420, 430 (1984) ("One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule."); New York v. Quarles, 467 U.S. 649, 658 (1984) (acknowledging the "desirable clarity" of the \textit{Miranda} rules).

\textsuperscript{295} \textit{See} Pennsylvania v. Muniz, 496 U.S. 582, 610 (1990) (Marshall, J., concurring): [The plurality's] position, were it adopted by a majority of the Court, would necessitate difficult, time-consuming litigation over whether particular questions asked during booking are "routine," whether they are necessary to secure biographical information, whether that information is itself necessary for record-keeping purposes, and whether the questions are—despite their routine nature—designed to elicit incriminating testimony.

\textit{Id.} (Marshall, J., dissenting); \textit{Perkins}, 496 U.S. at 308-09 (Marshall, J., dissenting from Court's adoption of "undercover agent" exception to \textit{Miranda}) ("The Court's holding today complicates a previously clear and straightforward doctrine. . . . [T]he outer boundaries of the exception created by the Court are by no means clear."); \textit{Quarles}, 467 U.S. at 658 (acknowledging that the public safety exception to \textit{Miranda} warning requirement "lessen[s] the desirable clarity of that rule").
Withrow v. Williams and Edwards v. Arizona have moved sharply against this trend by supporting and reinforcing Miranda. Hindsight clearly reveals which decisions form the trend and which the exceptions, but it is unlikely that the eventual direction was so clear at the time each new decision came down. This uneven path has also created uncertainty among those forced to deal with the continually changing rules. Third, in terms of reliance, while Miranda does not serve as a basis for the advanced planning entailed in commercial activities, Miranda and its warnings have become one of the better known aspects of constitutional law, recited nightly in our living rooms as part of one televised crime drama or another. Yet, that popular presentation may prove misleading, as it does not reflect Miranda's increasingly empty symbolism.

296. 507 U.S. 680 (1993) (refusing to limit habeas corpus review of alleged Miranda violations); see also Sonenshein, supra note 27, at 407-08 (noting that the Burger Court, after establishing grounds “to overrule Miranda,” seemingly reversed direction and “breathed new life into Miranda”).

297. 451 U.S. 477 (1981) (following the letter and spirit of Miranda by prohibiting police from reinitiating questioning of suspect after he has invoked right to counsel); see also supra text accompanying notes 227-28.

298. See Yale Kamisar et al., Modern Criminal Procedure 508 (8th ed., 1994) (observing that the Court has interpreted Miranda fairly generously in some important respects and that “[i]n the early 1980s Miranda seemed to enjoy a ‘second honeymoon’”).


Suffice it to say that the public will have understandable difficulty in comprehending how a confession obtained in violation of Miranda can at once be (1) “irrebuttable” presumed to be the product of official compulsion, and therefore suppressible as a matter of federal constitutional law, and (2) “noncoerc[ed]” and “wholly voluntary.”

Id. (alteration in original) (citations omitted).

Compare Edward Chase, The Burger Court, the Individual and the Criminal Process: Directions and Misdirections, 52 N.Y.U. L. REV. 518, 519 (1977) (arguing that the Burger Court criminal law decisions revolve around an obsession with “factual guilt”), with Louis Michael Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 437 (1980) (disagreeing with Professor Chase's perspective and arguing that the Burger Court criminal law decisions revolve around preoccupation with “crime prevention and control”). In addition, the erosion of Miranda has resulted in pockets of lower court caselaw in which these courts have interpreted Miranda more narrowly than even the Court's own decisions would seemingly support. See supra notes 162-65, 241-57 and accompanying text.

300. See Planned Parenthood v. Casey, 505 U.S. 833, 855-56 (1992) (noting that “the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity” (citation omitted)); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved. . .”).

301. Consider, for example, law enforcement's “newest tactic” whereby an officer, af-
cally, even the *Miranda* warnings themselves may prove misleading given
the Court’s erosion of the parallel enforcement rules.

Under these circumstances, honoring both the spirit and letter of
*Miranda* until such time as its undesirability became clear, as the Court
did with *Lochner* and *Plessy*, may have proved the better path given the
pragmatic consequences of revision. Moreover, characterizing the Bur-
ner/Rehnquist Courts’ approach as gradual erosion is not entirely accu-
rate. With true erosion, the Court itself is unclear of its eventual desti-
nation, and is working through the existing rule with an open mind,
evaluating and reevaluating its conclusions with each case presented.
There is little to suggest that the Burger/Rehnquist Courts ever had an
Tucker,* the Burger Court's assault on *Miranda’s* constitutional founda-
tions strongly foreshadowed the Court's desired destination. In dealing
with *Miranda*, the Court’s approach seems more a deceptive ploy, de-
signed to conceal the majority’s new agenda, than a continuing reeval-
uation of *Miranda’s* proper place. Particularly in decisions such as *Innis,*
where the Court’s proposed standard seemed to support *Miranda* but its
application of the standard substantially undermined the interrogation

ter providing the suspect with *Miranda* warnings, attempts to engage him in conversation
about the crime by asking the suspect if he is willing to speak “‘outside *Miranda.’” See
Charles D. Weisselberg, Saving *Miranda*, 84 CORNELL L. REV. 109, 160 (1998). The sus-
pect is expressly reassured that any information gained cannot be used at trial, and that
the officer is merely attempting to understand what happened. See id. at 160-61. Of
course, the officer fails to explain in a meaningful way that while the suspect’s statement
cannot be used in the Government’s case-in-chief, it may be used for impeachment and
lead to the discovery of additional evidence. See id. at 162. Police officers thereby convert
*Miranda’s* warning requirement into “a new and aggressive [law enforcement] tool.” Id. at
161-62.

302. See Sonenshein, supra note 27, at 407 & n.12 (“Although the Burger Court has
not overruled *Miranda*, the Court has consistently undermined the rationales, assump-
tions, and values which gave *Miranda* life.”); id. at 461 (“In its pre-1980 decision-making,
the Burger Court had shown its disdain for the assumptions which underlie *Miranda* and
had limited, misread, or ignored its holding at every apparent opportunity.”).


304. See id. at 451 (concluding that the failure to provide full *Miranda* warnings does
not render an otherwise voluntary statement excludable); see also *Elstad*, 470 U.S. at 319
(Brennan, J., dissenting) (“[W]hile purporting to reaffirm these constitutional guarantees,
the Court has engaged of late in a studied campaign to strip the *Miranda* decision piece-
meal and to undermine the rights *Miranda* sought to secure.”); *Michigan v. Mosley*, 423
U.S. 96, 112 (1975) (Brennan, J., dissenting) (“Today’s distortion of *Miranda*’s constitu-
tional principles can be viewed only as yet another step in the erosion and, I suppose, the
ultimate overruling of *Miranda*’s enforcement of the privilege against self-
incrimination.”).

305. 446 U.S. 291 (1980); see supra text accompanying notes 170-88 (discussing *Innis*).
The Erosion of Miranda

trigger, the Court’s mixed message strongly suggests a political, rather than judicial, agenda.

Even with the full cooperation of the coordinate branches of government, the Court’s ability to control physically the actions of the public, directly affected individuals, such as police, prosecutors, defense attorneys, and defendants, or even other actors within the judicial branch, is quite limited. The Court, and government more generally, depend heavily on the public’s acquiescence, if not willing acceptance, of its rulings. If the Court is to lead and not merely follow public opinion, maintaining the appearance of propriety and abiding by the strictures of its institutional position become central concerns.

Even where its direct authority is the strongest, the Court has only limited ability to review effectively the constitutional decisions of other courts. In the Court’s 1996 Term, for example, the Court considered 6687 petitions for certiorari, and reviewed on the merits only 168 cases, or 2.5 percent. Though the Court can use summary dispositions to target certain areas for increased supervision, these statistics reveal that the vast majority of lower court decisions go unreviewed. Given its limited ability to undertake direct review, the Court relies heavily on the honesty, respect, and good faith of the lower courts to abide by and fairly enforce its rulings. If the lower courts were to resort to deceptiveness and bad faith, pretending to heed the words of the Court while ignoring its underlying substance, the Court’s ability to rule even its own branch would be substantially diminished. As a result, the Court must make every effort to ensure that its own decisions deal honestly with earlier cases. Where the Court strays from such a path in considering its own

306. See Innis, 446 U.S. at 300-01.
307. See The Supreme Court, 1996 Term, 111 HARV. L. REV. 51, 435 (1997). If these statistics are broken down somewhat further to focus on in forma pauperis petitions, where Miranda issues are often raised, the Court granted review on only 0.3 percent of such petitions. See id.
308. See, e.g., Arthur D. Hellman, The Supreme Court’s Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions, 11 HASTINGS CONST. L.Q. 5, 7 n.11 (1983) (“Summary reconsideration orders were extremely rare under Chief Justice Vinson (1946-1953) and in the first nine Terms under Chief Justice Warren; no more than a dozen can be found in any one Term. The 1962 Term marked a turning point: there were more than 60 such dispositions.”); J. Mitchell Armbruster, Note, Deciding Not to Decide: The Supreme Court’s Expanding Use of the “GVR” Power Continued in Thomas v. American Home Products Inc. and Department of the Interior v. South Dakota, 76 N.C. L. REV. 1387, 1387-88 (1998) (noting that summary proceedings where Court grants certiorari, vacates the lower court’s decision, and remands for reconsideration “have been issued regularly since use of the procedure rose dramatically in the 1960s”).
309. See KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING
past decisions, as it has with *Miranda*, it should not be surprised when the lower courts do likewise with the Court’s decisions, past and present, more generally.

Attacking *Miranda*’s constitutional foundations involves similar pragmatic consequences. On its own, systematically narrowing and limiting *Miranda*’s scope and effectiveness inherently conveys the admission that the Court now believes that *Miranda* was wrongly decided. Such an admission of past mistake almost certainly serves as a reminder that the present Court may also be mistaken. Going further and questioning the very legitimacy of an earlier decision casts a similar, though darker, shadow over the present Court because it inevitably suggests that if the Court had behaved illegitimately in the past, it may just as well be doing so now. If the Court treats its prior decisions without respect, it invites others to treat its present decisions similarly. In consequence, the Burger/Rehnquist Courts’ treatment of *Miranda* poses a threat to the Court’s institutional legitimacy, and therefore authority, that extends far beyond *Miranda* itself.310

In the end, the Court’s voice is its only tool. While an occasional contradiction is not necessarily fatal, the presence of repeated vacillation, disrespect, and deception in its words tend to diminish directly the Court’s influence and authority.311 Perhaps the Rehnquist and Burger Courts believed that the Warren Court assumed too much authority, and therefore set out to weaken the Court’s institutional position intentionally through their treatment of *Miranda* and other legacies of the Warren Court. But regardless of their purpose, there is little doubt that institutional weakening has been the effect. Even if one is otherwise untrou-

**APPEALS 257 (1960):**

It is not the occasional overt overruling of older doctrine which is cankering the confidence of counselor and advocate, it is the quag-footing of the everyday, the felt parlousness of any hold at all for hand or foot, since the mere words upon the page, when read just as doctrine, do deceive, and since so many still grope and stumble, blind as yet to the fact and nature of the real reckonabilities in the courts’ work. One can almost urge that a frank overruling, when it does crop up, brings with it something of relief: that point, at least, can for a while be counted on as clear.

*Id.*


311. *See id.* at 865-66:

There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

*Id.* at 866.
bled by *Miranda*'s substantive erosion or favors undermining the decision due to its supposed impact on the criminal justice system, the Court's disingenuous approach towards *Miranda* is objectionable. Undertaken too soon, with too little reason, deceptively implemented, and driven by nothing more than a change in the Court's membership, the erosion of *Miranda* represents precisely the sort of political decision that will "seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."313

V. THE PATH AHEAD

In terms of the Court's institutional integrity, in comparing *Miranda* to the decisions that came after, *Miranda* is readily seen as the more legitimate. While the *Miranda* Court may have stretched constitutional doctrine to reach its result, the Court seemed to acknowledge doing so. Moreover, regardless of the arguments asserted against *Miranda*, it was not an ill-considered lark. The Warren Court embraced the approach set forth in *Miranda* only after thirty years of voluntariness cases had plainly revealed both the coercion that can arise in custodial police interrogation and the failure of the voluntariness standard to address that coercion adequately. While the decision undoubtedly imposed some burden on law enforcement activities, it did not prohibit custodial police interrogation altogether, but chose instead to strike a more protective, yet still reasonable, balance between suspect and law enforcement.315

In contrast, the Burger Court waited only five years before beginning to dismantle *Miranda* as constitutional doctrine. Its basis for doing so was surprisingly weak. Given the very short time *Miranda* had been in

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312. See Oregon v. Elstad, 470 U.S. 298, 320 (1985) (Brennan, J., dissenting): The Court's decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning.

313. *Casey*, 505 U.S. at 865 (plurality opinion of Justice O'Connor).

314. See *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966) ("[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."); see also supra notes 70-78 and accompanying text.

315. See Schulhofer, *Reconsidering Miranda*, supra note 2, at 460-61 ("The *Miranda* decision, of course, was a compromise. It did not eliminate all possibilities for abusive interrogation, and it stopped far short of barring all pressured or ill-considered waivers of Fifth Amendment rights.").
force, the impetus for change could scarcely have been any substantial change in factual conditions or social perceptions of those conditions, or a fair assessment of *Miranda*'s impact on law enforcement. The new justices of the Burger Court simply exercised the authority they had received as political appointees to begin rewriting *Miranda*'s constitutional doctrine to reflect their personal preconceptions. More troubling, where *Miranda* was forthright, the Burger and Rehnquist Courts were deceptive, pretending, for example, that *Miranda* was not constitutionally-based on the one hand, while continuing to impose on the States their interpretation of *Miranda* on the other.

Stare decisis and the pragmatic consequences it embodies do not necessarily mean that *Miranda* must survive, although they do suggest that the costs of directly overruling *Miranda* may be excessively high. But if *Miranda* is to be reversed, better that it be done honestly and forthrightly, rather than by deception and degrees. Honest disagreement about constitutional doctrine and associated policy concerns will always have a place on the Court and in its decisions, but disrespect and deception should not.

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316. Cf. *Casey*, 505 U.S. at 943 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Blackmun frankly acknowledged the politicizing of the Court on the abortion issue:

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

*Id.*